IN THE COURT OF APPEAL OF NEW ZEALAND

CA18/2015
[2016] NZCA 139

BETWEEN		MONOCRANE NZ LIMITED (IN LIQUIDATION) First Appellant
		DAMIEN GRANT AND STEVEN KHOV AS LIQUIDATORS OF MONOCRANE NZ LIMITED (IN LIQUIDATION) Second Appellants
AND		ANGELA MONCUR Respondent

Hearing:	16 March 2016
Court:	Randerson, French and Kós JJ
Counsel:	B J Norling and A Ho for Appellants D P Weaver and A J Bell for Respondent
Judgment:	19 April 2016 at 4.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The first appellant and second appellants as liquidators must pay the respondent costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] An estranged husband and wife enter into a relationship property agreement pursuant to the Property (Relationships) Act 1976 (the Act). Under the agreement the husband assumes full ownership and control of a company owned jointly by the husband and wife. The wife agrees to resign her directorship and transfer her shares to the husband. He agrees to assume sole responsibility for the shareholders' current account liability. Subsequently, the husband places the company into voluntary liquidation and appoints liquidators. The liquidators issue proceedings against the wife for recovery of the full amount of the shareholders' current account liability.

[2] That was the scenario before Keane J in the High Court. The Judge held the relationship property agreement protected the wife from any liability for the shareholders' current account and dismissed the claim.[1]

[3] The liquidators now appeal the decision.

Factual background

[4] Mr and Ms Moncur separated on 12 January 2009 after 25 years of marriage. After taking independent legal advice, they entered into a relationship property agreement on 19 April 2010 pursuant to s 21A of the Act. The agreement was subsequently varied. It was common ground that the agreement and variation complied in all respects with the requirements of the Act and were binding on Mr and Ms Moncur.

[5] At the time of entering the relationship property agreement, Mr and Ms Moncur were the sole directors of a company called Monocrane NZ Ltd (Monocrane). They and their family trust (the trust) owned 900 of the 1000 shares in Monocrane. The remaining shares were owned by their son Luke and Luke's family trust. The parties agreed for the purposes of this appeal the existence of Luke's shareholding was not relevant. We have therefore proceeded on the basis that for all practical purposes the company was owned beneficially by Mr and Mrs Moncur.

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1 *Monocrane NZ Ltd (in liq) v Moncur* [2014] NZHC 3012.

[6] During the financial year ended 31 March 2010 Mr and Ms Moncur had each taken drawings from a shareholders' current account that was in their joint names, leaving the account overdrawn by $130,729. The previous financial year, the current account balance had been nil.

[7] Under the relationship property agreement Mr Moncur took full ownership and control of Monocrane. He obtained all of Monocrane's assets and agreed to assume responsibility for the overdrawn current account as his separate debt. Ms Moncur retained as her separate property the bundle of rights relating to the trust, which included the interest in the family home. The family home was subject to a mortgage held by Sovereign Finance (the Sovereign mortgage).

[8] The loan secured by the Sovereign mortgage comprised two separate advances. The advances were identified in the relationship property agreement as "the residential loan" and "the business loan".

[9] It was a further term of the relationship property agreement that in the first instance Ms Moncur would refinance the full amount of the Sovereign mortgage debt (that is, both the residential loan and the business loan), thereby releasing Mr Moncur from any liability to Sovereign Finance. However, it was also agreed $200,000 of the business loan would be Mr Moncur's separate debt and that he would pay that sum of money to Ms Moncur on or before 17 November 2010. Until then, Mr Moncur undertook either personally or through Monocrane to pay Ms Moncur weekly instalments of $300 in consideration for her continuing to provide the security for the refinanced business loan.

[10] In accordance with the relationship property agreement, Ms Moncur duly refinanced all of the Sovereign mortgage debt by borrowing from a firm of solicitors and her sister. She also resigned as a director of Monocrane effective 17 May 2010 and transferred her shares and those of the trust to Mr Moncur on 8 July 2010.

