EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE DISTRICT COURT
AT WELLINGTON

CIV-2017-085-000355
[2017] NZDC 14706

BETWEEN	[WHITEHEAD] Plaintiff
AND	[HOPKINS] Defendant

Hearing: 5 July 2017

Appearances: Jane Forrest for the Plaintiff
John Delany for the Defendant

Judgment: 31 July 2017

RESERVED JUDGMENT OF JUDGE S M HARROP
AS TO MUTUAL SUMMARY JUDGMENT APPLICATIONS

Introduction

[1] The parties are married with four children but separated in August 2015. Because of the family context in which this proceeding arises and especially because of the involvement of children, I have anonymised their names as [Whitehead] for wife and [Hopkins] for husband.

[2] On 5 August 2016 at the conclusion of a mediation the parties signed a deed of settlement under s 21A of the Property (Relationships) Act 1976 ("PRA") which not only comprised their rights in respect of relationship property but also included an agreement that [Hopkins] would pay [Whitehead] $11,900 per month "as maintenance for her and the children" ('the August agreement").

[3] After making the requisite monthly payments until the end of March 2017, [Hopkins] sought, on 13 April, to reduce the monthly payment to $7,000 but [Whitehead] did not agree to this.

[4] Later in April, [Hopkins] applied to the Child Support Agency of the Inland Revenue Department for a formula assessment in respect of child support. This determined his monthly liability for child support was $2,909.60, covering all four children for each of the months until March 2018.

[5] On 10 May 2017, [Whitehead] issued this proceeding against [Hopkins] claiming judgment for the $4,900 not paid by the end of April together with interest at 5% per annum and seeking a declaration that [Hopkins] is required to pay the $11,900 each month in accordance with the August agreement, less any sums paid to [Whitehead] by [Hopkins] by way of child support as assessed by the Inland Revenue Department.

[6] [Whitehead] applied for summary judgment contending that there is no defence to her claim. [Hopkins] has filed a notice of opposition and, though not strictly necessary, also a statement of defence. He has also proactively applied for summary judgment against [Whitehead] on the ground that her cause of action cannot succeed. The grounds of his opposition to [Whitehead's] summary judgment application and of his application are identical. He says that he has not only an arguable but a complete defence to [Whitehead's] claim because pursuant to s 65(2) of the Child Support Act 1991 ("CSA") [Whitehead] is deemed to have elected under s 64 that [Hopkins'] liability to pay child support in respect of each of the children ends on the day before the formula assessment made by the Commissioner of Inland Revenue is first to apply. Accordingly, he says that as from 3 May 2017 he has no further liability under the August agreement.

[7] Both parties have tended to put the question of quantum to one side, so I propose in this judgment simply to determine [Whitehead's] application for summary judgment as to liability and [Hopkins'] application for summary judgment. The parties indicated that in light of my judgment they will negotiate further and, if unable to agree on implementation and consequences, will apply to the court for any necessary further orders.

Issue

[8] The essential question arising on both summary judgment applications is what impact, if any, does the formula assessment obtained by [Hopkins] have on his obligation to pay the $11,900 per month under the August agreement? [Whitehead] says it has no impact; [Hopkins] says it terminates his obligation to make that monthly payment. The parties accordingly are at polar extremes in their contentions.

[9] Given the summary judgment context in which this issue arises, more accurately the issues are whether (a) in terms of r 12.2(1) of the District Court Rules 2014 [Whitehead] has satisfied the court that [Hopkins] has no defence to her cause of action, and (b) whether in terms of r 12.2(2) [Hopkins] has satisfied the court that [Whitehead's] cause of action in her statement of claim cannot succeed.

Background and the August 2016 agreement

[10] [Whitehead] and [Hopkins] entered a de facto relationship in 1998 and married in 2001. Their four children are aged 12, 10, 7 and 6. After they separated in August 2015 [Whitehead] and the children stayed in the family home and [Hopkins] who was the sole income earner paid maintenance of $20,000 per month. As is evident from this [Hopkins] earns a substantial income; he is a partner in a [profession deleted] firm.

[11] According to [Whitehead], [Hopkins] tried to reach an agreement as to division of relationship property directly with her and excluding his interest in the [profession deleted] partnership. She however elected to engage a lawyer and [Hopkins] then did also. Valuations of four rental properties and of [Hopkins'] interest in the [profession deleted] partnership were obtained. [Whitehead] was not satisfied with the latter valuation and obtained a second one from a forensic accountant. The former family home was sold.

[12] Ultimately, on 5 August 2016, a mediation occurred and that led to the signing of the August agreement. It was comprehensive and addressed both the division of relationship property and financial support by way of maintenance for

[Whitehead] and the children. The parties were represented by lawyers at the mediation and the resulting agreement was certified by them in accordance with s 21F of the PRA.

