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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM 2018-044-000176
FAM 2019-044-000697
[2022] NZFC 7461

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976 AND THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	GREER PEARL BAKER Applicant
AND	PETER ERNEST BAKER First Respondent
AND	PETER ERNEST BAKER AND CHRISTOPHER DESMOND WESTERN as trustees of the BETER TRUST AND THE MATIPO TRUST Second Respondents
AND	PETER ERNEST BAKER as trustee of the PE BAKER TRUST Third Respondent
AND	ERNLUC TRUSTEE LIMITED as trustee of the ERNLUC TRUST Fourth Respondent
AND	POINT WELLS TRUSTEE LIMITED as trustee of the POINT WELLS TRUST Fifth Respondent

Hearing:	17 June 2022
Appearances:	D Chambers QC & S Barber for the Applicant S Jefferson QC & A Hansen for the First Respondent No appearance by or for Second or Third Respondents M Vickerman for Fourth & Fifth Respondents
Judgment:	3 August 2022

RESERVED JUDGMENT OF JUDGE A M MANUEL
[REASONS]

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[1] The first respondent Mr Baker applied for orders transferring these proceedings to the High Court pursuant to s 38A of the Property (Relationships) Act 1976 (the PRA). The application was dismissed in a results decision on 15 July 2022. The reasons are set out in this decision.

[2] Section 38A of the PRA relevantly provides:

> **Transfer of proceedings to High Court**
>
> (1) A Family Court Judge may order the transfer of proceedings to the High Court if the Judge is satisfied that the High Court is the more appropriate venue for dealing with the proceedings.
>
> (2) In considering whether to make an order under subsection (1), the Judge must have regard to—
>
> > (a) the complexity of the proceedings or of any question in issue in the proceedings:
> >
> > (b) any proceedings before the High Court that are between the same parties and that involve related issues:
> >
> > (c) any other matter that the Judge considers relevant in the circumstances.
>
> ..

(3) …

(4) …[1]

[3] The applicant Ms Baker opposed. The fourth and fifth respondent trusts supported the application. The second and third respondent trusts took no part.

[4] The proceedings are between former spouses and turn principally on whether two property agreements, one made in July 1995 and the other in September 2015, should be set aside.

[5] Mr Baker submitted that because of the "complexity of the proceedings, questions in issue in the proceedings and other matters which are relevant" the High Court was the more appropriate venue to deal with the proceedings.

Background

[6] The parties began a de facto relationship in January 1993. They married in July 1995, five days after signing a s 21 agreement on 24 July 1995 (the s 21 agreement). They separated in March 2013 and signed a s 21A agreement about two and a half years later, on 10 September 2015 (the s 21A agreement).

[7] Before they began their relationship Mr Baker had founded a transport company known as Peter Baker Transport (PBT). The s 21 agreement recorded that

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[1] S 38A of the PRA was preceded by s 22 of the PRA which until 2014 provided that:

> (1) Every application under this Act must be heard and determined in the Family Court.
>
> (2) This section is subject to any other provisions of this Act that confers jurisdiction on any other court.
>
> (3) Regardless of subsections (1) and (2), a Family Court Judge may order that proceedings be transferred to the High Court if the Judge is satisfied that the High Court is the more appropriate venue for dealing with the proceedings, because of their complexity or the complexity of a question in issue in them.
>
> …

Mr Baker's assets or interest in certain assets including PBT were his separate property.

[8] PBT traded throughout the parties' relationship and marriage and was very successful.

[9] After separating the parties reached a relationship property settlement, the terms of which were recorded in the s 21A agreement. These were based on a number of factors, including the valuation of PBT.

[10] Ms Baker subsequently learned that PBT had been sold for more than the value placed on it for the purposes of the s 21A agreement. She claims Mr Baker obtained a valuation of PBT at the time which valued PBT at more than he stated it was worth and more than the value ascribed to it in the s 21A agreement.

