EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

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IN THE FAMILY COURT
AT HASTINGS

FAM2014-020-000352
[2016] NZFC 10394

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	SASHA CLIFTON Applicant
AND	ROLF INGRAM Respondent

Hearing:	7 & 8 July & 18 August 2016
Appearances:	I P Squire for the Applicant G R Thornton for the Respondent
Judgment:	6 December 2016

RESERVED JUDGMENT OF JUDGE A B LENDRUM
[Property Relationship]

Introduction

[1] This judgment is the outcome of proceedings in which Ms Sasha Clifton (the applicant) made application to set aside a s 21 Property (Relationships) Act 1976 (the Act) agreement (the agreement) that she had entered into with Mr Rolf Ingram (the respondent).

[2] That agreement was completed on 21 August 2012. The applicant applied to set aside that agreement on 10 October 2014.

[3] Ms Squire is counsel for the applicant. Mr Thornton is counsel for the respondent.

Issues

[4] The applicant claims that to give effect to the agreement would cause serious injustice on the basis that:

(a) the agreement was unfair or unreasonable in light of all the circumstances at that time it was made; and/or

(b) the agreement became unfair or unreasonable in light of the changes in circumstances since it was made.

[5] She claims also that the agreement was entered into by her when she was under duress and/or the undue influence of the respondent.

[6] The respondent denies the applicant's claims and submits that:

(a) The applicant was not under any form of undue influence, coercion or duress when she signed the agreement; and

(b) Her property position both when the agreement was signed and at the end of their relationship was not significantly different from that when she commenced the relationship; and

(c) Accordingly she has suffered no serious injustice as a consequence of the agreement.

Background

[7] The parties began their relationship during the first quarter of 2010.

[8] At the time the relationship commenced the applicant had two adult children from a previous relationship and the respondent three minor children from his first marriage. The applicant worked for a [occupation deleted] and the respondent owned and operated a [occupation deleted] business.

[9] On October 2010 the parties became engaged to be married. In December 2010 the applicant moved into the respondent's home at [address 1 deleted]. Her sister moved into the home she had previously occupied at [address 2 deleted]. That property was owned by the [name of trust deleted]; a trust settled by the applicant and her solicitors.

[10] In March 2011 the applicant alleges that the respondent persuaded her to have the trustees sell the [address 2 deleted] property on the basis that he would provide for her financial needs and those of her daughters.

[11] In April 2011 the respondent required surgery and the applicant took unpaid leave to care for him. In May 2011 the applicant returned to work, but only for reduced hours, so that she could continue to care for the respondent and his children.

[12] In that month the [name of trust deleted] sold the [address 2 deleted] property. It made a distribution of $100,000 to the applicant. It is claimed the trust made a loss, albeit unquantified, on the sale.

[13] In June 2011 the applicant alleges the respondent required her to reduce her work hours further so that she would be more available for the respondent and his children. She was advised by her employers she could not further reduce her hours. She alleges the respondent then sought to have her resign on the same basis that he would provide financially for her and her children.

[14] On 21 June 2011 the applicant tendered her resignation. Shortly thereafter the applicant learned her job was to be made redundant. She then withdrew her resignation.

[15] In July 2011 the parties began relationship counselling with Ms Odette Hoffmann.

[16] On 26 July 2011 the applicant received her notice of redundancy.

[17] That same month the respondent had a further [medical details deleted] operation and the applicant nursed him again.

[18] In November 2011 she received a redundancy payment of $35,000.

[19] In or about February 2012 the parties began counselling with a sex therapist Ms Naada Bracey.

[20] In the January/February 2012 period the applicant alleges the respondent first raised the issue of a contracting out agreement and advised he would have his solicitor Mr Robinson prepare the same. It is agreed that in March 2012 the respondent showed the applicant a copy of the draft agreement. A copy was also emailed by Mr Robinson to the applicant's solicitor Mr McAra.

[21] On 7 March 2012 the parties attended on Dr Koch their general practitioner. At that time the applicant alleges that she advised Dr Koch of the abusive behaviour of the respondent towards her.

[22] The s 21 property agreement was completed on 21 August 2012.

[23] The parties finally separated on 6 May 2013.

[24] The applicant filed her proceedings on 10 October 2014.

Section 21 agreememt

[25] The s 21 Property (Relationships) Act agreement, is as Mr Thornton submitted, what might be termed a standard form agreement as at the date it was completed. The essential nature of the agreement in terms of the decisions that I am required to make are as follows:

(a) The assets owned by each party at the time of execution of the agreement were to remain their own separate property.

(b) Any property acquired at a later point in joint names would be relationship property.

[26] Given the date of execution of the agreement, and the termination of the relationship some nine months later, the only item of property that may have fallen into the category of post agreement acquired property was the purchase of a section at [location deleted]. However the evidence discloses clearly that that property, while contracted for under the joint names of the parties, was settled under the name of the respondent alone. Moreover the applicant made no financial contribution to its purchase.

[27] Again, in terms of the issues I have to determine, the essential aspects of the agreement for the applicant were that her separate property included:

(a) The $100,000 distribution she had received from the [name of trust deleted] on the sale of the property.

(b) A [vehicle details deleted] motor vehicle or any vehicle purchased in substitution therefore. The [vehicle details deleted] was a gift to the applicant by the respondent.

(c) Any income earned by her during their relationship.

[28] It is of note that the agreement contains a contradiction. That is as between Schedule A(o) and Schedule B(d) and provides for the engagement ring, gifted to the applicant by the respondent, being deemed to be the respondent's separate property.

[29] However, I record that no issue is taken with the form of the agreement by either party, and the applicant has made no claim in respect of the "gift".