[13] It is important to set out in full the terms of the August agreement. The cover sheet described it as "Deed of Settlement – Section 21A Property (Relationships) Act 1976". Its terms, with appropriate amendments to avoid identification of the parties or their children, were:

> **Parties**
>
> 1. **[Whitehead]** of Wellington, Mother
>
> 2. **[Hopkins]** of Wellington, [profession deleted]
>
> **Background**
>
> A. [Whitehead] and [Hopkins] (collectively "the parties") entered a de facto relationship in 1998 and married in 2001. They separated in August 2015.
>
> B. The parties are the parents of … (age 11) …, (age 9), .. , (age 7)
>
> and …, (age 5) ("the children").
>
> C. The parties are also trustees and beneficiaries of a family trust known as the … Family Trust created by deed on 12 June 2009 ("the trust"). ….is the independent trustee.
>
> D. The parties are the owners of certain property (as that term is defined in the Property (Relationships) Act 1976 ("the Act"). The parties have agreed to settle their differences concerning that property and wish to make provision for final division.
>
> E. [Whitehead] and [Hopkins] have also reached agreement in respect of their respective beneficial interests or expectancies in property owned by the trust which have been documented in minutes of the trust and in a Deed of Arrangement to the trust.
>
> **Introduction**
>
> [Whitehead] and [Hopkins] agree in their capacity as spouses and in their capacity as trustees of the Trust as follows:
>
> **1. Status of agreement**
>
> 1.1 This agreement is made pursuant to section 21A of the Act and records the parties' intentions to fully settle their differences

concerning the status, ownership, and division of property owned by them.

2. Care of Children

2.1 The parties recognise:

(a) They are the children's parents and joint guardians. They each have a responsibility to care for and protect the children and each recognises the other's right to be consulted on important matters affecting the children's upbringing, education, health and welfare;

(b) They are both responsible for looking after the children and making arrangements for their care, development and upbringing.

3. Financial Support

3.1 The parties acknowledge that since separation [Hopkins] has paid maintenance to [Whitehead] of not less than $20,000 per month.

3.2 The parties agree that [Hopkins] will pay to [Whitehead] the sum of $11,900 per month as maintenance for her and the children. This is to be paid on or before the last working day of the month commencing August 2016 to [Whitehead's] account number ….. This sum will be adjusted on an annual basis as at 30 June each year to reflect any increase of the CPI rate up to 3%, and will reduce by 20% on each child either becoming 18 years of age or financially independent, and will cease on the youngest child becoming 18.

3.3 This amount can be reviewed to take into account any significant change in the incomes of either party.

3.4 This has been agreed in lieu of child support and neither party will make any claim in respect of child support.

3.5 Each party will make provision in their will for the maintenance and financial support of the children while they are minors in the event of their death.

4. Relationship Property

4.1 As at the date of separation the parties owned the following relationship property:

(a) Chattels

(b) Motor vehicle;

(c) Bank accounts;

(d) Rental properties (investments);

(e) [Hopkins'] interest in the [profession deleted] Partnership;

4.2 The parties record that they have a beneficial interest in the trust by virtue of being trustees and beneficiaries of the trust.

5. Chattels and Motor Vehicles

5.1 [Whitehead] will retain all personal items, chattels and the motor vehicle in her possession at the date of this agreement as her separate property.

5.2 [Hopkins] will retain all personal items, chattels and the motor vehicle in his possession at the date of this agreement as his separate property.

6. Bank Accounts

6.1 The parties have a joint bank account with ANZ bank, account number [account number deleted]. This will be closed once [Hopkins] has repaid the amount owing.

6.2 All other bank accounts in [Whitehead's] sole name will be her separate property from the date of this agreement.

6.3 All other bank accounts in [Hopkins'] sole name will be his separate property from the date of this agreement.

7. Rental Properties

7.1 [Hopkins] is the sole registered owner of the following rental properties:

(a) …. Mount Victoria, Wellington (legal description …..) which has a market valuation of $1,000,000 as at 8 March 2016

(b) …. Te Aro, Wellington (legal description ….) which has a market valuation of $1,245,000 as at 4 March 2016

(c) …. Te Aro, Wellington (legal description …..) which has a current market value of $815,000

(d) …. Kelburn, Wellington City (legal description ….) which has a current market value of $795,000 as at 4 March 2016.

7.2 The rental properties secure borrowing from the ANZ bank in the sum of $4,230,000.

7.3 On payment of the sum of $1,000,000 to [Whitehead], [Hopkins] will retain the rental properties as his separate property and will be solely liable for all costs and expenses in relations to those properties.

8. Debts

8.1 [Hopkins] will be solely liable for all debts referred to at clause 7.2 above, all debt in the parties joint names, and all debt in [Hopkins'] name and he indemnifies [Whitehead] in respect of those debts.

8.2 [Hopkins] will pay the cost of John Hagen's valuation, the property valuations and the mediators fee.

8.3 [Whitehead] will be solely liable for any debt she has incurred in her sole name from the date of separation.

9. Trust Property

9.1 The parties record that the family trust owns the former family home being the property at ….. in Wellington. The trust has entered into an unconditional sale and purchase agreement for the property in the sum of $1,510,000 and which is due to settle on 26 August 2016.

9.2 The parties have agreed that subject to finance being approved the net proceeds of sale (after payment of real estate fees and solicitor's costs relating to the sale of the property) the proceeds will be paid:

(a) $1,000,000 to [Whitehead] on or before 9 September 2016 (settlement date); and

(b) The balance to [Hopkins].

9.3 In the event finance for the $1 m referred to at clause 9.2 is not available [Hopkins] agrees to procure as much as possible, but in any event not less than $800,000 to enable [Whitehead] to purchase a home, with the balance being paid as quickly as possible and at least within 12 months, together with an additional capital sum to represent use of money at the rate of 4% or [Hopkins] will pay any borrowing cost for the difference between what he is able to pay and the $1m (at his election).

