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

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IN THE FAMILY COURT
AT AUCKLAND

FAM-2017-090-000282
[2018] NZFC 3561

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[CARLOS GLASS] Applicant
AND	[STEPHANIE BOND] Respondent

Hearing:	14 February 2018
Appearances:	S Morris and G Angus for the Applicant J Noble for the Respondent
Judgment:	14 May 2018

RESERVED JUDGMENT OF JUDGE S J MAUDE
[Application to set aside agreement as to division of relationship property, application to give effect to non-compliant relationship property agreement, Section 15 income disparity compensation and relationship property division]

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[1] This decision is about the division of relationship property between [Carlos Glass] and [Stephanie Bond].

[2] The parties separated in April 2014.

[3] Mr [Glass] seeks equal division of relationship property as between the parties.

[4] To achieve equal division of relationship property, Mr [Glass]:

(a) Seeks to have set aside an agreement entered into by the parties on 4 December 2014 purporting to divide relationship property on an unequal basis.

(b) Seeks, if successful, to have enforced what he claims to have been a September 2014 agreement reached without legal advice providing for transfer of the parties' family home to Ms [Bond], with a subsequent payment to him of $100,000.

(c) In the event that the 4 December 2014 agreement is set aside, and the asserted September 2014 agreement not given effect to, Mr [Glass] seeks division of relationship property in accordance with the Property (Relationships) Act's presumption of equal sharing.

[5] Ms [Bond] maintains that the 4 December 2014 agreement was one that complied with the requirements of the Property (Relationships) Act and that it should be upheld.

[6] The thrust of Mr [Glass]'s case for the setting aside of the 4 December 2014 agreement was:

(a) It provided for a division on the basis of Ms [Bond] retaining 87.1 percent of the parties' relationship property and he 12.9 percent. He asserted that that represented a serious injustice to him.

(b) He had been mistaken when executing the December 2014 agreement, believing that what he described as the September 2014 agreement remained binding, that he believed assuring to him a payment on a later date of $100,000 from Ms [Bond].

Background

[7] The background to the proceedings was as follows:

(a) The parties commenced a relationship in 1997.

(b) Mr [Glass] commenced working at [place of work deleted] in 1998, thereby commencing his [financial] career.

(c) Ms [Bond] obtained a [degree in healthcare] in 2001.

(d) Ms [Bond] began working [in the healthcare sector] in February 2002.

(e) The parties commenced a de facto relationship in mid-2002.

(f) The parties married on 15 April 2007.

(g) The parties purchased their family home at [address deleted – the family home] on Auckland's [suburb deleted] in December 2009.

(h) Ms [Bond] stopped working in March 2010, giving birth to the parties' first child, [Sean], on [date deleted] 2010.

(i) Ms [Bond] returned to work for two days a week in April 2011.

(j) The parties' second child, [Cassia], was born on [date deleted] 2012, Ms [Bond] taking approximately 15 months off work following his birth.

(k) Between July and November 2013, Ms [Bond] returned to work two days a week.

(l) The parties' youngest child, [Lisa], was born on [date deleted] 2013.

(m) The parties separated in April 2014.

(n) Mr [Glass] left the parties' family home on 28 April 2014.

(o) On 4 September 2014, Mr [Glass] forwarded to Ms [Bond] the email that he asserted contained the basis of agreement as to division of relationship property.

(p) Mr [Glass] claimed that the parties met at their home in September 2014 and signed a printed off copy of the above email, intending that the document be binding.

(q) In October 2014, Ms [Bond] instructed her solicitors as to relationship property issues.

(r) On 5 November 2014, Ms [Bond] sent an email to Mr [Glass] saying that he would need to engage a lawyer, Mr [Glass] then engaging Mr Ivan Vodanovich.

(s) Mr [Glass] on 1 December 2014 obtained advice from Mr Vodanovich and signed what became the 4 December relationship property agreement, Ms [Bond] signing the same on 4 December.

(t) Ms [Bond] resumed working part-time [in the healthcare sector] in May 2015.

(u) On 28 February 2017, Mr [Glass] sent an email to Ms [Bond] seeking discussion about her paying to him what he perceived to be the monies owed to him pursuant to what he claimed to be the parties' September 2014 agreement.

The 4 December 2014 agreement's key provisions

[8] The agreement, by way of summary, contained the following key provisions:

(a) Transfer of the parties' family home to Ms [Bond] as her separate property.

(b) Record that the parties acknowledged Ms [Bond] as the children's primary caregiver.

(c) Agreement by Mr [Glass] to continue to guarantee the ASB Bank mortgage secured over the family home until refinanced by Ms [Bond].

(d) Notwithstanding Mr [Glass]'s guarantee, agreement that payment of monies due in respect of the ASB Bank mortgage was the responsibility of Ms [Bond].

(e) Each party to retain chattels in their respective possession at the date of execution of the agreement.

(f) Ms [Bond] to retain the parties' motor vehicle.

(g) Mr [Glass] to retain his KiwiSaver account.

(h) Agreement that the family home was transferred to Ms [Bond] in consideration for her undertaking not to make any claim in the Waitakere Family Court for compensation pursuant to s 15 of the Property (Relationships) Act.

(i) Record that the terms of the agreement were in full and final settlement of all issues relating to division of relationship property between the parties.

Content of the 4 September 2014 email Mr [Glass] to Ms [Bond] that he asserts formed the basis of a binding agreement between the parties

[9] Mr [Glass]'s email read as follows:

> Hi [Stephanie]
>
> As I mentioned, I would like for half of the ownership of the house to be transferred to a Family Trust, on the basis that I am paid $100,000 as detailed below.

> Half of the house at [address deleted]] is to be transferred into a Family Trust, with yourself and one other (you can nominate) as trustees, and [Sean], [Cassia], and [Lisa] to be the beneficiaries
>
> - The trust will have the power to borrow, and I would be prepared to rely on your goodwill not to dissolve the trust. The purpose is for asset protection. I would suggest that you put the other half in a similar trust for the same reason.
>
> - I will require $100,000 at some stage to use as a deposit on a house. My rationale for this is the following
>
>   - My estimate of the house value is in excess of $700, meaning that less the $330k mortgage in place currently, equity is around $370k
>
> - In the event that the property is sold and net proceeds after debt repayment are less than $200k, the funds are to be split after allowance for debt reduction, i.e. any amount reduced from the current $330k is to be paid to your *(sic)* first
>
> - Payment of less than $100k is not to be made unless in the circumstances of a sale as outlined above, unless by mutual consent and supported by Registered Valuation.
>
> - Payment is not expected within 12 months, but not anticipated to be more than 5 years. Again, this is a best endeavours request, and I am comfortable that you will do this when you are in a position to do so (which may be more than 5 years)
>
> - The $100,000 is to increase between now and time of payment by the % increase in house values in the area over the same time. QV sales data will confirm. This will ensure the $100,000 does not deflate
>
> I do not require any documented confirmation of the above, just that your *(sic)* understand, are comfortable with, and intend to adhere to as much as possible. Please feel free to ask or address any areas that you need to

[10] Mr [Glass] asserted when examined that transfer of the family home to Ms [Bond] was always intended and that the Trust referred to by him in his 4 September 2014 email was simply for the children.

[11] His evidence was that Ms [Bond] did not reply to his 4 September email, but that she sought to progress resolution and printed a copy of the email, which he and Ms [Bond] signed when he visited the family home later in the month.

