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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2010-044-002591
[2021] NZFC 8277

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[MARIANA RYAN] Applicant
AND	[ALEX RYAN] Respondent

Hearing:	29 July 2021
Appearances:	J Gandy for the Applicant R Holm for the Respondent
Judgment:	24 August 2021

RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to application to set aside or rehear a previous judgment]

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[1] The applicant [Mariana Ryan] applies to set aside a judgment of the Family Court issued on 6 May 2013 and for the Court to direct a rehearing. She says that at the time of the hearing she was overseas and was not able to attend. That she instructed her counsel to apply for an adjournment. That he failed to do so. That her counsel breached his obligations to her. As a result, the decision of the Court was delivered without the evidence being tested. She says she has been significantly prejudiced as a result. She says that she can provide an explanation for the delay in applying to set aside; in that she instructed her counsel to appeal the decision and advanced money to him. That he failed to do so. That she complained to the Law Society who referred the matter to the Disciplinary Tribunal. He was found guilty and sanctions were imposed on him. She now pursues a remedy seeking to set aside the orders made by the Court.

[2] She says the background is as follows:

- The parties met in October 2001.

- She says that she moved in to live with the respondent who was living at his brother's home at [address A] in December 2001. I observe that the respondent says that they did not live together as a couple prior to marriage.

- She says that on [date 1] 2002 the parties married. In the first judgment on 6 May 2013 I accepted the commencement date of the relationship being the date of marriage and accepted the evidence of the respondent that the parties had not lived together prior to marriage. This is one of the areas of conflict in the evidence between the parties.

- She says that in September/October 2002 the parties purchased the family home from the respondent's brother.

- In September 2003 the respondent says that the parties separated and he asserts that the marriage was of 13 months duration. I accepted the September date as being the date of separation as asserted by the respondent in the judgment. The applicant says that the parties'

relationship continued but began deteriorating in August 2007 and that she subsequently moved to Melbourne, Australia at that time. The respondent says that there were attempts at reconciliation but they did not reconcile and the separation that occurred in September 2003 remained permanent.

- The applicant says that on 27 August 2007 she registered a notice of claim over the family home. She points to the record and says that on 3 December 2010 (3 years later) she applied for a division of relationship property to the Family Court. The proceedings took their usual course and there were procedural directions made.

- In late April 2013 she says that her counsel Mr Banbrook informed her that the matter had been set down for hearing. She said that she advised her counsel she was unable to make to the hearing at such short notice and instructed her counsel to seek an adjournment.

- On 2 May 2013 Mr Banbrook for the applicant advised the Registry that he had not received further instructions from the applicant and therefore he will appear at the hearing for the purpose of withdrawing as counsel. The case was set down in the long cause fixture system at the Auckland Family Court. The hearing date was 6 May 2013. I was the allocated Judge to hear the case.

- On 6 May 2013 the case was called and there was no appearance by Mr Banbrook. The Court had received written submissions from Ms Holm for the respondent and she sought orders. I have read the complete file prior to the hearing. I expressed in the oral judgment some disappointment about Mr Banbrook not attending the Court being on the record. I directed him to provide an explanation before considering what further steps (if any) the Court will take. He did file a memorandum to say that he had intended to appear but had accidently gone to the wrong Court and apologised to the Court for his non-appearance. In the memorandum Mr Banbrook advised that the applicant was currently in [a South American country] and that she was unable to travel to attend the hearing.

