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

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IN THE FAMILY COURT
AT NORTH SHORE

I TE KŌTI WHĀNAU
KI ŌKAHUKURA

FAM-2017-044-000679
[2020] NZFC 6310

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	ANDRE FRANCOIS OERTEL Applicant
AND	CATHERINE GRACE LAING Respondent

Hearing:	30 July 2020
Appearances:	Applicant is Self Represented Ms V Crawshaw QC and Ms Wilson for the Respondent
Judgment:	20 August 2020

RESERVED JUDGMENT OF JUDGE K MUIR

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[1] Mr Oertel and Ms Laing were married and after they separated they entered into an agreement under s 21A of the Property (Relationships) Act 1976 (the PRA) on 10 May 2018.

[2] Among other terms that agreement provided that the wife was to retain a Look Through Company (LTC) which she owned and controlled as her separate property, but that the house it owned at Gills Road, Bucklands Beach (Gills Road) was to be placed on the market for sale. After repayment of secured debts, holding costs and costs of sale, the net proceeds were then to be divided equally between Ms Laing and Mr Oertel. Ms Laing was also to then pay Mr Oertel the sum of $80,584 (the adjustment sum), calculated in accordance with a schedule attached to the agreement.

[3] Gills Road did not sell for the value that they hoped it would sell. As a result, there are no net proceeds for equal division. There are insufficient funds to enable Ms Laing to be reimbursed for all of the costs of sale from the proceeds of sale. In fact she had to contribute additional sums to enable the property to settle. Ms Laing says she has subsequently been unable to sell any other property or otherwise pay the sum the adjustment sum to Mr Oertel.

[4] She has applied for an order under s 33 of the Act to allow her to access $48,663 of the $57,004 that was in her superannuation/KiwiSaver account with Craigs Investment.[1] She intends to use the funds to pay was that part of the adjustment sum that she says is due to Mr Oertel. She says that she should not be required to pay the entire adjustment sum. She claims the right to deduct money that she says were expended on Gills Road including costs of sale. She says she is entitled to deduct $31,921, although that includes $4000 which was due to be paid to the mediator Tony Lendrum by Mr Oertel and which she paid on his behalf. She therefore says that the net amount she should be required to pay Mr Oertel is $48,663.[2]

[1] Annexure A to her affidavit of 22 June 2020 was a Craigs Investment Partners report showing total funds of $57,163 as at 22 June 2020.
[2] If the payment that she made to Mr Lendrum is not included that figure must be $52,663.

[5] Mr Oertel asks that I enforce an agreement which is not recorded in the s 21A agreement that he be given a half-share of the jewellery retained by Ms Laing.

[6] The issues that I need to determine are:

1. Does the s 21A agreement require Ms Laing to pay Mr Oertel the adjustment sum without deduction?

2. Can I interpret or amend the agreement so as to require Mr Oertel to contribute to the costs that Ms Laing was unable to recover from the sale proceeds of Gills Road?

3. Can I make the orders for the s 31 of the PRA requiring the managers of Ms Laings superannuation fund to pay part or all of that fund to Mr Oertel?

4. Can I make any orders in relation to an alleged agreement that Mr Oertel would receive a half-share of jewellery retained by Ms Laing?

Facts

[7] Mr Oertel and Ms Laing entered into a de facto relationship in 2003. They were married in 2004 and separated in June 2016.

[8] In November 2017 an application for division of relationship property was filed in this Court by Mr Oertel.

[9] On 10 May 2018 the parties attended a mediation. Both Mr Oertel and Ms Laing were independently represented at that mediation and advised in relation to the execution of the s 21A agreement which was duly certified.

[10] The relationship property agreement in Clause 2 deals with a Family Trust controlled by Ms Laing and the LTC under the heading "*Cathy Laing Family Trust/Cathy Laing Properties*". The Family Trust owned a property at Luplau Crescent, Howick. The LTC owned Gills Road. The parties agreed Gills Road had an

approximate value of $890,000. Clause 2.5 of the agreement stated that there was a mortgage owed to the ASB Bank in the sum of $790,000.