[30] The commencement point for any consideration of the issues surrounding the agreement is the form the agreement itself. These points are clearly established by the evidence:

(a) There is no dispute the agreement is fully compliant with the procedural requirements of s 21F of the Act; and accordingly

(b) The agreement provides certainty insofar as the respective property interests of the parties were concerned; and is thus

(c) Binding on the parties; provided only that

(d) The applicant is unable to have it set aside on the grounds submitted.

[31] The preparation process for the agreement was clearly as follows:

(a) A first draft was prepared by Mr Robinson the solicitor for the respondent.

(b) That draft was forwarded to the applicant's lawyer Mr McAra by email on 2 March 2012.

(c) The email requested that Mr McAra advise the applicant with respect to the agreement and further advise of any required amendments or additions.

(d) On 19 April 2012 Mr McAra confirmed that the "property agreement is fine" but sought three minor amendments. Mr Robinson was invited to forward a final version for execution by the applicant.

(e) The final form agreement was forwarded by Mr Robinson to Mr McAra by letter dated 23 May 2012. It included the amendments sought.

(f) It was signed, as I have set out above, on 21 August 2012 and in a manner fully in accord with the provisions of s 21F of the Act.

[32] In the evidence before the Court there is no written record of either the applicant, or Mr McAra, disputing the substantive content of the agreement as prepared by Mr Robinson. Additionally there is no evidence that the applicant complained to Mr McAra of the alleged pressure being placed upon her by the respondent with respect to either the terms of, or execution of, the agreement. It is a matter of record that Mr McAra has not filed any affidavit in respect of this matter.

[33] It is apparent from the evidence that the applicant had at least two meetings with Mr McAra. She executed the agreement during the second meeting. Those meetings were some months apart.

[34] Finally there is no evidence that the applicant and respondent, although engaged, had decided upon a wedding date and that completion of the agreement was a pre-condition of a marriage occurring.

The law

Serious injustice s 21J

[35] The applicant relies upon ss 21J and 21G of the Act.

> **21J Court may set agreement aside if would cause serious injustice**
>
> (1) Even though an agreement satisfies the requirements of section 21F, the Court may set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.
>
> (2) The Court may exercise the power in subsection (1) in the course of any proceedings under this Act, or on application made for the purpose.
>
> (3) This section does not limit or affect any enactment or rule of law or of equity that makes a contract void, voidable, or unenforceable on any other ground.
>
> (4) In deciding, under this section, whether giving effect to an agreement made under section 21 or section 21A or section 21B would cause serious injustice, the Court must have regard to—

(a) the provisions of the agreement:

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

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

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

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

(f) any other matters that the Court considers relevant.

(5) In deciding, under this section, whether giving effect to an agreement made under section 21B would cause serious injustice, the Court must also have regard to whether the estate of the deceased spouse or **[[**partner**]]** has been wholly or partly distributed.

21G Other grounds of invalidity not affected

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

[36] In her claim the applicant has relied upon s 21J(4)(c) that the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made and subs (d) that 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).

[37] The applicant also relies on s 21G which does not limit any rule of law or equity that makes a contract void, voidable, or unenforceable on any other ground. It is noted that this term is also repeated as subs (3) of s 21J.

[38] The applicant relies on this further ground (s 21G) because it permits her to establish the equitable causes of action of duress and/or undue influence notwithstanding the effect of the parties' compliance with s 21F.

The agreement was unfair or unreasonable at the time it was entered into

[39] The law is clear that a Court may set aside an agreement pursuant to s 21J of the Act if it is satisfied on the balance of probabilities that giving effect to the agreement would cause "serious injustice".

[40] The onus is on the applicant to clearly demonstrate serious injustice. It is important to note that the Court must consider the potential serious injustice to both parties.

[41] The leading authority in respect of this issue is the case of *Harrison v Harrison*[1]. This judgment followed the 2001 amendment to the Act which included the insertion in section 21J(1) of the need for the injustice to be of a serious nature.

[42] In *Harrison* the Court of Appeal held as follows:

> [84] In cases concerning contracting out agreements, it will usually be the case that one of the parties (being the party with the most assets at risk) will have driven the proposal that such an agreement be entered into. The legislation provides substantial protection for those who contract in this area in the form of the requirements for legal advice and certification. This might be thought to be a legislative acceptance of the reality that such agreements are usually negotiated in pressured circumstances. In most instances, contracting out agreements are signed against express or implicit threats directed at the underlying relationship. Such a threat may be along the lines of that present in *Wood* of, "Sign the agreement or I will call off the wedding". In the case of de facto partners about to become subject to the Property (Relationships) Act, the threat might be along the lines of, "Sign the agreement, or I am going to terminate the relationship". It would be very destabilising of the contracting out regime for the Courts to hold that the sort of pressure which is almost always present in such cases is itself a basis for holding that an agreement is unjust.
>
> [90] It will almost always be the more affluent party who wants a contracting out agreement and it will be often be the case that the other party only signs the agreement given the implications for the relationship if he or she declines to do so.

[1] *Harrison v Harrison* [2005] 2 NZLR 349 (CA).

> [91] We are conscious that the latter way of looking at the situation might be thought to be a little bleak and emotionless. It is, however, consistent with the legislative scheme. In s 21J(4)(e) the legislature directed the Courts to have regard to "the fact that the parties wished to achieve certainty". This requirement presupposes that parties to such an agreement did seek "to achieve certainty". The drafting certainly does not appear to contemplate an inquiry by the Court into the states of mind of the parties.
>
> [92] Fogarty J was heavily influenced by the extent to which the effect of the agreement deviated from the operation of the Property (Relationships) Act.
>
> [93] There are two respects in which this approach seems to us to be wrong. The first is that it seems to us to be unreal to measure the fairness and reasonableness of this agreement against the outcomes available under the Property (Relationships) Act. The second is that while the relevant statutory regime necessarily provides the context in which to consider fairness and reasonableness of a contracting out agreement, that consideration must necessarily be nuanced and allow for what is inherent in the exercise of contracting out. To some extent these considerations overlap.
>
> [112] The consequence is that, at least for contracting out agreements, "serious injustice" is likely to be demonstrated more often by an unsatisfactory process resulting in inequality of outcome rather than mere inequality of outcome itself. Parties are in general free to agree to quite different arrangements to those otherwise imposed upon them by the Act.
>
> [115] The pressure to which she was subject was generally of a kind which is likely to be present in many, if not most, situations in which contracting out agreements are entered into, ie making continuation (or resumption) of a particular relationship conditional upon an agreement being signed.