9.4 The trust will be wound up.

10. [Hopkins'] Interest in the [profession deleted] partnership

10.1 The parties engaged John Hagen to value [Hopkins'] interest in [the [profession deleted] partnership]. Mr Hagen provided a valuation of [Hopkins'] "bundle of rights" at $270,000 (excluding any retirement benefit). [Whitehead] obtained a critique of that valuation from Mr Charles Purcell. Mr Purcell has provided a view that the bundle of shares should be valued at between $600-750,000 (excluding the retirement benefit). He has also advised that [Whitehead] is entitled to a share of "super profit" from the date of separation to the date of payment. Again, these values exclude any retirement benefits.

10.2 [Hopkins] will retain all of his interests and entitlements in [the [profession deleted] firm] and [Whitehead] acknowledges that the sum to be paid to her as provided in this agreement includes full and appropriate compensation to her in respect of such property interest.

11. Cash Adjustments/Settlement

11.1 In addition to the distribution of $1 m from the trust [Hopkins] will pay:

(a) $5,000 per month for a period of 6 months (commencing August 2016) which is to be paid together with the financial support provided in clause 3 above.; and,

(b) a lump sum of $95,000 payable on 1 September 2017.

11.2 This sum together with the financial support provided at clause 3.2 above has been agreed taking into account any claim [Whitehead] might have otherwise pursued under the Act, and the Family Proceedings Act or any other claim in equity or in law and the disputed value of [Hopkins'] interest in [professional firm deleted]. It is a full and final settlement of all Relationship Property matters and all matters relating to trust property.

12. Implementation of Division

12.1 [Whitehead] and [Hopkins] will immediately take any steps necessary to secure to the other party the title to and possession of the property to which that other party may be entitled under this agreement.

13. Disclosure

13.1 Each party warrants to the other that full and proper disclosure has been made to the other. In particular, the parties confirm that all relationship property (including any debts owing to them, if any) has been disclosed to the other's lawyer and is referred to in this agreement.

14. Comprehensive and Final Agreement

14.1 The provisions of this agreement are in full and final settlement of all or any claims or rights which [Whitehead] and [Hopkins] may have against each other, whether under the provisions of the Property (Relationships) Act 1976 or under any Act or Acts passed in substitution or amendment thereof, or under any other statute or rule of the common law or equity, or otherwise however so arising.

14.2 This agreement remains binding despite the taking of property by creditors or bankruptcy, reconciliation, dissolution or death.

15. Severance

15.1 In the event of any provision of this agreement being invalid or unenforceable, all other provisions thereof will nevertheless continue in full force and effect to the extent that they can be severed from such provisions as have been held invalid or unenforceable.

16. Independent Legal Advice

16.1 [Hopkins] and [Whitehead] each acknowledge that they have had independent legal advice as to the effects and implications of this deed and further acknowledges that he or she is estopped against the other from all or any claim or demand in respect of the property of any nature whatsoever.

17. Capacity

17.1 The parties acknowledge that each of them have legal capacity to enter into this agreement and that neither is under duress or undue influence and that each voluntarily signs this agreement of his or her own free will.

18. Fair and Reasonable

18.1 The parties acknowledge that they consider this agreement to be fair and reasonable in light of the provisions of the Property (Relationships) Act 1976 and all of these circumstances at the date of this agreement. They further acknowledge that they have considered the possibility of future changes in circumstances when assessing the fairness and reasonableness of this agreement.

19. Costs

19.1 Each party will be responsible for their own legal costs in relation to the negotiation, preparation and execution of this agreement and all matters relating to the parties separation.

[14] Early in 2017 an issue arose when the parties' insurance broker advised that an insurance premium payment was outstanding in respect of the family home. [Whitehead] agreed with [Hopkins] and the broker that they would each pay half. [Hopkins] however advised [Whitehead] that having paid his half he was deducting that from the monthly payment of $11,900. [Whitehead] says she was uncomfortable with [Hopkins] dealing with this issue unilaterally and deducting funds from the monthly payment which had not been agreed. She instructed her lawyer to send an email on 3 February 2017 advising that [Hopkins] could not unilaterally vary the amount payable. However she chose to take no other action at that time.

[15] On 13 April 2017 [Hopkins] sent an email to [Whitehead] proposing a reduction in the monthly payment from $11,900 to $7,000. He said this was due to significant changes in their respective circumstances and it seemed like an appropriate time to review the amount. He set out reasons. [Whitehead] instructed her lawyer to reply on 18 April to the effect that [Hopkins] could not unilaterally change the monthly maintenance payment but if there was (in terms of clause 3.3) a "significant change in the income" of [Hopkins] he could seek a review. The letter outlined a proposed process for such a review.

[16] There was further brief correspondence prior to the issue of this proceeding on 10 May which need not be detailed here. However, in late April, [Hopkins] applied to the Commissioner of Inland Revenue for a formula assessment as to child support under the CSA. The assessment was that for the period 26 April 2017 to 31 March 2018 [Hopkins] is to pay [Whitehead] $2,909.60 per month in respect of the four children. [Hopkins] says that from 3 May 2017 he has paid the monthly formula assessment amount of $2,909.60 plus an additional $4,090.40 per month directly to [Whitehead], making a total monthly payment of $7,000.

[17] [Hopkins] has also applied, on 14 June 2017, to the Wellington Family Court for an order that "cancels, varies or suspends the voluntary agreement embodied in the Deed of Settlement dated 5 August 2016" made between the parties. This is made on the grounds that:

> "The applicant and respondent who married in 2001 entered into a voluntary agreement covering both spousal maintenance and child support on 5 August 2016 and that a formula assessment of child support has been in force since 3 May 2017 and that the voluntary agreement needs to be cancelled, varied or suspended to take into account both the formula assessment now in place and the merits of the Respondent's entitlement to spousal maintenance."

