IN THE COURT OF APPEAL OF NEW ZEALAND

CA440/2011
[2012] NZCA 445

	BETWEEN	READY MARK LIMITED Appellant
	AND	JILL GRANT Respondent

Hearing: 19 September 2012

Court: Randerson, Stevens and Miller JJ

Counsel: T A Chubb and R P Kaur for Appellant
M W Vickerman for Respondent

Judgment: 28 September 2012 at 10 a.m.

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Any issue as to costs in the High Court is to be resolved in that Court.

C Costs in this Court are reserved. Counsel are to file memoranda in accordance with [39] of this judgment.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] In the High Court the appellant company (Ready Mark) sought summary judgment against the respondent, Ms Grant, for $94,466.55 for renovation work carried out on a property she owned. Ready Mark is a company controlled by Ms Grant's former husband. The work was carried out shortly before the couple separated in 2005.

[2] Ms Grant's defence to Ready Mark's claim was that it had already been determined as part of the valuation of relationship property in proceedings between herself and Mr Grant in the Family Court.[1] It followed that the doctrine of *res judicata* applied to prevent Ready Mark (as Mr Grant's privy) from pursuing the summary judgment claim.[2]

[3] Associate Judge Christiansen accepted Ms Grant's defence was arguable and dismissed Ready Mark's application for summary judgment.[3] On Ms Grant's application, he also struck out Ready Mark's claim. Ready Mark responded by bringing this appeal against the refusal of summary judgment and by applying to review the strike-out decision. Venning J granted Ready Mark's application for review and reinstated its claim against Ms Grant.[4] An application by Ms Grant for leave to appeal to this Court against Venning J's decision was declined by Courtney J.[5] No steps have been taken to seek leave from this Court to appeal Venning J's decision and we are concerned solely with Ready Mark's appeal against the refusal of summary judgment.

[4] It is now common ground that if the renovation work issue was determined in the Family Court proceedings, then Ms Grant has a complete defence to Ready Mark's claim. The sole issue on appeal is whether that is so.

Factual background

[5] Mr and Ms Grant married in November 1987 and separated around June 2005. They owned a substantial home which was sold and the net sale proceeds divided equally between them. An interest in a company was also realised and divided equally.

[6] Apart from an interest in an entity known as AWB Sole Trader and a yacht, all other property existing at the date of their separation and not already divided was

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1 *J G v JB G* FC North Shore, FAM-2002-044-591, 13 July 2010.
2 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 37; and *Contact Energy Ltd v Attorney-General* [2009] NZCA 351 at [71].
3 *Ready Mark Ltd v Grant* HC Auckland CIV-2010-404-8264, 17 June 2011.
4 *Ready Mark Ltd v Grant* HC Auckland CIV-2010-404-8264, 18 November 2011.
5 *Ready Mark Ltd v Grant* [2012] NZHC 970.

effectively owned by the J & J Grant Family Trust. In proceedings brought in the Family Court, Ms Grant sought orders in relation to the various entities owned by the Family Trust.

[7] Around the time the parties separated, Ms Grant purchased in her own name a mixed residential/commercial property in which she later resided and from which she ran a business of her own. Mr Grant agreed through Ready Mark to undertake renovation work on the property. The work was duly carried out but Ms Grant was unable to pay for it immediately. She acknowledged in her evidence in the Family Court that she had agreed with Mr Grant she would be invoiced on settlement of their relationship property. In a later affidavit, Ms Grant agreed that the cost of the work would be taken into account in due course and she confirmed in cross-examination that she would pay the renovation costs at settlement.

The evidence of Mr McLoughlin

[8] Mr McLoughlin was a chartered accountant who gave evidence for Mr Grant in the Family Court at a hearing before Judge Ryan in June 2010. In his first affidavit, he valued the various entities owned by the Family Trust as having an aggregate current value of approximately $2,018 million. In his second affidavit, Mr McLoughlin reduced that figure drastically to an overall value of approximately $300,000. His second affidavit explained the reason for the reduction in value of approximately $1.7 million. He had reduced the value of a company named Powershield and similarly he reduced the value of the entity known as Ready Mark Consultants.