[11] Ms Baker is seeking orders setting aside both agreements; the s 21 agreement under s 21J of the PRA and the s 21A agreement under 21J of the PRA as well as contractual and equitable principles under s 21G of the PRA. She is also seeking a number of orders against Mr Baker which would enlarge the pool of relationship property for division and permit her to claim a greater share of that property. She has jointed the trusts as additional respondents.

Proceedings

[12] After Mr Baker sold PBT in August 2017 Ms Baker heard about the sale from a third party.

[13] In March 2018 she applied for pre-proceedings discovery. Mr Baker opposed her application and applied to strike it out. The matter was heard in November 2018 and the Court ordered the discovery sought by Ms Baker, describing Mr Baker's opposition as "…inappropriate, and resulting in unnecessary cost for Ms Baker and delay in consideration by her as to how her substantive proceedings should be framed." Increased costs of $25,000 were awarded in her favour.

[14] Ms Baker then filed relationship property proceedings and affidavits in support. Mr Baker responded with supporting affidavits including evidence from a

forensic accountant, Mr Hussey. Ms Baker replied with evidence from her own forensic accountant, Mr Hayward.

[15] It emerged from the evidence that the Ernluc Trust (the fourth respondent) which Mr Baker had settled shortly after separation, needed to be joined as a party. Consent to join the Ernluc Trust was declined so Ms Baker applied for joinder. The Ernluc Trust engaged representation and opposed joinder. In February 2021 the Family Court ordered joinder of all trusts and commented:

> I am troubled by the lack of progress in these proceedings noting that as long ago as November 2018, I was asked to consider an application opposed by Mr Baker for pre-litigation discovery. I provided for discovery and subsequently ordered costs to be paid by Mr Baker in respect of the application.

[16] Following the provision of answers to interrogatories and further discovery from Mr Baker and the Ernluc Trust and final evidence from Ms Baker in June 2021 the matter was ready for hearing.

[17] But in July 2021 Mr Baker indicated that he would apply to transfer the proceedings to the High Court. Ms Baker declined to agree. In August 2021 Mr Baker applied to transfer the proceedings to the High Court and sought a one day hearing. The matter was not heard until June 2022.

[18] Ms Baker submits that the respondent's application to transfer the proceedings resulted in about 11 months delay, which has added to the delays caused by the respondents' unsuccessful opposition to pre-proceeding discovery and to joinder of trusts. These resulted in delay of about eight months (March to November 2018) and six months (August 2020 to February 2021).

[19] The respondents however submit that it was not until a statement of issues for Ms Baker was produced in April 2021 that it became clear the High Court would be the more appropriate venue for dealing with the proceedings.

Substantive claims

[20] Ms Baker's claims were outlined in a statement of issues dated 15 April 2021. These were described by her counsel as "relatively standard" and seeking a "variety of orders that are commonplace in relationship property litigation." In summary they include:

> (a) a claim under s 21J to set aside the s 21 agreement;
>
> (b) claims under s 21J and s 21G to set aside the s 21A agreement;
>
> (c) (i) a claim under s 8 that the parties' rights and interests in various trusts are relationship property;
>
> (ii) alternatively, a claim under s 9A that Mr Baker's rights and interests in trusts are his separate property and that Ms Baker is entitled to the increase in gains in this separate property, either due to an application of relationship property or due to her contributions;
>
> (d) claims under s 15 and s 15A for economic disparity;
>
> (e) a claim under s 17 that Mr Baker's separate property was sustained by relationship property;
>
> (f) claims under s 44 and 44C for dispositions of property made by Mr Baker to various trusts;
>
> (g) a claim under s 182 of the Family Proceedings Act 1980 (FPA) that various trusts were nuptial settlements, either at settlement or because of later acquisitions of property.

Legislation relevant to transfer to the High Court

[21] Section 22(1) of the PRA provides that "every application under this Act must be heard and determined in the Family Court."

[22] Section 1N(d) of the PRA sets out the principle:

> that questions arising under this Act about relationship property should be resolved as inexpensively, simply and speedily as is consistent with justice.

