

**IN THE HIGH COURT OF NEW ZEALAND  
NEW PLYMOUTH REGISTRY**

**CIV 2007-443-000688**

BETWEEN	STEVEN TIMOTHY CORBITT Plaintiff
AND	ANNABEL CHRISTINE ROWLEY First Defendant
AND	BILLINGS Second Defendants
AND	GREGORY PETER LLOYD Third Defendant
AND	NICHOLSONS Fourth Defendants

Hearing: 2 September 2008

Counsel: R Wilson for plaintiff  
S Gifford for interested party K L Wallace

Judgment: 6 April 2009 at 4:00pm

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**JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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*This judgment was delivered by me on 6 April at 4:00pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:

Colleen McLeod, Private Bag 2031, New Plymouth 4342 for plaintiff  
Kennedys, PO Box 3158, Auckland 1140 for first and second defendants  
Francis Roger Mori, PO Box 68, New Plymouth 4340 for third and fourth defendants

[1] The plaintiff (Mr Corbitt) applies for an order transferring a Family Court proceeding to this Court, and consolidating it with this proceeding. The application is unusual in that it is not opposed by the defendants in this proceeding, but only by the opposing party in the Family Court proceeding, Mr Corbitt's ex wife (Ms Wallace).

[2] This proceeding, and the present application, have their genesis in an application by Ms Wallace to the Family Court to set aside a relationship property agreement between Mr Corbitt and Ms Wallace. The second defendant firm acted for Ms Wallace in relation to that agreement. The fourth defendant firm acted for Mr Corbitt. The first and third defendants were the persons within those firms who provided the independent legal advice and requisite certificates on the agreement. Ms Wallace brought her application on the grounds that she did not get proper advice, and the agreement was unfair and uncertain. Mr Corbitt has opposed Ms Wallace's application. He says that appropriate legal advice was given, and that the agreement was, and remains, just and certain. He has cross-applied for a declaration that the agreement is valid.

[3] Mr Corbitt subsequently issued this proceeding in which he seeks damages from the solicitors who advised Ms Wallace and himself on the agreement, in the event that the agreement is declared void or set aside. He claims that Ms Wallace's solicitors owed him a duty of care to provide independent legal advice to the proper standard, and that his own solicitors owed him a duty of care to ensure that the agreement contained all requisite matters and was sufficiently certain. Mr Corbitt brought this proceeding ahead of resolution of the Family Court proceeding because of concern that a limitation period was about to apply.

[4] Mr Corbitt is concerned that there is a risk of conflicting findings if the two proceedings are not heard together. He seeks transfer of the Family Court proceeding to this Court, and consolidation of the proceedings.

[5] Ms Wallace challenges the application on both jurisdictional and substantive grounds. She says first that only a Family Court Judge has jurisdiction to order

transfer of the Family Court proceeding. She also argues that it would be unjust to require her proceeding to be heard with the present proceeding.

[6] The defendants in this proceeding do not wish to be heard on the application for transfer, and do not oppose consolidation.

### **Issues for determination**

[7] The issues which the Court needs to address on this application are:

- a) Whether this Court has jurisdiction to transfer Ms Wallace's application; and
- b) If so, whether an order for transfer should be made. As Mr Corbitt's primary ground for seeking transfer is to allow consolidation of the two proceedings, the decision on whether or not to order transfer will turn primarily on the need for or desirability of consolidation.

### **Jurisdiction to transfer – statutory provisions**

[8] The application is made in reliance on s 43(6) of the District Court Act 1947 and s 16(1) of the Family Courts Act 1980.

[9] Section s 43 of the District Courts Act provides various mechanisms for transfer of a proceeding from the District Court to the High Court. Subsections (1) and (2) prescribe circumstances in which a District Court Judge can order transfer. The relevant mechanism for the present application, however, is to be found in subsection (6), which reads:

#### **43 Transfer to High Court of proceeding within jurisdiction**

...

- (6) Notwithstanding the foregoing provisions of this section, the High Court or a Judge thereof on the application of any party to the proceeding may order the removal into the High

Court, by order for certiorari or otherwise, of any proceeding commenced in a District Court, if the High Court or Judge thereof thinks it desirable that the proceeding should be heard and determined in the High Court. Any such removal shall be on such terms as to payment of costs, giving security, or otherwise as the High Court or a Judge thereof thinks fit to impose.