[9] However, by far the greatest reduction arose from writing off Ready Mark's work-in-progress of $773,829. Mr McLoughlin's evidence in this respect was:

> 53. In my First Affidavit (at paragraph 83), I estimated approximately $500,000 to be the recoverable sum which the J & J Grant Family Trust could expect to receive from Encore 2000 Limited. Encore's ability to repay the J & J Grant Family Trust the sum of $500,000 was entirely dependent on Encore's ability to recover its advance to Readymark Limited. Readymark Limited's ability to repay its debt was, in turn, dependent on it realising reported work-in-progress of $773,829. The uncertainties associated with

eventually recovering this reported asset is specifically referred in paragraph 82 of my First Affidavit.

54. *In the event, the reported work-in-progress of $773,829 at 31 March 2008 was unable to be realised as cash.* The work-in-progress was carried out for the following associated entities;

Readymark Clients	
Cheltenham Five	87,313
RMC	468,610
Jill Grant	62,652
Powershield	155,254
Total	**$773,829**

55. For the purposes of reporting its financial position at 31 March 2009, Readymark Limited has recategorised the Powershield fit-out cost of $155,254 as a separate item. The balance of the prior year work-in-progress amount of $618,575 ($773,829 - $155,254) remains unpaid. *I understand that eventual payment will not occur.*

56. *Accordingly, the underlying net worth which previously supported possible recovery of the J & J Grant Family Trust's advance to Encore 2000 Limited is no longer a reasonable prospect.* In the circumstances, any value associated which [sic] Readymark Limited is restricted to the net third party working capital and fixed asset balances reported at 31 March 2009. These balances form part of the values listed at paragraph 44 (a).

(Emphasis added)

[10] It is accepted that the figure of $62,652 shown as work-in-progress due from Jill Grant is the debt due for the renovation work. It was not explained how this figure differed from the amount claimed of $94,466.55 later claimed by Ready Mark from Ms Grant but neither counsel suggested the difference was material.

[11] Counsel also accepted Mr McLoughlin's evidence that the work-in-progress was "unable to be realised as cash" must have reflected advice he received from Mr Grant. Mr McLoughlin's ultimate conclusion was that the current value of the relationship property of the parties was $300,000 after excluding separate property.

[12] Mr McLoughlin's evidence in the Family Court included analysis of account balances which off-set each other as between the various entities. This analysis included advances made to both Mr and Ms Grant on shareholder loan accounts. There was a net negative balance of $63,070 that was deducted in Mr McLoughlin's

calculation in arriving at his final figure of $300,000 as the value of the remaining relationship property of the parties after excluding separate property.

Judge Ryan's decision in the Family Court

[13] It is unnecessary to traverse all of Judge Ryan's decision in the division of relationship property. It is sufficient to record that he accepted Mr McLoughlin's evidence as to the value of the "package of rights" in the Family Trust at the figure of $306,000. The Judge discussed the reduction in value between Mr McLoughlin's first and second affidavits as follows:[6]

> Mr McLoughlin's first valuation estimated some $500,000 able to be recovered from the J & J Grant Family Trust which in turn would receive that sum from Encore 2000 Limited. Encore 2000 Limited's ability to repay the J & J Grant Family Trust this sum of money was entirely dependent on its ability to recover the advance it had made to Readymark Limited and in turn Readymark Limited's ability to repay the debt was dependent upon it realising reported work in progress of $773,000 odd. Since Mr McLoughlin's first valuation the work in progress was unable to be realised in cash and it was in part carried through to other entities. There is now a little over $600,000 owed for work in progress and it is readily apparent that it is unlikely this will be recovered. As a result Mr McLoughlin concluded at paragraph 56 of his second affidavit that the underlying net work which supported, in his first valuation, the possible recover of the $500,000 is no longer a reasonable prospect.