[43] In helpful submissions, filed immediately prior to the hearing, Ms Squire referred me also to the case of *Babylon v Babylon*[2]. In that case Justice Heath held that an agreement could be set aside. He held;

[2] *Babylon v Babylon* HC Auckland CIV-2006-404-3217, 12 October 2007.

> "In light of Mrs Babylon's psychological and emotional state at the time she attended to sign the agreement, her inability to process advice received in a rational manner within the time available, her lack of knowledge of the intended creation of the trust immediately after the matrimonial property agreement had been signed and Mr Babylon's intention to put the family home beyond her reach (for relationship property purposes) I am satisfied that, notwithstanding formal compliance with the requirements of s 21F of the Act, the Judge was right to set aside the matrimonial property agreement.

[44] Accordingly it will be necessary to establish whether the evidence supports the applicant's contentions that such a threshold has been met in this case.

Duress

[45] As a consequence of my view of the evidence I received in this case it is appropriate that I note that one of the oldest maxims of equity is "he who comes into Equity must come with clean hands"[3]. Therefore a person who seeks to invoke equitable relief in relation to a particular transaction must not have acted improperly in relation to that transaction. 'Clean hands' is a personal defence.

[46] In a decision of the Court of Appeal in *Haines v Carter*[4] the Court held:

> … duress necessarily involves the illegitimate application of pressure by threats. The illegitimacy of the pressure may lie in the illegality of the actions threatened or, alternatively, may be associated with the illegitimacy of the particular threats in the context in which they are made.

[47] In *Pharmacy Care Systems Ltd v the Attorney-General*[5] the Supreme Court held that the law relating to duress had been "sufficiently clear and settled by the Privy Council in *Attorney-General for England and Wales v R*".[6] In that latter case the Privy Council adopted the formulation set out by the House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*.[7]

[48] This approach and test has been more recently confirmed by the Court of Appeal in *McIntyre v Nemesis DBK Ltd*.[8]

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[3] *Jones v Lenthal* (1669) 1 Ch CAS 154.
[4] *Haines v Carter* [2001] 2 NZLR 167.
[5] *Pharmacy Care Systems Ltd v the Attorney-General* (2004) 17 PRNZ 308 (SC).
[6] *Privy Council in Attorney-General for England and Wales v R* [2004] 2 NZLR 577 (PC).
[7] *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 (HL) at [400].
[8] *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329 at [25].

[49] Accordingly the test I must apply in this case is as follows:

(a) Was there a threat against, or the exertion of illegitimate pressure on, the applicant?

(b) If so, did the threat result in the applicant being coerced into entering into the agreement?

(c) If the result of that analysis is a finding that there was duress, did the applicant affirm the agreement?

Undue influence

[50] Undue influence is the second equitable doctrine which the applicant asserts as a ground upon which the Court may set aside this agreement.

[51] The elements of this cause of action that the applicant must demonstrate are present are that:

(a) The respondent had a special capacity and opportunity to influence her.

(b) That influence was exercised.

(c) That influence was misused but in the sense that there must be something unconscionable about the respondent's conduct and he must have induced the applicant to enter the contract by unacceptable means.

(d) That influence bought about the transaction; that is the execution of the agreement.

(e) That the influence produced a state of impaired free will such that the act of the applicant in signing the deed was not a free and voluntary act.

[52] In Contractor Bonding Limited v Snee[9]: Richardson J gave a well accepted statement of principle in respect of this doctrine. He said:

> … undue influence consists in the gaining of an unfair advantage by an unconscious use of power by a stronger party against a weaker in the form of some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by the stronger party. It is directed at conduct within a relationship which justifies the conclusion that the disposition or agreement was not the result of the free exercise of the disponer's will. The doctrine is founded on the principle that equity will protect the party who is subject to the influence of another from victimisation.

[53] In *Royal Bank of Scotland Plc v Etridge*[10] in the House of Lords Lord Nichols stated:

> Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused.

[54] Later in his judgment he equated the words "undue" in the undue influence formulation as synonymous with the words "improper" and referred to undue influence as an unacceptable form of persuasion. He also added such conduct was unacceptable conduct and an abuse of influence and a wrong.

[55] Professor Bigwood[11] wrote following *Etridge*:

> It follows from such statements that the publicly announced objective of undue influence law is not to rescue people from the consequences of their own folly, imprudence, recklessness, extravagance, vice or want of foresight. Rather it is to protect people from being forced, tricked or mislead in any way by others into parting with their property.
>
> The focus of the enquiry thus falls squarely on the manner in which the plaintiff's transactional assent was produced relative to the conscience of the defendant.

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[9] *Contractor Bonding Limited v Snee* [1992] 2 NZLR 157 at 165.
[10] *Royal Bank of Scotland Plc v Etridge (Number 2)* [2002] 2 AC 773.
[11] Professor Bigwood *Explotative Contracts* (Oxford University Press, Oxford, 2003) at 8.2.

[56] In *Hogan v Commercial Factors Limited*[12] the Court of Appeal held that *Etridge* was declaratory of the law of undue influence and its principles were most likely to be applied in New Zealand.[13]

[57] Accordingly undue influence requires the claimant to prove either:

(a) Actual undue influence by evidence that the defendant coerced her consent; or

(b) That an inference can be drawn of undue influence from proof that the claimant was in a relationship of influence with the defendant and secondly that the transaction is one which is inexplicable and cannot be reasonably accounted for by the relationship.