[12] Ms [Bond] denied printing the email or that there was any signed document.

[13] Her evidence was that the email confused her, she seeking thereafter to resolve all matters with the assistance of lawyers.

Is the 4 December 2014 agreement to be set aside?

The law

[14] Section 21J of the Property (Relationships) Act reads as follows:

> **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.

[15] The Court is directed, pursuant to s 21J(4), to consider the factors identified in that subsection.

I will consider those factors later in this decision.

[16] In *Harrison v Harrison*,[1] the Court of Appeal at para [28] observed:

> There are two significant differences between the jurisdiction as conferred by the Matrimonial Property Act to set aside agreements and the corresponding jurisdiction under the Property (Relationships) Act:
>
> 1. The key test has shifted from turning on the Court being satisfied that it would be "unjust to give effect to the agreement" under s 21(8) of the Matrimonial Property Act to the Court being satisfied that "giving effect to the agreement would cause serious injustice" under s 21J(1) of the Property (Relationships) Act.
>
> 2. Section 21J(4)(e) of the Property (Relationships) Act does not correspond to any provision in the s 21(10) of the Matrimonial Property Act.

[17] In *Clark v Sims*,[2] Patterson J observed at para [36]:

> … Not every injustice will entitle a Court to set aside an agreement. There must have been at the time of entering into the agreement, or subsequently because of a change of circumstances, unfairness or a lack of equity of a substantial kind. …

The Judge went on to say:

> … A Judge, in my view, should not set aside an agreement unless there has been a substantial injustice of sufficient gravity for the Judge to determine that in conscience the Court should intervene. That one party can establish that he or she did not receive what she may have received under the provisions of the Act, will not in itself be a sufficient ground to set aside an agreement, although gross inequality may well be a factor which weighs heavily in the determinative process of the Courts.

[18] In *Wells v Wells* (referred to above) Simon France J identified the following principles that should be considered when determining whether an agreement should be set aside or not:

> a) serious injustice is a broad discretion which must be exercised in light of the policy underlying the legislation;

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[1] *Harrison v Harrison* (2004) 24 FRNZ 30
[2] *Clark v Sims* (2004) 23 FRNZ 757

b) an important component of the statutory scheme is the capacity of parties to contract out of its provisions so long as certain procedural requirements are met;

c) resultant disparity of outcome at the time of separation is relevant, but is not generally as important a factor in contracting out cases as it might be in compromise cases. In any particular case it might of course require considerable weight, but generally it is not to be seen as a determinative or necessarily dominant consideration;

d) consistent with c), a comparison to the outcomes that would be ordered if the Act were applied is relevant but not as significant as it might be in compromise cases;

e) contracting out will usually occur in circumstances where one party has the assets and is pushing for an agreement. The circumstances will often involve pressure, and may involve an issue of whether the relationship will continue in the absence of an agreement. Accordingly, the presence of such circumstances is not generally relevant to the issue of serious injustice;

f) more than disparity of outcome per se will often be present before serious injustice arises. Concerns with the procedure will often provide that extra factor. Case law will no doubt develop on the issue of what procedural concerns the Court is referring to. I assume that they are something other than a breach of the s 21F requirement;

g) a discretion exercised in accordance with these considerations will be difficult to disturb on appeal.

[19] In *Harrison v Harrison* (referred to above) the Court Appeal at para [81] as in particular to compromise cases observed the following:

> In most compromise cases, the parties will presumably set out to provide for a division of property which accords, at least broadly, to what would be ordered under the statutory regime. So where there is a significant discrepancy between what the agreement provides and the way in which the relevant statutory regime would have operated, this in itself may well suggest that the agreement is unfair or unreasonable and, as well, may well require explanation. In the case of a contracting out agreement, of course, the very purpose of the parties is to make provision which differs from the statutory regime.

Section 21J(4) factors

a) The provisions of the agreement

[20] There was no inherent fault to be found in the form of the agreement signed by the parties on 4 December 2014, nor any internal contradictions.

b) The length of time since the agreement was made

[21] The agreement was signed on 14 December 2014.

[22] Proceedings were issued in May 2017, some two and a half years later.

[23] Mr [Glass] asserted that his belief was that it was understood and agreed that pursuant to the agreement that he asserted was made in September 2014, and notwithstanding the 4 December 2014 agreement, Ms [Bond] owed to him a sum of $100,000, together with adjustment for movement in the value of the dollar.

[24] It was only, he said, when his "working relationship" with Ms [Bond] as to child care matters became more formal or arms' length on her becoming engaged to another man that he determined that he would call up the $100,000 that he claimed as owing to him.

[25] When Ms [Bond] denied the existence of an obligation, he issued proceedings.

[26] The proceedings issued by Mr [Glass] were issued promptly thereafter.

[27] While I doubt Mr [Glass]'s view that he truly believed that a debt was owed to him and I will consider in greater detail at a later stage of this judgment the parties' views at the time of execution of the 4 December 2014 agreement; in my view, in the absence of Ms [Bond] having taken any non-remediable steps in reliance on her understanding that agreement had been concluded in December 2014, there does not exist a disqualifying delay in respect of Mr [Glass]'s proceedings.

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

[28] The analysis required is an analysis of whether at the time the agreement was signed it was "unfair" or "unreasonable".

[29] Unfairness and unreasonableness have been approached as distinct and separate concepts.

[30] Either unfairness or unreasonableness must be shown by Mr [Glass] to succeed in the overturning of the 4 December 2014 agreement, not both.

[31] In *Pounteny v Pounteny*,[3] it was observed:

> The first (unfairness) referring rather to the circumstances in which the agreement was entered into, and the later (unreasonableness) as directing attention to its content and consequences.

Unfair?

[32] It is not asserted by Mr [Glass] that the circumstances surrounding his signing of the 4 December 2014 agreement involved undue pressure or influence.

[33] Mr [Glass] asserted that he was not in an emotional state to properly consider the agreement's terms.

[34] He principally relied on his assertion that he would not have signed the agreement if he had realised that what he believed to be a binding September 2014 agreement would not remain a binding commitment (that is, that within twelve months to five years Ms [Bond] would pay to him $100,000, together with an adjustment to take account of movement in the value of the dollar).

[35] His signing of the 4 December agreement was, Ms Morris submitted, a mistake arising from the above belief.

[36] That execution of the agreement was a mistake was reinforced or corroborated, Ms Morris urged, by her client's subsequent conduct, which involved:

(a) Payment of child support beyond the statutory level imposed by the Child Support Act formula.

(b) Payment of $9000 from his August 2014 employment bonus.

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[3] *Pounteny v Pounteny* CA 45/91, 20 September 1991

(c) Payment of $7000 to Ms [Bond] from his August 2016 employment bonus.

(d) The fact that he purchased for Ms [Bond] an iPhone and iPad.

(e) The fact that when the sound working relationship that he and Ms [Bond] had had became, at Ms [Bond]'s insistence, a more distanced and formal one he had on 10 May 2017 by email sought to call up payment of what he perceived to be a debt owing to him.

[37] Was Mr [Glass] mistaken when he signed the 4 December agreement?

[38] The evidence sets out that Mr [Glass], by email to Ms [Bond] on 4 September 2014, set out what he either understood to be agreed or proposed be agreed as to relationship property division.