[18] The application is made under s 32(2)(d) of the PRA.

[19] I observe in passing that on the face of it, at least to the extent that the August 2016 agreement relates to child maintenance or child support, [Hopkins'] application seems redundant because of his own contention that by virtue of s 65(2) of the CSA that agreement is (already) at an end. It is difficult to see how an agreement that is already at an end can be cancelled, varied or suspended.

[20] [Whitehead] has indicated that she intends to apply to strike out the s 32 application on the ground that the August 2016 agreement is not a "voluntary agreement" for the purposes of s 32(2)(d) of the PRA. It will be a matter for the Family Court to decide whether [Hopkins'] s 32 application may proceed and, if so, what the outcome is. The issue before me is different; in effect I am asked to determine what happens between the date of issue of this proceeding and the date of determination by the Family Court of the s 32 application.

Summary judgment jurisdiction and the civil court's jurisdiction to deal with this Family Court- related matter

[21] The principles applicable to summary judgment applications are well-known and not disputed as between the parties. They need not be stated at any length. Suffice to say for present purposes that the issue I have to determine does not depend on determination of any disputed facts but rather on a question of contractual interpretation followed by questions of statutory interpretation. Counsel agree that I am in as good a position to deal with the issues on this application as I would be after a trial. It has been established since the early days of summary judgments in New Zealand that a legal point may as well be decided on a summary judgment application as at trial if it is sufficiently clear, although novel or developing points of law may require the context provided by trial to provide the court with sufficient perspective[1]. While the issue here appears to be relatively novel, I consider that having had the benefit of full submissions on the legal issues, I am in as good a position to decide them now as I would be after a trial.

[22] As I observed to Ms Forrest at the hearing, I propose to put to one side certain observations made by [Whitehead] in her affidavits, namely those which purport to discuss her intention in signing the August agreement. I consider, and Ms Forrest accepts, that I need to apply the modern approach to contractual interpretation in New Zealand as confirmed by the Court of Appeal in *Boat Park Limited v Hutchinson*[2] and by the Supreme Court in *Vector Gas Limited v Bay of Plenty Energy Limited*[3] per Tipping J. In short I need to determine on an objective basis the intention of the parties having regard to the language they used in what was a formal written agreement reached after legal advice was provided. Undoubtedly the background to the agreement and the context in which it was signed may be taken into account but in the end, in the absence of good reason not to, the parties' agreement must be interpreted objectively on the basis of the words they chose to use in their formal written agreement.

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[1] See *Pemberton v Chappell* [1987] NZLR 1
[2] [1999] 2 NZLR 74 at [81]-[82]
[3] [2010] 2 NZLR 444 at [19]-[23]

[23] On the wider question of delineation as between the general (including civil) division of this court and the Family Court, these are now both divisions of the District Court under section 9 of the District Court Act 2016. Mr Delany does not dispute Ms Forrest's submission that [Whitehead] was in principle entitled to apply for summary judgment to the District Court in its civil jurisdiction in respect of any default in payment under the August 2016 agreement. Equally, the parties have the ability to make appropriate applications to the Family Court as exemplified by the s 32 application which [Hopkins] has made and which, albeit in a different context, puts in focus the question I need to determine namely the impact, if any, of the CSA formula assessment on [Hopkins'] obligation to make the monthly financial support payments.

Discussion

[24] As I have noted this case requires first contractual interpretation as to the meaning of the August agreement and then statutory interpretation as to the impact, if any, of the CSA formula assessment on that agreement.

[25] Although the submissions of counsel approached the interpretation of the agreement on the basis of whether or not it was appropriate to regard the financial support provisions as severable (as Mr Delany submits) or not severable (as Ms Forrest submits), I put that issue to one side for the moment.

[26] I consider, having regard to the key provisions highlighted by Ms Forrest that the financial support provision in clause 3 of the August agreement may be described as an agreement by [Hopkins] to pay, and by [Whitehead] to accept, $11,900 per month as maintenance for [Whitehead] and the children (with the future adjustments referred to in clause 3.2), that being a figure agreed to by [Whitehead] having regard to the other payments that [Hopkins] was required to make under the other provisions in the agreement and to the reality that she was compromising, to an uncertain extent, her relationship property claims.

[27] There was clearly a dispute about the value of [Hopkins'] interest in the [profession deleted] partnership but beyond that there was no consideration given by

the valuers to retirement benefits or to "super profit" entitlements. In short, [Whitehead] did not know how much her claim to relationship property might be but was prepared to compromise it in consideration of the various payments [Hopkins] agreed to make, clearly including the financial support payments. Clause 11.2 is critical to this conclusion. It clearly ties together the financial support payments with the other payments and refers to the full extent of her compromise notwithstanding the expressly-identified disputed value of [Hopkins'] interest in the [profession deleted] firm. It cannot be safely assumed therefore that if the parties had at an earlier stage agreed on all relationship property matters and were only on 5 August 2016 considering maintenance that [Whitehead] would have accepted $11,900 per month as sufficient maintenance for her and the children. She may – or may not have – done so.

[28] I therefore consider it to be artificial and potentially unfair to [Whitehead] to "unpick" parts of the agreement and sever them for a particular purpose.

[29] That said, I do not consider the issue before me is to be determined, or at least primarily determined, on the basis of severability or lack of it. The question I have to decide is whether or not the payment agreed to under clause 3.2 is impacted by the formula assessment.

[30] It is convenient to set out in full ss 64 and 65 of the CSA.

