EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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 TAURANGA

FAM-2013-075-000142
[2017] NZFC 7267

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[MAISIE BLAKE] Applicant
AND	[ANTHONY SCOTT] Respondent

Hearing:	11 September 2017
Appearances:	J Hunter and E Pascoe for the Applicant S Jefferson QC and J Hawker for the Respondent
Judgment:	11 September 2017

ORAL JUDGMENT OF JUDGE S J COYLE

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[1] The substantive proceedings relate to an application by Ms [Blake] to set aside a s 21 agreement entered into by her and Mr [Scott] in December 2010. If the decision is to set that agreement aside, then the Court will need to determine resolution of the substantive and outstanding relationship property issues.

[2] The hearing which was due to commence this morning has been set down for four days. But on 17 August of this year Ms [Blake]'s solicitors filed a further affidavit from Ms [Blake]. Its filing is precluded pursuant to r 52D Family Court Rules 2002 unless accompanied by an application for leave pursuant to s 52D(2). Having been reminded of this by Mr Jefferson, on 30 August Ms [Blake]'s solicitors filed an application for leave. That application was filed without notice. Today Ms [Blake]'s counsel, Ms Hunter, accepts that the application should never have been filed without notice in terms of r 24(2)(a)(iii) of the Rules.

[3] The affidavit contains a series of letters as between counsel and emails as between the parties, all of which have been sent on a without prejudice basis and a valuation of a property in [location 1]. That valuation purports to be a recent valuation but in fact seems to have been undertaken in March or April this year. That valuation has been disclosed prior and Mr Jefferson concedes that that valuation evidence can be admitted by consent under s 9 Evidence Act 2006. He, however, strenuously objects to the without prejudice correspondence being admitted and has asked that the affidavit not be read.

[4] There was a chambers discussion this morning as to how to resolve that issue. Agreement was reached that before I could determine whether that leave would be granted to file that affidavit out of time or not, I needed to read the affidavit and the contents of the correspondence between counsel and the parties in order to inform any decision that I make as to admissibility. I, accordingly, received the affidavit on that basis. But I have not formally admitted the affidavit in to evidence at this point in time. The matter was then stood down briefly for me to read the affidavit. There was then a period in which counsel made submissions as to why they thought the evidence should be admitted or not, as the case may be.

[5] I thus stood the matter down now until after lunch to enable me to consider the issue and to formulate the basis of this oral decision. The issues that I have to determine, therefore, are as follows:

(a) Should leave be granted under r 52D(2) Family Court Rules?

(b) If the previous answer is yes then is the evidence of the without prejudice communications admissible pursuant to s 57 Evidence Act or not?

(c) If the evidence is admissible is there evidence of a binding contract as between the parties in full and final settlement of all the outstanding issues which form the basis of the substantive applications before the Court?

First Issue – should leave be granted under r 52D(2)

[6] Mr Jefferson submits no. He points to the s 1N principles contained in the Property (Relationships) Act 1976 (PRA) and especially principle (d) which provides for proceedings to be resolved as simply, speedily and inexpensively as is consistent with the interests of justice. It is his submission, that the evidence that is now contested was sought to be put before the Court by Ms [Blake], was raised and squarely objected to by Mr [Scott]'s solicitors on 19 July of this year. Yet no application was made for leave to file that evidence until just shy of two weeks before the hearing. Mr Jefferson points out in his submissions that four days have been set down to determine the substantive issues and in his submission if the matter now needs to be abandoned then that is an inexcusable waste of time and contrary to inexpensive, speedy and simple resolution of the issues between the parties.

[7] He is, understandably, critical at the decision to file the application without notice. In his submission to formally raise in the context of proceedings an issue two weeks prior to the date of hearing is unacceptable. In his submission, based on s 1N(d) of the PRA, that in and of itself should be sufficient grounds to decline to admit the evidence.

Decision

[8] I disagree. Firstly the issues that are set out in the affidavit are prima facie relevant issues and are an important plank of the applicant's (now) case. Secondly, that issue has been foreshadowed, as between counsel, since July of this year. Thirdly, whilst Mr Jefferson is right as to the decision to file the application for leave without notice that should not be probative of refusing to grant leave. This is not about punishment for procedural impropriety but rather coming to a result which is fair and just. Which brings me to the fourth reason and that is to give effect to a just decision in terms of s 1N(c). Ms [Blake] should prima facie have an opportunity to file all relevant to support her case. Finally, I am mindful of the approach of Heath J in *Brown v Sinclair*[1] where even in the face of substantial breaches of procedural proprietary Heath J reinstated proceedings.