After receiving the memorandum I elected to take no further steps. The judgment remained standing. From the Court's perspective the matter was closed and no further steps were taken in the matter until 24 July 2020 (7 years later). The applicant filed an application to set aside the judgment following non-appearance and filed an affidavit in support providing an explanation for her non-appearance. The procedural history was set out by Mr Gandy in his written submissions and I set out the procedural background as follows:

> **Background (upon the applicant's evidence)**[1]
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> |---|---|
> | October 2001: | Parties meet |
> | December 2001: | Applicant moves in with respondent, who is living in his brother's home at [address A] **("the family home")** |
> | [date 1] 2002: | Parties marry; Judge Burns adopts this date as the commencement date of the relationship (accepting the respondent's evidence that the parties had not lived together prior to marriage) |
> | September/October 2002: | Parties purchase the family home from the respondent's brother |
> | September 2003. | Respondent evidences that the parties separated on this day; this evidence is accepted by Judge Burns |
> | August 2007: | Parties' relationship begins deteriorating and applicant moves to Melbourne, Australia |
> | 27 August 2007: | Applicant registers notice of claim over the family home |
> | 3 December 2010: | Applicant applies for a division of relationship property |
> | Late April 2013 | Applicant's counsel **("Mr Banbrook")** informs her of hearing. Applicant advises that she is unable to make the hearing at such short notice and instructs counsel to seek an adjournment |

2 May 2013:	Counsel for the applicant advises registry that he has not received further instructions from the applicant, therefore, he will appear at the hearing for the purpose of withdrawing as counsel
6 May 2013	Hearing occurs to determine division of relationship property and a judgment is issued in favour of the respondent **("the judgment").** Neither the applicant, nor her counsel, attend
5 June 2013	Counsel for the applicant files memorandum stating that, when he was given notice of the hearing on 6 May 2013, he made contact with the applicant who was currently in [a South American country]. His memorandum states that the applicant advised she was unable to travel to attend the court hearing. Counsel states that he attended the hearing but appeared at the wrong court as an explanation for his nonappearance.

Procedural background

24 July 2020:	Applicant files application to set aside judgment following non-appearance and affidavit in support
21 August 2020:	Judge Manuel directs the application to be served on respondent
6 October 2020:	Respondent files notice of opposition
22 October 2020:	Judge Burns directs these proceedings be case managed by his Honour and makes further directions to progress the case
4 November 2020:	Judge Burns issues minute and directs this matter proceed to hearing. Further timetabling directions made. His Honour declines to sever the issues of setting aside the judgment and

	whether a protection order should be granted
26 January 2021	Judge Burns set down this matter for a judicial conference
12 March 2021•	Judicial conference (by telephone) occurs. Judge Burns severs the family violence and relationship property proceedings. His Honour further directs that the NOE for the 2013 hearing be provided to counsel and sets down a three-hour short cause hearing in relation to the relationship property proceedings. A 15-minute conference is also allocated at the end of the short cause hearing to progress the family violence proceedings.
20 April 2021	Counsel for applicant files memorandum seeking alternative hearing date. Short cause hearing was set down for 28 May 2021 but counsel for the applicant had other court commitments at that time. Matter rescheduled for 29 July 2021

[3] The applicant relies on four key facts that she asserts to be true, namely:

(a) that during 2006 the respondent stayed with her at her rented apartment during the weekends and she would stay with the respondent during the week days;

(b) she was required to leave the family home over the weekends when the respondent's father would stay (as he did not approve the relationship);

(c) the parties holidayed in Rotorua together as a couple in 2005;

(d) the parties enjoyed holidays to [a South American country] where the respondent was introduced to the applicant's family.

[4] On the basis of those facts she asserts that the marriage continued and was in excess of three years and therefore not a marriage of short duration contrary to what was found by the Court in 2013.

[5] The respondent disputes each of those key facts and says that his evidence that he gave to the Court was correct and the parties had a marriage of short duration. He says that he has filed affidavits from a number of witnesses confirming that the marriage came to an end. He accepts that there were attempts at reconciliation but they were unsuccessful and that the applicant has misinterpreted those attempts as suggesting that the parties did not separate.

