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IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2014-009-000280
[2017] NZFC 1773

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[SEBASTIAN BLAKE] Applicant
AND	[ELLIE SHAW] Respondent

Hearing:	01 March 2017
Appearances:	Ms J Stringer for the Applicant Mr P J Egden for the Respondent
Judgment:	8 March 2017

JUDGMENT OF JUDGE R J MURFITT
- Property (Relationships) Act 1976 section 24 -
- The Extentions of Time, Merits of Case, Conditional Order-

Introduction

[1] The applicant applies for leave to make an application out of time pursuant to s 24(2) Property (Relationships) Act 1976.

[2] The parties disagree as to how late the application has been presented for filing, but agree it was outside the limitation period contained in s 24(1)c, which requires an application made after a de facto relationship has ended to be made no later than three years after the relationship ended.

[3] A Judge has directed that the hearing be split so that the question of leave to apply is dealt with separately, and before the substantive application is heard.

Factual background

[4] There is not much on which Mr [Blake] and Ms [Shaw] agree as true. Issues of credibility will loom large, and I have had an opportunity to assess their comparative reliability in this preliminary hearing which occupied three and a half hours.

[5] The relationship began in either 2001 (as Mr [Blake] would have it) or 2002 (as Ms [Shaw] would have it).

[6] The relationship was a volatile one, marked by numerous periods of separation. Mr [Blake] contends these were "*occasional*" and says the couple lived together continually for three or four years without separating once. Ms [Shaw] contends they were never together for longer than six months without some form of dispute resulting in them separating, if only for a few days.

[7] During the course of their relationship, [the child] was born in 2008. He is a profoundly disabled child [medical details deleted]. She is his full time caregiver and Mr [Blake] has played little part in the child's care or upbringing. In particular, it seems he has made little if any contribution to the child's financial needs.

[8] They do not agree as to the time when they separated. Ms [Shaw] claims they separated in May 2011. Mr [Blake] claims they separated in August 2012. She says that by January 2012 she was in a new relationship with her partner [Ethan Clark], whom she met before the previous Christmas. Mr [Blake] contends if this was so, she was maintaining two relationships at the same time, because he believes they did not separate until August 2012. His memory is largely reinforced by the claim he and some friends [activity deleted] at her home in 2012.

[9] In the context of this particular issue, the date of separation is of relatively low relevance. Depending on the final determination as to separation date, they were apart either 22 months or 7 months after the limitation period expired when proceedings were issued in March 2016. In the context of previous cases, neither of those involves the sort of delay which would, on its own, prevent leave being granted to apply out of time.

[10] Credibility issues will be quite significant in the context of these proceedings. This will be relevant in the context of the separation date and many other aspects of the issues which arise in the substantive proceedings.

[11] Having seen both witnesses in the relatively narrow context of this preliminary hearing, I was more inclined to accept the respondent was a reliable witness, by contrast with the applicant. Mr [Blake] had a poor recollection or memory of when things occurred. He struggled with times to find reasons for recalling when events happened. At times his evidence contained internal contradictions. For example, he claimed that he had been discharged from bankruptcy in 2003, but under cross-examination allowed it may have been 2004. However, in an affidavit sworn by him in February 2014 he said he was an undischarged bankrupt even when the company *[company 1]* was formed, and that occurred in [date deleted] 2006. Mr [Blake] has been convicted of fraud, serious enough to have served [details deleted] in prison (so the sentence was probably 12 months or longer). That was in[date deleted]. Then and subsequently, he has shown an artful agility to transfer assets out of (and back into) his name for what I am quite sure was an intention to defeat creditors. Even when the current property, which he occupies in [address deleted], was purchased by the company [company 2], shares

held by his [sibling] were transferred into the applicants name until the purchase was complete, because [reasons deleted]. That in itself is a scheme designed to deceive, and does not reflect well on his reliability as a witness of truth.

[12] Counsel agree this preliminary dispute should proceed on the basis of cross-examined evidence of the main parties and with reference to the other affidavits filed. Some unsworn evidence has also been tendered, and if this case is to proceed to hearing, that will need to be presented in a proper fashion if it is to be taken into account.

[13] The substantive proceedings were filed in March 2016. However, two years earlier an application had been filed by Mr [Blake] to sustain a notice of claim under s 145A Land Transfer Act 1952. That application was discontinued, because the land he sought to protect against this position was owned by a company and not by Ms [Shaw] personally.

Principles

[14] Section 24 Property (Relationships) Act 1976 provides;

> **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 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 one 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)).

[15] While the section itself does not provide any statutory guidance as to how the discretion should be exercised, the decision of *Beuker v Beuker*[1] is the foundational decision which suggests there are four particular considerations which should guide a judge in deciding any issue of whether leave should be granted to bring a case outside the limitation period. Those are;

- the length of the delay
- the reasons for the delay
- prejudice to either party
- the merits of the claim

[16] In *Ritchie v Ritchie* [2] Anderson J made it clear these considerations, so often relied upon in cases concerning extension of time, are not to be seen as a definitive code. Other circumstances might well be relevant.