> **64 Election to terminate liability under voluntary agreement**
>
> (1) The person to whom child support or domestic maintenance is payable under a voluntary agreement that has been accepted by the Commissioner may, by written notice given to the Commissioner, elect that the liability of a person to pay child support or domestic maintenance under that agreement is to end from a specified future date.
>
> (2) The notice must be—
>
> (a) in the appropriate approved form; and
>
> (b) verified as required in the form of notice; and
>
> (c) accompanied by such documents (if any) as are required by the form of notice to accompany the notice.

(3) A document that accompanies the notice must also be verified as required by the form of notice.

(4) If any such election is made,—

(a) nothing in this Part or any other provision of this Act shall apply to any money that becomes payable in accordance with the agreement after the date of the election; and

(b) any money payable in accordance with the agreement after the date of the election may, without prejudice to any mode of recovery, be recovered by any person in the District Court.

(5) An election made under subsection (1) shall be irrevocable.

65 Child support voluntary agreement no bar to application for formula assessment

(1) The existence of a voluntary agreement shall not prevent any party in relation to that agreement from applying to the Commissioner for formula assessment of child support under Part 1.

(2) If a properly completed application for a formula assessment of child support in respect of the child to whom the agreement relates is completed, any person who, under the agreement, was a person to whom child support was payable is deemed—

(a) to have elected under section 64 that the liability of the other party to the agreement to pay child support in respect of the child under the agreement is to end with the day before the day on which the formula assessment is to first apply; and

(b) to have met the requirements of section 64(2) and (3).

[31] In order for the consequence in s 65(2) to follow from the successful completion of a formula assessment application for child support, the "voluntary agreement" referred to in s 65 must first be ascertained. A "voluntary agreement" for the purposes of s 65, must in my view be one "to pay child support". This is self-evident from, first, the wording of s 65(2) both in the initial part of it and in s 65(2)(a). Further, s 65(2)(b) deems the recipient of the child support payment under the voluntary agreement to have meet the requirements of s 64(2) and (3). This invokes s 64(1), where again "child support" is mentioned.

[32] There is a definition of "child support" in s 2 of the CSA:

> "Means any payment required to be made under this Act by any person towards the support of a qualifying child, whether under a formula assessment or a voluntary agreement or an order of the court."

[33] In my view this self-evidently means that the payment, or any part of it, required to be made under the August 2016 agreement is not within the definition of "child support". That is because it is not a payment required to be made under the CSA. The reference to "voluntary agreement" must be to one which is administered by the Commissioner in accordance with the Act after acceptance by the Commissioner. Only through the Commissioner accepting a voluntary agreement at the request of the parties can it become one in respect of which payment is *required* to be made.

[34] The phrase "voluntary agreement" is not defined in the CSA but s 47 provides as follows:

> **47 Application of this Part**
>
> (1) This Part applies where either—
>
> (a) the parties to a voluntary agreement for child support in respect of a qualifying child; or
>
> (b) the parties to a voluntary agreement for domestic maintenance,—
>
> want the Commissioner to administer the agreement in accordance with this Act.
>
> (2) The parties to a voluntary agreement for child support may be—
>
> (a) the parents of the child; or
>
> (b) a parent, or the parents, of the child and a carer of the child who is not the child's parent.
>
> (3) The parties to a voluntary agreement for domestic maintenance may be—
>
> (a) a married couple or civil union partners; or
>
> (b) the parties to a marriage, civil union or de facto relationship that has ended; or
>
> (c) persons who are the parents of a child but who have never been in a marriage or civil union with each other.
>
> (4) If there is any other party to the agreement in relation to whom subsection (2) or subsection (3) does not apply, that party is to be disregarded for the purposes of the application of this Act to the voluntary agreement.

> (5) If the agreement is made in relation to any child other than a qualifying child, the other child is to be disregarded for the purposes of the application of this Act to the voluntary agreement.

[35] This again expressly limits the relevant voluntary agreements to being those in respect of child support.

[36] What this means is that if the parties had clearly agreed to payment of *child support* then s 65 would have had potential application to that agreement, subject to both parties asking the Commissioner to accept and enforce it. Whether it would even then applied or not is subject to a further, alternative, argument which I will discuss at the end of the judgment. However, it is clear that the financial support agreement set out in clause 3 of the August agreement was not an agreement to pay child support under the CSA. Indeed, it is expressly something else because the parties, with legal advice from experienced family lawyers, have gone to the trouble of recording that their agreement as to maintenance was *in lieu of* child support and that neither party would make any claim in respect of child support – see clause 3.4.

[37] In short, whatever the constituent parts of the maintenance payment, the parties expressly chose to describe the payment as "maintenance" rather than "child support" and to reinforce this by emphasising that it was in lieu of child support. This agreement was reached with advice from, and no doubt was drafted by, experienced family lawyers who may be taken to have understood the difference between child support on the one hand and child and spousal maintenance on the other. There clearly is a difference: "maintenance", "maintenance agreement" and "maintenance order" are defined in the Family Proceedings Act 1980, child support in the CSA.

[38] I recognise that in isolation the second stanza of clause 3.4 of the agreement (not to seek child support) may be seen as an unlawful attempt to oust jurisdiction under the CSA, but the overall effect of clause 3 and the distinction expressly drawn by the parties between maintenance and child support must, as a matter of contractual interpretation, be given effect to as between them. In any event, the CSA still requires that both parties agree before their voluntary agreement is able to come under the CSA umbrella.