[11] On 20 September 2010 Mr Moncur as the then sole shareholder and director of Monocrane passed a company resolution placing Monocrane into voluntary liquidation and appointing liquidators. The original liquidators appointed by

Mr Moncur were the second appellant, Mr Khov, and a Mr Dreenan. Mr Dreenan subsequently resigned as liquidator and was replaced by the other second appellant, Mr Grant.

[12] The liquidators sold Monocrane's assets to a new company called Monocrane 2010 Ltd. Monocrane 2010 Ltd was owned by the father of Mr Moncur's then girlfriend. Mr Moncur became an employee of the new company.

[13] Mr Moncur did not honour his obligation under the relationship property agreement to pay the $200,000 to Ms Moncur. As a result, she was forced to sell the home. She obtained a judgment against Mr Moncur for $200,000 in the District Court.

[14] Between 7 December 2010 and 1 March 2012 the liquidators made demand of Ms Moncur for payment of the sum of $146,587.50. This figure comprised:

(a) The full amount of the overdrawn joint shareholders' account as at the end of March 2010, including all advances made to Mr Moncur as well as those to Ms Moncur after the date of separation on the basis each was jointly and severally liable for the full amount.

(b) What were said to be "further advances" totalling $8,500 made by Monocrane to Ms Moncur between April 2010 and September 2010, which Monocrane's accountant had debited to the shareholders' current account. This figure of $8,500 represented the total of the weekly instalments of $300 paid pursuant to the provisions of the relationship property agreement. It will be recalled Mr Moncur had agreed to pay the instalments either personally or through Monocrane.[2]

(c) Insurance premiums ($661.50) paid by Monocrane in relation to the Moncur family home.

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[2] In cross-examination the accountant conceded the instalments should not have been debited to Ms Moncur's current account.

[15] Ms Moncur resisted payment and the liquidators issued proceedings for recovery against her.[3] They did not issue proceedings against Mr Moncur, who now lives in Australia.

[16] As an alternative to the claim against Ms Moncur in her capacity as an indebted shareholder, the liquidators also claimed Ms Moncur was liable in her capacity as a director to repay the money. The basis of this alternative claim was an allegation that during the year ended March 2010 Ms Moncur had authorised payment of the advances to herself and Mr Moncur despite knowing Monocrane was insolvent.

[17] For her part, Ms Moncur argued the relationship property agreement was a complete defence to both claims.

[18] She also contended she was entitled to a set off of $281,222 on the ground she had advanced that sum to Monocrane and the money had never been repaid. According to Ms Moncur, the loan was documented in a formal loan agreement dated 1 April 2008. The agreement was signed by Mr and Ms Moncur as lender and by Monocrane as borrower, showing an advance of $281,222 from the Moncurs to Monocrane.

The decision of the High Court

[19] In rejecting the liquidators' claims, Keane J made the following rulings:

(a) If Ms Moncur had any liability in respect of the current account debt it could only be for the payments actually received by her, which the Judge calculated to total $73,859.78.[4]

(b) In any event, relying "analogously" on the decision of this Court in *Ready Mark Ltd v Grant*,[5] Monocrane and hence the liquidators

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3 The proceedings were initially filed in the District Court but were later transferred to the High Court.

4 *Monocrane NZ Ltd (in liq) v Moncur*, above n 1, at [74(a)]. This sum includes the payment of the $8,500.

5 *Ready Mark Ltd v Grant* [2012] NZCA 445.

should not be treated as a third party creditor.[6] They were precluded from pursuing these claims by the relationship property agreement under which Mr Moncur had assumed sole responsibility for the debt.

(c) The only basis on which the liquidators could defeat the relationship property agreement was if they could establish it was void under either s 47(1) or (2) of the Act as being an agreement to defeat creditors.

