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IN THE FAMILY COURT
AT INVERCARGILL

I TE KŌTI WHĀNAU
KI WAIHŌPAI

FAM-2018-025-208
[2020] NZFC 11149

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	JOHANNES JACOBUS ANTHONIUS VERNOOIJ Applicant
AND	OFFICIAL ASSIGNEE IN THE BANKRUPTCY OF SOPHIA VERNOOIJ Respondent

Hearing:	20 July 2020
Appearances:	J Beck for the Applicant S McKenzie for the Respondent
Judgment:	16 December 2020

JUDGMENT OF JUDGE A R MCLEOD

Introduction

[1] Mr and Mrs Vernooij married on 12 July 1997. It was the second marriage for them both. They did not have any children together although Mrs Vernooij had an adult child from a former relationship.

[2] The relationship between the parties broke down and they separated. On 5 October 2012, after four years of protracted negotiations, Mr and Mrs Vernooij entered into a compromise[1] agreement recording the division of relationship property between them ("the agreement").[2]

[3] While not being able to agree on the date of separation or on the specific value of certain assets, the parties agreed ultimately that there would be a global settlement, whereby all relationship property and debt was to be divided equally between them.

[4] The parties were assisted in their negotiations, and in reaching the final outcome, by their lawyers, as well as their own separate accountants who each provided separate valuations for the shares in the company, White Water Limited ("the company"), which was the primary asset of the relationship. Mr Vernooij was a joint director and shareholder of the company, along with his brother who lived in the Netherlands.

[5] The agreement was signed on the basis that it fairly reflected the parties' entitlements. The agreement required Mr Vernooij to make a final stage payment to Mrs Vernooij of $142,270.79 (plus interest) no later than 20 December 2016 ("the final stage payment"). The final stage payment was subject to Mr Vernooij providing information in respect of a joint debt to Mr Vernooij's parents and in respect of some post separation payments.

[6] In June 2015 Mrs Vernooij was declared bankrupt. The Official Assignee pursued Mr Vernooij to recover the sum owing to enable payment to Mrs Vernooij's unsecured creditors. Negotiations between the Official Assignee and Mr Vernooij failed, and when the due date of 20 December 2016 passed and Mr Vernooij had not met his obligations under the agreement, the Official Assignee made a claim for summary judgment. Mr Vernooij opposed the claim and a hearing was held on 22 January 2018. The Court found against Mr Vernooij and issued summary judgment in favour of the Official Assignee. Mr Vernooij was served with the order for summary

[1] S 21A of the Property (Relationships) Act 1976 ("the Act").
[2] BOD pp 9-23.

judgment on 10 July 2018, and on 18 July 2018 Mr Vernooij applied to set aside the agreement.

[7] There is a wealth of case law on applications such as the ones filed by Mr Vernooij. What is primarily important for me, however, is to glean the relevant principles from the cases that have been determined previously and apply them appropriately to the individual facts of this case.

Issues for determination

[8] The issues I must decide are:

1. Should the court extend the time limit for filing the claim brought by Mr Vernooij.

2. Subject to the determination of that issue, I then need to determine whether the agreement complies with the requirements of s 21F of the Act.

3. If I determine that the agreement does comply with the requirements of s 21F of the Act, then I need to determine whether the agreement should be set aside because giving effect to the agreement would cause serious injustice.

4. If I determine that the requirements of s 21F of the Act are not satisfied, I need then to determine whether to give effect to the agreement, provided I am satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.

1. Should the court extend the time limit for filing the claim brought by Mr Vernooij?

[9] The law requires that any application made under the Act is made within 12 months of a marriage being dissolved, unless the Court has extended the time for

filing after having heard from the applicant and any other person who has an interest in the property that would be affected by the order sought.[3]

[10] The marriage between the parties was dissolved on 7 January 2013. On that basis, any application filed by Mr Vernooij should have been filed by 7 January 2014. Mr Vernooij did not make a formal application to extend the time for filing his application. However, in his written evidence Mr Vernooij set out his reasons for the delay in filing his application.[4] Mr Vernooij was also subject to cross-examination in respect of this matter on the first day of the hearing.[5]

[11] Further, both counsel addressed the question of leave in their written submissions. Counsel for Mr Vernooij was what could be described as dismissive in her closing submissions in respect of the issue of the extension of the time for filing, noting that the question of "leave has not been a hotly contested point … because it is entirely reasonable for leave to be granted given the fact the Agreement did not end until 20 December 2016 and serious injustice arises from the terms of the Agreement".[6]