[14] The Judge then added back an unrelated figure of $63,000 that he considered Mr McLoughlin had double-counted to arrive at a final figure of $369,000 for the valuation of the package of rights. Judge Ryan continued:[7]

> I am satisfied that this is the most practical and realistic way of valuing the package of rights being enjoyed now by the First Respondent [Mr Grant]. It recognises the practicalities of the circumstances applicable to the trust entities and it applies a common-sense approach to the valuation of the package of rights.

[15] The Judge allowed $195,000 for the value of the yacht. This figure was added to give a total value of the remaining relationship property of $564,000. Mr Grant was ordered to pay Ms Grant a half-share of that sum ($282,000). All interests in the trust entities, AWB Sole Trader, the yacht and associated marina were

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6 At [53].
7 At [78].

declared to be the sole and separate property of Mr Grant while Ms Grant's interest in her home and business were declared to be her separate property.

Judge Ryan's Minute of 9 August 2010

[16] After the delivery of Judge Ryan's substantive judgment, Mr Grant's then counsel filed a memorandum under leave reserved for "further orders or directions to better implement this judgment". A number of matters were raised. Relevantly for present purposes, Mr Grant's counsel noted that Judge Ryan's decision did not appear to cover repayment of the amount due to Ready Mark for the renovation work. Counsel also raised an issue relating to Ms Grant's current account in Ready Mark. Counsel suggested the Judge might have overlooked dealing with those matters. It was suggested in the alternative that Mr Grant might be able to exercise his legal rights under the Trust to recover the money through separate court proceedings if necessary.

[17] In response, Ms Grant's counsel filed a memorandum pointing out that the Court had valued Mr Grant's bundle of rights in the J & J Grant Family Trust taking into account the matters Mr Grant's counsel had raised. Her counsel submitted that the Court had made a finding about Ms Grant's liability for the claims Mr Grant was raising by adopting the approach of Mr Grant's accountant. Counsel pointed out that if that finding were to be revisited then the value of the bundle of rights would also need to be revised.

[18] In response to these memoranda, Judge Ryan issued a Minute. The Judge did not address the current account issue raised but in relation to the renovation costs the Judge said:

> [4] I agree with Mr Templeton's [Mr Grant's then counsel] submission that the evidence establishes a clear agreement between the Applicant and Readymark Limited to the effect that she will meet the costs of the renovations to the property at 306 Lake Road Takapuna upon resolution of the proceedings. The difficulty however that I have in making the order sought by Mr Templeton is that Readymark Limited is not a party to these proceedings. This is really an issue between a third party and the Applicant concerning an outstanding debt. I do not consider that I have jurisdiction to make the order sought in these proceedings. The claim should be between

Readymark Limited and the Applicant by way of summary judgment in the Civil jurisdiction.

[19] The Judge did not address the submission made by Ms Grant's counsel to the effect that the issues raised had been determined by his adoption of Mr McLoughlin's valuation evidence.

[20] Ms Grant appealed to the High Court in relation to three of the findings made by Judge Ryan, none of which related to the current issues before the Court. The appeal was heard by Woolford J and dismissed.[8]

Associate Judge Christiansen's decision

[21] Ready Mark brought summary judgment proceedings against Ms Grant seeking to recover the cost of the renovation work and an order for repayment of her overdrawn current account in Ready Mark.[9] The claim to recover the cost of the renovation work was brought on the basis of an oral agreement by Ms Grant to the effect that "at the time of settlement of their relationship property issues, the amount owing for the renovations would be taken into account by the parties". Alternatively, a claim was brought under the Construction Contracts Act 2002.

[22] Associate Judge Christiansen concluded that Ready Mark's claim could not succeed. In summary, his reasons were:

- Judge Ryan had adopted Mr McLoughlin's approach to the valuation of the bundle of rights. He had adopted a practical and realistic way of valuing those rights, recognising that the practicalities of the circumstances required a commonsense approach.
- Mr McLoughlin had ascribed no value to the debt due by Ms Grant to Ready Mark in the same way that he had ascribed no value to the other and significantly larger debts due from entities in Mr Grant's control.
- In the context of the valuation, the debts were considered to be irrecoverable, a conclusion clearly adopted by Judge Ryan in the outcome.