(d) Ms Moncur did not transfer her current account liability to Mr Moncur with the intention to defeat creditors and therefore s 47(1) of the Act could not apply.[7]

(e) Nor was the agreement void under s 47(2) of the Act as an agreement having the effect of defeating creditors because the liquidators were out of time in seeking to invoke that provision.[8]

(f) For the same reasons, the claim against Ms Moncur in her capacity as a director could not succeed.[9]

[20] The Judge also dismissed Ms Moncur's set off, finding that on the evidence she had not established any claim against Monocrane.[10] There has been no cross-appeal against that finding.

Arguments on appeal

[21] On appeal, the liquidators did not challenge the Judge's rulings regarding s 47 of the Act.

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6 *Monocrane NZ Ltd (in liq) v Moncur*, above n 1, at [48]–[55].

7 At [66]. Section 47(1) and (2) provide:

(1) Any agreement, disposition, or other transaction between spouses or partners with respect to their relationship property and intended to defeat creditors of either spouse or partner is void against those creditors and the Official Assignee.

(2) Any such agreement, disposition, or other transaction that was not so intended but that has the effect of defeating such creditors is void against such creditors and the Official Assignee during the period of 2 years after it is made, but only to the extent that it has that effect.

8 At [73].

9 At [36]–[38].

10 At [20].

[22] Rather, the focus of the liquidators' arguments was on the *Ready Mark* decision and its applicability to this case.[11]

[23] Like this case, *Ready Mark* concerned a company owned by a married couple whose marriage had broken down. The company issued summary judgment proceedings against the wife seeking an order for repayment of her overdrawn current account in the company and payment of the cost of certain renovation work she had engaged the company to undertake.

[24] The company's application for summary judgment was dismissed in the first instance by Associate Judge Christiansen.[12] The Associate Judge found the claim could not succeed because the debts at issue had already been taken into account as part of the valuation of relationship property made by a Family Court Judge in proceedings between the husband and the wife. In the view of the Associate Judge, although the company may not have been a formal party to the Family Court proceedings, it was the privy of the husband.[13] It was therefore bound by the Family Court judgment and accordingly estopped by the doctrine of *res judicata* from bringing the claim independently of the Family Court's determination.[14]

[25] On review, Venning J endorsed the general approach taken by the Associate Judge.[15] Justice Venning found there was a sufficient nexus or mutuality of interest between the company and the husband, such that one was the privy of the other.[16] Unlike the Associate Judge, however, he was not satisfied the Family Court judgment had determined the issue of the renovation work but he was satisfied it had done so in relation to the issue of the wife's liability to repay the drawings. Accordingly, in his view, the company was estopped by an issue estoppel from seeking repayment of the drawings.[17] Alternatively, the Judge considered it would be an abuse of the process of the Court to permit the company to pursue that claim.[18]

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11 *Ready Mark Ltd v Grant*, above n 5.
12 *Ready Mark Ltd v Grant* HC Auckland CIV-2010-404-8264, 17 June 2011.
13 At [62].
14 At [64].
15 *Ready Mark Ltd v Grant* HC Auckland CIV-2010-404-8264, 18 November 2011.
16 At [24].
17 At [44].
18 At [45].

The liquidators appealed Associate Judge Christiansen's decision to this Court but the appeal was dismissed.[19]

[26] The doctrines of issue estoppel and *res judicata* invoked respectively by Venning J and Associate Judge Christiansen are both doctrines of what were traditionally known as estoppel by record. Where they apply, they operate to prevent a party to litigation from attempting in subsequent proceedings to relitigate earlier judicial determinations.

[27] Counsel for the liquidators, Mr Norling, argued *Ready Mark* was distinguishable and Keane J was wrong to rely on it. Mr Norling contended that in this case there could be no question of Monocrane being Mr Moncur's privy and so bound by the relationship property agreement because the concept of privies only applies in cases of estoppel by record. The present case was not a *res judicata* or issue estoppel case. There has never been any previous court determination about the Moncurs' current account debt.