[23] Section 38A of the PRA, which is set out at [2] above, governs the transfer of proceedings from the Family Court to the High Court. The Family Court has a discretion as to whether or not to order transfer. While the Court must be satisfied

that a case should be removed to the High Court, there is no formal onus on a party seeking transfer.[2]

[24] The overarching question is whether the High Court is a more appropriate venue than the Family Court. The factors which the Court must consider include complexity, any proceedings between the parties in the High Court in regard to a related issue and any other matter that the Judge considers relevant in the circumstances. The second factor mentioned is only relevant when proceedings have been filed in the High Court. None have been, so it is not relevant here.

Complexity – s 38A(2)(a) PRA

[25] Novel or complex legal or factual issues may suggest a transfer. That said, this must always be justified on factors peculiar to the case in question.

[26] In *Jacobson v Jacobson* the High Court held that:[3]

> The test is not whether the High Court is *an* appropriate venue for dealing with the proceedings, but whether it is a more appropriate venue than the Family Court. The test requires an assessment of the relative appropriateness of each court to deal with the particular proceedings. Bearing in mind the firm language in s 22(1), the legislature must be taken to have intended that, in making the comparison, due recognition should be given to the specialist nature of the Family Court and to the warranting of Judges as being suitability qualified to sit in that jurisdiction.

[27] Several trusts or companies do not make a case too complex for the Family Court. In *MAC v MAC* the Family Court dismissed this proposition stating:[4]

> This has also been a complex case. The documents make it clear there are a number of trusts and companies all of which will need to be studied to enable orders to be made. Having said that there is nothing particularly noteworthy in the documentation I have read which differentiates this case to a number which have been heard by the Family Court and which are still before the Family Court. Many of our claims these days are complex.

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[2] *KMH v CLH* [2012] NZHC 537.
[3] *Jacobson v Jacobson* [2012] NZHC 2292 at [21].
[4] *MAC v MAC* FC Rotorua FAM-2017-063-000652, 29 April 2021.

[28] Nor is there inevitable co-relation between the amount at stake and complexity. The Family Court has jurisdiction to deal with relationship property claims regardless of the amount at stake.[5]

[29] The respondents argued that complexity in this case arose from the differences between the forensic accountants, issues arising from the application of the *Clayton* case,[6] and issues arising under s 57 of the Evidence Act 2006 (EA).

Differences between the forensic accountants

[30] The respondents argued that there was "extensive and significantly conflicting expert evidence" before the Court.

[31] Ms Baker replied that it was not uncommon for experts to disagree and quite markedly. Valuation issues in relationship property proceedings were simply a question for the Court to decide.

The *Clayton* case

[32] The respondents submitted that Ms Baker was alleging that the parties' powers in various trusts were property for the purposes of the PRA, relying on the *Clayton* case despite the High Court having limited the effect of *Clayton* to its own facts.[7] It was said that *Clayton* did not apply to conventional trusts where the settlor/trustee was constrained by the other trustees' fiduciary duties and the long settled rule that a trustee cannot benefit themselves from the trust. To succeed with this claim Ms Baker would have to argue that *Clayton* went much further than that, a position which ran contrary to High Court authority and which the Family Court was bound to follow.

[33] Ms Baker responded that the respondents' arguments misconstrued *Clayton* which was less about comparing a trust deed to see how similar it was to the trust deed in that particular case and rather more about the Supreme Court's emphasis on "the need for worldly realism" and acceptance that strict concepts of property law may not

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[5] *Mitchell v Mitchell* (1994) 12 FRNZ 286 at 288.
[6] *Clayton v Clayton* [2016] NZSC 29.
[7] For example in *Pinney v Cooper* [2020] NZHC 1178, *Carmine v Ritchie* [2012] NZHC 1514 at [66] *NZMC v Foulkes* [2015] NZCA 552; *Goldie v Campbell* [2017] NZHC 1692 at [63].

be appropriate in a relationship property context. In short, each case brought under *Clayton* was wholly contextual and in making her application Ms Baker relied on this principle rather than the "check list approach" taken in some High Court cases.

S 57 of the EA

[34] The issue under s 57 of the EA related to the non-disclosure of the valuation obtained by Mr Baker after separation.