[39] Mr Delany submitted that in the rather curious absence of the definition of "voluntary agreement" in the CSA (curious, because that phrase is used repeatedly in Part 3 of the Act and indeed is the title to that Part) that from the PRA ought to be imported. That definition is in s 2 (emphasis added):

> ***voluntary agreement*** means a written agreement—
>
> (a) made between spouses or partners who are parties to proceedings; and
>
> (b) providing for one spouse or partner to pay sums of money to the other spouse or partner **for the maintenance of**—
>
> (i) the other spouse or partner:
>
> (ii) a child of the marriage or child of the civil union or child of the de facto relationship.

[40] He submitted that because s 32 of the PRA referred to both voluntary agreements and to the CSA the same definition should apply in both statutes. I do not agree. On the one hand, under the CSA, the definition of voluntary agreement could very easily have been stated to be the same as that in the PRA but Parliament has not said that. When the CSA was amended with effect from April 2015 that could have easily been done if it was seen as important. On the other hand, looking at the definition in the PRA, it is significant in its use of the word "maintenance" and the absence of any reference to "child support".

[41] In summary then I consider that the proper characterisation of the agreement recorded in clause 3.2 is that it was a voluntary agreement for the purposes of the PRA but *not* a voluntary agreement for the purposes of the CSA. On this view it is therefore a voluntary agreement which is susceptible of an application under s 32, as being one referred to in s 32(2)(d), but it is *not* one which is affected by s 65(2) of the CSA. I note this is reinforced by the fact that in s 32(1)(c), a voluntary agreement may or may not have been accepted under the part 2 of the CSA.

[42] In any event, here I do not consider that even with [Whitehead's] consent, which certainly has not been and will not be forthcoming, this was a voluntary agreement "for child support" which was capable of acceptance by the Commissioner under s 48 of the CSA because it is simply not clear as to the

proportion of the $11,900 which relates to child maintenance and which relates to spousal maintenance.

[43] I therefore conclude, after carefully considering the plain wording of the August agreement in its context, including its statutory context, that the parties agreed on a global monthly sum of $11,900 for child and spousal maintenance (not apportioned), that this was in lieu of child support and that neither would seek child support against the other. The CSA has no application or effect on the enforceability of the August agreement and in seeking a formula assessment [Hopkins] did what he had expressly agreed not to do.

[44] It follows that the formula assessment has no impact on [Hopkins'] obligation to make the $11,900 per month payment under clause 3.2 of the agreement. This could, in principle, lead to the apparent anomaly, although it is one for which [Hopkins] would be entirely responsible, an "own goal" as Mr Delany put it, of [Hopkins] being required to pay $14,809.60 each month. However, consistent with her view that the formula assessment is irrelevant and with her acceptance of the $11,900 per month, [Whitehead] seeks no more than that.

[45] Although, as I have noted, counsel addressed their submissions in the context of severability or otherwise of the financial support agreement, I consider the question is more fundamental than that. Because I have held that this was not a voluntary agreement to pay child support, then s 65(2) simply does not apply, regardless of whether it is possible or appropriate to sever the financial support provisions or not. Even if there had been a clearly severable agreement to pay child maintenance in a stated sum, I do not consider that could be for the purposes of s 65 of the CSA (without application to the Commissioner) a "voluntary agreement to pay child support" because the character of the payment, maintenance, would not be within the definition of child support in the CSA. However, as will be obvious from my discussion, I would if necessary have upheld Ms Forrest's argument against severability, primarily because of clause 11.2.

[46] In overview the August agreement may be seen, as most settlement agreements are, as reflecting compromise on both sides. [Whitehead] in agreeing to

accept $11,900 per month for herself and the children, and the other payments from [Hopkins], may be seen as having traded away her ability to seek more by way of relationship property share in relation to the [profession deleted] firm interest. On the other hand, though it is not so clear that he looked at it in this way, [Hopkins] may be seen as having traded away his ability to seek a lower monthly sum in fulfilment of his obligation to pay maintenance or child support.

[47] I have not, in this section of my judgment, found it necessary to refer to the main authorities referred to me by counsel because none of them focussed on the particular question I have had to decide. They were *Smythe v McSharry* [4], *Townsend v Bellamy*[5] and *PNJ v CX*[6].

[48] None of these cases featured the possible impact of a formula assessment on a maintenance agreement. Severability or otherwise was considered, but in the different context of applications under s 32.

Alternative argument under s 47

[49] In the course of preparing for the hearing, I considered the relevant provisions of the CSA and asked counsel to make submissions on the question of whether [Hopkins'] argument that s 65(2) applies faced a further hurdle, namely that it only applies to voluntary agreements which have been accepted by the Commissioner for the purposes of enforcement. Counsel made helpful written submissions as to this prior to the hearing and expanded on these at the hearing. I have already touched on this issue and the central provisions in the first part of this judgment.

[50] Although the conclusion I have already reached is sufficient to determine the summary judgment applications, I go on to consider this alternative argument in case I am wrong in my initial conclusion and because there was full argument on this alternative question.