[12] The issue of leave is not a minor procedural matter.[7] The discretion to extend the time for making an application must be exercised with regard to the Act's guiding principle of achieving justice for the parties.[8] The following factors are relevant in deciding whether to grant an extension:[9]

(a) the length of time between the expiry of the statutory time limit and the bringing of the application;

(b) the adequacy of the explanation offered for the delay;

(c) the merits of the case;

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[3] S 24 of the Act.
[4] BOD pp 6–7, paragraphs 26-30.
[5] NOE pp 46-50.
[6] Closing submissions of counsel for Mr Vernooij.
[7] *Lawrance v Van Hammerston* [2015] NZFC 1426. Although this case was decided in the context of a de facto relationship, the discussion in respect of process is relevant.
[8] Sections 1M(c) and 1N(d) of the Act; *Ritchie* v *Ritchie* (1991) 8 FRNZ 197, [1992] NZFLR 266 (HC); *Wang v Ma* [2019] NZHC 1821.
[9] *Beuker v Beuker* (1977) 8 FRNZ 1 MPC 20; *Ritchie (supra).*

(d) prejudice to the respondent; and

(e) whether it is just to grant leave in all of the circumstances.

[13] These factors are not to be taken as a comprehensive code, and even to the extent that they are relevant, the weighting to be given to each aspect of potential justice or injustice is a matter to be decided in the light of the particular case being considered.[10]

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

[14] The statutory time limit for filing an application expired on 7 January 2014. The application was brought by Mr Vernooij four and a half years after the statutory time limit expired. It is accepted by the respondent that the time delay alone is not a disqualifying factor on its own.[11]

(b) The adequacy of the explanation offered for the delay

[15] Mr Vernooij's explanation for the delay in bringing the application is that he tried to obtain legal advice about the agreement after it was signed but was unable to. He says he had an issue with the agreement a long time before he brought these proceedings.[12] Mr Vernooij said that he had made a complaint to the Law Society and so he had to get a new lawyer. Because he could not afford to pay a new lawyer, he went to the community law centre for advice. They were unable to help him. Mr Vernooij knew that it would be a hard application to make by himself. Mr Vernooij therefore decided to await the outcome of his complaint to the Law Society.[13]

[16] Mr Vernooij says that after Mrs Vernooij was declared bankrupt in June 2015, Mr Vernooij tried himself to resolve matters with Mrs Vernooij's lawyer.[14] He says

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[10] *Ritchie* (supra).
[11] *Saunders v Wilkinson* [2013] NZFC 7970; *JNL v DN*, FC, Wanganui, FAM-2004-083-000363, 21 August 2006 (15 years); *LMG v TGP*, FC, Greymouth, FAM-2010-018-000040, 14 October 2010 (8 years).
[12] NOE p 50 lines 1-3.
[13] BOD p 6 paragraphs 26-27.
[14] BOD p 6 paragraphs 29-30.

that he sent information to Mrs Vernooij's lawyer showing that he had made all of the payments owing by him under the agreement. According to Mr Vernooij this information was forwarded on to the Official Assignee. Mr Vernooij then tried to resolve matters himself with the Official Assignee.[15] The Official Assignee accepted some of the expenses that Mr Vernooij was able to provide invoices for.

[17] Mr Vernooij's counsel acknowledged in her opening submissions that there had been considerable time elapse since the agreement was made in October 2012. It was submitted on behalf of Mr Vernooij that Mr Vernooij was trying to get legal advice, to rectify the situation he found himself in following the adjudication of Mrs Vernooij as bankrupt in June 2015 and discovering the agreement's effects and implications before settlement was due on 20 December 2016. In her closing submissions, counsel for Mr Vernooij submitted on his behalf that leave should be granted because the extent of the prejudicial effect of the agreement was not known until after its time frame ran out on 20 December 2016 and that this was less than two years before proceedings were initiated.

[18] For the reasons discussed below, the explanation offered by Mr Vernooij and by his counsel for the delay is not accepted as adequate.

[19] The evidence given by Mr Vernooij, both in his affidavit evidence and in his oral evidence, was non-specific in respect to the delay in filing proceedings. Mr Vernooij's evidence does not clarify when he first had an issue with the agreement. There is no evidence from Mr Vernoiij that he had any issue with the agreement prior to Mrs Vernooij being declared bankrupt.

[20] Mr Vernooi had access to legal advice for more than two years after the agreement was signed. Mr Vernooij continued to instruct his then lawyer, Ms Bryan-Lamb, until 27 November 2014, over two years after the agreement was signed.[16]

[15] NOE p 40, lines 4-25.
[16] NOE p 54, lines 31-32.