[6] The law in relation to application to set aside has been summarised by Mr Gandy in paragraphs 5-14 of his submissions which I set out as follows:

> 5. Rule 56 of the Family Court Rules 2002 ("FCRs") provides that where a party does not appear at a hearing, a judgment given at that hearing may be set aside or varied by the court "on any terms it considers just if it appears to the court that there has been, or that there may have been, a miscarriage of justice" (emphasis added).
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> 6. Rule 56 has a wider discretion than rr 59 and 209-213 FCRs (which provide that the Family Court can order a hearing where there has been a miscarriage of justice) (emphasis added). However, the case law regarding what amounts to a miscarriage of justice under rr 59 and 209-213 FCRs may assist the Court in this determination.
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> 7. The considerations a court may have regard to are:
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> a. Whether the applicant has a substantial ground of defence;
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> b. Whether the delay was reasonably explained; and
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> c. Whether the party who obtained the judgment will suffer irreparable injury if the judgment is set aside.
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> 8. The court has also considered that the "default" of the applicant must be excusable", such as, the non-appearance was accidental or there was a force majeure "of such an overwhelming character as to prevent his appearance"' as well as any explanation for the delay in seeking to set aside a judgment. The above factors are not "necessary preconditions", simply factors to assist the court to "measure where the justice of the case lies, in the context of procedural rules whose overall purpose is to secure the just disposal of litigation".

9. It has been held that:

> If a defendant has not been able to present submissions as to whether an arguable defence is available, he or she has not had an effective opportunity to demonstrate to the Court that he or she has an arguable defence, even though a notice of opposition, or statement of defence and affidavits in support are before the Court. It is a matter of common judicial experience that the submissions and arguments presented by a party at a hearing can sometimes persuade the Court to a view different to that which might be first suggested by a reading of the papers. While it can be argued that a party who deliberately declines to appear at the hearing should not have the right to apply to set aside judgment, in my view the justice of the case in that regard can be addressed when considering the exercise of the discretion to set aside which is given by the rule.

10. A further consideration is whether the applicant's case has merit; "if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication".7Another consideration, in relation to the interests of justice, is the consequences of the award given in the judgment weighed against the applicant's failure to appear.

11. It has been held that:

> the application is otherwise meritorious, the [respondent] is not considered to be unduly prejudice if required to prove its case in a defended hearing. The prospect that it may not be able to prove its case, because of the [applicant's] arguable defence, is not an irreparable injury that should count against the application.

12. Rule 210(2) FCRs sets out examples of miscarriages of justice:

    a. Unfair or improper practices by a successful party to the prejudice of another Party;

    b. The discovery since the hearing of material evidence that could not reasonably have been known or foreseen before or during the hearing; and

    c. Misconduct by a witness that effects the outcome of the hearing.

13. These are not "rules of law", rather "tests by which the justice of the case may be measured".' Different cases may involve different considerations, therefore, the Court's discretion in determining whether there has been a miscarriage of justice is unfettered (provided the court pays due attention to the case's competing merits).

14. The onus rests on the party seeking a rehearing to show that there has been a miscarriage of justice.

[7] There is no dispute by Ms Holm in relation to those submissions. She has provided additional submissions in relation to the law herself.

[8] The case for the applicant is summarised by Mr Gandy in his written submissions in paragraphs 15-30 which I set out as follows:

> 15. Whilst not expressly stated, it can be inferred from the judgment that the learned Judge placed significant weight on the respondent's evidence that the applicant did not reside with him after September 2003 before concluding that the relationship was one of short duration. A finding that the relationship was one of short duration had the effect that the relationship property was divided in accordance with the (financial) contribution of each spouse to the marriage, rather than in accordance of the presumption of equal sharing which is afforded to relationships of longer duration.
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> 16. The applicant has a substantial defence to this finding. Firstly, the applicant had put into evidence that the parties enjoyed a relationship of approximately six or seven years. This was supported by an affidavit from [person X] who stated that she had seen the parties appear as a couple in 2005 and was of the understanding that the relationship had continued until 2007. The respondent, in his reply to the affidavit of [person X], accepts that the parties reconciled after September 2003, however, goes further to state that any attempts at reconciliation were unsuccessful. This position was not tested at the hearing.
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> 17. Secondly, common residence is but one factor in determining whether parties continued living together as a couple; other factors may have been present which may have supported a finding that the parties were in a relationship beyond 2003. His Honour placed weight on narrations in the applicant's bank statements for a "property man" and accepted the respondent's position that these payments were to pay rent for an apartment in the city where the applicant was residing. However, counsel notes that the applicant's bank statements were still being directed to the family home during the period that the respondent stated they were not in a relationship.
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> 18. Furthermore, at the hearing, counsel stated that the respondent had repaid some of the applicant's debts "as a means of clearing the slate" and was "something he didn't mind paying at that time". These debts were not insignificant ($11,000-$13,000) and the repayment may suggest at a degree of financial dependence or a mutual commitment to a shared life; two factors under s 2D of the Property (Relationships) Act 1976 ("the Act") suggesting the parties were still living together as a couple.
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> 19. The applicant was unable to present these submissions (which shows an arguable defence was available) due to the shortcomings of her counsel. It is submitted that the applicant has not had an effective opportunity to demonstrate to the Court this defence, even though supporting documents were filed on behalf of the applicant. The applicant had not yet put forward her reply to the respondent's affidavits and supporting evidence, therefore, there is a distinct possibility that the arguments which may have been put forward at the hearing may have persuaded the presiding judge to a different view to that which was ultimately delivered.

20. Mr Banbrook informed the court that he was unable to take instructions from the applicant but advised her that she was to make herself available at the hearing.' The applicant has deposed that she was only contacted by Mr Banbrook seven days prior to the hearing about the hearing date and was unable to make it back to New Zealand on such short notice.18 The applicant was unaware that Mr Banbrook was not in a position to attend the hearing (despite the contrary contents of his subsequent memorandum to the court, dated 5 June 2013) due to his sentence of home detention. Thus, her "default" in appearing is excusable.

21. She further deposed that she expressly instructed Mr Banbrook to seek an adjournment. The applicant has deposed that Mr Banbrook did not follow her instructions and it can be inferred that Mr Banbrook did not seek instructions in relation to the applicant's position for the hearing.

22. The applicant has provided an explanation for the delay in seeking that the judgment be set aside. The applicant was only made aware that a judgment had been made against her after the fact. The applicant received no correspondence from either Mr Banbrook or the court and assumed that the lack of progress was due to the lengthy delays in obtaining court dates as earlier advised by Mr Banbrook. The applicant's experience with these proceedings (in that it took three years after filing for a hearing to be occur) supported that assumption.

23. The applicant attempted to communicate with Mr Banbrook for a period of two years after the judgment was given but her attempts were unsuccessful. Mr Banbrook's actions were such that the New Zealand Law Society considered it appropriate to censure him. There were further issues between the applicant and Mr Banbrook regarding the applicant's attempt to appeal the judgment.

24. Once the applicant's engagement with her former counsel ended, the applicant was unable to obtain alternative legal representation. Lawyers who had indicated they had availability to represent her case were unable to provide their work under the Legal Aid scheme. The applicant filed her application to set aside the judgment at the first available opportunity once she obtained legal representation under the Legal Aid scheme.

Irreparable injury

25. The learned Judge made an award that the family home was to be the respondent's separate property and that the debts the applicant owed (and paid for by the respondent) were her separate debts. On this basis, the applicant was order to repay the respondent $11,000 (being the amount he paid for the debts).

26. It is submitted that there is prima facie merit in the applicant's case (at set out in [15]-[20] of these submissions), therefore, the respondent will not be unduly prejudiced if he is required to prove his case in a defended hearing. However, the applicant would suffer prejudice if she is unable to obtain her share of the relationship property. It is accepted that she did not financially contribute to the outgoings family

home, however, the Act recognises that non-financial contributions are equally as relevant to the determination of division of relationship property as financial contributions.