[11] It is Clauses 2.8 to 2.10 of the agreement which are in dispute:

> 2.8 The parties agree that Gills Road should be placed on the market for sale. As director of (the LTC) Cathy shall be responsible for the sale process, but shall be reimbursed from the net sale proceeds any costs expended on Gills Road from the date of this agreement to sale, including:
>
> (a) Marketing/advertising cost;
>
> (b) Any necessary repairs to Gills Road;
>
> (c) Mortgage payments, less rent received;
>
> (d) Insurance costs;
>
> (e) Rates.
>
> 2.9 Upon sale of Gills Road, the following shall occur. The sale proceeds shall be applied as follows:
>
> (a) To repay the ASB mortgage secured over Gills Road;
>
> (b) To real estate agent's commission;
>
> (c) Legal costs for conveyancing;
>
> (d) To Cathy to repay any costs at Clause 2.2(a) – (e) above;
>
> (e) Balance to be divided between the parties equally, *on the date of settlement in addition to which* the adjustment sum payable by Cathy at Clause 2.10 below *shall be made*.
>
> 2.10 On the date of settlement, the following shall occur:
>
> (a) Cathy will pay Andre the sum of $80,584 (EIGHTY THOUSAND, FIVE HUNDRED AND EIGHTY-FOUR DOLLARS).
>
> (b) Andre will withdraw the notices of claim registered against the title to Luplau Crescent and Gills Road.

[12] The words in italics in Clause 2.9 above were inserted into the agreement in hand writing with the change initialled. Prior to their insertion Clause 2.9(e) read "*the balance to be divided between the parties equally, subject to the adjustment payment payable to Cathy at Clause 2.10 below*".

[13] The agreement goes on to deal with other property. It has clauses that require the parties to execute all documents and do all things required to implement the agreement. The agreement also deals with debts and relevantly, Clause 8.2 reads:

> 8.2 Except as otherwise expressly provided in this agreement, neither party shall be liable to pay to the other or satisfy any debt owed by the other immediately prior to this agreement or after the date of execution of this agreement.

[14] The agreement incorporates a full disclosure clause at Clause 10.1 and at Clause 11 records that each of them had received adequate legal advice, had the effects of the agreement explained to them, had access to all the information they required, were not under any legal disabilities and considered the terms of the agreement just, fair and reasonable.

[15] Clause 12.3 provides that if any provision in the agreement is held to be invalid or unenforceable the other provisions shall nevertheless continue in full force.

[16] Clause 14 is labelled "Comprehensive and Final Agreements". The clauses thereunder record that the agreement is the result of a negotiation and compromise to achieve an agreement they consider fair. They recognise that the agreement does not provide for equal division of property, and specifically record that it settles all rights and claims that they may have against each other whether under the PRA, the Family Proceedings Act or otherwise.

[17] There were other conditions in the agreement including a condition that Mr Oertel provide Ms Laing with bank statements from all accounts held by him. These proceedings were to be discontinued by the date of settlement.

[18] Attached as a schedule to the agreement is a typed document headed "*Offer Accepted*" which records a calculation of how the adjustment sum payable to Mr Oertel of $80,584 was calculated. It appears from the agreement that an overall division of relationship property of 55 percent to Ms Laing and 45 percent to Mr Oertel was agreed.

[19] The s 21A agreement did not deal with jewellery in any specific way beyond a "catch all" clause that appeared in Clause 6 where there was a list of the property that each would retain as "*their separate property*", which included "*all other property in (the parties) sole name*". However, following the mediation at 11.36 pm on 18 May 2018 Mr Oertel sent an email directly to Ms Laing's lawyer Ms Crawshaw QC which read:

> Hi Vivienne
> Could you please organise with your client that Troy a mutual friend will come and collect the jewellery if she can put it in a parcel for him to collate and make a time please. A good starting point would be to get photos of all the jewellery that we could determine what half of the value is as I have been deprived of so many things.
> Kind regards
> A Oertel.