[10] Specialist Family Courts were established by the Family Court Act as a division of the District Court. The long title of the Act reads:

An Act to establish Family Courts as divisions of District Courts, and to provide for the constitution, jurisdiction, powers, and procedures of Family Courts

[11] The relevant parts of s 16 of the Family Courts Act provide:

**16 Application of District Courts Act 1947**

- (1) Subject to the succeeding provisions of this section, the District Courts Act 1947 shall apply, with any necessary modifications, to Family Courts and Family Court Judges in the same manner and to the same extent as it applies to District Courts and District Court Judges.
- (2) Where any of the provisions of this Act conflict with any of the provisions of the District Courts Act 1947, the provisions of this Act shall prevail.

[12] Section 11 of the Family Courts Act gave Family Courts jurisdiction to determine proceedings brought under various statutes dealing with family relationships, including (at time of enactment) the Matrimonial Property Act 1976. Until 1 February 2002 s 22 of the Matrimonial Property Act gave the High Court and the Family Court concurrent jurisdiction in respect of proceedings under the Act. That section read:

**22 Courts to have concurrent jurisdiction**

- (1) The High Court and a Family Court shall each have jurisdiction in respect of proceedings under this Act:

Provided that a Family Court shall have no jurisdiction to entertain any application in respect of any matrimonial property where proceedings under this Act relating to or affecting that property are pending in the High Court at the date at which the application is made.

- (2) Notwithstanding anything in subsection (1) of this section if a Family Court Judge is of the opinion that any proceedings under this Act, or any question in any such proceedings, would be more appropriately dealt with in the High Court, he may, upon application by any party to the proceedings or without any such application, refer the proceedings or the question to that Court.
- (3) The High Court, upon application by any party to proceedings pending under this Act in a Family Court, shall order the proceedings to be removed into the High Court unless it is satisfied that the proceedings would be more appropriately dealt with in a Family Court. Where the proceedings have been so removed they shall be continued in the High Court as if they had been properly and duly commenced in that Court.

[13] The jurisdictional issue in this case arises out of the change to s 22 brought about by the Property (Relationships) Amendment Act 2001 which came into force on 1 February 2002. Section 22 was rewritten to remove the originating jurisdiction of the High Court and vest it exclusively in the Family Court.

[14] Section 22 of the Act (now renamed the Property (Relationships) Act 1976) now reads:

## **22 Jurisdiction**

- (1) Every application under this Act must be heard and determined in a Family Court.
- (2) This section is subject to any other provision of this Act that confers jurisdiction on any other court.
- (3) Regardless of subsections (1) and (2), a Family Court Judge may order that proceedings be transferred to the High Court if the Judge is satisfied that the High Court is the more appropriate venue for dealing with the proceedings, because of their complexity or the complexity of a question in issue in them.
- (4) The Family Court Judge may transfer proceedings on the application of a party to the proceedings or on his or her own initiative.
- (5) Proceedings transferred to the High Court continue in that Court as if they had been properly commenced there.

## **The jurisdictional issue and arguments**

[15] The jurisdictional issue is whether the Family Court's exclusive jurisdiction under s 22 extends to this application for transfer. Counsel for Mr Corbitt accepted that s 22 requires all applications under the Property (Relationships) Act to be commenced in the Family Court. However, in a carefully constructed argument drawing on *Zaoui v Attorney-General* [2005] 1 NZLR 577 and the supervisory jurisdiction of the High Court, he argued that once commenced the proceeding was subject to the power to transfer in s 43(6) of the District Courts Act (which applied to Family Courts by virtue of 16(1) of the Family Courts Act). He argued that s 22 did not impliedly repeal s 43(6), submitting that authorities such as *Jew v Jew* [2003] 1 NZLR 708 and *Public Trust v Nicholas* [2005] NZFLR 923 suggest that the Family Court's jurisdiction is not as comprehensive as the literal words of s 22 might suggest.

[16] Counsel for Ms Wallace submitted that s 22 was clear in establishing exclusive jurisdiction for relationship property matters in the Family Court, and that the reference to "every application under this Act" extended to an application for transfer (for which specific provision is made in s 22 (2) and (3)). He relied on *Cuthbert v Humphries* (FC AK, FP004/313–D/03, 20 May 2004, Robinson J) where the Family Court commented (obiter) that the High Court no longer has jurisdiction to order that relationship property proceedings pending in the Family Court be transferred to the High Court.