27. The respondent in his Notice of Opposition has not raised any grounds supporting a finding that he would suffer irreparable injury if the judgment was set aside. A respondent is not considered to be unduly prejudiced if they are required to prove their case at a defended hearing.'

Conclusion

28. Ultimately, the applicant was deprived of the opportunity to cross-examine and address the points raised by the respondent's counsel, due to the inactions of her then-counsel, Mr Banbrook. Given there was an arguable defence available which could have been put to the court at hearing, had the applicant's counsel appeared, it is submitted that there may have been a miscarriage of justice.

29. A further miscarriage of justice may have occurred when weighing up the consequences of the award in the judgment against the applicant's non-attendance. The applicant was not given sufficient notice (by her counsel) to appear at the hearing and her counsel failed to properly advance her case at the hearing. As a result, not only has the respondent had the exclusive use and benefit of the parties' relationship property, the applicant was required to repay debts which the respondent had initially paid.

30. The applicant respectfully submits that the judgment given by Judge Burns on 6 May 2013 should be set aside for the reasons outlined above.

[9] The case for the respondent is summarised in Ms Holm's written submissions in paragraphs 13-23 inclusive which I set out as follows:

13. It is submitted that it goes against the principles of the Act that a relationship that ended in September 2003, had a dissolution sealed on 25 July 2011 and a court decision for relationship property in May 2013, can be relitigated again disturbing the Respondent's life in 2020/2021.

14. The Limitation Act 2010 under section 11 provides a defence when there has been no claim for the money for 6 years. This is not binding on the court, but the court is asked to consider this as part of the irreparable injury to the Respondent of still not being free of money claims from a relationship that bore no children and lasted for only 18 months. The relationship ended 19 years ago, and the decision of the court was over 7 years ago. The onus is on the Applicant to show a miscarriage of justice and it is submitted that the reverse is true if this matter is relitigated today when a decision of the court was made having available to it, all evidence. Lawyer's submissions cannot change the facts and it is submitted that no submission has been

provided that makes the relationship any more likely to be a long duration relationship.

15. There are no circumstances set out in R 210 of a miscarriage of justice that apply to the current case. No new evidence has been discovered. There have been no improper actions by Mr [Ryan] or his witnesses. The transcript with the judge and Mr [Ryan]'s affidavit evidence indicates that he informed the Applicant directly of the hearing date and of concerns about her counsel in advance .

16. The decision about the relationship being of short duration was made after the judge had available to him the full file in preparation for a long cause fixture of 1 day duration. The evidence the Applicant provided via affidavit was able to be considered. The judge made a finding of fact that the affidavit evidence put forward by Mr [Ryan] and his witnesses was accepted. Given the scarcity of evidence for the Applicant this is not surprising. She did not have anyone or any documentation that supports that she resided with Mr [Ryan] outside of hearsay evidence. If the parties were putting themselves out to the world that they were in a relationship as required under 2D(2) it would not be hard to find witnesses or documented evidence of the relationship. Bank accounts were requested of the Applicant to assist but they still remain undisclosed.

17. [Person X] allegedly saw the parties walk in a park together in Rotorua. Mr [Ryan] has agreed that that they walked together and tried to reconcile their differences, but that all such attempts failed . The plane tickets to South America in the Applicant's affidavit in support of Domestic violence proceedings show the parties taking separate flights The law is clear in that even if they reconciled and co-habituated this would need to be for more than 3 months. Meeting to discuss the relationship is a far cry from a relationship reconciliation over 3 months in duration.

18. The onus is clearly on the applicant as is set out by Judge Wills in Attwood:

    There is no debate that in an application for rehearing, the onus rests on the party or parties seeking the rehearing to satisfy the Court that there has been a miscarriage of justice which justifies granting the rehearing .