[20] Ms Crawshaw replied on 11 May to Mr Oertel's lawyer, Mr Locke in a short letter, paragraph [3] of which read:

> Of course, I will not be replying to him direct, but I suggest you remind him that the jewellery will be divided on the date of settlement.

[21] Mr Oertel annexed those documents to the affidavit that he swore on 22 June 2020, along with a photograph of a whiteboard calculation that had been prepared in the course of the mediation and featured lists of properties and values, a column for "*Cathy*", a column for "*Andre*" with those values attributed between those columns.[3] The item "*jewellery*" simply had "*divide*" written next to it. In that affidavit Mr Oertel claimed that he was entitled to $100,000 for his half-share of the jewellery. He claimed that the jewellery had been included in the settlement at the amount of $200,000 "*as per the valuation certificates*".

[22] Mr Oertel evidently sent an email to the Court on 19 December 2018 claiming that no settlement had been entered into. However, neither party has made an application to challenge the validity of the s 21A agreement to date.

[23] Gills Road was placed on the market for sale by Ms Laing and/or the LTC. It was evidently difficult to sell. The sale settled on 13 January 2019 when the property

[3] I was not addressed by either party on the admissibility of this evidence from the course of the mediation.

sold for a total sum of $797,500. As at the date of settlement, the settlement statement recorded that the amount required to pay the ASB Bank was $791,002.81. There were outstanding rates and disbursements. The net result was that after the deduction of real estate agents commission Ms Laing (or the LTC, Cathy Laing Properties Limited which was shown as the client on the settlement statement) was required to contribute the sum of $22,761.86 in order for the sale to settle.

[24] In an affidavit she swore on 28 February 2019 Ms Laing listed other costs that had been incurred between the date of agreement and the date of sale including mortgage payments, advertising costs, staging and marketing costs, and some minor maintenance costs. She allowed a credit for rental income. The total costs incurred were $30,739. She was seeking an equal share from Mr Oertel of $15,370. In addition, she was seeking an equal contribution by him to the shortfall on sale of $22,761.86, ie: $11,380. The total she sought to recover including the $4000 that she paid to Mr Lendrum, and miscellaneous costs was $31,921.[4] She annexed the mediation agreement pursuant to which she and Mr Oertel were jointly and severely liable for Mr Lendrum's fee and I am satisfied that she did pay $4000 on Mr Oertel's behalf.

[25] Since that time, she has been endeavouring to sell the property owned by her Family Trust at Luplau Crescent. The property apparently recently went in to auction and was passed in without success.

[26] This matter came before Judge Maude on 13 February 2019. At that time Ms Laing was still seeking to enforce a condition in the agreement which required Mr Oertel to provide certain bank statements. Judge Maude set this matter down as submissions only hearing.

[27] Ms Crawshaw was asserting that the Court had jurisdiction under s 33 of the PRA, not simply to enforce the terms of the agreement, but also to look to the intent of the parties as revealed by the agreement and consider a variation so as to take account of the unanticipated loss.

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[4] Exhibit D to affidavit Ms Laing sworn on 25 May 2020.

Interpretation, Variation and Enforcement of Section 21A Agreements

[28] While Mr Oertel has complained about some of the terms of the agreement neither party has applied to set aside the agreement nor is there an application before the Court to vary the terms of the agreement.

[29] There is in fact no express provision in the PRA expressly allowing orders to be made varying the terms of the s 21A agreement. Such agreements are binding as to their terms, if they are validly entered into, unless they are either void for non-compliance under s 21F or unless they are set aside on the basis that they would cause serious injustice under s 21J.

[30] Section 21L provides for the enforcement of such agreements:

> **21L Enforcement of agreements**
>
> (1) Remedies that, under any enactment or rule of law or of equity, are available for the enforcement of contracts may be used for the enforcement of agreements under section 21 or section 21A or section 21B.
>
> (2) This section is subject to the provisions of this Part.