[35] Section 57 of the EA provides that a party is not obliged to disclose expert valuation evidence or advice given which was made in connection with an attempt to settle a dispute between the parties.

[36] The respondents argued that the outcome of this issue would potentially have "significant consequences for the conduct of settlements and litigation which appears to seek to broaden disclosure obligations of parties" and while the Family Court had jurisdiction to determine the issue, given its importance, it was preferable for it to be determined by the High Court.

[37] Ms Baker responded that the respondents had misconstrued this portion of her claim. Her claim for breach of fiduciary duty was not based on an argument that Mr Baker did not disclose the valuation report he obtained for PBT but rather that he breached his fiduciary duty to her when he obtained the higher valuation and entered into settlement negotiations whilst knowing PBT was worth far more than he had indicated. Or, in other words, Mr Baker breached his fiduciary duty because he knew PBT was worth more than what he conveyed to Ms Baker when signing the s 21A agreement. Section 57 of the EA did not affect this enquiry.

Novelty and Complexity generally

[38] More generally, Mrs Baker submitted that any complexity must genuinely lie outside the ambit of the PRA and referred, by way of example, to cases where transfer had been ordered involving:

(a) issues arising from concurrent trans-Tasman proceedings[8];

(b) where the issue was whether the respondent killed the deceased[9];

(c) an agreement entered into under Californian law[10];

(d) allegations of breach of fiduciary duties by trustees which were the subject of separate proceedings in the High Court[11];

(e) the restoration of a company to the companies register, which was necessary to determine the extent of relationship property[12]; and

(f) determining the relative priorities of a charging order registered by the Commissioner of Inland Revenue.[13]

[39] Ms Baker submitted that this case did not involve such a level of novelty or complexity.

Other relevant matters – s 38A(2)(c) PRA

All issues being heard together

[40] The respondents submitted that it was desirable that all issues between the parties were dealt with in one Court. This would not be possible if the case was not transferred because certain issues fell outside the Family Court's jurisdiction and would need to be filed either in the District or the High Court and determined separately. One issue was an alleged breach of fiduciary duty by Mr Baker and it was submitted that this claim relied on equitable principles rather than a statutory right pursuant to the PRA. Another issue was an allegation of common mistake as to the value of PBT, which was a claim under the Contract and Commercial Law Act 2017 (previously the Contractual Mistakes Act 1977).

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[8] *Gilmore v Gilmore* (1993) NZFLR 561.
[9] *Royal Reid v Liu* [2017] NZFC 4972.
[10] *Toma v Toma* (1992) 9 FRNZ 39.
[11] *Cuthbert v Humphries* FC Auckland FP 004/313-D/03, 20 May 2004.
[12] *Christensen v Cressey*, FC Tauranga FAM-2005-070-1137, 10 June 2008.
[13] *Hare v Hare* [2019] NZHC 2801.

[41] The respondents relied on s 4 of the PRA and 74 and 75 of the District Courts Act 2016 (DCA) which relevantly provide as follows:

> **S 4 Act a code**
>
> (1) This Act applies instead of the rules and presumptions of the common law and of equity to the extent that they apply—
>
> > (a) to transactions between spouses or partners in respect of property; and
> >
> > (b) in cases for which this Act provides, to transactions—
> >
> > > (i) between both spouses or partners and third persons; and
> > >
> > > (ii) between either spouse or partner and third persons.
>
> (2) Subsection (1) does not apply where this Act expressly provides to the contrary (such as in subsection (5)).
>
> (3) Without limiting the generality of subsection (1),—
>
> > (a) the presumption of advancement does not apply between husband and wife:
> >
> > (b) the presumption of resulting trust does not apply between spouses, civil union partners, or de facto partners:
> >
> > (c) the presumption that the use of a wife's income by her husband with her consent during the marriage is a gift does not apply between husband and wife.
>
> (4) Where, in proceedings that are not proceedings under this Act, any question relating to relationship property arises between spouses or partners, or between either or both of them and any other person, the question must be decided as if it had been raised in proceedings under this Act.
>
> (5) …

> **S 74 General civil jurisdiction**
>
> (1) The court has jurisdiction to hear and determine a proceeding—
>
> > (a) in which the amount claimed or the value of the property in dispute does not exceed $350,000:[14]
> >
> > (b) that, under any enactment other than this Act, may be heard and determined in the court.