19. Counsel for the Applicant has tried to reinterpret Mr [Ryan] paying for Ms [Ryan]'s debts as somehow evidence of a shared life. It is submitted that this is stretching the definition. Debt collection letters were addressed to Mr [Ryan]'s home. Ms [Ryan] signed over the family home. The parties had resolved matters in Ms [Ryan]'s favour, given a relationship of short duration, this was to allow Mr [Ryan] to have a clean break. He was willing to honour this was it not for Ms [Ryan] bringing matters back to the court for a 'second bite of the cherry'. Such a conclusion would set a dangerous precedent for those separating and trying to do so amicably.

20. The Applicant received compensation from her lawyer for the costs award on the basis that this was owing to Mr [Ryan] from the hearing, but no payment has been made . Even if the payment is made, this is not a payment directly from Ms [Ryan], it is covered by Mr Banbrook's payment. There is no miscarriage of justice, Ms [Ryan] has already obtained justice from Mr Banbrook for any possible disadvantage to her. The reality is she did not have a reasonable chance of success given the evidence. This has not changed.

21. Mr [Ryan] has relocated to Tauranga in attempt to have a clean break. The house that was the subject of proceedings has been sold long ago. Decisions have been made relying on a judgement of this court. If one cannot rely on a court order not being over turned 7 years later, there is no justice and no clean break.

Conclusion

22. The Applicant had a short duration relationship with the Respondent. She brought litigation without adequate evidence and brought delay followed by travel overseas at the time of the hearing. A decision was made in her absence in 2013 but she did not file in court for 7 years, longer than the time used for statute of limitation matters. No new evidence has emerged to support her claim. Mr [Ryan] has in the meantime relocated to Tauranga and he would suffer irreparable injury to have to relitigate matters in Auckland so many years later. He has never received costs that were ordered from the last proceedings despite the Applicant receiving compensation for those funds from Mr Banbrook.

23. The Applicant has not repaid any of the debts to Mr [Ryan] she was ordered to in 2013. Mr [Ryan] is again out of pocket in defending this application and costs on a solicitor client basis are sought.

Judgment

[10] I dismiss the application to set aside and rehear my decision of 6 May 2013 for the following reasons:

Delay

[11] The applicant has provided an explanation for a two-year delay after she was first advised of the outcome of the hearing. She instructed Mr Banbrook to file an appeal and paid him a sum of money in advance to do the work for that. He did not file the appeal. I think she has provided a reasonable explanation for waiting for a period of two years while that process took place but has not provided an adequate explanation for the further five-year period on top of that before she brought the application.

Prejudice

[12] If the application is granted there would considerable prejudice to the respondent. He has clearly relied on the judgment as he was entitled to do. He has moved on with his life and relocated cities and the property has been sold. He has paid the debts of the applicant and she has not paid the costs award. I accept that if the application was granted it would not cause irreparable injury to the respondent but I find that it would cause significant prejudice to him in that he would have to go through a further hearing, engage counsel and incur costs and experience the stress of further proceedings.

Miscarriage of justice

[13] The applicant has not produced any new evidence which was not available at the hearing before me in May 2013. She has provided voluminous affidavit evidence and I have been referred to affidavit evidence filed in the Family Violence proceedings. The evidence that she provided tends to corroborate the respondent's evidence given in the proceedings before me in May 2013 rather than cause me to doubt the veracity of the evidence. The case was set down in a long cause fixture. I expected the applicant and her counsel to attend the hearing and be fully prepared for the hearing including reading the entire file. For the reasons given in the judgment I was surprised the applicant did not attend and no explanation was provided to me at the time. However the affidavit evidence produced by the respondent confirming the separation between the parties and a marriage of short duration were compelling. The applicant only really produced one affidavit in support of her case that the marriage continued. This was essentially evidence that the applicant and respondent were seen holding hands in Rotorua in 2005. The respondent acknowledged that there was an attempt at reconciliation and they did go to Rotorua but that evidence falls well short of establishing that there was a resumption of the marriage in a committed sense. In fact a lot of the evidence produced by the applicant herself in her affidavit raises significant doubt about any possible resumption of cohabitation. The examples of her own evidence which undermines her case is as follows:

(a) In exhibit C to her affidavit of 18 October 2019 in the Family Violence proceedings in paragraph 13 she confirmed that she was outside of

Auckland in 2004 attending to seasonal work and living in boarding accommodation. In paragraph 2 of her affidavit sworn 13 July 2017 which is exhibit B to the affidavit of 14 October 2019 she acknowledged that she had incurred parking fines and was overseas and she instructed her lawyer to make arrangements to pay those parking fines. I observe that her passport has not been produced so I do not have a schedule of the precise times that she was overseas. It appears as though the parking fines were incurred well before she went overseas;

(b) In a document which is attached to her affidavit as exhibit A to her affidavit of 14 October 2019 shows a certificate of incorporation and attached to it a company extract for a company [name deleted] shows as at the date of that document being 15 October 2007 her address was in Parnell and not the former family home;

(c) In a further document headed up case summary following a complaint by the applicant to the police dated 3 July 2005 her address was recorded as in the CBD;

(d) In a similar document headed up case summary report for the period of 2 July 2009 her address was listed as Queen Street, Auckland CBD. There are further case summary reports which indicate her address was in CBD in 2007;

(e) Similarly for September 2007 her address changed but if she was living during the week back at the former family home I think it is likely in those documents she would have given that address as her address for service. She did not. Her lawyer Mr Gandy argued that this was consistent with her evidence that she spent the week with the respondent at his place and the weekends at her address in the CBD. I do not accept that argument;

(f) The Certificate of Title and the historic search shows clearly that there was a transfer of the title from their joint names to the respondent solely. The letter from the lawyer that undertook the conveyancing work clearly shows that she was advised to receive independent advice and she chose to waive to do so. The only conclusion I can reach is that she considered that there was little entitlement in the property at that stage with the equity being so small and on the basis that he paid debts that she had incurred that they reached a reasonable agreement between them amounting to an appropriate division of relationship property. The respondent has a good argument pursuant to s 21H of the Act that that agreement implemented between them could be ratified pursuant to that section.

[14] The witnesses produced by the respondent corroborated his evidence.

[15] A further affidavit of the applicant in support of her Family Violence Act proceedings being paragraph 4(g) confirms that she was not living at the address in 2003. She said that she was forced out of the house and had issues with her employment but nevertheless had stated on her own evidence that she was not living with the respondent.

[16] A further document was filed by the applicant headed 'notice of response' dated 11 November 2020 prepared by the applicant herself. In paragraph 27 she says that she was forced to sign the title transfer on 30 October 2003 and that she was thrown out on to the streets on 11 November 2003. She says that the legal instrument of transfer was signed before his lawyer on 20 November 2003 and that she was no longer at the house and was out on the streets. She says that the signature on the document was forged by a third party and she had no memory of meeting with the lawyer. She contends that it was not her signature. I am not aware of any complaint being made to the police of forgery and the letter from the lawyer confirming that she had signed the transfer after receiving advice to seek independent legal advice which she clearly waived doing and signed the document in the presence of the solicitor. I think it is highly improbable that a solicitor would be party to a forgery of a signature and would have ensured that her identification was properly known.

[17] In the same affidavit particularly around paragraphs 16 and following clearly the applicant says there were significant issues in the marriage which tends to corroborate the marriage being one of poor quality and of a short duration rather than as asserted by her of lasting through to 2007.

[18] In her affidavit of assets and liabilities sworn on 9 November 2010 she confirmed that since the date of separation she had been a student in both Auckland and Melbourne. I have not seen her passport to show the times that she went to Melbourne.

[19] There is clear clash between the evidence given by the respondent in his affidavit of 30 April 2013 in response to [person X]'s affidavit where he confirmed that the parties ceased to live together in late 2003 but there were a couple of brief occasions when they attempted to reconcile but this failed. He says that [person X] had no knowledge of what happened in their relationship.