[31] Ms Laing is asking the Court to make orders under s 25 of the Act which allows the Court to determine the respective shares of each spouse or partner in relationship property and divide property or any part of that property and make any other order that the Court deems fit. She is asking that the Court make orders in terms of the s 21A agreement under s 25, but that the agreement be varied or interpreted so as to ensure she is not solely responsible for the loss on sale of Gills Road. She argues that if the Court makes a decision to divide property in accordance with the agreement under s 25, it may use its ancillary powers under s 33 to vary the agreement.

[32] She then asks that s 31 of the Act be applied to enable her to access the funds that are held by her superannuation/KiwiSaver provider to repay the resulting varied adjustment sums to Mr Oertel.

[33] Under s 21M if an agreement is held to be invalid or is set aside pursuant to s 21J, the provisions of the Act have effect as if the agreement had never been made.

[34] There is nothing in Clauses 2.8 to 2.10 of the agreement that specifically requires Mr Oertel to contribute to any shortfall in the sale of Gills Road.

[35] It appears that the parties did not contemplate that there would be a shortfall. However, the agreement is clear as to its literal terms in Clauses 2.9 and 2.10. Ms Laing is to pay Mr Oertel the sum of $80,584 regardless of the amount that is received from the sale of Gills Road. There is no provision for any deduction to meet any losses on sale. Clause 2.9(e) provides that the balance is to be divided between the parties equally on the date of settlement. It does not say that any loss or shortfall should be paid or contributed to by the parties equally.

[36] Mr Oertel submits that the receipt of the adjustment sum without deduction was important to him in that it was for that reason that Clause 2.9(e) was amended to include the additional words that I have put in italics. He submits that if he had contemplated that he might be required to meet any shortfall on sale he might have negotiated a different mechanism of settlement such as simply requiring or allowing Ms Laing to retain the Gills Road property and pay him at a time that was unrelated to any sale of the property. He says he would not have left Ms Laing with sole control over the sale process.

[37] To some extent that is speculation, but it would also be speculative if I were to conclude that the parties both intended that Mr Oertel would contribute to any shortfall when the agreement does not say that.

[38] Ms Crawshaw presented careful submissions, but she did not address me on any principles of contractual interpretation which might allow me to imply a requirement that Mr Oertel meet the shortfall in to the agreement. She did not purport to rely on any rules of law or equity under s 21L.

[39] I was referred to cases which deal with the Court's ability to exercise its discretion under s 33 of the PRA, when enforcing an agreement, by making orders in terms of the agreement pursuant to s 25 of the PRA.

[40] The principal case relied on was the decision of Judge Boshier in *Belt v Belt*[5] under the provisions of the Matrimonial Property Act 1976.

[41] The s 21A agreement between Mr and Mrs Belt allowed Mrs Belt to occupy their home with two children of school age for two years and after that, if no agreement was reached, the property was to be sold.

[42] The application came before the Court along with an application for maintenance. Mrs Belt was asking the Court to allow her to purchase the property rather than order it to be placed on the market for sale as the agreement required.

[43] Mr Belt was seeking to enforce the requirement for sale under s 21(12C) (which is the equivalent of s 21L in the PRA). His Honour noted that the provision is discretionary:

> … remedies that … are available for the enforcement of contracts may be used for the enforcement of agreements under this section.[6]

[44] Judge Boshier decided he would not order specific performance of the agreement as it was worded. He said:

> It seems to me in the exercise of my discretion that a much more efficient and expeditious result can be achieved by going beyond the wording of cl 4 of the deed and invoking my ancillary powers under s 33. I again remind myself that I must not seek to impose a regime other than that envisaged within the spirit and intent of the deed itself. In other words, I do not believe that it is incumbent on the Court to transpose a wholly different settlement pursuant to s 33 to that which the parties themselves agreed to in a properly advised situation. I make it clear I do not attempt such a course. Equally I make it clear that the Court has its responsibilities in implementing its achievement of a fair and just result.[7]