[17] *Ritchie v Ritchie* was a case in which a delay of 20 years in issuing proceedings (in relation to a particular artwork) was not sufficient to disqualify an applicant from being granted an extension of time.

[18] I raised the question during argument as to whether I have the power to consider an extension of time subject to a condition. There is conflicting High Court authority on the point.

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[1] *Beuker v Beuker* [1977] 1 MPC page 20
[2] *Ritchie v Ritchie* [1992]NZFLR 266

[19] In *Rutherford v Rutherford*[3] Barker J imposed a condition limiting the scope of the litigation and the property in dispute. He said at paragraph [73]:

> "These parties appeared to the outside world as if they were married; this factor takes the case completely out of the ordinary.
>
> I then have to ask myself whether this extraordinary factor outweighs any injustice to the husband, because the ultimate inquiry must look at the overall justice of the matter.
>
> In my view, the justice of the situation indicates that the wife be permitted to bring proceedings out of time under the Matrimonial Property Act 1976. There would be hardship amounting to injustice if she did not make a limited claim. Section 33(6) allows me to impose terms; these proceedings are to be restricted to a claim in respect of the matrimonial home only. It would be unjust to allow the wife to claim in respect of other matrimonial property after all this time. The prejudice to the husband would be just too great."

[20] Two years later in *Nowacki v Spyve*[4] Tipping J doubted the accuracy of that judgment, and in particular the rationale that the powers under s 33(6) enable a Court to impose conditions on a decision to grant leave to bring proceedings out of time.

[21] In that case however, Tipping J focused on the question of whether, in crafting conditions to an order allowing an extension of time to bring proceedings the Court has power to confine the ambit of the issues, or the range of decisions available to the Judge hearing the proceedings ultimately. That, he considered, was contrary to the philosophy of the Act. He said at page 331:

> *"*It is my view therefore that there is no power to limit the ambit of the wife's claim *in the way contended for by the husband* as a condition of granting an extension of time" (emphasis added).

[22] In that case, the condition sought by Mr McIsaac for the husband was that the wife's claim could proceed only against the matrimonial home, thus restricting the range of issues the Court ultimately could determine.

[23] In *Nowacki v Spyve,* Tipping J was considering a condition quite different from that which I am considering in this case. Here I am considering a condition of a more procedural nature, which will ameliorate a potential prejudice to the respondent, and open the gate to allow the applicant to have his day in Court.

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[3] *Rutherford v Rutherford* [1986] 4 NZFLR 70
[4] *Nowacki v Spyve* (1988) 5 NZFLR 321

[24] Barker J was undeterred and in 1999, in the decision of *Campbell-White v Prattley*[5] he again granted leave for proceedings to be brought out of time, where the delay amounted to three years and one month, but on a condition that the wife sign a statement in terms of s 9(2) of the Act that her interest in immovable property in Scotland could be considered by the Court and that the Act apply to her interest in those properties. He considered "*justice will be done*" if she was allowed to pursue her claim on that condition.

[25] That was an application brought in advance of the filing of substantive proceedings (unlike the situation in this particular case). The Court also made directions that she must file her substantive proceedings within 28 days and prosecute them with considerable diligence.

[26] In my view, there is no jurisdictional barrier to the Court granting relief under s 24(2) subject to conditions which would have the effect of mitigation any of the concerns arising under the *Beuker* considerations. That would serve the interests of justice between the parties, and that helps to achieve a principal object of the Act.

[27] Generally, where the Court has power to exercise a discretionary relief, the power to allow full relief implies the power to apply partial relief where that would meet the interests of Justice.

[28] I prefer to follow the approach adopted by Barker J in the decisions to which I have referred.

Lapse of Time

[29] In this case, the delay after the expiration of the limitation period was either seven or twenty-two months. That is not unusual in the run of things, and in the context of the many authorities referred to in the texts and in counsel's submissions.

[30] Mr Egden acknowledged that if his objection relied on the length of delay only, he would not have a successful case to advance.

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[5] *Campbell-White v Prattley* [1999] NZFLR 930

Reasons for the delay

[31] In this case Mr [Blake] contends the delays in filing his proceedings were attributable to changes of lawyers and financial difficulties. Two lawyers retired in the course of their retainer with him. Another gave advice which Mr [Blake] did not agree with and he terminated her retainer.

[32] At one stage in cross-examination he blamed the respondent for his delay by putting "*undue pressure*" on him in relation to his pursuit of contact with [the child]. That seems to be a facile explanation, given that she was desperate for Mr [Blake] to play a more full parenting role in [the child]'s life.

[33] However it is clear that Mr [Blake] had numerous changes of lawyer, and while I suspect he is largely responsible for that the lack of consistent approach, I do not consider that should be a reason to refuse him leave to bring his action.

Prejudice

[34] Prejudice involves a balancing exercise, because there will be disadvantage arising for both parties whether leave is granted or refused to bring an application. There must be more than inconvenience or exposure to litigation risk to justify refusing leave to bring the action because of prejudice to the other party.