[39] In my view, it is clear that the email was a proposal as opposed to a record of what was agreed already, it commencing:

> As I mentioned, I would like half of the ownership of the house to be transferred to a Family Trust, on the basis that I am paid $100,000 as detailed below.

His email concluded:

> I do not require any documented confirmation of the above, just that you understand, are comfortable with, and intend to adhere to as much as possible. Please feel free to ask or address any areas that you need to.

[40] Ms [Bond]'s evidence was that she was confused on receipt of the email.

Mr [Glass] had, she said, always been responsible for the couple's finances.

He was [working in the financial sector], she [working in the healthcare sector], she said.

She determined that relationship property issues should be resolved by use of lawyers.

[41] Mr [Glass]'s evidence was that when visiting the family home relating to the children Ms [Bond] had printed off a copy of his email and that the couple had signed confirming that they agreed to its terms.

[42] Ms [Bond] was adamant that she did not print the document off and that no document was signed.

[43] No signed document was produced.

[44] There were subsequent emails which set out that rather than transfer the family home to a Trust, Mr [Glass] proposed transfer of the home to Ms [Bond].

The emails made no further reference to a $100,000 payment.

[45] Produced in evidence was an email trail in June 2014 which revealed discussion between the parties as to the loan obligations secured by mortgage over the family home.

On 16 June 2014, Mr [Glass] said as to the signing of new loan documents envisaged to coincide with the house transfer:

> … We will have the full balances when we sign the new loan document so just keep a copy and anything you reduce from that is yours.
>
> Happy to put it in writing no problem at all. We can do at any time but don't worry about it too much, the worst case is that we split the balance if you ever sell and I wouldn't be prepared to give you more than I needed to (which will be more than what you are paying off in principal) if I was going to be an arse about it.
>
> We can draw something up on Tuesday if you like but have a think about how you want it to work and what you think is fair. I won't/don't want to dictate how this works and just want to do the best I can for you.

Ms [Bond] responded:

> Yes, makes sense. Keep the first loan over 21 years and I will evaluate later if needed. Will want something in writing at some stage regarding equity etc can that be sorted later? Do I just need to keep note of our equity when I pay the first payment …

[46] Plainly there was contemplation by both parties of transfer of the home to Ms [Bond] in June 2014, though the terms had not been finalised.

[47] Eventually, though Mr [Glass] did not view it as necessary, Ms [Bond] engaged lawyers to provide her with advice and draft an agreement.

[48] A draft agreement (identical to that dated 4 December 2014) was forwarded to Mr [Glass] by his lawyers on 28 November 2014, and he having viewed it responded by email to his lawyer saying:

> At least they kept it nice and simple. Only issue that is not correct is the value of the property at $580k (would be over $700k) but since she is getting it I don't suppose it matters.

[49] Three days later, on 1 December 2014, Mr [Glass] met with his lawyer, Mr Vodanovich, and signed the agreement.

[50] Cross-examined, Mr [Glass] acknowledged that paragraph 4 of the agreement was referred to by his lawyer, as was the penultimate paragraph. Those paragraphs read:

> **4. Monetary Adjustments**
>
> In consideration of [Stephanie] not making an application to the Waitakere Family Court seeking an Order that [Carlos] compensate her pursuant to Section 15 of the Property (Relationships) Act 1976 [Carlos] hereby agrees that [Stephanie] shall retain the family home without having to make any adjustment payment to him for the same.
>
> …
>
> 13.2 The parties acknowledge that this agreement is in full and final settlement of all or any rights, claims or demands that either may have against the other or his or her estate in respect of their relationship and separate property pursuant to the provisions of Section 21 of the Property (Relationships) Act 1976, under any Act or Acts passed in amendment or substitution or any other Act or rule of common law or of equity or otherwise.

[51] Mr [Glass], by affidavit, estimated an appointment for the purpose of receiving advice from Mr Vodanovich of not more than 15 minutes, with no explanation given as to what s 15 meant.

[52] He acknowledged in oral evidence, however, when cross-examined that Mr Vodanovich had talked to him about clause 4 of the agreement.

[53] Mr [Glass], as to the proposition put by Mr Noble (for Ms [Bond]) that he signed the agreement knowing that it meant leaving the home to Ms [Bond], compensating her for the fact that she was a financially disadvantaged stay-at-home mum, said:

> In my mind it wasn't consequential to why I was signing it, I was signing it to transfer the house, so the clause didn't really have any impact for me. He just told me it was a good clause.

[54] Against the above background, Mr [Glass] asks the Court to conclude that the agreement was unfair, signed by him in the mistaken belief that it did not override what he believed was an obligation Ms [Bond] had taken on in September 2014 to pay to him $100,000 at a later date.

[55] Mr [Glass] was, at the time of execution of the 4 December agreement, [working in the financial sector].

He, by hearing time, had become a [manager in his field].

[56] Mr [Glass] described being in no emotional state to execute an agreement in December 2014, and was supported by the evidence of his sister, who said that at the time he was struggling emotionally and mentally and not emotionally competent to make important decisions.

[57] He was also supported by his mother, with whom he had lived for a number of weeks post-separation, who said that she had urged her son not to settle on anything until his emotions had settled down.

[58] He was also supported by his workmate, [Walter Cain], who described Mr [Glass] when he separated as "upset and in a fragile state".

[59] Mr [Cain] and Mr [Glass]'s mother's evidence as to Mr [Glass]'s emotions focussed on separation and the weeks following (separation occurred in April 2014), the agreement however signed on 4 December.

[60] The email trail produced and referred to by me above did not reveal an inability by Mr [Glass] to grapple with the issues confronting him.

[61] No professional evidence was adduced as to the extent of Mr [Glass]'s fragility, nor was it suggested that he was unable to hold down a [financial] role.

[62] There was no suggestion in evidence that Mr [Glass]'s relationship with his children was curtailed post-separation, something that might have occurred if he was in the midst of an emotional crisis.

[63] Mr Vodanovich, who provided advice as to the December 2014 agreement, was not called as a witness, nor were any file notes made by him produced. That, I observe, surprised me somewhat.

[64] It is hard to comprehend how Mr [Glass] could have, given his occupation and his lead role in the couple's finances pre-separation, truly believed on execution of the December 2014 agreement that the terms of the agreement, read and explained to him, and in particular paragraphs 4 and 13.2, meant anything other than what the agreement actually provided.

[65] What is abundantly clear is that:

(a) The parties contemplated transfer of the family home to Ms [Bond].

(b) Mr [Glass] proposed a deferred payment in return for Ms [Bond]'s retention of the home.

(c) Ms [Bond] sought, as would normally be the case, legal advice.

(d) She, no doubt, explained to her lawyer the couple's desire to advantage her to compensate her for her role as primary caregiver for the parties' young children.

Paragraph 3.6 of the parties' December 2014 agreement reads as follows:

> [Stephanie] will be the primary caregiver of the children of the marriage for the foreseeable future. [Stephanie] is a [healthcare worker] by trade but is not currently working though is looking to start part-time work in the reasonably near future.

(e) Ms [Bond]'s lawyer, cognisant of s 15 of the Act, likely paraphrased the parties' intended compromise away from an immediate equal sharing clean break, which would have involved sale of the family home, into retention of the home by Ms [Bond] in consideration for her foregoing an ability to seek compensation in respect of income disparity.