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[4] [2013] NZFC 5591 (Judge Ellis)
[5] [2004] 2 NZLR 692 (HC) and [2005] NZFLR 129 (CA)
[6] [2012] NZFC 2979 (Judge Russell)

[51] Section 65 appears in Part 3 of the CSA which is headed "voluntary agreements". That part of the Act begins with an application provision, s 47, which for convenience I again set out:

> **47 Application of this Part**
>
> (1) This Part applies where either—
>
> (a) the parties to a voluntary agreement for child support in respect of a qualifying child; or
>
> (b) the parties to a voluntary agreement for domestic maintenance,—
>
> want the Commissioner to administer the agreement in accordance with this Act.
>
> (2) The parties to a voluntary agreement for child support may be—
>
> (a) the parents of the child; or
>
> (b) a parent, or the parents, of the child and a carer of the child who is not the child's parent.
>
> (3) The parties to a voluntary agreement for domestic maintenance may be—
>
> (a) a married couple or civil union partners; or
>
> (b) the parties to a marriage, civil union or de facto relationship that has ended; or
>
> (c) persons who are the parents of a child but who have never been in a marriage or civil union with each other.
>
> (4) If there is any other party to the agreement in relation to whom subsection (2) or subsection (3) does not apply, that party is to be disregarded for the purposes of the application of this Act to the voluntary agreement.
>
> (5) If the agreement is made in relation to any child other than a qualifying child, the other child is to be disregarded for the purposes of the application of this Act to the voluntary agreement.

[52] On the face of this provision the only voluntary agreements to which the part applies, and therefore to which all of the sections in the part apply, are those which both parties to the voluntary agreement for child support want the Commissioner to administer in accordance with the Act. There is no doubt that [Whitehead] does not want the Commissioner to administer the August agreement in accordance with the CSA.

[53] Ms Forrest (correctly) submitted that while the CSA did not define "voluntary agreement" , "qualifying voluntary agreement" is defined in s 2 as:

> "A voluntary agreement that, under s 48, qualifies for acceptance by the Commissioner".

[54] Ms Forrest referred me to the statutory requirements for registration of a voluntary agreement as set out in s 55 and highlighted that an application to register a voluntary agreement must be signed by both parties and that this has not occurred here.

[55] Ms Forrest also referred me to the judgment of Ronald Young J in *GDB v CDB*[7]. The facts there were quite different but the court had to consider whether a formula assessment for child support, which had occurred when the mother had applied for a benefit, suspended or brought to an end the father's child support obligations under a December 2008 agreement. The father contended that s 65 of the CSA prohibited the mother from enforcing the agreement while she was in receipt of a benefit and while he was subject to a formula assessment for child support. So, to that extent, the issue was similar to the present if one accepts that the August 2016 agreement was one for the payment of child support which I have found not to be the case.

[56] Young J discussed whether s 65 applied as follows:

> [147] However, Mr Barnes goes further. He says that the effect of s 65 of the Act is to cancel the December 2008 agreement from the date of the formula assessment. My conclusion is that s 65 does not apply in the circumstances of this case. I am satisfied that s 65 of the Act applies only to registered (the Act refers to "accepted") voluntary agreements and not (as here) to voluntary child support agreements that have not been registered under the Act.
>
> [148] The Child Support Act provides for the registration of voluntary child support agreements. There are statutory requirements as to their contents.[8] Once registration is accepted the Commissioner takes over enforcement of the agreement.
>
> [149] Section 64 provides:
>
> **64 Election to terminate liability under voluntary agreement**

[7] [2013] NZHC 2054
[8] Sections 48 and 55.

(1) The person to whom child support or **[**domestic maintenance**]** is payable under a voluntary agreement that has been accepted by the Commissioner may, by written notice given to the Commissioner, elect that the liability of a person to pay child support or **[**domestic maintenance**]** under that agreement is to end from a specified future date.

(2) The notice must be—

(a) In the appropriate approved form; and

(b) Verified as required in the form of notice; and

(c) Accompanied by such documents (if any) as are required by the form of notice to accompany the notice.

(3) A document that accompanies the notice must also be verified as required by the form of notice.

(4) If any such election is made,—

(a) Nothing in this Part of this Act or any other provision of this Act shall apply to any money that becomes payable in accordance with the agreement after the date of the election; and

(b) Any money payable in accordance with the agreement after the date of the election may, without prejudice to any mode of recovery, be recovered by any person in any District Court.

(5) An election made under subsection (1) of this section shall be irrevocable.

[150] Section 64 is concerned with the circumstances where a recipient of child support by virtue of a registered voluntary agreement, elects to end the "liability of a person to pay child support under that agreement". The election is not an end to the obligation to pay child support under the voluntary agreement but to end the fact that the agreement is "registered" under the Act. The election is not to end the agreement itself. The effect is for the custodial parent to lose the enforcement advantage of the Commissioner's obligation to enforce such agreements.

[151] Section 65 provides:

65 Child support voluntary agreement no bar to application for formula assessment

(1) The existence of a voluntary agreement shall not prevent a person who is a qualifying custodian or a liable parent in relation to that agreement from applying to the Commissioner for formula assessment of child support under Part 1 of this Act.

(2) Where, in relation to a voluntary agreement made in relation to a child and to the persons who are respectively the qualifying custodian and the liable parent in relation to that child in terms of that agreement,—

(a) The qualifying custodian or the liable parent makes a properly made application for formula assessment of child support in relation to that child; and

(b) In terms of that application those same persons are respectively the qualifying custodian and the liable parent in relation to that child,—

the qualifying custodian is deemed—

(c) To have elected under section 64 of this Act that the liability of the liable parent to pay child support in respect of the child under that agreement is to end with the day before the day on which that formula assessment is to first apply; and

(d) To have met the requirements of subsections (2) and (3) of that section.