[28] In developing these submissions, Mr Norling stressed that Monocrane was an independent legal entity and that it was not a party to the relationship property agreement. Mr Norling further emphasised that, although the Act may be a code regulating relationship property,[20] s 20A of the Act expressly preserves the rights of creditors. Section 20A(1) states that secured or unsecured creditors of a spouse or partner have the same rights against that spouse or partner and against property owned by the spouse or partner as if the Act had not been passed. Thus, while Ms Moncur would have a remedy against Mr Moncur for breach of the relationship property agreement, as between her and Monocrane she was liable to pay the debt.

[29] Mr Norling also pointed out that, unlike Monocrane, the company in *Ready Mark* was not in liquidation and did not owe money to creditors. In this case, preventing the liquidators from being able to recover the current account debt from Ms Moncur would be to the prejudice of Monocrane's unsecured creditors. There was evidence the deficit for unsecured creditors was $300,000.

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19 *Ready Mark Ltd v Grant*, above n 5.
20 See s 4.

Analysis

Some preliminary observations

[30] We acknowledge the importance of recognising the separate legal identity of limited liability companies and the importance of protecting the interests of creditors who deal with such companies.

[31] We also agree *Ready Mark* is of relatively limited relevance in this case, not least of all because by the time it reached this Court the only issue for determination was the proper interpretation of the Family Court decision. In this Court, the company did not dispute it was the husband's privy and that if the renovation work had been part of the Family Court valuation, then it would be estopped from suing the wife. This Court was never required to consider in what circumstances a closely held company might be considered the privy of its shareholders.

[32] We also agree that in the High Court in *Ready Mark* the concept of privies was applied in the different context of estoppel by record and that there appears to be very little authority for its use outside that context and the context of estoppel by deed.[21] Certainly counsel for Ms Moncur, Mr Weaver, said he had been unable to find any.

[33] We accept too there are special policy factors at play in cases of estoppel by record relating to the administration of the justice system and the need for finality of litigation.[22] On the other hand, it would arguably be a strange result that the wife in *Ready Mark* would not have had any defence had she and her husband happened to have resolved their relationship property dispute by way of a formal relationship property agreement instead of filing court proceedings. Such a result would be difficult to justify, especially having regard to the policy of the Act and the status it affords relationship property agreements entered into pursuant to its provisions.

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[21] See also estoppel by representation: *Laws of New Zealand* Estoppel by Representation and Related Estoppels (online ed) at [53] and [55]; *Volbar Restaurants Ltd v St Lukes Square Ltd* HC Auckland CP1051/90, 25 February 1992 at 12; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 444.

[22] See K R Handley *Spencer Bower and Handley Res Judicata* (4th ed, LexisNexis, United Kingdom, 2009); *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 (HL).

[34] Unfortunately, Keane J did not elaborate on the reasons why he considered the relationship property agreement to trump Monocrane's claim other than to state that because of its close association with Mr Moncur, Monocrane was not a "third party creditor" for the purposes of s 20A of the Act and that the Act was a code.[23]

[35] As we see it, correctly analysed, the only basis on which Ms Moncur can succeed in this case is if she can establish an abuse of process or raise an estoppel as the wife was able to do in *Ready Mark*. However, contrary to Mr Norling's submission, we do not consider the absence of an earlier Court proceeding is of itself the end of the inquiry. Nor do we consider it necessary to determine whether the concept of privies applies outside estoppel by record. Cases should not turn on doctrinal labels. Rather, it is necessary to have regard to the unifying principle that underlies all estoppels, namely unconscionability.[24] That being so the real question for determination is whether in all the particular circumstances of this case it is unconscionable for Monocrane to seek to recover the current account debt from Ms Moncur.

Is it unconscionable for Monocrane to sue Ms Moncur?

[36] Mr Weaver submitted it was unconscionable of Monocrane to sue Ms Moncur because the relationship property agreement was expressed to be in full and final settlement. We do not accept that submission. It is commonplace for relationship property agreements to be expressed to be in full and final settlement and to contain provisions dealing with debts owed by the parties to external creditors. Of itself that could not preclude a creditor who was not a party to the agreement from seeking to recover the debt. Otherwise, s 20A would be rendered nugatory.