(f) Mr [Glass] read the agreement, received advice as to it and signed it.

[66] The above scenario, which on the balance of probabilities I believe to be the reality, simply does not sit well with Mr [Glass]'s advice to his four support witnesses that his belief was that he would receive $100,000 to $150,000 at a later date.

[67] Importantly, Mr [Glass]'s mother's evidence related to a period of only a few weeks after separation when her son was living with her.

[68] Mr [Glass]'s aunt, Mr [Cain] and Mr [Hardin] cross-examined could not recall when it was that Mr [Glass] had told them that he expected to receive $100,000 to $150,000 at a later date.

Mr [Hardin], pushed, said it would have been maybe September 2015, or might have been early October that Mr [Glass] had told him of his expectation.

Mr [Glass]'s mother's evidence was that her son had reached an agreement by October 2014 with Ms [Bond], she however vague as to dates.

[69] Mr [Glass]'s aunt, Ms [Wood]'s, evidence was that she had been told of her nephew's expectation within a couple of months of separation.

[70] All four support witnesses' evidence was of Mr [Glass]'s belief that he would receive payment at best, from Mr [Glass]'s perspective, was up to two months prior to when the December agreement was signed and likely before, or at best shortly after, Mr [Glass]'s rejected 4 September email proposal.

[71] The September email proposed no compromise to Ms [Bond] in return for her lost employment opportunity as primary caregiver of the parties' children other than occupation of the family home and transfer of half of the family home to a Trust for the children. Save for occupation of the home for the benefit of the children, she received no benefit.

Such a proposition would, with advice, never have been construed as offering to Ms [Bond] any significant compensation.

Her position that she was confused and needed to seek legal advice is believable.

[72] The conclusion that I reach is that the process leading to execution of the agreement and the execution of it was not unfair.

[73] I cannot conclude that on execution of the 4 December 2014 agreement Mr [Glass] did not understand that the document signed contained within it the entirety of the settlement reached.

d) Was the agreement unreasonable at the time it was executed?

[74] The agreement contains within it a compromise in that Mr [Glass] foregoes the Property (Relationships) Act's presumed equal sharing entitlement (s 13 of the Act).

[75] Mr [Glass], pursuant to the December 2014 agreement, received 12.9 percent by value of the pool of relationship property.

[76] Mr [Glass] in his email correspondence prior to execution of the agreement suggested that the $580,000 agreed value for the family home based on QV was low, and that its real worth was $700,000 or more. Mr [Glass] could have obtained a valuation report and produced it in evidence to substantiate the above view, but did not.

[77] The best evidence before me as to valuation of the family home at the time that the December 2014 was signed is the agreement's record that the parties agreed that its value was $580,000.

[78] The agreement, pursuant to paragraph 4, purports to equate the compromise that Mr [Glass] made away from an equal division (he moved from 50 percent entitlement to 12.9 percent entitlement) with s 15 of the Act's income disparity compensation.

[79] The pool of relationship property at the time that the agreement was signed was acknowledged to be $310,000 by value.

The compromise, therefore, or assumed compensation figure in respect of income disparity, was $115,000, the result being that Mr [Glass] received, pursuant to the agreement, a KiwiSaver account valued at $40,000 as against a Property (Relationships) Act equal sharing entitlement of $155,000.

[80] I observe that compromise agreements, in order to be upheld, need not achieve precisely what imposition of the Property (Relationships) Act's code would provide for but that, as observed in *Harrison v Harrison* (supra), where a significant disparity exists, that might suggest an unreasonable bargain.

[81] I must ask myself whether the implicitly agreed compromise figure ($115,000) was so wrong as to dictate that the outcome achieved by the agreement was such an unreasonable one as to cause a serious injustice. To answer that

question, I must determine whether a Court in December 2014 would have arrived at an income disparity compensation award in favour of Ms [Bond] sufficiently close in value to the $115,000 compromise made in the agreement to avoid a finding that a serious injustice was occasioned to Mr [Glass].

[82] In December 2017, the Supreme Court released the decision of *Scott v Williams*, in which the Justices made observations about what processes should be adopted in assessing what appropriate compensation, pursuant to s 15 of the Act, should be.

[83] I specifically observe that that decision postdates the execution of the parties' agreement.

I therefore proceed to determine what compensation the Court might have awarded Ms [Bond] in December 2014 on the basis of the relevant authorities for the Court to consider at that time.

[84] Section 15 of the Act reads as follows:

> **15 Court may award lump sum payments or order transfer of property**
>
> (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (**party B**) are likely to be significantly higher than the other spouse or partner (**party A**) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.
>
> (2) In determining whether or not to make an order under this section, the court may have regard to—
>
> (a) the likely earning capacity of each spouse or partner:
>
> (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
>
> (c) any other relevant circumstances.
>
> (3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

[85] It is clear from what has been regarded as a leading authority, *X v X*,[4] that while the compensation determination is made at hearing date, the assessment of quantum is to be made at separation date.

[86] The Court must firstly be satisfied that after the parties' marriage ended the income and living circumstances of Mr [Glass] were likely to be significantly higher than those of Ms [Bond].

[87] Secondly, the Court must be satisfied that if such significant disparity exists the disparity results from the effects of the division of functions within the parties' marriage.

[88] It can be seen from s 15(3) that the awarding of compensation is a discretionary one. That is to say, any formulaic calculation must ultimately be subjected to the Court's discretion as to what is fair and equitable compensation.

[89] The Court must be satisfied that there exists a significant disparity not simply as to earning capacity, but also as to living circumstances.

[90] Both section 15(2)(b) and *V v V*,[5] make it clear that the responsibility of one spouse for the ongoing care of children is an important factor for consideration.

[91] In the evidence heard by me, it was clear that Mr [Glass] now sought a 50/50 care arrangement in respect of the children, that proposition rejected by Ms [Bond].

[92] The Court was not engaged in Care of Children Act proceedings when hearing the evidence, and is not in a position to, and is not asked to, determine what the appropriate care arrangement today actually is or should be.

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[4] *X v X* [2007] NZFLR 502
[5] *V v V* HC Wellington CIV-2006-485-764, 8 December 2006

[93] In *X v X*,[6] the Court of Appeal made it clear that it is not for the Court when making a s 15 assessment to enquire into the merits of the parties' child care choices, rather it being the Court's responsibility to act on the joint decision making of the parties as to when a caregiver would be expected to return to work.

[94] Relevant to the above assessment, I note that it was the parties' agreement that Ms [Bond] would be the primary caregiver of the children for the foreseeable future, she however likely to be looking for part-time work in the reasonably foreseeable future (paragraph 3.6 of the 4 December agreement).

[95] Ms [Bond] at separation, referencing the above but also the parties' evidence, was the primary caregiver of the parties' children, aged then four, two and 11 months.

[96] I am entirely satisfied, in light of the negotiations that I have referred to earlier in this judgment, the fact that Ms [Bond] was at home, not working, and caring for the children on separation, and that Mr [Glass] was working full-time [in the financial sector], that paragraph 3.6 of the parties' agreement fairly records the parties' intent or "modus operandi" as to child care at separation.

[97] What is clear from paragraph 3.6 of the parties' agreement is that it was envisaged that Ms [Bond] would return to part-time work as a [healthcare worker] in the reasonably near future (but importantly, not full-time work).