[9] I decline, therefore, to order that the affidavit is inadmissible under the s 1N(c) principle as submitted by Mr Jefferson. That of course is not the end of the matter as I still need to consider issues (b) and (c).

Second Issue – Is the evidence of the without prejudice discussions admissible pursuant to s 57 Evidence Act?

[10] Pursuant to s 12A Family Court Act 1980 evidence is admissible in proceedings under the PRA only if it complies with the provisions of the Evidence Act. In saying that there is a discretion, I acknowledge, under s 12A(4) to admit evidence if otherwise inadmissible. But in my view the issue in relation to the without prejudice communications on the facts of this case is so black and white that either the evidence is in or out under the Evidence Act and s 12A(4) is of no assistance to me at all.

[11] Section 57 Evidence Act provides a prohibition on the disclosure of evidence raising out of settlement negotiations unless the evidence falls within the exceptions set out in s 57.

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[1] *Brown v Sinclair* [2016] NZHC 3196

[12] Ms Hunter relies on s 57(3)(b); that is, she seeks to show that the without prejudice communications show an acceptance of an offer to settle all matters as between the parties. She would then seek to argue that the agreement reached, as evidenced in the without prejudice communications, should be given effect to pursuant to s 21H PRA. In effect her argument is that if I determine the communications are evidence of an agreement and are admissible, then all I need to do is make orders to give effect to that agreement and everyone in effect can "shut up shop and go home."

[13] Thus in order to determine the admissibility under s 57(3)(b) I need to answer the third issue as well, namely was there an agreement/settlement as between the parties.

[14] The relevant provision of the Evidence Act is in part due to an amendment in 2016 to the Evidence Act. In relation to the issue Katz J in *Capital + Merchant Finance Limited v Perpetual Trust Limited*[2] held the following:

> Settlement privilege cannot be claimed where there is a dispute as to whether settlement has been reached, or a dispute regarding the terms of settlement. That is because, in such circumstances, it will be necessary for the court to look at the settlement communications between the parties to determine the existence and terms of any settlement they may have reached.

[15] This is really an encapsulation of the common law exceptions of privilege under s 57 (commonly called "without prejudice privilege" or "settlement privilege"). It was developed the English Courts and accepted in New Zealand.[3] Prior to the 2016 amendment to the Evidence Act this exception was not necessarily recognised by statute.

[16] In relation to the amendment Venning J in *Interlact Limited v Fonterra TM Limited*[4] recently stated:

> Even before the 2016 amendment to the Evidence Act 2006, the evidence of discussions leading up to the settlement would have been admissible under s 57(3)(a) to the extent that the communications and discussions provide evidence of objective facts necessary to assist the Court to interpret the settlement agreement in accordance with the parties' true intentions. Where the interpretation of a settlement is in question, disclosure of the negotiations

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[2] *Capital + Merchant Finance Limited v Perpetual Trust Limited* [2015] NZHC 1233
[3] *Sheppard Industries Limited v Specialized Bicycle Components Incorporated* [2011] NZCA 346
[4] *Interlact Limited v Fonterra TM Limited* [2017] NZHC 1086 at [18]

> may be necessary to ensure substantive justice. In such a case disclosure of the discussions does not undermine the mediation process but is for the purpose of determining the specific terms of an agreement the parties arrived at following the process.

[17] The other ground that could potentially be relied upon is the overriding judicial discretion to waive privilege contained in s 57(3)(d) which states:

> (d) The use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the Court considers that it is in the interests of justice the need for the communication or document to be disclosed in the proceedings outweighs the need for the privilege, taking in to account the particular nature and benefit of the settlement negotiations or mediation.

[18] In relation to this case Ms Hunter submits that an offer was made by Mr [Scott]'s solicitors on 10 February of this year which was eventually accepted by Ms [Blake]'s solicitors on 20 June. Mr Jefferson submits that the 10 February offer was rejected by Ms [Blake] and that no binding contract came in to effect as a consequence.