[21] Mr Vernooij said in his written evidence that he thought that he had made a complaint to the Law Society in 2014. Mr Vernooij accepted under cross-examination that he did not make a complaint to the Law Society against Ms Bryan-Lamb until 29 June 2015,[17] after Mrs Vernooij was declared bankrupt on 4 June 2015. Mr Vernooij did not provide any evidence about the nature of his complaint and whether it was in relation to the agreement, and if so, in what regard.

[22] Whatever the nature of the complaint, it was accepted by Mr Vernooij (as submitted by his counsel on his behalf) that the complaint to the Law Society was not upheld; the decision being delivered on 23 September 2015. Mr Vernooij applied to have the decision reviewed. The review tribunal decision, which was delivered on 27 April 2018, did not uphold Mr Vernooij's claim.[18]

[23] Under cross examination, Mr Vernooij accepted that after Ms Bryan-Lamb had ceased acting for him (in November 2014) he had instructed counsel in the North Island on "a different matter".[19] The inference can be drawn that either Mr Vernooij was able to afford to pay for that lawyer himself or, alternately, that he had applied for and been granted legal aid.

[24] Mr Vernooij was cross-examined in relation to legal aid.[20] Mr Vernooij accepted that he had been advised about legal aid. Mr Vernooij avoided answering directly a question put to him in cross-examination as to whether he had applied for legal aid in respect of the agreement. It was not clear from Mr Vernooij's answer whether he had applied for legal aid in respect of the agreement and had been turned down and, if he had been turned down, why.

[25] Mr Vernooij failed to produce any evidence to substantiate his claim that he could not afford to pay for a lawyer.

[26] There was no evidence proffered by Mr Vernooij to support his contention that he tried to resolve matters directly with counsel for Mrs Vernooij. He says he sent

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[17] NOE p 21.
[18] Paragraph 36 of the applicant's closing submissions.
[19] NOE p 47.
[20] NOE p 49 lines 1-3.

correspondence to counsel for Mrs Vernooij. He has not attached a copy of any correspondence sent. There is no evidence at all to support this contention.

[27] Mr Vernooij says that he tried to resolve matters himself directly with the Official Assignee. Mr Russell Fildes is the Official Assignee for the southern region of New Zealand. A copy of an affidavit sworn by Mr Fildes on 7 June 2017 in respect of the summary judgment application was included in the second bundle of documents, along with a copy of Mr Vernooij's affidavit sworn 13 October 2017 in support of his notice of opposition, the decision of His Honour Judge Callaghan following the summary judgment hearing on 22 January 2018, and a copy of the order for summary judgment. The bundle of documents was prepared by counsel for Mr Vernooij. As far as I am aware there was no issue by either party in respect of including the information in the second bundle of documents. It was open to counsel for Mr Vernooij to call Mr Fildes for his evidence to be tested. Mr Fildes was not called as a witness. On that basis it can be concluded that Mr Fildes' evidence was not challenged by Mr Vernooij.[21]

[28] Mr Fildes says in his affidavit that there was communication directly between himself and Mr Vernooij and that the Official Assignee was prepared to make some concessions in order to bring about a speedy settlement. According to the affidavit of Mr Fildes, Mr Vernooij advised that he did not intend to pay anything. That statement is consistent with the evidence of Mr Vernooij filed in support of his notice of opposition to the application for summary judgment.

[29] Mr Vernooij instructed counsel in 2017 in respect of the summary judgment application. There is no evidence that Mr Vernooij was failing to meet the costs of this lawyer and therefore it can be inferred that Mr Vernooij was indeed meeting the lawyer's fees. Mr Vernooij's counsel appeared for him at the summary judgment hearing. It is not clear on the evidence when he first instructed counsel in respect of the summary judgment. However, these proceedings were not filed until after the summary judgment order had been served on Mr Vernooij. There is no evidence explaining why Mr Vernooij did not apply to have the agreement set aside at this stage.

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[21] S 130 Evidence Act 2006.

[30] The only real explanation can be that he applied to have the property agreement set aside because he had failed in his opposition to the summary judgment application. This general proposition was accepted by Mr Vernooij under cross-examination.[22]

[31] Counsel for the Official Assignee put it to Mr Vernooij that it was only when Mr Vernooij realised, following service on him of the order for summary judgment, that he would have to make the final payment that he had an issue with the agreement. Although Mr Vernooij tried to defend that that was the case and said that he had had an issue with the agreement long beforehand, for the reasons set out above there is no evidence to support Mr Vernooij's position.