[98] Plainly for her as a [healthcare worker], return to part-time work would not, when that occurred, put her back in a non-disadvantaged income earning circumstance.

[99] What is also clear is that, as a [healthcare worker], return to part-time work would ensure that the foundation for return to full-time work would be in place.

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[6] *X v X* [2010] 1 NZLR 601

[100] In essence, the parties' agreement makes it clear that the constraining factor in respect of return to work for Ms [Bond] was her need to provide care for the parties' children. The evidence heard by me confirms the same.

[101] Ms [Bond]'s evidence was that she envisaged that she would return to full-time work when the parties' youngest child commenced secondary schooling.

She said at paragraph 76 of her 7 July 2017 affidavit:

> I plan to start working full time when [Lisa] is at high school which will be in February 2027.

[102] What is clear is that her expression of intent, not contradicted at hearing, was hers but not an expressed joint intent.

[103] In my view, an earlier return to full-time work than when [Lisa] commences college is an option for assessment purposes that this Court must consider, the circumstances not as in *X v X*, when the Family Court was overturned having superimposed its own view as to when a parent could return to the workforce. In the case before me there was not agreement as to when Ms [Bond] would return to the workforce, leaving it for the Court, when addressing the issue of compensation for income disparity, to form its own view based on the evidence.

[104] As to the methodology to adopt for calculating compensation, I observe that in *M v B*[7] at para [123] Robertson J observed:

> The purpose of an order made under s 15 is to compensate a spouse/partner whose economic position, that is income and living standards, is significantly lower than their spouse's/partner's because of the effect of the division of functions within the relationship: Property (Relationships) Act 1976, s 15(3). An order results in a readjustment of the division of relationship property and is guided by the principle in 1N(c). The aim of this section is to provide a means by which residual inequality, in terms of earning capacity and standard of living that is not addressed in the division of relationship property, can be dealt with where it is required in all the circumstances of the case. A s 15 award does not permit a Court to exercise a broad and unfettered discretion to redress economic disparity simpliciter: I adopt the approach which applied in *de Malmanche v de Malmanche* [2002] 2 NZLR 838 at [157] persuasive.

[7] *M v B* [2006] 3 NZLR 660

[105] Justice Goddard in *Jack v Jack*[8] at paragraph [29] observed that the following elements were in operation in assessing what compensation should be paid pursuant to s 15 of the Act:

> (a) The jurisdictional foundation is a disparity in both living standards and income.
>
> (b) The disparity must be significant as between the parties. It is a subjective assessment. What the community at large enjoys is irrelevant as to living standards.
>
> (c) The purpose of the award is compensatory.
>
> (d) Income should be considered in the round from all periodic streams of money. The assessment is of potential income so that actual income may not be the relevant starting point.
>
> (e) There is no onus of proof in the strict sense it being for the court to be satisfied.
>
> (f) The disparity must be caused by the division of functions but it is presumed that there is mutuality to the election of roles such that the Court need not enquire into the merits of the decision. Evidence of reluctance to work or preference of leisure may be relevant to the discretion rather than causation.
>
> (g) The exercise is discretionary and therefore not a formulaic one.

[106] At the outset, I observe that Ms [Bond] was not working at separation and that it was agreed that at best her return to work in the foreseeable future would be part-time.

As a trained [healthcare worker] caring for the parties' children as a continuation of the adopted division of roles in the marriage, where Mr [Glass] was the primary income producer and Ms [Bond] the primary caregiver, her lost income stream plainly results from the functions held by the parties within their marriage.

[107] Justice Goddard observed in paragraph [62] of *Jack v Jack* (supra):

> [62] The majority of the Court of Appeal in *X v X* said the object of an enhanced position award "is to provide the disadvantaged partner with a share of the enhancement of the advantaged partner's future income or living standards resulting from the division of roles in the relationship" and "could arise … where the disadvantaged partner's role has assisted the advantaged

[8] HC Wellington, CIV-2013-485-4816 (2014) NZHC 1495

> partner in gaining qualifications or enabled him or her to commit himself to fulltime work, without the distraction of child caring responsibilities".[44]

[108] Justice Robertson in *X v X* (supra) in paragraphs [128] and [129] observed as follows:

> [128] At all levels, the courts in this case have been inundated with accounting material and asked to slot figures into formulae to produce end figures. I consider that is a misconceived approach to s 15. The section does not engage the courts in a simple accounting exercise, but in a sensible jury assessment role. Precise analysis of each party's projected financial situation is not possible (although informed estimates can be made as they were here). Financial analyses are less than helpful when they fail to engage with the manner in which the parties elect to deal with particular assets. What happens in the future in this case will largely be a reflection of the lifestyle choices that these parties decide to make. That will not often be the position, but clearly is so here.
>
> [129] In determining quantum, what is important is the overall circumstances that gave rise to the disparity between the parties and what will be "just between them" going into the future. A court should be transparent in its assessment of the factors that contribute to its decision to make an award, and it must be robust in responding to the evidence that is available. However, in the final analysis under s 15(3) there is limited assistance to be garnered from experts' projections. No rote formulae can reliably throw up award sums that are just. The court must determine the justice of an award on the basis of its assessments of the parties' overall financial circumstances, the value of the loss sustained by the claimant party, and the future earning potential of each party.

[109] In paragraph [135] Justice Robertson observed:

> [135] This particular s 15 quantification process is not a universal or precise accounting exercise. The basis on which an award is calculated should always be tailored to the facts of a particular case. An award should be realistic compensation for the demonstrable detriment which Mrs X was suffering at the time of separation and fair compensation for the consequences arising from the division of functions in the relationship. Because detailed accounting assessments were available, I have utilised them but reject any suggestion that this is the only way to reach a proper figure for s 15 compensation.

[110] This Court is faced with a mother who has provided evidence, not challenged, that if her [healthcare] career had continued unabated by marriage responsibilities her income would have been approximately $89,000 per annum.

[111] Her average agreed income over the three year pre-children years adjusted for inflation to December 2017, would have been $81,763.92 or approximately $65,000.00 net.

[112] Ms [Bond]'s annual income net of taxation for the year ended 31 March 2017 was $40,566.00.

[113] For the 2016 year, it was $40,371.00 or approximately $32,000.00 net.

[114] For the 2015 year, it was $12,912.00 gross or approximately $10,300.00 net.

[115] What I deduce from the above is that progression over almost four years has occurred from nil income to an income of $40,566.00 net.

[116] [Lisa], the parties' youngest child, is now four.

[117] There is no evidence before me as to a reasonable return date for Ms [Bond] to fulltime work.

Mr [Glass] has stated that he has offered to care for the children on a 50/50 or week-about basis, that proposition rejected.

[118] I do not detect from the position of the parties at agreement and from the negotiations leading into the December 2014 agreement that the couple envisaged that their children would at an early age be in fulltime day care and school with both parents working fulltime.

[119] When [Lisa] commences school in February 2019 both parents will be able to work fulltime with the assistance of after school care and no apparent reason from a welfare and best interests perspective, to prevent the parties negotiating a care arrangement for the children to suit.

[120] In light of the 2014 expectations reflected in paragraph 3.16 of the December 2014 agreement, I do not believe that the parties expectations would have been return to fulltime work on commencement of school by [Lisa] but likely because of

the relatively small relationship property pool and a good, but not exceptional income, earned by Mr [Glass], the luxury of part-time work for Ms [Bond] to continue until [Lisa] commences college, would not have been sustainable.