[152] Section 65 makes no mention of a registered voluntary agreement. On the face of it, therefore, it appears to apply to voluntary agreements that are not registered as was the case here. But for two reasons I am satisfied s 65 applies only to registered agreements. The first reason arises from s 47 of the Child Support Act 1991. This section provides as follows:

47 Application of this Part

(1) This Part of this Act applies where either—

(a) The parties to a voluntary agreement for child support in respect of a qualifying child; or

(b) The parties to a voluntary agreement for **[**domestic maintenance**]**,—

want the Commissioner to administer the agreement in accordance with this Act.

(2) The parties to a voluntary agreement for child support may be—

(a) The parents of the child; or

(b) A parent, or the parents, of the child and an eligible custodian of the child who is not the child's parent.

[153] Section 65 is within Part 3 of the Act and is therefore covered by s 47. Unless s 47 can be read down in some way, s 65 is limited to voluntary agreements the parties want the Commission to administer, those that I have called registered agreements.

[154] The second reason to assume s 65 applies only to registered voluntary agreements, relates to the interrelationship between ss 20 and 65. Section 20 provides that where there is a voluntary agreement and a liable parent becomes liable to pay child support by way of a formula assessment then the voluntary agreement is suspended. This logically follows. The alternative is that the liable parent would be liable to make two separate child support payments for the same children, one under the voluntary agreement the other under the formula assessment. Suspension only is also

> appropriate because if for any reason the formula assessment ends, then the voluntary agreement should be reactivated.
>
> [155] It therefore makes no sense for s 65 to apply to the very same circumstances; where a voluntary agreement for child support is entered into and subsequently a formula assessment of child support liability obtained. If s 65 applies to voluntary agreements that are not registered, then in contrast to the suspension provision in s 20, s 65(2)(c) provides that liability to pay under the agreement ends as if a s 64 election has been made.
>
> [156] The s 64 election is concerned with an election to end the registration of the voluntary agreement, not the effect of the agreement itself. Similarly "that agreement" in s 65(2) must refer to the registration of the agreement. And so looked at broadly ss 64 and 65 are concerned with registered voluntary agreements where a custodial parent elects to cancel registration of the agreement (in s 64) or where an application is made for a formula assessment (s 65) and there is a registered voluntary agreement. In both cases the liable parent's liability to pay under the registered agreement ends. The voluntary agreement in both situations is effectively "deregistered". The Commissioner can no longer be required to enforce the agreement.
>
> [157] Where the s 64 situation applies (where the custodial parent has sought the deregistration) the voluntary agreement continues and so ensuring a continued obligation to pay child support. Where in s 65 a formula assessment is sought, the agreement is deregistered. The Commissioner can no longer be required to enforce the agreement. This logically follows from the fact that the liable parent has an obligation to pay child support under the formula assessment. And in that situation by virtue of s 20 the voluntary agreement itself is suspended so long as the formula assessment applies. The result of this analysis is that ss 64 and 65, therefore, can have no application to the current situation.

[57] Ms Forrest submits that I am bound by Young J's finding and that this provides a further or alternative reason why s 65 does not apply in this case and therefore cannot assist [Hopkins].

[58] Ms Forrest submits further that although s 20, providing for the suspension of agreements, has been repealed since Young J's judgment, his analysis of s 65 and surrounding provisions, and the first of the two reasons (set out at [153]) for his conclusion that s 65 applies only to what he called registered agreements, remains valid.

[59] Mr Delany submits that the contention, and indeed Young J's conclusion, that s 65 only applies to qualifying voluntary agreements must be wrong for a number of reasons, some of them practical. He gave examples to support this contention in his

supplementary submissions. While in general terms I accept there is practical force in some of Mr Delany's contentions, the plain wording of the s 47 of the CSA is against him. Also, there is a practical reason why there would be unsatisfactory practical ramifications if Mr Delany's argument were upheld: why should a party who has signed a solemnly-recorded formal written agreement for child maintenance one day, be able unilaterally to go off to the Commissioner the next day and obtain a different assessment, which by virtue of s 65 brings the agreement to an end?

[60] More significantly for present purposes, even if Young J is wrong in his conclusion (not that I consider His Honour is), I am undoubtedly bound to follow it. It was a reasoned conclusion reached after full argument and while the facts of the case with which Young J was dealing were different they were not materially so. Accordingly, if I had been required to determine the summary judgment applications on the basis that there was a voluntary agreement to pay child support potentially affected by s 65, I would still have concluded that s 65 still did not apply for the reasons set out by Young J.

Result

[61] For these reasons, I would grant [Whitehead] summary judgment as to liability against [Hopkins] and dismiss [Hopkins'] summary judgment application against her. However, I leave it to the parties either to reach agreement as to the way forward or to revert to the Court on seven days' notice to the other party for further directions or orders. Given [Hopkins'] reluctance to have a formal money judgment entered against him in circumstances where I gather he can afford to make the $11,900 monthly payments, I anticipate the parties will now be able to resolve all matters between themselves for the period from the issue of this proceeding, pending the s 32 application being considered and determined by the Family Court.

[62] It will be a matter for [Whitehead] whether or not to apply to strike out [Hopkins'] s 32 application, or simply to oppose it on its merits, but in my view the application is in principle able to be made because it is an application to cancel, vary or suspend the voluntary *maintenance* agreement, not an application to cancel, vary or suspend a *child support* agreement.

[63] Having succeeded, [Whitehead] is entitled to costs, both on her application and [Whitehead's], which on a preliminary basis I assess on a 2B basis. If either party wishes to make submissions to the contrary they may do so by memorandum to be filed within 14 days of the date of this judgment. I would hope however that this is a matter on which, in order to avoid further legal costs, agreement can be reached.

[64] I thank counsel for their submissions.

S M Harrop
District Court Judge