Evidence

[58] It is stating the obvious, but necessary in this case, to note that the credibility, honesty and reliability of witnesses is of key importance in enabling a Court to make determinations in respect of factual disputes. Credibility in this sense means:

> The quality that makes something, as in a witness or some evidence, worthy of belief.[14]

[59] In *Williams v Williams*[15] Judge Callinicos set out a most useful statement as regards credibility and reliability of evidence in family law cases. He said:

> [21] In assessing whether the evidence of any given witness is credible or reliable one cannot overlook the inherent fact that human beings can be complex, they are often affected by emotion and anxiety, not merely of the hearing but the experiences of the relationship and its breakdown. It is not unusual in Courts such as this that many witnesses may recall or perceive events in a manner shaped by their emotional positions more than from objective recall. Other witnesses are influenced by the outcome they seek. Judges must be attuned to the importance of not approaching witnesses as machines or robots, devoid of those contaminating qualities. In assessing

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[12] *Hogan v Commercial Factors Limited* [2006] 3 NZLR 618 at [36].
[13] See also *NZ Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 which follows the Court's position in *Hogan*.
[14] Bryan A. Garner (ed.) *Blacks Law Dictionary* (10th ed., Thomson Reuters, Minnesota, 2014).
[15] *Williams v Williams* [2015] NZFC 4905.

> witness reliability, due allowance is and must be made for those characteristics.

[60] It is equally clear that what might be termed positive evidence is evidence that is consistent, clear, cogent, credible, compelling and, if possible corroborated. On the contrary less satisfactory evidence is evidence marked by minimising, diverting, denying, blame and justification. To that I would add also evidence that is inconsistent, implausible, unreliable and unconvincing.

[61] I record also that the basic tenets of the Evidence Act being relevance and reliability, are still fundamentals in proceedings under the Family Law Acts[16]. As stated in *AB v CD*[17]:

> Evidence is admissible if it is relevant but also needs to be probative and it needs to be material; that is will it tend to prove or disprove an issue that the Court needs to determine in the particular application.

[62] Credibility plays a significant part in this case. That is because on several important issues the parties have had to admit to events or actions that they had previously either denied, or had filed evidence alleging a different nature to their action.

[63] In my view the respondent's evidence was significantly challenged by his clear, complete, and sworn, denial of any of the actions of abuse as alleged by the applicant. In my view those denials lack credibility in a significant way. They were countered by a wealth of allegations both from the applicant, and importantly and unchallenged from others, of his alcohol induced unsavoury and distasteful behaviour towards the applicant.

[64] Additionally her allegations as to his sexual demands were clearly corroborated by Ms Hoffmann and, indeed, as to his practice, by himself in cross-examination. These allegations were further corroborated by the parties' attendances on Ms Bracey. If there were not acute issues of sexual dysfunction between them it is clear they would not have consulted her.

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[16] *H v MSD* HC Wellington CIV-2009-485-403, 13 August 2009, Dobson J at [93].
[17] *AB v CD* HC Christchurch CIV 2010-409-223, 7 February 2011, Lang J at [42].

[65] In conclusion there is the issue of his tax position vis–à-vis the Inland Revenue Department. The respondent sought to implicate the applicant in his tax evasion scheme when the evidence is clear that his actions of tax evasion predated his relationship with her.

[66] However the applicant is also in a similar situation. This is because her actions in seeking, in however much an amateur fashion, to blackmail the respondent in the hope of attaining amended terms of the s 21 agreement, leave me in a position where I consider I must treat much of her evidence with real caution. Moreover in my view there was clearly an element of her evidence being influenced by, or tailored to, the outcome she seeks.

[67] I record that on the applicant's interlocutory application I granted, on 16 July 2015, her application that the parties counsellor Ms Hoffman, their sex therapist Ms Bracey and their GP Dr Koch release upon appropriate, and unchallenged, terms the notes of their attendances upon the applicant and respondent in respect of the applicants allegations of physical, psychological, sexual or fiscal abuse.[18]

[68] While it cannot be said that the three professionals were happy with this order they all complied. Indeed Ms Bracey and Dr Koch gave evidence at the hearing. I found that Ms Bracey gave her evidence very fairly and professionally. She confirmed there was a power imbalance in the parties' relationship which she found to be in favour of the respondent.

[69] Most unfortunately I am not able to say the same for the evidence of Dr Koch. His compliance with the Court's directions was grudging, late and incomplete. His manner when cross-examined was similar. When he had to admit to the fact of a joint consultation with the parties which he had previously not acknowledged he attempted to divert and then minimise. As a consequence I find that I can give little weight to his evidence.

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[18] Judgment of 16 July 2015.

[70] The evidence of these three professionals was on balance inconclusive as to the allegations made by the applicant. However more importantly there was also no evidence, and particularly in the notes of Ms Hoffmann, to indicate the applicant had complained of being pressured or coerced into signing the agreement. The applicant herself acknowledged this.[19]

Analysis

Serious injustice s 21J

[71] In this case the evidence is that at the start of the relationship the applicant had, or claimed to have, the following property:

(a) An interest in the [name of trust deleted] property in which she lived at Hastings.

(b) Her income from her job in [occupation deleted] and its attendant benefits of superannuation, life insurance and discounted medical insurance.

(c) A car worth approximately $7000.00 at trade in on 2 November 2010; some eight months after the relationship commenced.

(d) A bank account holding $20,000 approximately. I note there was no independent evidence provided as to either this account or quantum.

[72] For his part the respondent had considerable property including:

(a) the family home, with a value between and $1,700,000 and $2,000,000; and

(b) his business; and

(c) motor vehicles.