[121] In my view, a lead in of 12 months following commencement of school for [Lisa] (i.e. February 2020) should be provided prior to an expectation that it will be necessary for Ms [Bond] to return to fulltime work.

[122] I adopt that period (April 2014 separation date until February 2020 return to fulltime work) as the income disparity compensation period.

[123] I am not satisfied that Mr [Glass]'s income progression post separation represents anything other than the progression that he would have made in the absence of his marriage and its responsibilities.

[124] There is no evidence to suggest that what has not been described as a meteoric rise over this period, arises from anything other than natural experience based progression.

[125] In my view, it is appropriate for me to assess the compensation payable by Mr [Glass] to Ms [Bond] on the basis of a period from separation to February 2020, the period being five years and 10 months.

[126] The income that Ms [Bond] would have been able to earn were it not for her functions as primary caregiver was, I accept, in accordance with her evidence, the sum of $89,000.00 gross, or, approximately $70,000.00 net of tax. That sum represents the income that a senior [healthcare worker] would have been able to earn had her career not been interrupted as Ms [Bond]'s was.

[127] Asked, as I am, to look through 2014 lenses I must approximate the speed of Ms [Bond]'s return to the workforce post-separation with however the benefit of hindsight evidence before the Court as to her actual progression since.

[128] I proceed to calculate what I believe to be Ms [Bond]'s lost income from separation to February 2020.

[129] Ms [Bond] returned to the workforce on a part-time basis in mid-2015.

I therefore calculate her lost 2014/2015 income as $70,000.00 net of tax.

[130] There is a lack of specificity as to her progression of return between mid-2015 and hearing.

[131] Ms [Bond]'s unchallenged evidence was that she now works six days per fortnight, or put another way, six days out of 10 work days.

[132] I calculate for the period 2015 to 2016 her lost income on the assumption of her working four days in 10 representing six days lost income equating to a lost net of tax income of $42,000.00.

[133] For the 2016/2017 and 2017/2018 years, I calculate her lost income as being four days per fortnight, or $28,000.00 per annum, totalling $56,000.00.

[134] For the period from mid-2018 to February 2020, which I calculate at 10 months, I assess Ms [Bond]'s lost income as $50,600.00.

[135] On the above basis Ms [Bond]'s lost net income over the calculation period is $218,600.00.

[136] Because in achieving a settlement in December 2014 it is implicit that various contingencies that Ms [Bond] would otherwise have faced would have been removed, discounting of the above sum is appropriate.

Those contingencies include such as:

(a) The advantage of cash.

(b) The cost of litigation.

(c) The possibility of a speedier return to the workforce than envisage.

[137] I adopt a discount of 30% as adopted in *X v X* (supra) for a similar period.

[138] The resultant figure is $153,020.00 after applying the above discount.

[139] In my view, given that the decisions made for this couple as to their working lives was joint, it is appropriate in assessing compensation to halve the lost income, the resultant compensation figure being accordingly $76,510.00 which I round off at $76,500.00.

[140] Mr [Glass] paid to Ms [Bond] a portion of his mid-2014 work bonus, which in the absence of evidence to the contrary, I assume reflected payment for work undertaken principally during the relationship period. He did however pay to Ms [Bond] the sum of $7,000.00 in respect of a work bonus received by him in latter years post-separation and it is appropriate that that sum be deducted from the compensation figure. The resultant compensation figure that I arrive at for the purposes of s 15 of the Act being $69,500.00.

[141] Mr [Glass]'s after tax income of approximately $116,000.00 per annum at mid-2015 matched against Ms [Bond]'s makes it clear that notwithstanding Ms [Bond]'s retention of occupation of the family home for she and the children, his income was significantly greater than hers resultant from functions held by the parties during their relationship and that further, it is axiomatic that his living standards were similarly substantially higher than hers.

[142] I am mindful that Ms Morris, for Mr [Glass], had urged that I consider the reality that Mr [Glass], by choice, had paid more by way of child support than the Child Support Act's Formula assessment would provide for.

In my view, assessment of child care responsibility is a matter for parents, the Child Support Act Formula applicable only where parents cannot reach agreement as to the appropriate level of support to be paid.

My view is that Mr [Glass] and Ms [Bond] assessed what an appropriate level of child support should be and implemented it such that it is appropriate for me to make

the assumption that the child support payments made by Mr [Glass] were by agreement in fulfilment of his responsibilities to his children as opposed to contributions to Ms [Bond].

[143] I was referred to the fact that Ms [Bond] travelled to [two countries] post-separation with her then fiancée but not partner.

Her evidence was that the cost of such travel was paid by her by credit card with the sum reimbursed to her by her fiancée.

[144] The above position was not challenged by Mr [Glass] and I accept it.

[145] The above travel aside, Ms [Bond] has been a near fulltime parent with living standard sacrifices to be associated with that since separation.

[146] I conclude that Ms [Bond]'s entitlement to s 15 compensation before considering the sum from a wider discretion perspective taking into account the relationship property pool available to the parties would have been at December 2014 $69,500.00 as determined by paragraph [140] above.

[147] Equal division of the $310,000.00 relationship property pool would have provided to Mr [Glass] $155,000.00. To receive $69,500.00 by way of compensation Ms [Bond] would have received by way of relationship property division after receipt of compensation $224,500.00.

Having made the above income disparity compensation payment Mr [Glass], for his part, would have received $85,500.00.

The above division would reflect receipt by Mr [Glass] of 27.58% of the relationship property pool and by Ms [Bond] 72.42%.

[148] Such a division would have provided Mr [Glass] at separation with $85,500.00, a sum in my view too small to have been utilised by him as a deposit for purchase of a house for he and when he cared for the children.

[149] Receipt by Mr [Glass] at separation of $40,000.00, as envisaged by the agreement, would not have provided him with a deposit adequate to secure him a home of his own.

[150] Given the pool of relationship property available for division in December 2014 with Mr [Glass]'s unaffected career progression reflected in the fact that he is now a [manager in his field] a 72.42%/27.58% division of relationship assets would, in my view, still not have been a fair outcome.

I record that before recalling the judgment issued by me on 28 February 2018 that resulted in the issue of this judgment I had concluded, when exercising my discretion as to what an appropriate income disparity compensation figure might have been for Ms [Bond], that availability of $99,000.00 for rehousing to Mr [Glass] was appropriate, such that the 68%/32% division of relationship property that I had arrived at resultant from income disparity compensation calculation was fair and equitable.

[151] In my 28 February judgment (now recalled) I in error used February 2019 as the end date for the purposes of calculation of what would be appropriate compensation for Ms [Bond], instead of the correct date identified by me of 2020.

[152] The result incorporated into the decision issued by me today is an increase in compensation formulaically calculated to Ms [Bond] from $56,000.00 to $69,500.00.

The impact of that increase would have been to increase, if implemented, the share of the relationship pool that Ms [Bond] would receive from 68% to 72.42%, and reduction of the share that Mr [Glass] would receive to 27.58%.

Exercising my discretion as to what appropriate compensation would be, I hold the view that retention by Mr [Glass] on 2014 figures of 27.58% of the then $310,00.00 relationship pool, or $85,500.00, would fall too far below what was fairly and equitably required by way of division than I could impose.