[45] His Honour decided that he had a discretion under s 33 of the Act in setting a value pursuant to s 2(2) of the Act, but that discretion was fettered "*to some extent if not to a large extent by the deed which has been entered into*".[8]

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[5] *Belt v Belt* (1989) 5 FRNZ 258.
[6] S 21 (12C) Matrimonial Property Act (emphasis added).
[7] *Belt v Belt* n 3 at p 262.
[8] *Belt v Bdelt* n 3 at p 262.

[46] The Judge allowed Mrs Belt to purchase the property at a value which took account of savings that the parties would make if Mrs Belt purchased directly, ie: by deducting real estate agents commission and allows discount for a cash payment.

[47] With respect to the learned Judge the reasoning which allowed him to vary from the terms the parties had agreed that the property be placed on the market and sold, and to apply instead what he saw as "*the spirit and intent of the agreement*" rather than enforce it according to its terms, is somewhat opaque.

[48] Ms Crawshaw referred me to three other decisions where the *Belt v Belt* decision had been cited. The first of those is a decision of Judge Ullrich QC in *Stott v Stott*.[9] In that decision Her Honour noted at paragraph [20]:

> [20] The court may enforce the terms of the Compromise Agreement insofar as the agreement deals with matters that can be subject to orders under the Act. This requires the Court to make an order under s25 confirming the position agreed under the s21 agreement, and then, if necessary, making orders under s33 to give effect to that agreement.

[49] Her Honour relied in that regard on *Bishop v Bishop*, a 1981 decision of Roper J.[10] I note that *Bishop v Bishop* was decided before the equivalent of s 21L was added to the Matrimonial Property Act.[11]

[50] Judge Ullrich in *Stott* specifically noted that the Court does not have the power to alter the terms of s 21A agreements:

> [22] Although the Court may enforce the agreement by means of s25 and s33(1), it seems contrary to the intent of Part 6 of the Act if the Court could alter the terms of the agreement without the consent of the parties and without challenging the agreement in terms of s21J. In that respect the decision of *Belt v Belt*, to substitute an order to sell the family home to the wife at a price the Court determined, rather than order a sale of the home as the agreement required goes further than the Act allows.

[51] Her Honour noted that if either party wished to challenge the agreement in that case they needed to do so under s 21J.

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[9] *Stott v Stott* FC WN FAM-2005-085-000139, 9 August 2006.
[10] *Bishop v Bishop* (1981) 4 MPC 2017.
[11] Section 21(12C) was inserted into the Act by s 7 of the Matrimonial Property Amendment (No. 2) Act 1983. Prior to that it appears there was no direct power for the Family Court to enforce such agreements using the rules of law and equity.

[52] *Belt v Belt* was also referenced in *WLH v DGH*[12] a decision of Judge D R Brown. However, the reference to *Belt v Belt* in that case at paragraph [14] simply notes that jurisdiction was thereby confirmed to make orders under s 25 and s 33 of the Act reflecting the agreement. There was no suggestion in *WLH* that the terms of the s 21A agreement could be varied using that mechanism.

[53] Finally, I was referred to the decision of Judge Russell in *Norton v Norton-Francis*:[13] Again at paragraph [7] the Judge in that case simply noted that it logically follows that a Family Court should be able to enforce the terms of a s 21 agreement using the powers in ss 25 and 33. The Judge specifically noted at paragraph [13]:

> [13] My task this afternoon is to implement the provisions of the agreement. I am not going to entertain any other proposed adjustments to the figures for that would be straying outside the terms of what the parties have agreed to.

[54] Ms Crawshaw did not refer me to any law or any of the relevant authorities in relation to the implication of terms to contracts or agreements generally. Indeed, she said she was not in fact asking me to imply a term into the agreement, but rather give effect to the parties' true intention as to the meaning and effect of the relevant clause in the agreement.