[19] NOE p 25.

The latter two were also of substantial value.

[73] The evidence is also, and I accept it, that at the time the agreement was signed the applicant's property had changed in the following manner:

(a) While she had received the sum of approximately $100,000 from the [name of trust deleted] when the residential property was sold an undisclosed amount of those funds had been dissipated by the time the agreement was signed.

(b) She was no longer employed at the [name of employer deleted] and therefore no longer enjoyed the benefits attendant on that employment.

(c) She had received a redundancy payment of $35,000 but was in the process of expending that entire sum on her own support and her contributions to the respondent's home and his children.

(d) She owned a new motor vehicle worth some $65,000; gifted to her by the respondent.

[74] The respondent retained ownership of all of the property he had held at the start of the relationship together with the applicant's engagement ring worth $45,000.

[75] By the date of separation while the applicant retained the above assets the quantum of funds in her various accounts were further depleted. However she did possess the following additional assets:

(a) A half share investment in [name of company deleted] worth $52,500 plus GST of $7,875 to her. The investment had a return available, if utilised, of approximately $5,000 per annum for the applicant.

(b) While she had used some of her remaining funds to purchase a motor vehicle for her daughter at a cost of $25,000 the respondent had

"arranged" for her to receive a GST refund in respect of her purchase of that vehicle.

[76] I have set out above[20] the details of the preparation of the agreement, the time that elapsed between the first draft of that agreement being provided to the applicant by way of her solicitor, and her execution of the final document.

[77] I note that in the *Harrison* decision[21] the Court attached considerable weight to the reasoning in *Wood v Wood*[22] with regard to agreements or contracts that seek to protect property sourced from outside the relationship. That was clearly the object of the agreement in this case for the respondent.

[78] Again as I set out earlier[23], and will discuss again later in this judgment, the Court in *Harrison* considered it highly relevant that the justice or otherwise of any agreement requires that both parties position be given equal consideration.

[79] In this case, as in *Harrison* and *Gemmell v Harlow*[24], there is no evidence that this applicant questioned the validity of the agreement until after the parties had separated.

[80] In this case at the time the agreement was prepared and signed each party had a choice not to remain living with the other. Again, as in *Harrison*, the applicant had the option to determine whether she would end the relationship and seek her rights at law or remain in the relationship and accept the agreement. This case can be distinguished from that of *Gemmell* because in that case the applicant was required to leave the relationship home immediately upon receipt of a notice to leave. No such requirement existed here. The applicant left of her own volition. Indeed the respondent did not wish her to leave.

[81] I record that her allegations of the respondent's abuse of her significantly predate the period March to August 2012. Indeed while she claims they continued

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[20] At [31].
[21] Above [37].
[22] *Wood v Wood* [1998] 3 NZLR 234.
[23] Above [42].
[24] *Gemmell v Harlow* (2006) 25 FRNZ 887.

throughout that period and thereafter until their final separation, the evidence is that the respondent behaved in a similar way for almost the entirety of the relationship. It is noteworthy, also, that the parties were attending counselling, in one form or another, prior to the agreement being prepared and completed.

[82] The applicant's case, set out in Ms Squire's submissions, leave little doubt that the applicant's financial and employment position changed for the worse as a consequence of this relationship. However that change in my view of the evidence had begun to occur well before the time the agreement was proposed, and subsequently executed. That trend continued until the time the parties separated finally some nine months after the agreement was executed.

[83] In my view, and as in *Harrison* and *Gemmell*, this applicants position is similar to that of the wife in *Harrison* where the Court stated that such a position:

> Naturally invites sympathy and thus an approach which leaves her with a substantial reward has some attraction.[25]

[84] However the Court determined this could not be a decisive factor. As it noted[26] the reasoning and approach of the Court in regard to contracts signed in similar circumstances, and under such pressure, must be based on the premise that such pressure is "broadly of the kind that the legislature must have regarded as acceptable".

[85] In this case I do not think that there was extreme emotional psychological pressure placed upon the applicant although I accept that for her a combination of the respondent continuing to behave as he had from soon after the relationship began, combined with his desire to effect the completion of the agreement, meant that she was under significant pressure to complete the agreement.

[86] However in my view there is no indication, or indeed allegation that, when the applicant attended on Mr McAra to sign the agreement, she was:

(a) Unable to process his advice in a rational manner; and

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[25] *Harrison* at [77].
[26] *Harrison* at [87].

(b) Could not do so in the time available; and

(c) She did not have available to her sufficient knowledge of their respective property.[27]

[87] Additionally I do not consider that the pressure the respondent exerted was such as to make the agreement unfair or unreasonable either at the time of execution or later. The respondent was fully entitled to seek such an agreement so that he could protect his separate property, accumulated over a number of years prior to his relationship with the applicant, and which would, otherwise, have become relationship property with the effluxion of only a little more time.

[88] Finally as I have already noted *Harrison* reminds that serious injustice applies to both parties. In my view had the respondent not taken the steps he did then he was the only party who risked suffering serious injustice.

[89] Accordingly I consider that the threshold of serious injustice, as determined in *Harrison*[28] has not been met in this case. Confirming my view that the injustice claimed has not met the level of seriousness required is the fact that this was not a case where an unsatisfactory process resulted in an inequality of outcome.[29] To the contrary the process was unimpeachable and the outcome was one where each retained the property that they had brought to a relationship only two and a half years earlier, or property in substitution thereof. In particular while the applicant did not have her home she had an investment and a car with a combined value in excess of the distribution to her from the [name of trust deleted].

Duress and undue influence

[90] I turn now to consider the applicant's applications in respect of duress and undue influence.

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[27] *Babylon* at [43].
[28] *Harrison* at [38].
[29] *Harrison* at [112].