The sum of $99,000.00 reflecting a 32% share in the relationship property pool in my view remains fair.

[153] Would what at December 2014 have been a 12.9%/87.1% division with a $40,000.00 share available to Mr [Glass], have amounted to a serious injustice?

[154] I reflect on the reality that compromised agreements do not, to avoid being set aside, need to equate in outcome exactly with that outcome that would have been provided by the Property (Relationships) Act.

Section 13 of the Act envisages equal division.

The Act however legislatively empowers separating parties to enter into binding contracts that compromise what outcome the Act itself would have provided, which compromises not doubt take account:

(a) The risks involved in litigation.

(b) The costs of litigation.

(c) The value of clean break.

[155] Notwithstanding the above, the irresistible conclusion that I come to is that a resolution in December 2014 that provides for Mr [Glass] $40,000.00 out of a pool of $310,000.00 and an inability to acquire housing for he and the children, creates a serious injustice.

Has the agreement become unfair or unreasonable in light of any changes of circumstances since it was made?

[156] The only change in circumstances argued was the asserted meteoric rise in value of house prices in Auckland.

[157] I have not been provided with any valuation evidence of the parties' former family home, or for that matter Mr [Glass]'s KiwiSaver Scheme entitlements.

[158] I cannot assess what increase in value might have occurred.

[159] I note that in *Clark v Sims* (supra) Paterson J observed:

> Ms Clark is endeavouring to obtain the benefit of inflation and a change of zoning which took place many years after their property agreement was entered into. In my view to hold that a change in circumstances based on inflation and zoning changes many years later is sufficient to create a serious injustice, would be opening the floodgates.

[160] The Court is aware, and I believe can take judicial notice, of a view held that over the long term prudently invested medium risk investments and equities keep pace with, if not outstrip, value increases in property.

[161] I resist taking judicial notice of such a long-term view or forming a view myself as to respective potential movements in value of both the family home and the KiwiSaver fund over the period December 2014 to date, it not being in the absence of evidence for the Court to speculate.

The parties wish to achieve certainty as to the status, ownership and division of property by entering into the agreement.

[162] I have no doubt from the evidence before me that Ms [Bond]'s wish on 4 December 2014 was to achieve certainty about outcome based upon the terms of the agreement signed by her, it having been explained to her by her lawyer.

[163] Mr [Glass] has raised a doubt as to his wish to have created certainty on the basis of the agreement's terms.

[164] I have already concluded that I do not accept Mr [Glass]'s evidence that he did not believe that he was entering into a binding contract on 4 December 2014, knowing that the compromise he wished in favour of his wife had been by the lawyer who drafted the agreement signed by him categorised as the foregoing by Ms [Bond] of a s 15 entitlement.

[165] The expression of view that Mr [Glass] had a sum of some $100,000.00 to $150,000.00 owing to him at a later date made to his four support witnesses I have observed were all made well before the December agreement was drafted.

They were also, it appears, expressed very much at a time when discussion was still occurring flowing from the suggestion that his interest in the family home could be transferred to a Trust.

[166] What I have concluded occurred was a process of negotiation leading to the December 2014 agreement, that he was properly advised as to the contents of the agreement and that its contents represented final settlement.

Any other matters

[167] No other matters were raised.

Outcome as to whether the 4 December 2014 agreement is to be overturned

[168] I conclude that the compromise agreement that divided relationship property on the basis that Ms [Bond] retain the family home with Mr [Glass] retaining the KiwiSaver account at value of $40,000.00 created a serious injustice. It left to him a 12.9% interest in the pool of relationship property not allowing for him to re-establish himself in the housing market something that rang contrary to the couples' housing ownership norm and disadvantaged him with relation to his ability to present to the children with a home owned by him.

[169] I am assisted in coming to the above view by the reality that no evidence was given of any calculation undertaken by the parties or their lawyers suggesting the direction of any of their minds to what an appropriate level of compensation in respect of s 15 of the Act might have been.

Should the alleged September 2014 agreement be upheld?

[170] Section 21F of the Property (Relationships) Act reads as follows:

21F Agreement void unless complies with certain requirements

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

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

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

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

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

[171] The agreement asserted by Mr [Glass] to have existed, if it did, did not comply with s 21F of the Act for the following reasons:

(a) The parties did not receive the benefit of legal advice.

(b) Lawyers did not certify that advice had been given.

(c) If there was a written document, it was not produced and flowing from that there was no evidence of the parties' signatures having been witnessed.

[172] Section 21H of the Property (Relationships) Act provides the jurisdiction for the Court to give effect to a non-qualifying agreement. The section reads as follows:

21H Court may give effect to agreement in certain circumstances

(1) Even though an agreement is void for non-compliance with a requirement of section 21F, the court may declare that the agreement has effect, wholly or in part or for any particular purpose, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.

(2) The court may make a declaration under this section in the course of any proceedings under this Act, or on application made for the purpose.

[173] What is abundantly clear from the evidence before the Court is that there were discussions between the parties as to possible relationship property resolution that led to Mr [Glass]'s September 2014 email to Ms [Bond].

[174] There was no evidence given to the Court as to where, from those discussions, Mr [Glass]'s email proposition that a share in the family home would transfer to a Trust for the children emanated.

[175] The result, if implemented, would have not compensated Ms [Bond] at all for her lost earning capacity other than by way of providing for she and the children occupation of the parties' family home given that the proposed agreement provided for transfer of Mr [Glass]'s interest in the home to a Trust for the children.

[176] Understandably in my view, Ms [Bond] was confused by this proposition. I have already indicated that I accept her evidence in that regard.

[177] Understandably, Ms [Bond] determined to have relationship property negotiations referred to lawyers. I accept her evidence in that regard.

[178] There was no produced signed document evidencing the agreement that Mr [Glass] asserted was reached.

Ms [Bond] was adamant that there was not one.

I accept Ms [Bond]'s evidence that there was no signed agreement. For her to have signed such a document would have run contrary to her position that she was confused by Mr [Glass]'s proposition and that she saw it as appropriate that she received some compensation for her disadvantaged position as a primary care parent.

[179] Mr [Glass] may have, from his perspective, thought that there was some deferred payment agreed to in return for the non-sale in the short term of the parties' family home, however I am absolutely clear in my mind that having reviewed the evidence there was no meeting of the minds as to this proposition.

[180] I further observe that cross-examined Mr [Glass] attempted to explain away his proposal to transfer his share of the family home to a Trust by stating that it was never intended that his interest in the home ever be transferred to a Trust, it always being intended that the transfer be to Ms [Bond] and that the Trust was simply to be established for the children's sake.

Such a view simply does not sit comfortably with any concept of there being a binding agreement intended in terms of Mr [Glass]'s 4 September 2014 email that he asserts was printed by Ms [Bond] and signed by them.

[181] I cannot be satisfied by a significant margin that the asserted September 2014 agreement should be given effect to.

Relationship property division

[182] Having set aside the 4 December 2014 agreement and having declined to give effect to the asserted September 2014 agreement, it falls to the Court to implement division of relationship property between the parties.

[183] No evidence was produced by the parties as to current valuation of:

(a) The family home.

(b) Mr [Glass]'s KiwiSaver scheme.

(c) The parties' motor vehicle.

(d) The parties' furniture.