(c) The merits of the case

[32] In assessing the merits of a case within the context of an application for leave, the court should confine itself to a prima facie view of the substantive merits. There is no final determination of the merits, with such issue being reserved for the substantive hearing.[23]

[33] In this case, there was no preliminary hearing in respect of whether leave should be granted. All matters, including the substantive matters, were considered together. I therefore had the benefit of having affidavit evidence and hearing cross-examination in respect of the substantive matters. The witnesses at the hearing were Mr Vernooij, his accountant, his former counsel, and former counsel for Mrs Vernooij.

[34] Mr Vernooij's case is as follows:

(i) the agreement is void because it does not comply with the requirements of s 21F of the Act; and/or

(ii) the agreement should be set aside because giving effect to the agreement would cause serious injustice.

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[22] NOE p 49, line 7.
[23] *JNL v DN* (supra); *Clark v Sims* (High Court, Auckland, M135/01, Master Faire, 21 August 2002).

[35] I shall now discuss each of these sub-issues in more detail.

The agreement is void because it does not comply with the requirements of s 21F of the Act

[36] Section 21F of the Act provides that an agreement is void unless it complies with certain requirements. [24] In this case Mr Vernooij says that the agreement is void because his lawyer, Ms Bryan-Lamb, did not explain the effect and implication of the agreement to him.[25]

[37] Mr Vernooij says that the advice given by Ms Bryan-Lamb was inadequate in the circumstances because of the following:

(a) The agreement was hastily put together and did not reflect the agreement that he understood had been reached, particularly in respect of how interest payable on the loan to his parents would be dealt with, and how post separation payments would be dealt with, vis a vis the amount of the final payment to be made to Mrs Vernooij.[26] In particular, Mr Vernooij says that he did not understand that he would be required to provide invoices in respect of the post separation payments contemplated by clause 8 and 16.

(b) He did not see a draft of the agreement prior to signing it.[27]

(c) He was under financial pressure at the time that the agreement was signed.[28]

[38] As set out by counsel for the respondent in her submissions, the leading case in this regard is the Court of Appeal decision of *Coxhead v Coxhead*. As discussed by Hardie Boys J in *Coxhead*: [29]

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[24] S 21F of the Act.
[25] S 21F(5) of the Act.
[26] BOD p 4 paragraphs 17-18, p 8 paragraphs 36 and 38.
[27] BOD p 4 paragraph 16.
[28] BOD p 2 paragraph 5, NOE p 13, lines 7-10 and 20-21.
[29] *Coxhead* v *Coxhead* [1993] 2 NZLR 397 at paragraphs [40]-[50].

> Each party must receive professional opinion as to the fairness and appropriateness of the agreement at least as it affects that party's interests. The touchstone will be the entitlement that the Act gives, and the requisite advice will involve an assessment of that entitlement, and a weighing of it against any other considerations that are said to justify a departure from it. Advice is thus more than an explanation of the meaning of the terms of the agreement. Their implications must be explained as well. In other words, the party concerned is entitled to an informed professional opinion as to the wisdom of entering into an agreement in those terms. This does not mean however that the adviser must always be in possession of all the facts. It may not be possible to obtain them. There may be constraints of time or other circumstances, or the other spouse may be unable or unwilling to give the necessary information. The party being advised may be content with known inadequate terms. He or she may insist on signing irrespective of advice to the contrary. In such circumstances, provided the advice is that the information is incomplete, and that the document should not be signed until further information is available, or should not be signed at all, the requirements of subs (5) have been satisfied.

[39] No two cases are identical. It is for me to assess what happened in the particular circumstances of this case against the *Coxhead* test and to determine whether the advice given in the circumstances of this case was adequate.[30]

[40] The onus of proof rests on the party wanting to uphold the agreement to prove that the formal requirements of s 21F of the Act have been complied with.[31]

[41] For the reasons set out below, I am satisfied that the respondent has discharged their onus to prove that the formal requirements of s 21F of the Act have been complied with.

[42] I do not accept that the agreement was hastily put together. It is common ground that there were ongoing negotiations for four years prior to the agreement being entered into. Both parties had the benefit of senior, experienced counsel and access to their own independent accountants for the duration of those negotiations. Ms Bryan-Lamb has approximately 20 years' experience as a solicitor. Mr Vernooij accepted that he had first instructed Ms Bryan-Lamb in respect of relationship property matters in April 2008, four and a half years before the agreement was signed.

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[30] *Wylie v Wylie* [2019] NZHC 2638.
[31] *West v West* [2003] NZFLR 231 (HC).