[55] In order to give effect to the orders Ms Crawshaw is asking I find that I would need to amend or interpret Clause 2.9 of the agreement along the lines of the following:

> 2.9(e) Any positive balance or any deficit is to be divided between the parties equally on the date of settlement. Andre's share of any deficit will be met by deduction from the adjustment sum payable by Cathy at Clause 2.10.

[56] I find that it would not be appropriate for me to imply such a term in this case whether using s 25 and s 33, s 21L or otherwise.[14] The leading case on the implication of contractual terms remains *BP Refinery (Westernport) Pty Limited v Shire of Hastings*:[15]

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[12] *WLH v DGH* [2013] NZFC 1336.
[13] *Norton v Norton-Francis* [2016] NZFC 2555.
[14] To the extent that *Belt v Belt* suggests that ss 25 and 33 of the PRA can be used to vary, rather than merely enforce a s 21A agreement, I respectfully disagree.
[15] *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 16 ALR 363 at 376.

> In [Their Lordships'] view, for a term to be implied, the following conditions (which may overlap) must be satisfied:
>
> (1) It must be reasonable and equitable;
>
> (2) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (3) It must be so obvious that it "goes without saying";
>
> (4) It must be capable of clear expression;
>
> (5) It must not contradict any express term. The implication of such a term would not be reasonable and equitable.

[57] I find that conditions (1), (2), (3) and (5) above all not satisfied here. As Mr Oertel has said, he effectively surrendered control of the sale process to Ms Laing. He might not have been prepared to do that if the parties were agreeing that he should not only share in any gain on the sale of the property but also in any deficit. I cannot therefore say it is reasonable and equitable to imply a term in the contract.

[58] The term I would have to imply is also not so obvious that it "*goes without saying*". It is not clear to me both Mr Oertel and Ms Laing would have acquiesced. I consider it significant that Mr Oertel specifically sought to have the typed draft amended to make it clear that any balance he received was to be in addition to the adjustment sum. That corroborates his assertion that he was not willing to contemplate being required to contribute to any deficit. In his affidavit sworn 16 July 2020 Mr Oertel expressed concern at the sale process and suggested the property had been sold by Ms Laing to a friend. While it is clear that he has no direct evidence to support that claim it does emphasise why he was concerned that he was "*not consulted at any stage regarding the sale*".

[59] The implication of such a term would also arguably contradict Clause 8.2 which expressly excludes liability for debts the other spouse subsequently incurs, and Clause 14.2 which proscribes the parties from making any further claims "*both at law and in equity*".

[60] It follows that my conclusion is that the s 21A agreement does require Ms Laing to pay Mr Oertel the sum of $80,584 without deduction. I cannot interpret

or amend the agreement so as to require Mr Oertel to contribute to the costs that Ms Laing was unable to recover from the sale proceeds of the property.

[61] I do however agree that it is appropriate that I make orders in terms of the s 21A agreement under s 25 of the PRA as Ms Laing requests. That empowers the Court to use the other mechanism available in the PRA to enforce the material terms of the agreement.

KiwiSaver

[62] Ms Laing has asked that I make orders under s 31 to be served on the managers of her superannuation fund, Craigs Investments, requiring them to pay the sum of $48,663 from her fund to Mr Oertel.

[63] Section 31 of the PRA reads as follows:

> **31 Orders in relation to superannuation rights**
>
> (1) Where the relationship property to which any application under this Act relates includes property of the kind described in section 8(1)(i), the court may make any order under this Act, or any provision of any such order, conditional on either spouse or partner entering into an arrangement or deed of covenant designed to ensure that the other spouse or partner receives his or her appropriate share of that property, and every arrangement or deed entered into pursuant to any such condition shall have effect according to its tenor.
>
> (2) A copy of any arrangement or deed entered into pursuant to subsection (1) may be served on the manager of the superannuation scheme from which the entitlement is derived.
>
> (3) Where a copy of any such arrangement or deed is served on any such manager he or she shall, notwithstanding the provisions of any Act, deed, or rules governing the scheme, be bound by the provisions of the arrangement or deed.