[19] In Mr Jefferson's opening submissions he refers to the common law principles of offer and acceptance. At [22] he refers to the learned authors of *The Law of Contracts in New Zealand* stating:

> The use of the traditional offer and acceptance analysis of the formation of a contract requires the person alleging the existence of the contract to satisfy the Court that, on the basis of the principles described above, there was an offer to enter in to legal relationships upon sufficiently definite terms. This must then be complimented by evidence which enables the Court to determine that the offer was validly accepted by the offeree. Proof of these matters will establish that the parties have reached an agreement which may be capable of legal enforcement.

[20] Additionally, as he submits, a counteroffer constitutes a termination of the original offer and without acceptance of the exact terms an offer cannot be deemed to have been accepted. I do not take Ms Hunter to object to Mr Jefferson's statement of the law and indeed in her submissions she did not refer to any case law in relation to this issue.

[21] Ms Hunter's position is that the communications show:

(a) That there was no counteroffers made and thus no repudiation of the initial offer. Rather in her submission there was just attempts at clarification as to the terms of the 10 February offer.

(b) In any event Ms Hunter submits that Mr [Scott] reinstated the offer by his email of 8 June at 8.06 pm to Ms [Blake] and that subsequently that reinstated offer was then accepted by Ms [Blake] solicitors in their letter of 20 June in which they purport to accept the 10 February offer.

[22] In order to resolve that issue I need to examine what the letters and the correspondence show.

[23] First is a letter from Ms Hunter to Mr Jefferson of 9 February of this year with an offer of settlement. That was responded to by Mr [Scott]'s solicitors the following day with a counteroffer being made to settle in terms of [6] of that letter, namely:

> That being said Mr [Scott] instructs us to make the following counterproposal:
>
> (a) That the property [location 2] be transferred in to your client's sole name (she is already an owner as to a one-half share).
>
> (b) That the [street name deleted] property be forthwith placed on the market for sale by [company name deleted] with the entire net proceeds of sale to be paid to your client (ie, after deduction of the bank debt of approximately $170,000)[5]
>
> (c) That costs lie where they fall.

[24] At issue is whether that counteroffer was accepted or not and that is the issue that I have to determine.

[25] The next significant letter was from Ms [Blake]'s solicitors to Mr [Scott]'s solicitors. That was a letter of 17 February 2017. I do not accept Ms Hunter's submission that it was a clarification. It was clearly a counteroffer as it entailed a major difference in approach in that it amended the 10 February offer to provide for Ms [Blake] to share in half the debt to the bank, not all of the debt as was proposed in Mr [Scott]'s solicitor's 10 February letter.

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[5] By letter of 17 February 2017 Mr [Scott]'s solicitors clarified that the actual bank debt figure was $201,000 not $170,000

[26] Then on 20 June there was a letter from Ms [Blake]'s solicitors to Mr [Scott]'s solicitors accepting the 10 February offer and on 14 July a letter from Mr [Scott]'s solicitors revoking the prior offer made on 10 February. Thus prima facie the correspondence of counsel show an acceptance of the February offer on 20 June and, belatedly, an unenforceable revocation.

[27] However, underpinning the correspondence as between counsel is email communications between the parties. On 7 June at 8.24 am there was a without prejudice communication by email[6] in which Mr [Scott] indicates a willingness to settle for what could only be described as pragmatic reasons.

[28] The next day, at 4.58 pm, Ms [Blake] replies by email similarly saying that she wishes to settle. Later that night, on 8 June at 6.07 pm, Mr [Scott] puts a new offer to Ms [Blake] and at 7.10 pm she responds rejecting it describing it as "a nonsense". She asks for a better offer than the one contained in the 10 February letter. On any objective consideration of her response, she has clearly not accepted either offer at that point in time.

[29] Later that night at 8.02 pm Mr [Scott] replies that the 10 February offer was a mistake but that it still stands and goes on to say:

> …and you never accepted it anyway so it was definitely my best offer by default.

[30] Then four minutes later Mr [Scott] sends another email to Ms [Blake] saying:

> [Maisie], it is my best offer, I'm sorry if it's not good enough for you, but I had to try, Regards.

[31] It is Ms Hunter's submission that that email reinstates the 10 February offer with the words "it is my best offer". Mr Jefferson submits that it could not be properly construed as reinstatement rather is simply a statement of fact that the 10 February offer was his best offer and in effect "it is my best offer" should have read "it was my best offer".

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[6] Indeed all of the subsequent email communications between Mr [Scott] and Ms [Blake] were always headed up on a "without prejudice basis."