[91] It is clear that these grounds, advanced to void the agreement, must relate to the applicant's execution of the agreement. Accordingly in my view the events to be considered can only be those events which occurred prior to 21 August 2012.

[92] Mr Thornton for the respondent in his final submissions to me[30] submitted that there is no direct evidence of duress and/or undue influence in the lead up to the applicant signing the property agreement. He acknowledged that there were allegations of abuse which the applicant claimed were relevant to these two causes of action. The applicant for her part, by way of Ms Squire,[31] submitted that her execution of the agreement was because she was too scared of the respondent, as a consequence of his abusive behaviour, not to do so.

Duress

[93] I adopt the process most recently set out by the Court of Appeal in the *McIntyre v Nemesis DBK Ltd*[32] case.

Was there a threat against, or the exertion of illegitimate pressure on, the applicant to sign the agreement?

[94] On the evidence before me and on the balance of probabilities, I can find no meaningful threat or threats made by the respondent to the applicant in respect of her execution of the agreement. As I have noted earlier I do accept that the respondent exerted some pressure on the applicant to sign the agreement. I consider that pressure was exerted because, although a first draft had been prepared of the agreement in March 2012, and the applicant had engaged her own lawyer to act for her, the agreement was not signed prior to 21 August 2012. That lawyer had acted for her previously. She approved the draft in principle making only certain minor modifications. I note that those were accepted by the respondent.

[95] Moreover I find that the pressure applied was not illegitimate or improper in any way. As the Courts have emphasised for some time, notably in *Harrison* in

[30] Closing submissions for respondent 8 September 2016 page 5.
[31] Closing submissions for applicant.
[32] *McIntyre v Nemesis DBK Ltd* at [48].

respect of couples in a relationship, legitimate pressure does not constitute duress even though it may in fact compel a plaintiff to act against her will. It was not illegitimate or improper for the respondent to propose to do that which he had a legal right, power or liberty to do; which was to protect his own interests in the circumstances of a relationship which had clearly changed in both nature and degree by early 2012.

[96] In particular there is no evidence here that the respondent was leveraging against the applicant's rights. He did not at any time threaten to remove the rights the applicant might have obtained under law. I am clear that it cannot be improper pressure simply to put a "hard choice" to the applicant. The applicant did not have to sign the agreement. She had a reasonable choice to end the relationship at that point and issue proceedings if she thought fit so to do.

[97] In my view then in order for the pressure to be illegitimate or improper it must have been:

(a) Independently wrongful because it threatened the applicant's existing rights (which in this case on its face the agreement did not do); or

(b) It was unconscionable in the circumstances (which cannot be the situation in this case when the agreement accorded each party all the property they bought into the relationship).

[98] Furthermore in this case the respondent had a legitimate interest in putting the choice to the applicant. To hold otherwise would mean that he would have had no choice but to remain in an unstable relationship, as clearly it was becoming at the time, with the result that the applicant would obtain significantly increased rights against his property pursuant to the Act.

If so, did that threat result in the applicant being coerced into entering into the agreement?

[99] In the House of Lords decision *The Universe Sentinel*[33] and the Privy Council decision *Pao On v Lau Yau Long*[34] the Courts defined the essence of this element of duress.

[100] In the first of those cases the Court found that an improper pressure was a pressure "amounting to compulsion of the will". In *Pau On* the Privy Council made the following comment:

> In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did nor did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All those matters are … relevant in determining whether he acted voluntarily or not.[35]

[101] In this case it is submitted by the applicant that the respondent's behaviour toward her was such that effectively it became a compulsion of her will. However when I consider the evidence before me I do not think that this submission is made out. My reasons for that view are that notwithstanding the many allegations made against the respondent of what I will call "bad behaviour", and being an amalgam of;

(a) Significant consistent and regular abuse of alcohol combined with "boorish" type behaviour both in public and private; and

(b) Continual pressure for sexual relations

the evidence discloses that behaviour had been a consistent presence in the relationship from almost the beginning of the relationship, and certainly from no later than the time the applicant moved into the respondent's property in December 2010.

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[33] *The Universe Sentinel* [1983] A.C. 366 (HL).
[34] *Pao On v Lau Yau Long* [1980] A.C. 614 (PC).
[35] At 635.

[102] Additionally in respect of the execution of this agreement, there does not, on the evidence before me, appear to have been any greater, or more marked, behaviour leading to an increased pressure being placed on the applicant such as to coerce her into signing the agreement. The only evidence was her assertion that the respondent would badger her[36] to sign, be angry with her[37] or abuse her about signing[38] the agreement.

[103] When I consider the test set out in *Pau On* and I acknowledge that the respondent's requirement of the agreement, and his pressure to have the applicant sign it, gave her a clear, although not necessarily pleasant, choice to make. However she did have a choice which was to leave the relationship at that point. If she had done so she would not have further consumed the funds which the agreement left for her as her separate property and which I accept she had been spending to maintain herself during the relationship. Moreover there is no evidence I can rely upon of any protest by the applicant. If there had been then it is reasonable to expect her solicitor would have known of it; and as I have already noted he has been "silent" in these proceedings.

[104] In making those determinations I accept the respondent's evidence that the applicant had the free and unfettered use of his credit card for matters relating to her daily living. However I also accept that the applicant felt she had to make certain payments from her own funds towards the relationship expenses. Her position on this issue is credible, and not surprising, in all the circumstances of this case.

[105] However that does not derogate from the fact that the applicant had a choice even if she did not like the choice. The fact that she may have had financial hardship as a result does not in itself meet this element of duress.