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8 *Grant v Grant* HC Auckland CIV-2010-404-5158, 31 March 2011.

9 *Ready Mark Ltd v Grant*, above n 3.

- Ms Grant's debt to Ready Mark was valued for the purposes of fixing her half-share in Mr Grant's bundle of rights.
- Likewise, the level of the respective shareholders' accounts was taken into account in the valuation.
- Although Judge Ryan had not directly addressed the cost of renovations and the shareholders' accounts in his decision, it was implicit by Judge Ryan's adoption of Mr McLoughlin's valuation that they were taken into account.
- In expressing a view in his Minute that the renovation debt was still due, Judge Ryan was not correct. That debt had already been dealt with by him when he accepted, and effectively ruled, that it was of no value.
- Were it otherwise, the value of debts owed by other entities of Mr Grant would also have been taken into account to produce a much greater value for the purpose of fixing a value of the amount due to Ms Grant.
- Mr Grant would have been obliged to pay a larger sum if a value had been attributed to the shareholders' current accounts and the renovation debt.
- Ready Mark was clearly the privy of Mr Grant and was bound by the consequences of the outcome in the Family Court affecting Mr Grant.
- Ready Mark was estopped by the doctrine of *res judicata* from bringing the claim independently from the Family Court's determination.
- Ready Mark was attempting to augment its value at the expense of Ms Grant for the sole benefit of Mr Grant and thereby unsettle the distribution of relationship property adjudicated upon in the Family Court.

[23] On that footing, Associate Judge Christiansen dismissed the summary judgment claims as well as striking out the proceedings on Ms Grant's application.

The judgment of Venning J

[24] As earlier noted, Ready Mark applied to a High Court Judge for a review of Associate Judge Christiansen's decision to strike out Ready Mark's claims. Although there has been no application for leave to appeal Venning J's decision, we

need to mention it because Mrs Chubb for Ready Mark relies upon Venning J's reasoning to support her appeal against the dismissal of the summary judgment application.

[25] Venning J found there was a sufficient nexus or mutuality of interest between Ready Mark and Mr Grant such that each was the privy of the other. That finding is no longer in dispute.

[26] The Judge discussed aspects of Mr McLoughlin's evidence and concluded that Judge Ryan had already determined the issue of whether Ms Grant was liable to repay Ready Mark her drawings on current account. The Judge found that an issue estoppel applied to prevent Ready Mark (as Mr Grant's privy) from arguing against that determination in the High Court proceedings. Venning J reached that conclusion because he considered that Judge Ryan had excluded the net amount of approximately $63,000 owed by the trust entities to the parties and entities associated with them in valuing the trust entities. The Judge said:[10]

> It was a corollary of the value Judge Ryan ascribed the trust entities that Ms Grant was not liable to repay these drawings. In other words, the determination of the issue of whether Ms Grant was liable to repay her drawings was an essential and fundamental step in the logic of Judge Ryan's judgment. The Judge determined the division of relationship property on the basis of the value he ascribed Mr Grant's package of rights in the trust entities. He ordered that half of that value be paid [to] Ms Grant and declared that all interests in the trust entities were Mr Grant's separate property[.] In doing so, he determined the issue, inter alia, of whether Ms Grant's drawings from Ready Mark were liable to be repaid.

[27] Alternatively, the Judge concluded it would be an abuse of process to permit Ready Mark to pursue the current account claim in the High Court. The cause of action seeking to recover the drawings could not succeed and was properly struck out.

[28] The Judge took a different view in relation to the renovation work. Venning J considered that Judge Ryan had not directly addressed the issue of the renovation work nor Ms Grant's liability for it. No issue estoppel arose in relation to that matter.

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[10] *Ready Mark Ltd v Grant*, above n 4, at [44].