[14] The quantum was increased from $200,000 to $350,000 with effect from 28 February 2017.

(2) The amount claimed in a proceeding under subsection (1) may be for the balance, not exceeding $350,000, of an amount owing after a set-off of any claim by the defendant that is admitted by the claimant.

S 75 Money recoverable by statute

(1) The court has jurisdiction to hear and determine a proceeding—

(a) for the recovery of any penalty, expenses, costs, contribution, or similar monetary liability that is recoverable under any enactment; and

(b) in which the amount claimed does not exceed $350,000 excluding interest that may be payable under the Interest on Money Claims Act 2016.

(2) Subsection (1) does not apply if an enactment expressly provides that the proceeding may only be brought in another court.

…

[42] The respondents submitted that both claims fell within the civil jurisdiction of the District Court and therefore the Family Court, provided they fell within its monetary jurisdiction. But they did not, because they were in excess of $350,000.

[43] They argued that s 4 of the PRA confirmed that the PRA was a code and applied instead of the rules and presumptions of the common law and equity to the extent they applied to transactions between spouses in respect of property. While the Family Court had exercise equitable jurisdiction however, s 74(1) of the DCA was clear that the Family Court did not have jurisdiction to hear and determine an equitable claim in a proceeding in which the amount claimed or the value of the property exceeded $350,000.

[44] This statutory bar was subject to there being express statutory provision allowing the Family Court to exercise equitable jurisdiction, but the respondents argued there was no such provision in the PRA.

[45] Ms Baker submitted that in making her claims for mistake and breach of fiduciary duty, she relied on the interplay between ss 21F, 21G and 21J(3) of the PRA which relevantly provide as follows.

21F Agreement void unless complies with certain requirements

(1) Subject to section 21H, an agreement entered into under section 21 or section 21A or section 21B is void unless the requirements set out in subsections (2) to (5) are complied with.

(2) The agreement must be in writing and signed by both parties.

(3) Each party to the agreement must have independent legal advice before signing the agreement.

(4) The signature of each party to the agreement must be witnessed by a lawyer.

(5) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

s 21G Other grounds of invalidity not affected

Section 21F does not limit or affect any enactment or rule of law or of equity that makes a contract void, voidable, or unenforceable on any other ground.

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

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

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

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

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

(a) the provisions of the agreement:

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

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

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

> (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:
>
> (f) any other matters that the court considers relevant.
>
> …

[46] Ms Baker submitted that cases had been brought under s 21G in the Family Court for many years – regardless of the value at stake – with no issue raised about the Family Court's jurisdiction.

[47] Ms Baker relied on the Court of Appeal authority, *LAC v KAY*[15], in which Mr C appealed against a Family Court decision not to strike out Ms Y's application for division of de facto relationship property. He argued that their pre-2001 agreement meant the Family Court had no jurisdiction to determine its validity and enforceability, either under the PRA or because the value of the property exceeded the Family Court civil jurisdiction.

[48] The High Court dismissed the appeal, confirming that the Family Court could apply the rules of common law and equity when considering avoidability or enforceability of relationship property agreements:[16]

> Further, the Act does not stand entirely apart from the general law. Its operative words do not state that it is a code, although that word appears in the heading to s 4. Rather, it applies instead of the rules of common law and equity to the extent that they apply to property transactions between spouses or partners, but it specifies that those rules do apply where the Act expressly provides. It does so provide in places, notably in s 21J, which allows the Court to set aside agreements entered under s 21. The criterion is serious injustice but s 21J "does not limit or affect any enactment or rule of law or of equity that makes a contract voidable, or unenforceable on any other ground" so the Act expressly contemplates that the Family Court will apply rules of law and equity when deciding whether an agreement causes serious injustice.