[64] That section appears to contemplate that a division of superannuation funds will be affected by orders requiring spouses to enter into "*an arrangement or deed of covenant*". The section does not expressly authorise the Court to simply direct that the fund manager pay a particular sum to one of the parties.

[65] However, the practice of this Court is usually to receive evidence as to the terms of any trust, deed or restrictions on distribution of the funds, often in the form of a letter from the fund manager advising what they will require from the Court in order to make a distribution. That evidence was not provided here but I am willing to make an order requiring the fund manager to make a payment to Mr Oertel. I am going to limit the requirement to pay the sum of $48,663 rather than requiring the fund be paid in its entirety in reduction of the adjustment sum. I am doing that solely because Mr Oertel has not applied for an order to enforce his rights by a way of payment from the fund. The order that Ms Laing has applied for is limited to the amount of $48,663. However, that does not mean that she is released from the obligation to pay the balance of the $80,584 under the s 21A agreement. Her obligation remains.

[66] I will grant leave to the parties to come back for further orders or directions as to the form or wording of the order I make should the fund manager require any particular wording or direction. I am also granting leave for Ms Laing to ask that the order be amended so that the fund in its entirety be paid in reduction of the adjustment sum if she so desires.

The Jewellery

[67] In his affidavits sworn 16 July 2020 and 25 May 2020 Mr Oertel indicated that he wanted the Court to either make a direction that Ms Laing provide him with half of the jewellery or pay him the sum of $100,000 on account of the value of half of the jewellery.

[68] He does not have an application before the Court to vary or set aside the existing agreement and in any event, I have already found that I have no power to vary or amend agreements made under s 21A.

[69] Leaving to one side issues of any privilege attaching to the parties' negotiations during their mediation there is some evidence that there was an express agreement that Mr Oertel should receive a 50 percent share of the jewellery in the form of the exchange of correspondence referred to in paragraphs [21] and [22] above. That might

constitute supplementary agreement which a Court might be prepared to give effect to under s 21H of the PRA.[16]

[70] However, Mr Oertel has not made an application for orders under s 21H. Any such application would face a number of significant hurdles including the terms of Clause 14 of the agreement headed "*Comprehensive and Final Agreement*".[17] In the circumstance I find I do not have jurisdiction in the absence of any application and I decline to make any orders in relation to the jewellery.

Orders and Directions

1. Within 14 days of this judgment dated 20 August 2020, the respondent is to provide a copy of these orders to the fund manager of her KiwiSaver account, Craigs Investment Partners.

2. Within 28 days of this judgment dated 20 August 2020, the respondent's KiwiSaver fund manager Craigs Investment Partners shall disburse from the respondent's KiwiSaver Scheme (Portfolio No. [details deleted]) the full amount of her superannuation to be applied by her to the applicant to pay at least the sum of $48,663.

3. In the event that any further orders or directions are necessary in order to secure a payment from the superannuation fund, leave is granted for either of the party to file a memorandum, accompanied if necessary with any relevant correspondence from the fund managers. The matter is to be referred to me in Chambers. I reserve the right to make such further or additional orders as are necessary to give effect to these orders.

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[16] Alternatively, Mr Oertel may have another remedy such as he says that he relied upon assurances that he would receive that the jewellery would be accounted for on settlement to his detriment and in particular, allowed Ms Laing to recover jewellery which was stored at a property that he was occupying when he might have otherwise retained it.

[17] It might also be that other equities that come into play if the Court were asked to apply s 21H. For example, there is some evidence that Mr Oertel was able to receive the sum of $100,000 for shares in a company which was attributed no value for the purposes of the settlement.

4. Because Mr Oertel was self-represented I make no order as to costs.

Signed at Auckland this 20th day of August 2020 at am / pm

K Muir
Family Court Judge