[106] Accordingly when I review all the evidence on this element I find that it is not consistent with a finding of duress. The applicant had a full range of legal options available to her. She had her own solicitor attending on her to provide counsel with respect to the agreement. Mr McAra had been her counsel for some

[36] NOE p 8.
[37] NOE p 9.
[38] NOE p 11.

time and she reposed trust in him. In these circumstances I cannot accept her claim that she could not leave the respondent because she was completely under his control.[39] Indeed she did just that only a few months later. If she could leave then because of his continued behaviour she could have equally done so in August 2012. In my view this is a part of the applicant's evidence which falls into the category I referred to earlier.[40]

[107] Moreover in accepting the agreement, as she did, the applicant entered into the prospect of a long term relationship with the respondent where relationship property would have accrued pursuant to the agreement. The fact that did not eventuate and that, on her construction of events, the respondent's behaviour drove her from the relationship, cannot in my view satisfy the essential elements of duress in respect of her execution of the agreement.

Did the applicant affirm the agreement?

[108] As a result of my conclusion that duress is not made out in this case it may be thought unnecessary to consider the last element of affirmation. However in my view, and for completeness, I include my determination on this issue.

[109] In *Pharmacy Care Systems Ltd v Attorney-General*[41] the Court of Appeal held that a failure to take timely steps to void the agreement, said to be made under duress amounts to affirmation.

[110] I consider that on the evidence before me there were no steps taken by the applicant to void the deed until significantly after the relationship came to an end. More specifically prior to separation there is no evidence before me of any protest whatsoever of duress, or indeed undue influence, by the applicant in regard to the final agreement. Nor is there any significant or credible evidence to suggest that the applicant's affirmation of the agreement, by continuing the relationship, occurred because she was operating under any duress.

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[39] NOE p 20.
[40] At [67].
[41] *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) at [112] and followed in *McIntyre.*

[111] To the contrary, all the evidence discloses is a continuation of the respondent's regular, and frequent, unpleasant behaviour. While this was undoubtedly seen as unsavoury by the applicant, it was no more, and no less, than his behaviour, as she alleges, from almost the beginning of the relationship; and, on her own evidence, April 2010. As such it was behaviour which the applicant tolerated, if not accepted, from that time until the date of separation.

[112] Accordingly in my view the applicant's action, in staying in the relationship without evident protest, and accepting the continuing financial arrangements between her and the respondent, both in accord with the final agreement, and in terms of their daily living, amounted to affirmation of the agreement.

Undue influence

[113] In this area I must follow the process set out in *Etridge*[42] as confirmed by the New Zealand Court of Appeal in *Hogan*[43] and subsequently endorsed in *NZ Venue and Event Management.*

Was this a relationship of influence and if so was it exercised?

[114] In *Wilkinson v ASB Bank Limited*[44] the Court held that the relationship between husband and wife is no longer automatically regarded as creating a special disability but is merely one inherently at risk of undue influence. If that is the case as between husband and wife it is difficult to assume that a de facto relationship, particularly of relatively short term duration, should be deemed a relationship of influence.

[115] In any event there is no independent evidence that the applicant trusted the respondent in such a manner that she simply signed the agreement because he asked her to do so. In fact the evidence is to the contrary. It is clear that she prevaricated in terms of signing the agreement for a period of some several months during which,

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[42] *Etridge* at [7].
[43] *Hogan* at [9].
[44] *Wilkinson v ASB Bank Limited* [1998] 1 NZLR 675.

as I have found earlier, she was placed under some pressure by the respondent. That pressure was not however improper in my view.

[116] To meet this element there must have been some clear and unequivocal evidence that the applicant was particularly susceptible to causative influence, or persuasion, by the respondent in connection with her decision making on such a major issue as the agreement; that influence or persuasion being within the scope of the parties' special relationship. In my view the authorities show that only a high degree of trust or influence will result in the relationship being subject to fiduciary regulation.

[117] I consider the test here is really whether the respondent acquired such a degree of ascendancy over the mind of the applicant that she was effectively deprived of the power of independent choice with respect to the agreement. That degree of ascendancy would mean that whatever choice she did express might cease to be her choice but rather become more the act and will of the respondent.

[118] However I consider the following evidence indicates that this was not a relationship where the respondent was able to influence the applicant into signing the contract against her will:

(a) The respondent was not entrusted with the management of the applicant's financial affairs.

(b) Rather the applicant controlled and kept her financial affairs separate to a significant degree; particularly in respect of the bulk of the funds received from the [name of trust deleted] and from her redundancy.

(c) While I accept in considerable degree that the respondent's behaviour towards the applicant within the relationship was offensive, boorish and probably, at times, degrading there is no evidence that the applicant was not able to handle that; albeit with difficulty and distress at times. Support for this view can be seen from her decision to remain within the relationship after the completion of the

agreement despite a continuation of that behaviour. Therefore, while highly unpleasant at times, the essence of their relationship was that it was one where the applicant accepted this behaviour, over almost the entire period of the relationship, and yet remained with him until separation.

(d) While she prevaricated over completing the agreement, and being in fact against a background where she claimed that the respondent had said he would never need such an agreement, the fact is that she saw her lawyer, reviewed the draft, made some minor amendments, and then in the fullness of time signed the final agreement after receiving independent advice from her lawyer.

(e) Moreover there has been no question of the efficacy of that advice. Nor has the solicitor sworn an affidavit which might support a contention that the applicant's will had been overborne. Finally there can be no doubt that his advice was independent.

(f) The applicant was familiar with the terms of the agreement by the time she signed it in final form. There can be no dispute that the applicant fully understood the nature and legal effect of the final deed. While the applicant may have been unhappy about certain aspects of it I consider it is clear, given the parties were looking to purchase a section for a home in [location deleted], that she considered, at that time, they had the basis of a long term future relationship.

(g) Clearly in signing the agreement and remaining in the relationship, the applicant *made a choice* that she did not want to leave the relationship at that time. Such a choice in my view obviates any issue of a relationship of influence.