[49] The High Court rejected the "narrow approach" to the Family Court's jurisdiction put forward by Mr C:[17]

> … Lastly, there is no compelling policy reason to adopt the narrow approach to jurisdiction for which counsel for the applicant contends. Civil litigation exceeding $200,000 in value must ordinarily be conducted in the High Court,

[15] *LAC v KAY* [2011] NZCA 271.
[16] *LAC v KAY* HC Dunedin, CIV-2010-412-57, 27 May 2010 at [38].
[17] At [43].

> but the legislature has already conferred on the Family Court unlimited jurisdiction over the division of relationship property, including jurisdiction to set s 21 agreements aside by reference, in part to the principles of law and equity. It would be anomalous if the Family Court had jurisdiction to decide whether a pre-2001 agreement exists between de facto partners yet could not decide whether such agreement was enforceable in law. Such division of function between the Family Court and the High Court would also lead to overlapping issues being determined in separate proceedings, which could seldom be in the interests of justice, or which might result in all such cases being tried, contrary to the evident intent of the legislature, in the High Court.

[50] The Court of Appeal upheld the High Court decision. Mr C's arguments about the Family Court's jurisdictional limit were rejected with the Court finding that:[18]

> Section 1N(d) provides that one of the principles to guide the achievement of the PRA's purpose is that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice. Keeping the questions of avoidability and enforceability within the jurisdiction of the Family Court promotes this.
>
> …
>
> By contrast, the interpretation pressed by [counsel for the applicant] runs counter to this principle …Rather, an applicant such as KAY must seek to hear those issues determined in separate proceedings in the High Court. Depending on the way in which the High Court determines them, the parties may then have to return to the Family Court for further issues to be addressed. Far from being inexpensive, simple and speedy, the process contemplated by [counsel for the applicant] is likely to be costly, cumbersome and slow.

[51] The respondents countered that in *LAC v KAY* the Court was asked to consider a pre-2001 agreement, but not whether the Family Court has the ability to go beyond its equitable statutory jurisdiction. It was submitted that the decision simply confirmed that where there was an express power to enquire into matters under the PRA, such as pursuant to s 21P of the PRA, the Family Court was entitled to do so. However the claims of breach of fiduciary duty and common mistake were not claims which the Family Court could address where the value of the property in dispute exceeded the quantum jurisdiction of the District Court. They fell outside the jurisdiction of the Family Court and had to be either filed in the District Court (with consent to an increase in jurisdiction) or filed in the High Court or transferred there.

[52] Ms Baker submitted this was incorrect and the *LAC v Kay* decision had wider application than the respondents suggested. The Court of Appeal had held that the

[18] *LAC v KAY*, above n 16, at [22]-[23].

Family Court's jurisdiction in regard to declaring relationship property agreements void or unenforceable under common law or equity was unlimited:[19]

> So it is within the jurisdiction of the Family Court to declare an agreement made after 1 August 2001 voidable or unenforceable on ordinary principles whatever the value of the property at stake.

[53] Moreover, Ms Baker argued that even if the respondents' arguments were correct (which she disputed), the jurisdiction issue could easily be overcome by the respondents giving consent to the Family Court hearing the claims for mistake and breach of fiduciary duty with no limit on jurisdiction. When expressly invited to put their position in writing to the Court, the respondents declined to give consent.

Delay and costs

[54] At the date of the June 2022 hearing the Family Court registry indicated that if the case were transferred to long cause fixtures with an estimated hearing time of between five to eight days as a primary fixture, it would likely be heard in about June 2023.

[55] The High Court registry indicated that if the case were immediately transferred to the High Court, it would likely be allocated a five to eight day fixture in the latter part of the second quarter of 2024.

[56] In addition, the High Court would likely require further interlocutory steps to be completed before trial, and while this would not necessarily add to delay it would certainly add to the parties' costs. In the Family Court no further interlocutory steps would be required.

Acquiescence to Family Court's jurisdiction

[57] Ms Baker submitted that the respondents had not objected to the Family Court's jurisdiction over the past three and a half years and it was too late to claim that transfer had now become necessary.

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[19] At [26].

[58] While the respondents placed reliance on the case of *KMH v CLM*[20] Ms Baker submitted this was misguided because the transfer application in that case was made near the start of proceedings and before discovery had been completed.