[37] Mr Weaver also sought to rely on the fact Mr Moncur had the authority to bind Monocrane and that under the relationship property agreement the weekly instalments of $300 were to be paid either by Mr Moncur or Monocrane. However, as we read the provision in question, it was not purporting to impose an obligation

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23 *Monocrane NZ Ltd v Moncur*, above n 1, at [55].

24 *Gillies v Keogh* [1989] 2 NZLR 327 (CA); *National Westminster Finance New Zealand Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA).

on Monocrane to pay the $300. Rather, Monocrane was simply named as a conduit by which Mr Moncur could elect to discharge his personal obligation if he so chose.

[38] The reference to Monocrane in the relationship property agreement does of course highlight the close nexus between it and Mr Moncur. The fact the $300 instalments were paid by Monocrane also evidences Monocrane's knowledge of the relationship property agreement.

[39] Where we consider Mr Weaver to be on stronger ground is a further submission that, while Monocrane may not have been a formal party to the relationship property agreement, it nevertheless took a benefit from the agreement to the detriment of Ms Moncur. The alleged benefit is said to have been Ms Moncur agreeing to discharge the Sovereign mortgage.

[40] In order to address that submission and Mr Norling's counter-argument that there was no benefit to Monocrane, it is necessary for us to set out some further facts relating to the Sovereign mortgage and the 1 April 2008 loan agreement between Monocrane and Mr and Mrs Moncur. It will be recalled Ms Moncur relied on the 1 April 2008 loan agreement to support her set off defence.

The Sovereign loans

[41] In addition to Monocrane, Mr and Mrs Moncur also owned another company called Moncur Engineering Ltd (Moncur Engineering). Justice Keane found that in 2006 Sovereign Finance made two advances to the trust for the purposes of paying a debt owed to an external creditor by Moncur Engineering.[25] The two advances were a Sovereign Go Floating facility (the Sovereign Floating loan) and a Sovereign Go Fixed 24 months facility (the Sovereign Fixed loan).

[42] On 31 March 2008 Moncur Engineering transferred all its assets and liabilities to Monocrane. The following day (1 April 2008) the formal loan agreement was signed between Mr and Mrs Moncur as lender and Monocrane as borrower. The amount of the loan was expressed to be $281,222. Under the heading

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[25] *Monocrane NZ Ltd v Moncur*, above n 1, at [13]–[14].

"loan term", the loan was identified as the combined total of the Sovereign Floating loan and the Sovereign Fixed loan.

[43] The 1 April 2008 loan document also stated under the heading "Pay Structure" that Monocrane was to pay Sovereign "direct".

[44] Although the relationship property agreement makes no mention of the 1 April 2008 loan agreement, it is clear the Sovereign Floating loan is the same loan as that identified as "the residential loan" in the relationship property agreement. It will be recalled that under the relationship property agreement Ms Moncur took on the residential loan as her separate debt and repaid it. It is also clear the Sovereign Fixed loan is the same loan as that identified as "the business loan" under the relationship property agreement,[26] which Ms Moncur also repaid in full in the expectation of later receiving $200,000 from Mr Moncur.

[45] Mr Norling submitted that, while Ms Moncur's payment of the two loans in 2010 was of benefit to Mr Moncur, it was not of any benefit to Monocrane. That was because, despite signing the 1 April 2008 loan agreement, Monocrane was not in fact under any liability to either Sovereign Finance or the Moncurs from which it was relieved by the relationship property agreement.

[46] In support of that submission, Mr Norling pointed to evidence that between 2006 and 2008 Mr and Mrs Moncur had taken drawings from their shareholders' current account in Moncur Engineering despite that company trading at a substantial loss. Moncur Engineering's accountant offset those drawings against the Sovereign loans, which had the effect of reducing the Moncurs' current account in Moncur Engineering from a deficit to a nil balance by 31 March 2008. In other words, by means of this set off, Moncur Engineering effectively repaid the Moncurs. The loan as far as Moncur Engineering was concerned had thus already been extinguished before its business was sold to Monocrane. The loan could not be and was not reintroduced into Monocrane's books.