[43] I accept the submission of counsel for the respondent that this is not a situation whereby Ms Bryan-Lamb had been instructed solely for the purposes of giving independent legal advice in respect of the agreement. As submitted by counsel for the respondent, the evidence demonstrated that there was a close solicitor-client relationship between Mr Vernooij and Ms Bryan-Lamb, and that the relationship could be described as one of Ms Bryan-Lamb being Mr Vernooij's "trusted advisor". Mr Vernooij accepted under cross-examination that Ms Bryan-Lamb acted for Mr Vernooij from April 2008 through to November 2014 – a total of six and a half years - and that Ms Bryan-Lamb's law firm acted for the company as well. The evidence demonstrated that at one point Ms Bryan-Lamb's firm had 17 matters recorded as being open for Mr Vernooij and the company. As Mr Vernooij was the only director resident in New Zealand, he gave instructions on behalf of the company.

[44] Ms Bryan-Lamb and Mr Vernooij's accountant, Mr Tony Marshall, were cross-examined. The evidence of Ms Bryan-Lamb and Mr Marshall was consistent and overwhelmingly demonstrated that there was regular and ongoing consultation between Ms Bryan-Lamb and Mr Marshall, particularly during the key period in the negotiation during the months of August and September 2012. The evidence demonstrates the Mr Marshall advised Mr Vernooij and Ms Bryan-Lamb in respect of the worst case and best-case scenario for Mr Vernooij with reference to the financial accounts of the company for the relevant periods (being the 2008-2012 financial years).

[45] I am easily satisfied, after having heard the evidence of Ms Bryan-Lamb and Mr Marshall, that Mr Marshall was fully appraised as to the issues, the claims that Mrs Vernooij was advancing, and that the advice given to Ms Bryan-Lamb in terms of advancing a settlement proposal took into account the company's current account during the 2008-2012 financial years, the debt owing to Mr Vernooij's parents (based on the information available), and that the ultimate figure that was settled on as owing to Mrs Vernooij reflected the mid-way point based on the financial accounts as to Mr Verrnooij's best and worst case scenario.

[46] The final terms of the agreement that the parties entered into was based on a chain of letters sent on behalf of Mr Vernooij on 15 August, 27 August and

14 September 2012. There is no question, based on the evidence of Ms Bryan-Lamb, Mr Marshall and Mr Vernooij, that before each letter was sent Ms Bryan-Lamb consulted both Mr Vernooij and Mr Marshall. I accept the evidence of Ms Bryan-Lamb that before any of the letters were sent, draft letters were sent to Mr Vernooij for his approval prior to being sent, and input was obtained from the accountant, Mr Marshall, in respect of the drafting of the letters and the ultimate settlement proposal.

[47] I also accept the evidence of Ms Bryan-Lamb that while Mr Vernooij was not always readily available to confirm his instructions in a timely way, she would not send the letters without his instructions. Mr Vernooij conceded under cross-examination that this was the general process with Ms Bryan-Lamb. He also conceded that there were times when he was difficult to get hold of and that he did not check his emails in a timely fashion.

[48] The evidence is not clear as to whether Mr Vernooij saw a copy of the agreement before he attended Ms Bryan-Lamb's office to sign the agreement. However, as set out above, the terms of the agreement were based on a proposal advanced by Mr Vernooij, based on accounting and legal advice. The time records produced by Ms Bryan-Lamb verify the timeframe within which the agreement was drafted, and also verify the time spent with Mr Vernooij on the date that the agreement was signed.

[49] Under cross examination, Ms Bryan-Lamb confirmed her affidavit evidence which was that she spent three hours with Mr Vernooij with the draft agreement and went through the agreement clause by clause, with her advising him in respect of the effect and implication of each clause. Ms Bryan-Lamb's evidence was clear that if she was concerned that Mr Vernooij did not understand the effect and implications of the agreement, or had Mr Vernoooij objected to signing the agreement, she would never have certified the agreement.

[50] I do not accept that the agreement did not adequately deal with the issue of the loan to Mr Vernooij's parents. It was accepted by Mr Vernooij in his written and oral evidence that he had not provided adequate information during the four-year

negotiation period in respect of the loan to his parents. Nevertheless, the final figure owing to Mrs Sophia Vernoooij accounted for one half of the value of the loan to Mr Vernooij's parents, based on the information which was available to the parties, their counsel, and to their accountants. Further, the agreement provided that the final figure owing to Mrs Vernooij was subject to Mr Vernooij providing, within a period of 12 months post the execution of the agreement, further and more detailed information in respect of the loan. Mr Vernooij failed to do so within the time period allowed.