## **Discussion**

[17] In my view the critical issue in respect of jurisdiction is whether s 22 of the Property (Relationships) Act is so inconsistent with s 43(6) as to impliedly repeal it in respect of proceedings involving relationship property. Before addressing the history and interaction of these two sections, I will comment briefly on a point raised by counsel for Ms Wallace, namely that s 43(6) has no application as it is limited to a proceeding commenced in the District Court as distinct from the Family Court.

[18] The Family Court was established as a division of the District Court (refer the long title and s 4 of the Family Courts Act). S 16(1) of the Family Courts Act expressly provides that the District Courts Act is to apply to Family Courts “with any necessary modifications”. In *Singh v Kaur* [2000] 1 NZLR 755 Potter J held that the jurisdiction of the Family Court was “super-added” to the general jurisdiction of the District Court. After discussing s 16(1) of the Family Courts Act, she stated (at para [31]):

[31] ... Thus, Part III of the District Courts Act 1947 which confers Jurisdiction on the District Court (and importantly with relevance to this case and most of the decided cases referred to above, the equity jurisdiction of the District Court conferred by s 34 of the District Courts Act), applies to Family Courts and Family Court Judges. While s 16 of the Family Courts Act provides that the District Courts Act shall apply "with any necessary modifications" I do not consider any necessary modification arises from the requirement of s 11 of the Family Courts Act that jurisdiction under specified statutes and enactments, should be exercised only by the Family Court.

[19] Returning to the key issue, counsel were agreed that the legislative intent of the Property (Relationships) Amendment Act 2001 was to prioritise the Family Court as the Court of original jurisdiction for all proceedings under the Property (Relationships) Act. Where they differ is whether the language of s 22 as inserted by the Amendment Act was a sufficiently clear expression of legislative intent to limit the right to order transfer to a Family Court Judge (and hence override s 43(6)).

[20] A consideration of the prior provisions for transfer will help in understanding of this point. Prior to commencement of the Amendment Act there were three statutory provisions relating to transfer of proceedings from the District Court to the High Court, namely s 43 of the District Courts Act, s 14 of the Family Courts Act, and s 22 of the Matrimonial Property Act:

- a) Section 43 provided powers to both the District Court and the High Court for transfer of any civil proceedings. The District Court’s power varied according to the value of any property or relief claimed. The Court was required, upon request, to transfer a proceeding in which the claim or the value of property or relief claimed exceeded \$50,000, but had a discretion below that sum if the proceeding raised

an important question of law or fact or an issue over title to a hereditament. The High Court, on application to it, had a discretion to order transfer if it decided that transfer was desirable. The High Court's power under s 43(6) is a "stand alone" power: *Wilkinson v Wilkinson* (1990) 6 FRNZ 483.

- b) Section 14 of the Family Courts Act gave a Family Court power to order transfer if it considered it expedient to do so because of the complexity of the proceeding or any issue in it.
- c) Section 22 of the Matrimonial Property Act 1976 gave power to transfer a matrimonial property proceeding both to the District Court and to the High Court. The District Court had a discretion to transfer if it considered that the proceeding, or any question in it, would more appropriately be dealt with in the High Courts. The High Court was required, on application, to order the proceedings to be transferred to it unless satisfied that the proceeding was more appropriately dealt with in a Family Court.

[21] It can be seen from the above that there was an apparent conflict between s 43(1) and (2) and s 14. The Family Court's power to transfer was not limited by value as was the general power available to the District Court. By reason of s 16(1) of the Family Courts Act, s 14 would prevail over ss 43(1) and (2). Further, as s 14 was subject to "the Act under which any proceedings are brought", s 22(2) of the Matrimonial Property Act prevailed over s 14 of the Family Courts Act, and hence over s 43(1) and (2) of the District Courts Act.

[22] There appeared to be a similar conflict between the sections governing the High Court's power to transfer. Under s 43(6) the High Court had to be satisfied the transfer was desirable, but then had a discretion: *Fuehrer v Thompson* [1981] 1 NZLR 699. Under s 22(3) of the Matrimonial Property Act, the High Court was obliged to transfer the proceedings unless it was satisfied that the proceedings would be more appropriately dealt with in a Family Court.