[35] Generally prejudice relates to situations where for example:

- the respondent has changed her position on the basis of a reasonable expectation that proceedings would not be brought;

- she has been lulled into a false sense of security that matters were resolved and at rest;

- she has lost opportunities for presenting the facts of her case, such as where a critical witness has become unavailable.

[36] Here there are no such factors, and in fact the respondent has known of Mr [Blake]'s latent claim since the couple separated. For example his 2014 notice of claim or caveat registered in 2014, and a letter of claim from Mr Pelham (Mr [Blake]'s lawyer in 2014) would certainly have kept her aware that relationship property division was a live question.

Strength of claim

[37] The real issue as agreed by Mr Egden relates to the prospects of success by Mr [Blake] should he be allowed leave to bring this application out of time. Mr Egden submits the division of property rights already achieved is more than likely to be equal or in favour of Mr [Blake] already. He submits Ms [Shaw] should not be put to the cost and trouble defending proceedings where Mr [Blake] is unlikely to achieve any positive benefit for himself.

[38] While it is not of central relevance, Mr Egden highlighted that his client already has the emotionally demanding burden of caring for [the child], [medical details deleted].

[39] From a perusal of the pleadings, and after hearing counsel submissions and the evidence presented in cross-examination, it is clear these proceedings involve complex and far reaching issues.

[40] Already I detect they include:

(a) Whether the parties' relationship involved a qualifying relationship or a series of relationships.

(b) The possibility of a settlement agreement, with issues under s 21H of validation of a technically imperfect agreement, and possibly issues relating to setting aside the agreement.

(c) The respondent's claim for unequal sharing under s 13 for extraordinary circumstances, which might include her responsibilities to a disabled child, covert contemporaneous relationships and the

applicant's fraud convictions and sentence, and possibly his subterfuges in trying to hide his property rights.

(d) The prospect of compensation in favour of the respondent under s 20 for the respondent's contributions to payment of the applicant's personal debts.

(e) Issues under s 16 where the applicant and respondent each owned shares in companies which owned homes capable of being a relationship home (if a look through approach is taken).

(f) Allocation of property as a result of considering the interest of the child under s 26.

(g) Section 18B compensation

(h) As a result of the post separation care by the respondent of [the child] without significant help from the applicant.

(i) In addition the companies which own the homes occupied by the applicant and the respondent might need to be joined.

(j) Joinder of Mr [Blake]'s [sibling] as a third party in the proceedings.

[41] Mr Egden estimates the cost of litigation might well amount to $50,000 to $70,000 per party. I can well see the respondent's costs might reach that higher level.

[42] Mr [Blake] is not the registered owner of shares in the company which owns the property in [address deleted], which he owns, and which is valued at $1,200,000. He acknowledges that he has an agreement with his [sibling] that he (the applicant) will acquire the equity in the property if he (the applicant) sustains the mortgage and outgoings for a period of ten years. This agreement has all the hall marks of another façade to keep from official scrutiny the assets which Mr [Blake] holds in truth as beneficial owner, while his [sibling] holds legal title to the shares.

[43] Neither does the respondent own the home which she occupies outright. Rather she owns the shares in the company which owns it.

[44] Assuming a net asset value, and assuming a court looks through the obvious charade where Mr [Blake]'s assets are held in the name of his [sibling], she has real estate worth $550,000, and he has control of real estate worth $600,000.[6]

[45] Given that Mr [Blake] has a history of fraudulent behaviour and has previously been bankrupt, the respondent is at risk that, even if she succeeds in this litigation, she will be left the loser because of the burden of legal costs. There is a real risk that, if Mr [Blake] is ultimately unsuccessful, he will again take refuge in bankruptcy to deprive the respondent of any recourse in costs.

[46] To alleviate that risk, I consider a condition of leave granted to the applicant should recognise the need for the respondent to be protected for the costs of litigation in the event she is successful.

[47] Mr [Blake] presents himself now as a successful man of business. The property at [address deleted] was purchased through a company, with shares temporarily vested in his name (rather than his [sibling]'s name) so that finance could be arranged to facilitate the purchase. His ability to raise credit must be better than his [sibling]'s ability to raise credit.

[48] Should he be successful in the litigation, he will have nothing to fear from the losses associated with an order for costs against him.

[49] Should he be unsuccessful, particularly given the exposure this preliminary argument has given to his litigation risk, it is likely that indemnity costs would be awarded.

Conclusion

[6] The [address deleted] property worth $1,200,000 is said to be subject to a mortgage of $600,000.

[50] For these reasons I consider the interests of justice require that Mr [Blake] should have the opportunity to test his claim in Court, and that leave should be granted for him to bring these proceedings out of time, but on condition that he pays within 30 days the sum of $70,000 into Court as security for the respondent's costs should she be successful.

[51] I emphasise that, but for this condition, leave to bring the proceedings would have been declined.

R J Murfitt
Family Court Judge

Signed in Christchurch on 08 March 2017 at 2:50pm