[51] Further, I do not accept that Mr Vernooij did not understand that he would have to provide invoices in order to claim a reduction in the final stage payment because of post separation payments made by him. Clause 8 of the agreement identifies that both the company and/or Mr Vernooij made post separation payments to or on behalf of Mrs Vernooij and identifies broadly the nature of the payments. The final sentence of clause 8 records that:

> Once relevant invoices have been collated to accurately identify all such expenses and exchanged between respective parties' solicitors, it is agreed such sums shall be deducted from remaining funds payable to Sophia pursuant to paragraphs 16 to 16.3 below.

[52] It was Mr Vernooij (or the company) who had made the payments. The information was within his control. He was making a claim to recover the payments made by him. There could not have been any misunderstanding that in order to advance such a claim he needed to provide invoices to establish the claim.

[53] Further, Mr Vernooij is a person with considerable business acumen. He has experience in dealing with professionals, including solicitors and accountants. He is a director of the company. He is experienced in dealing with financial matters. In their oral evidence both Mr Marshall and Mr Vernooij agreed that Mr Vernooij was responsible for inputting all of the financial data into the company financial database, coding all of the payments, and that this information was what the accountant relied on in producing the company's financial accounts. It is not difficult to conclude that Mr Vernooij is familiar with the concept of needing to produce evidence in order to make financial claims such as the one that he was seeking to make pursuant to clause 8 of the agreement.

[54] I accept, on the basis of the evidence before the court, that Mr Vernooij was under some financial pressure when he signed the agreement. The pressure had arisen in the context of Mr Vernooij's business interests with his new partner. There is no evidence that the pressure impaired his decision making at the time he signed the agreement, particularly taking account of the context in which the agreement was signed as set out above at paragraphs [42]-[50] above. There is no evidence that Mr Vernooij was facing destitution or bankruptcy should the agreement not be signed.

[55] I am satisfied in the circumstances that the advice given by Ms Bryan-Lamb was not only adequate but easily met the threshold anticipated by the *Coxhead* test as being professional, that she explained the effects and implication to Mr Vernooij, and that the advice was given in a context of four years of negotiation and given alongside accounting advice from Mr Vernooij's own accountant who approved the settlement proposal upon which the agreement was advanced by Mr Vernooij and ultimately based.

[56] I am satisfied on the evidence before the Court that the agreement complies with the requirements of s 21F of the Act.

<u>The agreement should be set aside because giving effect to the agreement would cause serious injustice</u>

[57] A determination as to whether giving effect to the agreement would cause serious injustice in an exercise in discretion.[32] In exercising that discretion I must have regard to the factors set out in s 21J(4) of the Act.

[58] Given that this is a "compromise agreement" it is also relevant to consider whether the "agreement accords, at least broadly, to what would be ordered under the statutory regime".[33] As discussed by the Court of Appeal in *Harrison,* if there is -[34]

> …a significant discrepancy between what the agreement provides and the way in which the relevant statutory regime would have operated, this in itself may well suggest that the agreement is unfair or unreasonable and, as well, may well require explanation …

[32] *Wells v Wells* [2006] NZFLR 870 (HC).
[33] *Harrison v Harrison* [2005] NZFLR 252 at [81].
[34] Supra.

[59] This is because compromise agreements are: [35]

> entered into in respect of entitlements already accrued and should usually reflect the reality of those entitlements.

[60] The onus of proving serious injustice rests with Mr Vernooij.[36] The onus is not to be underestimated[37] particularly given that I have determined that the advice given by Ms Bryan-Lamb was not only adequate but easily met the threshold anticipated by the *Coxhead* test.

[61] Mr Vernooij says that the agreement should be set aside because giving effect to the agreement would cause serious injustice on the basis that the agreement was unfair and unreasonable in light of all of the circumstances at the time it was made; [38] and/or the agreement has become unfair or unreasonable in light of changes in circumstances since it was made[39]. In particular, Mr Vernooij says that serious injustice arises because the property agreement did not properly account for the following:

(a) deduction of post separation payments from the final stage payment;

(b) the interest owing on the loan to Mr Vernooij's parents;

(c) a timeframe or enforcement mechanism for non-compliance with the hazelnut provision;

(d) the current account;

(e) Mrs Vernooij's employment status.

[62] I do not accept that giving effect to the agreement would cause serious injustice for the reasons set out below.

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[35] Supra [112].
[36] *Wood v Wood* [1998] 3 NZLR 234.
[37] Supra.
[38] Section 21J(c) of the Act.
[39] Section 21J(d) of the Act.