[32] There was then an email of 15 June at 8.26 am from Ms [Blake] to Mr [Scott] in which she specifically says, "If you really want to settle cut the bullshit and make an offer better than your last." That shows in my view that she was still wanting at that time a better offer than that previously advanced by Mr [Scott], and there was no agreement.

[33] In the affidavit the next email in the chain is the one of 21 June in which Mr [Scott] sets out another offer. But Mr Jefferson, during his submissions, has provided an intervening email from Mr [Scott] to Ms [Blake] on Friday 16 June at 9.51 am.

[34] I do not accept that the 8 June 8.06 pm comment by Mr [Blake] "it is my best offer" is a reinstatement of the 10 February offer. But even if I am wrong in that the content of the 16 June email clearly indicates that as far as he is concerned the offer is withdrawn for he states"

> Seriously [Maisie], it was sent by mistake. It was and I was told to leave it and see what your response would be and go from there and that's what we did and as I've said you refused it in any case making it a dead duck.

[35] It is quite clear that at that point he saw that the offer had been rejected and was at an end hence his comment to Ms [Blake] that it was "a dead duck" which I take to mean off the table. Support for that can be found in the further email of 21 June at 7.27 pm in which he proposes another option for resolution. So clearly he did not think that an agreement had been reached at that point in time. But significant is the day before a letter had been sent from Ms [Blake]'s solicitors accepting an offer which was no longer in existence.

Finding

[36] It follows, therefore, that I have determined that the correspondence and email communication does not show the existence of a settlement or an agreement between the parties and thus the affidavit evidence is irrelevant for resolution of the substantive issues that are now left before the Court. I, therefore, determine that leave to file that affidavit should be declined on the basis that the evidence is no longer relevant to the

matters that I now need to determine with s 7 of the Evidence Act providing only for the admissibility of relevant evidence.

Recusal

[37] Mr Jefferson has indicated that if I came to that view his client would seek that I recuse myself from further continuing hearing this matter, in effect abandoning the hearing for the rest of the week. In his submission that, if the ultimate decision I reach is that the s 21 agreement is to be set aside, then it is open for Mr [Scott] to conclude that I have been unduly influenced by my reading of his willingness to settle the matter as a consequence of the without prejudice communications to which I have referred.

[38] In considering the issue of recusal I have considered the test set out by the Supreme Court in *Saxmere Company Limited v Wool Board Disestablishment Company Limited*[7] and also the Court of Appeal decision *R v Cullen*[8] where the Court of Appeal said:

> It is inevitable that defendants will appear more than once before the same Judge and the fact that something happens discreditable to the defendant happens on one occasion does not make it inappropriate for the same Judge to deal with another matter in the future. Judges are well able to put such things out of their minds just as juries are expected to do so from time to time with proper directions.

[39] That is, an issue of recusal does not arise merely because a Judge has ruled against a particular party on a pre-trial matter, even if the decision made was erroneous and adverse to the party now alleging bias.

[40] Following *Saxmere Company Limited v Wool Board Disestablishment Company Limited* a Judge is only disqualified if he or she has expressed views in the course of a hearing in such extreme and unbalanced terms or has, as occurred in *Saxmere Company Limited v Wool Board Disestablishment Company*, an involvement with the parties so as give rise to a perception of bias so as to throw doubt on the Judge's ability to hear and determine the issue objectively.

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[7] *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72
[8] *R v Cullen* [1992] 3 NZLR 577, (1992) 3 CRNZ 353 (CA)

[41] In this case the email from Mr [Scott] sent to Ms [Blake] on 7 June at 8.24 am clearly sets out that he wants to resolve the matters on the basis that he maintains the belief that Ms [Blake] has an uphill battle in setting aside the property agreement (whether that is so or not is yet to be determined) but for pragmatic reasons (namely litigation costs and time) he wants to settle.

[42] I could not properly infer that Mr [Scott] seeks to settle the matter because he believes that his defence to the setting aside of the agreement has no merit. I can see no grounds for an objective observer to conclude that I would be biased having read the now struck out affidavit. As the Court of Appeal said, Judges routinely see and hear evidence which they need to put aside and my obligation is to only hear and determine the matter based on the facts and the evidence before me. I, therefore, decline to recuse myself.

[43] Finally, given my determination of these issues Mr Jefferson has reminded me that costs are in issue. The issue of costs, in relation to that issue, can be reserved at the conclusion of the proceedings and I will determine costs at that point in time.

S J Coyle
Family Court Judge