

UPDATE RELATIONSHIP PROPERTY

When contracting out agreements don't provide protection

BY SHARON CHANDRA

SECTION 21J OF THE PROPERTY (RELATIONSHIPS) ACT 1976 provides the court with a discretion to void a relationship property agreement if giving effect to the agreement would cause a serious injustice. The recent High Court case of *White v Kay* [2017] NZHC 1643, [2016] NZFC 4942 emphasises the circumstances in which the court will void a contracting out agreement and highlights the importance of ensuring such agreements are regularly reviewed.

Mr White and Ms Kay entered into a contracting out agreement after living together for about 20 years. The agreement provided for each of them to retain all current and future property as their own. Mr White held significantly greater assets than Ms Kay, including an unencumbered family home.

Upon their separation, Ms Kay applied to void the agreement on the grounds of a serious injustice pursuant to Section 21J. Section 21J(4) sets out the matters which the court must have regard to in making its assessment:

- The provisions of the agreement,
- The length of time since the agreement was made,
- Whether the agreement was unfair or unreasonable in light of all the circumstances at the time it was made,
- Whether the agreement has become unfair or unreasonable in light of any changes in circumstances since it was made,
- The fact that the parties wished to achieve certainty, and
- Any other matters the Court considers relevant.

Provisions of the agreement

This requires an assessment of the terms of the agreement itself as to whether, on its face, the agreement is seriously unjust. In *White v Kay* the terms of the agreement were such that they took away Ms Kay's substantive rights under the Act. The court found it notable the agreement did not identify any specific items of property nor did it refer to the value of property or record the length of the parties' relationship at the time. This only serves to highlight the importance of ensuring complete disclosure is made when entering into a contracting out agreement.

Length of time which has passed

It is relatively well-established that the more time that passes since the execution of an agreement, the more difficult it will be to meet the threshold under s 21J. In *White v Kay* the parties entered into an agreement in 2004 and Ms Kay didn't challenge the agreement until 2012, at the time the parties separated. Whilst a number of years had passed since the agreement was made, the court held Ms Kay had no reason to turn her mind to challenging the agreement until the relationship was at an end. It was also relevant, during that period of time, Ms Kay continued to contribute to Mr White's separate property, which increased significantly in value and Ms Kay hadn't acquired any assets of her own.

Circumstances at the time of the agreement

The majority of case law favours the view that fairness relates to freedom of consent and unreasonableness requires a comparison between the terms of the agreement and the parties' entitlement under the Act. Generally, the greater the disparity, the readier the court will be to find it unjust to give effect to the agreement. The court in *White v Kay* held the agreement was unfair and unreasonable from its inception, on the basis that Ms Kay forwent almost her entire legal entitlement and received nothing in return.

The leading case of *Harrison v Harrison* [2005] 2 NZLR 349; [2005]



NZFLR 252 held that sound justifications for a disparity are likely to be easier found if the agreement has been entered into prior to the commencement of a de facto relationship and does no more than protect assets which were owned prior to the relationship.

Changes in circumstances

An agreement which does not result in a disparity at the time it was entered into may do so through the passing of time, as was the case in *Pountney v Pountney* CA45/91, 20 September 1991; BC9169020.

The relevant change in circumstances in *White v Kay* were that Mr White had improved the value of the property over time, with Ms Kay's support and assistance and he incorporated a company. Given the agreement in this case was found to be unreasonable from its inception, the court held the chances of it becoming less so over time were remote. The passing of time, in fact, had the effect of increasing the disparity between the parties. The court was, however, careful to note, a mere inequality or disparity on its own will be insufficient to meet the threshold under s 21J.

Certainty

The mere fact of entering into an agreement presupposes an object



AML/CFT in practice

Suspicious activity reporting

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of certainty. Even when this is not, in fact, the case, the court has been inclined to imply an element of certainty. In *White v Kay* the court found that, whilst the agreement may have put Mr White's mind at ease, there was no detrimental reliance on the agreement by him nor was there any benefit to Ms Kay in achieving certainty. The court's view was the need for contractual certainty was outweighed by the significant disparity, the length of the parties' relationship, their respective roles and the resulting power imbalance.

Other relevant considerations may relate to elements of influence or undue pressure short of duress when entering into the agreement. In *White v Kay*, the court was of the view that Ms Kay's signing of an agreement which provided no obvious benefit to her must inevitably have involved some form of psychological pressure.

The court found this was endorsed by the fact that Ms Kay had little knowledge of Mr White's financial affairs and the dynamics of the parties' relationship were such that Mr White was dominant and controlling. A further consideration the court took into account was the fact the lawyer who certified the agreement on Ms Kay's behalf gave evidence he would not certify the agreement if he were asked to do so again today.

After the above factors have been considered, the court must then decide whether giving effect to the agreement would give rise to a serious injustice. A successful application under s 21J holds a high threshold and caution must be exercised in making an assessment as to whether the threshold is met. ■

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WHILE THERE HAS BEEN A LOT OF DISCUSSION ABOUT how the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT) is to apply to lawyers from 1 July 2018, lawyers may wonder what they need to do to comply day-to-day, once it is in place.

One of the most important regular requirements will be suspicious activity reporting. When a lawyer comes across "suspicious activity" in their practice, they must report it to the Financial Intelligence Unit of the New Zealand Police within three working days. Failing to report suspicious activity is an offence (as is disclosing information about a report, with exceptions such as for getting legal advice).

The immediate question for lawyers is what activity is suspicious? There is no bright-line rule as to what activity is suspicious. Every lawyer will need to make a decision on whether activity is suspicious, for each individual case. The more informed lawyers are about money laundering and terrorism financing, the better the decisions they can make.

Under the amended Act, suspicious activity covers activity in relation to a transaction or service, or proposed transaction or service, in which the lawyer suspects the activity in question is or may be relevant to the investigation or enforcement of various Acts, such as the Crimes Act 1961, Misuse of Drugs Act 1975, and the Terrorism Suppression Act 2002. This definition creates a technical requirement for suspicious activity reports, but can be difficult to apply in practice. What may be relevant to an investigation or enforcement action may not be obvious to a lawyer advising on a transaction.

Red flags

AML regulators are aware that this definition is challenging. The Financial Markets Authority (FMA) found that in 2015/2016, all the entities it supervised only made about 80 suspicious transaction reports, below expectations. The FMA responded by giving its entities lists of "red flags" for suspicious transactions, for people like financial