[184] Save for assessment of compensation payable in respect of income disparity compensation to Ms [Bond] no suggestion is made that in respect of this marriage, division of relationship property should be anything other than equal.

[185] Counsel for Ms [Bond] suggested at the commencement of the hearing before me that in the event that I did not find that a binding agreement as to division of

relationship property existed, it might be necessary for the Court to timetable the filing of further evidence and to convene a second hearing to determine how relationship property should be divided.

[186] In my view the above approach would not assist in providing for division as urged by s 1N of the Act which reads as follows:

> **1N Principles**
>
> The following principles are to guide the achievement of the purpose of this Act:
>
> (a) the principle that men and women have equal status, and their equality should be maintained and enhanced:
>
> (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:
>
> (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:
>
> (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[187] I have been urged by Mr Noble for Ms [Bond] to, when approaching s 15 compensation in 2018, to adopt the views expressed in *Scott v Williams* (supra) as to valuation.

[188] Justice Glazebrook, in the Supreme Court's decision, observed that two main approaches as to s 15 valuation have been adopted, they being:

(a) To value what the disadvantaged partner would have earned in the future absent the division of functions in the relationship.

(b) To assess how much the advantaged partner's future earning capacity has been enhanced by the division of functions.

She observed that in some cases both the diminution and enhancement methods described above have been used.

[189] At paragraph [208] of her decision she observed that a broad approach should be taken to valuation to achieve as expeditious and inexpensive outcome as possible.

[190] Justice Glazebrook at paragraphs [206] to [208] supported the continued availability of the "but for" approach to valuation referred to by Justice Arnold in the Court's deliberations.

[191] I see in what is a relatively straightforward case for compensation, no reason to depart from the "but for" approach used by me in paragraphs [110] to [146] above.

[192] In the above paragraphs, I concluded that appropriate formulaically calculated compensation payable to Ms [Bond] in 2014 was $69,500.00 before exercising my discretion as to fairness. I arrived at that figure making provision for the discounting of contingencies which now, on the eve of Ms [Bond]'s return to the fulltime workforce, have not materialised.

In my view, a discount for the advantage of early resolution, contingent risks of changed circumstances and changes in value of money, is no longer called for.

[193] The resultant compensation figure without providing for discount becomes $109,300.00.

[194] The impact in 2014 of implementation of s 15 compensation that I have concluded should have been $69,500.00, would have provided for division of relationship property on a 72.42% to Ms [Bond] and a 27.58% to Mr [Glass] basis, that I have concluded provided too little to Mr [Glass]. $99,000.00 at 32% I concluded was appropriate.

[195] Such a division would have enabled the parties defined monetary entitlements in the real estate property market and the equities property market to increase in value proportionately post-division.

[196] In the event that I had adopted utilising the differences between the parties' income as opposed to the "but for" approach to s 15 compensation, yielding a higher compensation figure for Ms [Bond], the reality is that when exercising my discretion in 2014, I could not have found a resultant higher share of the pool for Ms [Bond] would have been equitable in the circumstances.

[197] In my recalled judgment I determined that a 68%/32% division of relationship property achieved equity and fairness while compensating Ms [Bond] pursuant to s 15 of the Act.

[198] As already indicated, I regard the threshold of approximately $100,000.00 (in my 28 February judgment $99,000.00) as a threshold beneath which, for Mr [Glass] as a share of the $310,000.00 relationship property pool in 2014, I would not have descended.

[199] The result of my above observations are that while I have recalled my judgment to correct the errors that flowed from inclusion of an incorrect end date for Ms [Bond]'s compensation, I do not come to the view that the end result outcome of division of relationship property on a 68%/32% basis should change.

[200] I come to the above view for the following reasons:

(a) The parties 2014 entitlements based on assessment of s 15 compensation then will have grown as a result of the market growth in both managed equities and real estate.

(b) The higher award that I would make today for s 15 compensation as a result of not applying a contingencies discount ($109,300.00) would easily be absorbed within the 68%/32% division of property given market value increases.

(c) I have not been provided with any valuation evidence at hearing date and view continuation of these proceedings to obtain them and further

compensation argument as not meeting the requirement contained in s 1N of the Act referred to above.

[201] I therefore determine that the relationship property pool, which includes the family home, the parties' chattels, motor vehicle, KiwiSaver and bank accounts, should be divided on the 68%/32% basis indicated above.

[202] My expectation is that the parties, assisted by counsel and informed by valuations, will implement division on the above basis.

[203] I record that my expectation would be that Ms [Bond] would be in a position to acquire Mr [Glass]'s interest in the family home by the time [Lisa] commences school in February 2019.

I would allow such occupation without settlement for that purpose if the parties are unable to reach their own agreement as to division.

[204] Given the absence of any valuation evidence (and I do not regard the QV record of value as to the family home as the same) but in order to achieve resolution of relationship property division as its expeditiously and fairly as possible, I make the following findings and orders:

(a) The parties' relationship property consists of:

(i) The family home.

(ii) Their chattels.

(iii) Their motor vehicle.

(iv) Mr [Glass]'s KiwiSaver scheme.

(v) The parties' bank accounts as identified in their affidavits of liabilities.

(b) All relationship property is to be divided on a 68%/32% basis, which division takes into account compensation payable to Ms [Bond] by Mr [Glass] in respect of the provisions of s 15 of the Act.

(c) Separation date value given that Ms [Bond] has had the benefit of the motor vehicle's use since separation, is appropriate for it and I note that the parties were agreed in their respective affidavits of assets and liabilities that that value was $8,000.00. I determine that that is the vehicle's value.

(d) The parties shall by commissioning of valuations or by agreement themselves, otherwise agree valuation of:

(i) The family home.

(ii) Their chattels.

(iii) The KiwiSaver account of Mr [Glass].

(iv) Their bank accounts.

(e) In the event that the parties cannot agree values for the above by 4 May 2018, they may return to this Court for findings in which case each is to by 25 May 2018 file evidence as to his or her proposal as to valuation for each item supported by expert evidence.

(f) Hearing date value is to apply to the KiwiSaver scheme and chattels, the KiwiSaver scheme value to be discounted to take into account post-separation contributions made to it by Mr [Glass].

(g) Counsel are, in the event that the Court's determination is sought, to file memoranda as to hearing time sought for the determining of values by 25 May 2018.

(h) Ms [Bond] is to have a first option to purchase Mr [Glass]'s interest in the family home, adjusted for division of other relationship assets and any further mortgage principle reduction made by her, such option to be exercised as follows:

(i) She is to provide written notice of her intent to purchase by 31 January 2019.

(ii) In the event that she seeks to purchase she is to effect settlement by 28 February 2019.

(iii) In the event that she does not elect to purchase, or that she fails to settle by the above date, the home is to be placed on the market for sale by auction with the proceeds of sale divided in accordance with the above relationship property sharing percentages adjusted for division of relationship assets between the parties as determine by me.

(i) Leave is reserved to return to the Court for directions as to sale or otherwise as to implementation of five days' notice.

[205] Costs are reserved and may be argued against the background of my observations that:

(a) Mr [Glass] has succeeded in an application to have the relationship property agreement set aside; and

(b) Ms [Bond] has succeeded in her application for compensation pursuant to s 15 of the Act.

S J Maude
Family Court Judge

Signed 14 May 2018 at 11.30 am