[23] The change to s 22 of the Property (Relationships) Act gains significance when considered against the foregoing analysis. In keeping with the legislative intent to give the Family Court exclusive jurisdiction on relationship property matters, the apparent bias in favour of the High Court exemplified by s 22 of the Matrimonial Property Act has been removed. There is no longer power to apply directly to the High Court. Further, the Family Court's power to transfer has been limited to cases where the Family Court considers that the proceeding as a whole is more appropriately dealt with in the High Court **because of complexity** of the proceeding or an issue in the proceeding (my emphasis).

[24] Section 4A of the Property (Relationships) Act is also relevant. It provides:

**4A Other enactments to be read subject to this Act**

Every enactment must be read subject to this Act, unless this Act or the other enactment expressly provides to the contrary.

[25] The changes made to s 22 were clearly intended to reinforce the specialised jurisdiction of the Family Court. The change from the test that the proceedings were more appropriately dealt with in the High Court to the present requirement that they be more appropriate because of their complexity, or the complexity of an issue in question, reinforces this intent. It suggests that wider considerations (such as consolidation) will not be considered unless consolidation raises issues which increase the complexity of the case. However, even if there is still an argument that the possibility of conflicting findings of fact can amount to complexity, and thereby warrant transfer, that issue can just as easily be determined by the Family Court. No reason was advanced in this case why application was not made to the Family Court. The special skill and experience of Family Court Judges, in my view, put them in as good a position as a Judge of the High Court to determine whether the complexity of the issue warrants transfer. This reasoning appears to underlie the judgment of the Family Court in *Cuthbert v Humphries*, although the Court's comment that the High Court no longer has jurisdiction to transfer was obiter, and the judgment does not mention any argument having been advanced in relation to s 43(6) of the District Courts Act.

[26] Counsel for Mr Corbitt presented a well reasoned argument that any proceeding within the District Court's jurisdiction could be removed under s 43(6), and that this was consistent with the High Court's supervisory jurisdiction over the exercise of statutory power by inferior Courts. He supported his argument by reference to the decision of the Supreme Court in *Zaoui v Attorney-General* where the Supreme Court had to consider whether the High Court had jurisdiction to recall or amend a warrant of commitment issued under s 114O of the Immigration Act 1987 (the Act having given that power to a District Court Judge). The Supreme Court held that the High Court had power to act under s 114O after the application had been removed to it under s 43(6). Counsel relied on the Supreme Court's statement at para [98]:

[98] The general terms of that provision plainly contemplate that the High Court will have all the powers that a District Court would have had to deal with the application.

He argued that s 43(6) similarly gave the High Court jurisdiction to decide on matters of relationship property notwithstanding s 22 of the Property (Relationships) Act. He submitted that there was no reason to treat the mechanism in s 22 (2) as the only procedure for transferring a relationship property case to the High Court.

[27] I do not read *Zaoui* as support for Mr Corbitt on the issue of jurisdiction to order transfer. The Supreme Court was not asked to consider the basis for transfer (the application had been transferred by consent). It had to decide only whether the High Court, after transfer, could exercise the statutory power given to a District Court Judge under s 114O after transfer. Counsel for Ms Wallace did not attempt to argue that the High Court would not have power to determine Ms Wallace's application after transfer (which seems to me to be the relevant point of the *Zaoui* decision). There was no need to consider this aspect of *Zaoui* in the present case given the specific provision in s 22(5) of the Property (Relationships) Act confirming the High Court's power.

[28] The Supreme Court did confirm (para [34] – [36]) that the High Court had an inherent substantive jurisdiction to supervise the exercise of statutory power by an inferior Court unless that power was excluded expressly or by necessary implication.

That is the potentially relevant aspect of that case for the present application. I am not persuaded, however that an application under 2 43(6) comes within that jurisdiction. It is an originating application rather than exercise of supervisory jurisdiction.