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[26] Unfortunately, the relationship property agreement does not accurately record the number of the business loan account, transposing two of the numbers. However, both Keane J and the parties proceeded on the basis it is the same loan as the loan cited in the 1 April 2008 agreement.

[47] According to Mr Norling, that also meant the Moncurs could never have enforced the 1 April 2008 loan agreement against Monocrane. Otherwise they would have been "double dipping". Although Keane J did not elaborate on his reasons for dismissing Ms Moncur's set off defence, we assume this must have been the basis.

[48] As will be readily apparent, the position is far from straightforward. However, even assuming Mr Norling is correct, it does not necessarily follow that Monocrane did not receive any benefit under the relationship property agreement as a result of Ms Moncur agreeing to repay the whole of the Sovereign mortgage debt.

[49] That is because on the face of it, the 1 April 2008 loan agreement is valid and evidences a liability on the part of Monocrane relating to the Sovereign mortgage debt. Mr Norling did not suggest the document was a sham. It follows that, if nothing else, the 2008 loan agreement created a risk for Monocrane that Sovereign might look to it for recovery under the Contracts (Privity) Act 1982, a risk Ms Moncur completely removed by repaying Sovereign in full pursuant to the relationship property agreement. Her payment relieved Monocrane of the responsibility and associated costs of having to defend itself at the possible suit of Sovereign and argue issues such as lack of consideration.

[50] A further tangible benefit to Monocrane arising out of the relationship property agreement was the fact that without it Monocrane was at severe risk of stalemate. All the shareholders were family and given the family breakdown, Monocrane needed a control change for its own sake, as well as for the sake of the shareholders themselves. The relationship property agreement provided that control change and resolved all disputes.

[51] On its own that benefit would be true of most relationship property agreements involving closely held companies. However, when combined with the other benefit we have identified, as well as Monocrane's knowledge of the relationship property agreement and its close association with Mr Moncur, we consider that is sufficient to raise an equity in Ms Moncur's favour. Monocrane received benefits under the relationship property agreement and allowed Ms Moncur to make the repayments to Sovereign. To do that and then turn around and sue

Ms Moncur on the basis it is legally a stranger to the relationship property agreement and so not bound by its provisions is unconscionable. We are satisfied that in the particular circumstances of this case Monocrane is estopped from denying it is bound by the relationship property agreement. The liquidators cannot have any greater rights than Monocrane and accordingly they too must be estopped.

[52] In coming to this conclusion, we note Ms Moncur did not expressly plead estoppel as a defence. However, Mr Norling did not take the pleading point, which we consider was appropriate. The failure to plead estoppel has not prejudiced the liquidators in any way. All of the facts that we have held give rise to an estoppel were in evidence and incontrovertible. We note too that both parties appear to have adopted a rather fluid or relaxed approach to pleadings. The liquidators, for example, never pleaded reliance on s 47 of the Act but nevertheless ran that argument at trial, seemingly without objection from Ms Moncur.

[53] We stress that this case turns on its own particular facts. In particular, we do not wish anything in this case to be taken as weakening the position of creditors who deal with closely held companies. Such creditors always have the protection of s 20A and, of course, s 47.

[54] Finally, we record that in light of our conclusion it is unnecessary for us to consider whether Keane J was correct to hold the current account debt was not a joint debt.

Outcome

[55] The appeal is dismissed.

[56] As regards costs, counsel agreed these should follow the event. Contrary to a submission made by Mr Weaver, we consider costs should be calculated on a band A basis, rather than band B. This was not a particularly complex appeal. It also does not justify certifying for second counsel.

[57] We therefore order the first appellant and second appellants as liquidators to pay the respondent costs for a standard appeal calculated on a band A basis together with usual disbursements.

Solicitors:
Waterstone Insolvency, Auckland for Appellants
Toni Brown Law, Tauranga for Respondent