The provisions of the agreement

[63] Based on the evidence before the Court, there can be no question that the terms of the agreement were negotiated on the basis of equal sharing between the parties. The agreement is drafted with specific reference to the Act.[40] The agreement identifies that the parties were unable to agree on the date of separation; specifies the parties' assets and liabilities and provides a mechanism whereby there was a cash adjustment made in favour of Mrs Vernooij to ensure that there was an equal division of the net value of relationship property.[41]

[64] The agreement identified clearly what property each party was to retain, and the classification of that property.

[65] The agreement specifically provided a mechanism for Mr Vernooij to claim a reduction of the final stage payment subject to the provision of invoices (refer paragraph [51] above).[42]

[66] The agreement accounted for the loan to Mr Vernooij's parents. While the agreement did not account specifically for the interest payable on the loan, the agreement provided a mechanism whereby Mr Vernooij was given an opportunity to provide further and more detailed information about the loan within 12 months of the agreement being signed. Mr Vernooij failed to produce that information within the defined time. Had he done so, it is fair to conclude that any interest payable would have been shared between the parties and deducted from the final amount owing to Mrs Vernooij. If there was no agreement in this regard, Mr Vernooij's remedy would have been to apply to the court for relief at that stage.

[67] In respect of the hazelnut trees, a handwritten amendment was made to the agreement by Mr Vernooij on the day that the agreement was signed which gave Mr Vernooij the option to uplift the hazelnut trees from the property that Mrs Vernooij

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[40] BOD pp 9-23, clauses 1.9, 17, 18, 23 of the agreement.

[41] BOD pp 9-23, clause 3 (reference to "half share of net equity"), clause 7 (last sentence reference to "Sophia's half *share*"), clause 16 (reference to "proper entitlements"), clause 16.1 (reference to "Sophia's half share of the value of the parties' relationship property assets").

[42] BOD pp 9-23, clause 16.3a) of the agreement which specifically referenced again that the final stage *payment* was subject to deductions pursuant to clause 8.

was to retain as part of the overall settlement. The terms of that amendment were agreed to as follows:

> 3(a) The parties agree Hans shall have the option to uplift all hazelnut trees (without any harm being inflicted upon the trees) whilst the school house remains in Sophia's ownership, with a view to all trees being uplifted on or before 31 July 2013 or earlier should Sophia sell the property at which time Hans is to be advised accordingly. Hans agrees to plough, roll and re-sow the orchard area in english pasture grass at his expense.

[68] Mr Vernooij's complaint is that the agreement did not provide a reasonable timeframe or a mechanism for enforcement in the event Mrs Vernooij did not honour this clause. Mrs Vernooij entered into a contract to sell the schoolhouse on 5 February 2013, with a settlement date of 11 February 2013. There is no question - after having heard the evidence of Mr Vernooij, Ms Bryan-Lamb and Mrs Wilson - that immediately that the contract was entered into by Mrs Vernooij, significant effort was made by Mrs Vernooij, Ms Bryan-Lamb and Mrs Wilson to contact Mr Vernooij by way of email and telephone messages to give him an opportunity to make arrangements to uplift the hazelnut trees. Mr Vernooij acknowledged under cross-examination that such contact was made and that he failed to reply to the emails or the telephone messages.

[69] I take into account also that Mr Vernooij had the opportunity to remove the hazelnut trees during the period 5 October 2012 to 5 February 2013, and elected not to do so. I also take into account the fact that Mr Vernooij's evidence was that he knew the prospective purchaser of the schoolhouse property and could have made direct contact with that purchaser to make arrangements to remove the hazelnut trees.

[70] In respect of the current account, I reject Mr Vernooij's claim that the current account was not properly accounted for. I am easily satisfied on the evidence that the final proposal that was advanced by Mr Vernooij was based on a valuation date for the company that was orchestrated to give the best value to Mr Vernooij; that there was extensive negotiation and discussion between the parties through their counsel with the benefit of accounting advice; there was full disclosure in respect of the current account schedule for the relevant financial years 2008-2012 and that the schedule prepared by Mr Vernooij's accountant, Mr Marshall, was disclosed by way of an

enclosure to a letter from Ms Bryan-Lamb to counsel for Mrs Vernooij, Mrs Wilson, dated 29 June 2012.

[71] In respect of Mrs Vernooij's employment status I find that this is not a relevant consideration. The agreement specifically records at clause 16.1 that funds received by Mrs Vernooij in partial settlement of her half share of relationship property assets "do not represent alleged wages or spousal maintenance payments previously claimed by Sophia during prior negotiations". The final figure payment was based on agreement between the parties as to what constituted post-separation payments made by Mr Vernooij to Mrs Vernooij in satisfaction of her half share of relationship property.