[29] Venning J then continued:

> [53] Mr McLoughlin discounted the likelihood of any recovery of the work-in-progress from the various entities. At the most it could be said that Mr McLoughlin mistakenly understood that payment for any of the debts, including Ms Grant's, would not occur. It seems clear that he was not aware of the arrangement between Ready Mark and Ms Grant that the renovation debt would be settled on the resolution of relationship property issues.
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> [54] There can be no issue estoppel on this point. The basis for the claim in these proceedings is that there was an agreement that the renovation debt would be paid by Ms Grant at the conclusion of relationship property issues. That was not an issue raised in the earlier proceedings and nor was it a matter determined in those proceedings.

[30] Although the Judge considered the application for review could be resolved on the basis of the pleadings, he also considered the evidence given by Ms Grant which we have already canvassed above. He considered that her evidence supported the oral agreement relied upon by Ready Mark in relation to recovery of the renovation costs.

Discussion

[31] Mrs Chubb for Ready Mark relied upon Venning J's reasoning in submitting that the claim to recover the renovation costs remained available to Ready Mark. There was, she submitted, an oral agreement by Ms Grant to pay the renovation costs upon the settlement of the relationship property issue. That agreement was independent of the relationship property proceedings and could be pursued notwithstanding the judgment of the Family Court.

[32] We do not accept that submission. We find ourselves in general agreement with Associate Judge Christiansen's judgment, essentially for the reasons he gave. Mr McLoughlin's valuation clearly proceeded on the basis that the Ready Mark work-in-progress (including the renovation debt) was "unable to be realised in cash" and that, in consequence, the recovery of the Family Trust's advance to Encore 2000 Limited was "no longer a reasonable prospect". As Mrs Chubb accepted, Mr McLoughlin's conclusion in that respect could only have come from instructions from Mr Grant who must be taken to have been aware of the agreement to pay the renovation debt.

[33] Mr McLoughlin's valuation proceeded on that footing and ascribed no value to the debt for the renovation work as reflected in Ready Mark's work-in-progress. In accepting Mr McLoughlin's valuation approach, Judge Ryan effectively determined that Ms Grant was not liable to pay that amount, just as Venning J accepted had occurred in respect of Ms Grant's drawings on the Ready Mark current account.

[34] Ms Grant's acknowledgement of responsibility for the debt must be viewed in context. The agreement envisaged that the debt would be taken into account in the eventual resolution of the relationship property issues. In the end, those issues were not determined by agreement but by court adjudication. Ultimately, Ms Grant's acknowledgement was subsumed in Mr McLoughlin's overall valuation method that Judge Ryan accepted.

[35] In his Minute, Judge Ryan was mistaken in concluding he did not have jurisdiction to deal with Ready Mark's claim for the renovation work. It was not a third party debt. The Family Court had jurisdiction to consider it as between the parties and it did so.

[36] Moreover, Mr Grant benefited from Mr McLoughlin's lower valuation of the bundle of rights in the Family Trust. Mr Grant was required to pay less to Ms Grant because the value of Ready Mark's work-in-progress was treated as irrecoverable. Mr Grant could not expect to receive that benefit and still be entitled separately to pursue Ms Grant for the very same debt he had instructed Mr McLoughlin was to be written off for valuation purposes.

[37] We conclude that the Family Court effectively determined Ms Grant was not liable for the renovation debt. Mrs Chubb accepted that, if we reached this conclusion, Ready Mark would be estopped from pursuing its claim in the High Court by virtue of the doctrine of *res judicata*.

Conclusion

[38] For the reasons given, we conclude that Associate Judge Christiansen was correct to dismiss the summary judgment application. In the circumstances, and for the reasons given, Ms Grant has a complete defence to Ready Mark's claim.

[39] We dismiss the appeal and reserve the issue of costs in this Court. The respondent is to file a memorandum as to costs within seven days of the delivery of this judgment and the appellant within seven days thereafter.

[40] Since Venning J's decision to reinstate the proceeding is not before us, the proceeding in the High Court remains extant. However, in view of our finding on this appeal, it could not succeed.

[41] Any issue as to costs in the High Court is to be resolved in that Court.

Solicitors:
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