[59] Moreover, the relevance of *KMH v CLM* was questionable because the Family Court now had unlimited jurisdiction under the Trusts Act 2019, including over constructive trusts when necessary or appropriate, and *KMH v CLM* had been decided prior to the enactment of s 38A of the PRA should thus be treated with caution.[21]

[60] This case was closer, it was submitted, to *MAC v MAC*[22] where the Family Court declined a transfer to the High Court, partly because the case had already been set down for hearing. In *MAC v MAC* the Court emphasised that a refusal to consent to extend the Family Court's jurisdiction diluted the strength of arguments for transfer.

Outcome

[61] The legislature has enacted a rule that relationship property cases must be commenced in the Family Court and are only to be transferred to the High Court in specified circumstances.

[62] The application to transfer in this proceeding was made very late in the piece after fruitless resistance by the respondents to earlier applications resulted in delay. However, the application was made after the respondents received Ms Baker's statement of issues, in which her claims were specifically pleaded. There was hence some justification for the timing and I find that the delay in making the application was unhelpful but not fatal to the application.

[63] Further, I find the application was not precluded because of any acquiescence to the jurisdiction of the Family Court. There is no time limit on making an application to transfer to the High Court although of course the later an application is made, the less likely it is that it will be granted.

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[20] *KMH v CLM* [2012] above n 2.
[21] See note 1 above.
[22] *MAC v MAC*, above n 4.

[64] The application was based on alleged novelties and complexities in the proceedings and a want of jurisdiction on the part of the Family Court to decide all matters in the Family Court.

[65] I do not accept that the issues relating to the *Clayton* case, or s 57 of the EA, or the differences between the forensic accountants, justify a transfer. These issues are the bread and butter of the Family Court. The issue over s 57 of the Act may have been misconstrued by the respondents. And the Family Court is capable of applying the doctrine of *stare decisis* and resolving the accounting issues. As the High Court in *Jacobson* stated:[23]

> To the extent that the experts may disagree, the Family Court Judge hearing the case will be required to come to his or her view in the same way that the Judge would come to a view on the value of real estate, or company shares, or of a partnership in any case under the Act. Judges of the Family Court can be expected to be experienced in addressing valuation issues in the context of the statutory framework of the PRA.

[66] The strongest submission made by the respondents was in relation to alleged jurisdictional limitations in the Family Court. Although it is not necessary to determine the competing arguments in the context of this application, the decision *LAC v KAY* suggests that jurisdiction to hear the claims in question does not originate from the general grants of jurisdiction under the DCA. Rather, the Family Court's jurisdiction flows from s 11(1)(e) of the Family Courts Act 1980 and the PRA and in particular ss 21J(3) and 21G which grant unlimited jurisdiction with respect to both the claims in question and their value.

[67] It could be said that most of the impediments to a hearing in the Family Court raised by the respondents impact principally on Ms Baker rather than on the respondents. In answer they say that if jurisdictional issues do in fact materialise, any Family Court decision made without jurisdiction on a particular issue would be a nullity and this would affect all parties, and not just Ms Baker. However, the respondents have it within their power to cure any jurisdictional issues (if indeed there are any) but have declined to do so.

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[23] *Jacobson v Jacobson* above n 3 at [24].

[68] The likely future delay and cost in the High Court as compared to the Family Court are also relevant and favour a hearing in the Family Court.

[69] In the circumstances of this case the Family Court is the more appropriate venue and more likely to ensure that it is resolved as inexpensively, simply and speedily as is consistent with justice. This is because in summary:

(a) the proceedings are insufficiently complex or novel to justify a transfer;

(b) *LAC v KAY* is authority for the proposition that the Family Court has jurisdiction to determine the issues the respondents allege fall outside its jurisdiction (but in any event the respondents decline to cure any jurisdictional issues (whether perceived or real)), and

(c) there is the prospect of a hearing in the Family Court in 2023 with less attendant cost, rather than in 2024 in the High Court with greater cost.

Dated at Auckland this day of

A M Manuel
Family Court Judge