[119] In my view all this evidence is inconsistent with the applicant surrendering control over her decision making to the respondent. Accordingly I do not consider

there was a relationship of influence and therefore there can be no exercise of that influence.

Was the transaction clearly explainable or did the respondent induce the applicant to sign the agreement by unacceptable means?

[120] In *Etridge* the Court held that even if a special relationship of influence exists between the parties to an impugned transaction, the inference of causative undue influence is not drawn, until a transaction is entered into whose nature and terms are such that they indicate, prima facie, that the transaction was the result in this case of the respondent exploiting his special influence over the applicant and not because of some innocent reason.

[121] Here all that the respondent sought to do was to do what he was lawfully entitled to do; that was to protect the property that he had brought to the relationship. Equally the agreement did the same for the applicant. To that extent the agreement cannot be impugned in my view.

[122] The only factor which might derogate from that position is the issue of the engagement ring. Engagement rings by their very nature are a gift from one partner to another as a symbol of their intention to marry. That this was a gift from the respondent to the applicant was without question. However that position did not enure in terms of this agreement. Rather the respondent sought, and obtained, the applicant's consent to the fact that the ring would revert to being his separate property in the event of a separation. Again while that action may be indicative of the respondent's attitude to the relationship I do not consider that that action can be said to vitiate this agreement such as to invalidate it for undue influence.

[123] It follows therefore that in my view the final deed was clearly explainable for the following reasons:

(a) As I have set out the applicant had a valid alternative choice to leave the relationship and enforce her rights at law. Those rights at law were fully preserved if she made that choice. Had she done so she

would have had, in my view, at that time a strong argument that the engagement ring was her separate property as a gift pursuant to s 10 of the Act.

(b) There was no evidence that the applicant could, or could not, have obtained a better result had she refused to sign the agreement and asserted her common law rights at that point. I note that at the time the agreement was signed the parties had not been in a relationship for three years. Their relationship had lasted at that point for approximately two and a half years and was, accordingly a relationship of short duration to which equal sharing did not automatically apply.[45]

Did the influence bring about the execution of the agreement?

[124] I do not consider that this agreement was the result of the respondent actually exercising an undue influence over the applicant for these reasons:

(a) He cannot be considered to have exploited the applicant. He received no undue advantage out of the choice he gave the applicant. Moreover he had a legitimate interest in asking for what he sought. In my view this cannot be unfair exploitation.

(b) Undue influence also requires an element of wrongful behaviour as, in the same way, is required in establishing duress. I can see no element of such wrongful behaviour in this case.

(c) Furthermore there is clear evidence which must abate any presumption of impropriety. That evidence is that the applicant received independent legal advice prior to the time she completed the transaction. The authorities are clear that such evidence of independent legal advice establishes that any influence the respondent had over the applicant is removed. This then eliminates any causative

[45] Sections 2E and 14A Property (Relationships) Act 1976.

effect of the respondent's influence on the applicant's decision to enter the agreement.

(d) Furthermore while it was not compulsory that the respondent took steps to ensure the applicant received proper independent advice he did so here. The applicant accepted his request and received advice from her own lawyer. In my view such independent legal advice must rebut any claim of undue influence as it breaks the chain of any presumed influence by the response over the applicant.

Affirmation

[125] As in the case of the claim of duress I consider there was both acquiescence and affirmation in regard to the agreement in this case. That is because the applicant did not make any claim of undue influence until significantly later and only after the parties had separated.

Findings and decision

[126] In this case on the evidence and the balance of probabilities I find the applicant has not met the threshold set out in *Harrison* in that any injustice she may have experienced does not meet the statutory criterion of serious injustice.

[127] I find that with the completion of the agreement both parties retained the property they brought to the relationship. In my view the only person who could experience serious injustice if the agreement was set aside would be the respondent.

[128] I take this view of the matter both as at the time the agreement was made and as it later became on the parties separation. In respect of that latter ground I need only note that while the applicant was, and is, in a more disadvantaged position financially; that position in financial terms was not significantly different to her position at the start of the relationship.

[129] The only significant or serious difference to her position resulted from her voluntary decision to accept redundancy from her former employer. However that

decision was made in mid 2011, more than one year in advance of the agreement and almost two years in advance of their separation. Accordingly it cannot be seen as an action which can void an agreement made in August 2012. Therefore I find that there is no serious injustice in this case sufficient to void the agreement pursuant to s 21J of the Act.

[130] As for the applicant's claims in equity my findings as to duress are as follows:

(a) There was no real threat, or exertion of illegitimate pressure, from the respondent to the applicant; and

(b) As there was no such threat or illegitimate pressure the respondent's actions did not coerce the applicant into entering the agreement.

(c) If I am wrong in respect of these findings the applicant affirmed the agreement by her actions and inactions.

[131] In respect of her claim of undue influence I find that:

(a) There is no compelling evidence of a relationship of influence in this case; and

(b) There is certainly no evidence that the applicant trusted the respondent to the extent that she signed the agreement simply because he asked her to do so; and

(c) Moreover her involvement with her trusted lawyer, during a somewhat prolonged process, means that she had independent professional advice available to her, and utilised the same, at the time she executed the agreement. In these circumstances that obviates any claim for undue influence; and

(d) Accordingly, and again as with duress, there was acquiescence and affirmation by her in this case.

[132] It follows for the reasons I have given, that on all the evidence, considered on the balance of probabilities, I find the applicant has not made out her case to set aside this agreement.

Orders

[133] Accordingly I make the following order and directions.

1. The applicant's application of 10 October 2014 to set aside the agreement of 29 August 2012 is dismissed.

2. If there is any issue as to costs

    a. Counsel for the respondent is to file the necessary memorandum by 20 December 2016.

    b. Counsel for the applicant is to file any memorandum in reply by 23 January 2017.

A B Lendrum
Family Court Judge