[20] Accordingly I have examined all of the evidence given by the applicant in support of her case to see whether the Court's conscience would be troubled. A rehearing was declined. I cannot see any new evidence which causes me to doubt the findings of fact made in May 2013. If anything I am reinforced in those findings as being correct.

[21] The applicant is seeking for the Court to make a finding that the marriage was one of long duration. Even if the marriage lasted for longer than three years the Court has a discretion to declare it a marriage of short duration particularly if the quality of the marriage was poor and there were frequent periods of separation. The applicant's own evidence in the Family Violence Act proceedings makes it clear that she considers she was a recipient of family violence to a significant extent. I am not in a position to make any findings about that but it clearly supports the view that the marriage was likely to be short, tempestuous and unhappy for both parties. Even if there was compelling evidence (which there is not) that the marriage lasted longer than three years, there is a likelihood if a full hearing went ahead that there will be a finding that the marriage was one of short duration because of its poor quality.

[22] In addition, the parties clearly reached agreement when the transfer of the property took place from their joint names to the respondent solely. The respondent engaged a lawyer. The applicant chose not to do so. There may have been all sorts of reasons why she chose not to do so. She may have considered that she did not have much of an interest in the property. There may have been some other pressures placed on her but the reality is that she clearly was advised to get advice and chose not to do so. She signed the transfer document. It is arguable in the circumstances that the agreement between the parties which was acted on and implemented could be ratified pursuant to s 21H of the Act if this matter went to a full hearing.

[23] In addition, if the matter went to a full hearing there is a likely argument to be presented by the respondent that in view of the fact that he relied on the judgment of the Court and implemented it that the value would be backdated to the date of hearing; the first being 2013. As a result the equity would not be based on the present day and that the Court would exercise a discretion under s 2G of the Act and back date the valuation to the first date of the hearing. Taking the mortgage into account the amount of any equity alleged even if the presumption of equal sharing applied would be as significant as the applicant considers.

[24] In addition, if the matter went to a full hearing and the application to set aside was granted there are likely to be significant s 18B arguments for post-separation contributions by the respondent which would further reduce the applicant's claim. Clearly he continued to pay the mortgage, rates and insurance and maintained the property.

[25] The marriage is over 20 years ago. The parties separated on the basis of the respondent's evidence 19 years ago. It has been nine years since the decision was made in May 2013 and in all of the circumstances I cannot see a miscarriage of justice has been shown. I consider it highly improbable that the Court would find the marriage of long duration and presumption of equal sharing applied. In view of all the circumstances it is likely that the finding would be a marriage of short duration and that the result is consistent with the Act and it would not be disturbed.

[26] The time limit for the Family Court Rules to apply for a rehearing has truly expired and I do not consider there are grounds to warrant an exercise of a discretion to extend that time.

[27] The applicant has produced voluminous evidence but much of it is irrelevant. The key documentary evidence including bank accounts which may have assisted her in establishing her case together with her passport have not been produced. Those key pieces of documentary evidence would be of considerable assistance to the applicant and her failure to produce can only lead to negative inferences being drawn.

[28] The applicant also does not come to the Court with clean hands. She has failed to comply with the orders made by the Court in 2013 in terms of reimbursing for payment of debts and has not paid the costs award. She has received an award of compensation through the Disciplinary Tribunal in relation to Mr Banbrook. It is disappointing that that has not been paid but she has received some compensatory award which the Family Court cannot improve on. Accordingly for all of those reasons I am satisfied that her application to set aside or rehear the judgment of 6 May 2013 should be dismissed and it is dismissed accordingly. The respondent may seek costs and if he does so a memorandum to be filed in 14 days with the applicant having the right to reply 14 days thereafter and the memorandum to be placed before me in chambers for a judgment on costs.

Dated at Auckland this day of 2021 at am/pm.

D A Burns
Family Court Judge