The length of time since the agreement was made

[72] The terms of the agreement were negotiated over a four-year period. The agreement was entered into on 5 October 2012, approximately eight years ago. Proceedings were filed by Mr Vernooij in July 2018, over five and a half years after the agreement was entered into.

[73] The parties were entitled to, and did, rely on the terms of the agreement from the date that the agreement was entered into, having both received independent legal advice at the time that the agreement was signed as to the effect and implication of the agreement.

Whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made

[74] Taking account of the foregoing, I reject Mr Vernooij's claim that the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made.

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)

[75] I reject Mr Vernooij's claim that the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made.

[76] The changes in circumstances are (a) Mrs Vernooij being declared bankrupt; (b) the Official Assignee seeking to recover the sum owing pursuant to the final stage payment to enable payment to Mrs Vernooij's unsecured creditors; (c) summary judgment being entered against Mr Vernooij. These changes in circumstances are neither unfair nor unreasonable.

[77] Indeed, to the contrary, the outcome of the summary judgment hearing was that the court determined that there would be a deduction from the final stage payment in the sum of $19,646.70 in favour of Mr Vernooij, thereby reducing his liability in that amount.

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

[78] The parties entered into the agreement after four years of protracted negotiations.[43]

[79] The parties were unable to agree on a date of separation or on the specific values of certain property. However, the agreement was drafted with reference to the party's respective entitlements under the Act; the parties agreed that the agreement was fair and accurately reflected broadly an equal division of the parties' net asset position.

[80] The agreement was clear that the agreement was in final settlement of all rights and claims that either may have, and was binding in all circumstances including, amongst other things, bankruptcy.

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[43] It is relevant to consider s 1N(d) of the Act in this context.

Any other matters that the court considers relevant

[81] The final terms of the agreement were a negotiated global settlement, taking into account four years of protracted negotiation, independent legal advice and independent accounting advice.

[82] Mr Vernooij's own witness, Mr Marshall, agreed under cross-examination that this was the case. The agreement reflected this at clauses 14 and 15. I accept Ms Bryan-Lamb's evidence under cross-examination that she had explained those specific provisions to Mr Vernooij clearly when she gave him the requisite legal advice as at the date that the agreement was signed.

[83] The agreement also specifically addressed the questions of serious injustice, independent legal advice, and the legal capacity of each party as at the date that the agreement was entered into.

[84] Taking account of the foregoing, I reject Mr Vernooij's claim that giving effect to the agreement would cause serious injustice.

(d) Prejudice to the respondent

[85] The Official Assignee pursued Mr Vernooij to recover the final payment owing, to enable payment to Mrs Vernooij's unsecured creditors. There is significant prejudice to Mrs Vernooij's unsecured creditors in leave being granted for Mr Vernooij to pursue what I consider to be, for all of the reasons set out above, an unmeritorious claim. It will result in further significant delay in the unsecured creditors receiving payment of what is owing to them.

(e) Whether it is just to grant leave in all of the circumstances

[86] Taking into account all of the circumstances as set out above, I find that it is not just for the Court to grant leave for Mr Vernooij to bring his claim to set aside the property agreement entered into on 5 October 2012.

[87] Having found against Mr Vernooij on the question of leave, it follows that there is no need for the court to address the substantive merits of the case.

[88] Mr Vernooij's application to have the agreement set aside is dismissed.

Costs

[89] An order for security for costs was made by consent on 3 July 2020 in the sum of $15,000.

[90] The Court may make such order as to costs as it thinks fit.[44] While that discretion is broad, in order to ensure that that discretion is exercised in a principled way regard should be had to the principles derived from the District Court Rules 2014.[45]

[91] I accept the submission of counsel for the respondent that costs decisions in relationship property cases should be treated the same way as costs decisions in ordinary civil proceedings, and follow the event.

[92] In this case I determine that the proceedings are to be categorised as category 2, band B.

[93] Before making a final decision as to the award of costs, including whether there should be any uplift pursuant to DCR 14.6, counsel for the respondent is to file, no later than 5 pm on 25 January 2021, a memorandum addressing DCR 14.2(f) and schedule 4 of the District Court Rules 2014.

A R McLeod
Family Court Judge

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[44] s 40 of the Act.
[45] Family Court Rules 2002, rule 207; District Court Rules 2014, rule 14.2 – 14.12; *Campbell* v *Goldie* [2019] NZHC 1573.