[29] The relevant issue is the one I have identified, namely whether s 22 overrides s 43(6). Counsel for Mr Corbitt referred to three authorities to support his submission that the jurisdiction given to the Family Court by s 22 was not as comprehensive as the literal words might suggest, and particularly as to the mechanism of transfer. As with *Zaoui*, I do not read them as compelling the conclusion that he seeks for Mr Corbitt:

- a) In *Public Trust v Nicholas* the High Court considered an application to strike out a relationship property proceeding commenced in the Family Court. Counsel for Mr Corbitt argued that this was an illustration of the Court writing down the apparently wide literal meaning of s 22. However, the Family Court made the order for transfer in that case, by consent. The High Court's power to make an order under s 43(6) was not considered. The issue of concern to the Court in that case was whether there was jurisdiction to transfer a part of the proceeding (the strike out application) rather than the proceeding as a whole. The Court circumvented that jurisdictional issue by treating the application as a case stated under s 13 of the Family Courts Act 1980.
- b) In *Jew v Jew* the High Court was asked to give a declaration that certain property belonged to a trust (and hence was not relationship property). The High Court found that it had jurisdiction to determine the question notwithstanding the exclusive jurisdiction of the Family Court in relation to relationship property matters. The Court considered and rejected the argument that it would be counter to the policy underlying the Property (Relationships) Act for it to accept jurisdiction on that originating application, on the grounds that it was

not determining relationship property. The Court stated, (at para [37] and [38]):

[37] ... If the property owned by the trust is not relationship property, this Court will not be classifying relationship property. If the property or any part of it is relationship property, the declaration sought will not be made.

...

[38] ... It is not, in my view, contrary to public policy that this Court determine status of property which may inevitably assist in resolving relationship property disputes, but which in itself does not determine matters within the sole jurisdiction of the Family Court. Nor do I see this as a duplicate proceeding to the Family Court proceeding. The remedies sought in the two proceedings are not equally effective. This proceeding, if successful, will not classify the property of the parties, nor lead to a division of relationship property.

No such distinction can be made in the present case. The proceeding which Mr Corbitt seeks to have transferred clearly involves matters (whether or not the relationship property agreement is void) which are the subject of the Property (Relationships) Act and come within s 25(1) of the Act.

- c) The final case to which counsel for Mr Corbitt referred was *Felton v Johnson* (HC AK CP419/SD97, 8 October 2003, Venning J). The High Court was asked to make declarations under s 47 of the Property (Relationships) Act. Its jurisdiction to do so was questioned having regard to the amendment of s 22 by the Property (Relationships) Amendment Act 2001. The case does not assist Mr Corbitt as that proceeding was commenced before the Amendment Act came into force and the transitional provisions of s 97 of the Act provides specifically for it to continue in the High Court.

[30] I find there is a conflict between the transfer provision in s 43(6) of the District Courts Act 1992 and s 22 of the Property (Relationships) Act 1976. I find that to allow s 43(6) to be used to seek transfer of a proceeding under the Property

(Relationships) Act 1976 would be inconsistent with the purpose and clear legislative intent of s 22 to provide primacy to the Family Court in such matters. The removal of the entitlement to apply direct to the High Court for transfer, and the limitation of the Family Court's power to order transfer to cases which are appropriate for transfer due to complexity, are powerful indicators that applications for transfer are to be determined in the first instance in the Family Court. Having regard to those matters, I find that this Court has no jurisdiction under s 43(6) to order transfer to this Court of Family Court proceedings FAM 2007-0430-00549.

### **Consolidation**

[31] Mr Corbitt's application for transfer was based solely on the ground that an order for consolidation was necessary to avoid the possibility of inconsistent decisions (and thereby was desirable in terms of the test in *Fuehrer v Thompson*). He contends that this possibility exists because of the different parties to the separate proceedings, with a prospect of different findings of fact on the critical questions of the standard and competence of the advice given on the relationship property agreement. He says that the outcome for him could be substantial (he has given evidence that it could be in the order of \$500,000). If the sum in issue is this great, that would preclude consolidation in the District Court (as occurred in *Singh v Kaur*).

[32] There is nothing to prevent Mr Corbitt raising these matters before the Family Court. The issue then will be whether they meet the criterion of complexity needed for an order for transfer. That will depend, in large part, on the nature of the respective arguments in relation to the relationship property agreement. It is appropriate that that matter be considered in the specialist jurisdiction of the Family Court.

## **Decision**

[33] Mr Corbitt's application is declined for lack of jurisdiction.

[34] Counsel did not address me on costs. In the normal course Ms Wallace (as the successful party) would be entitled to costs on a 2B basis. If counsel are unable to agree, memoranda are to be filed within 21 days.

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**Associate Judge Abbott**