IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2012-470-000982
[2014] NZHC 3012

UNDER	the Companies Act 1993
IN THE MATTER	of the liquidation of Monocrane NZ Ltd (in liquidation)
BETWEEN	MONOCRANE NZ LIMITED (IN LIQUIDATION) First Plaintiff
	DAMIEN GRANT and STEVEN KHOV Second Plaintiffs
AND	ANGELA MARY MONCUR Defendant
AND	PAUL MICHAEL MONCUR Third Party

Hearing: 12-13 May 2014

Appearances: BJ Norling and A Ho for Plaintiffs
DP Weaver for Defendant
No appearance for Third Party

Judgment: 28 November 2014

JUDGMENT OF KEANE J

This judgment was delivered by me on 28 November 2014 at 3pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
Waterstone Insolvency, Auckland.
Beach Legal, Tauranga.
DP Weaver, Tauranga.

[1] On 12 January 2009 Paul and Angela Moncur separated after a marriage of 26 years. On 19 April 2010, after a mediation, they entered into a relationship property agreement (a principal agreement and a variation agreement) under which, principally, Ms Moncur obtained their Gulf Harbour family home and Mr Moncur obtained all the shares and assumed complete control of their company, Monocrane New Zealand Limited.

[2] Under the agreement Ms Moncur undertook to refinance their existing loan from Sovereign, secured by mortgage over their home, $200,000 of which they identified as a 'business loan' and the balance as a 'residential loan', releasing Mr Moncur from any liability to Sovereign. The refinanced business loan was to be Mr Moncur's separate debt and he was to repay that sum to Ms Moncur within seven months of the date of the agreement with interest. Ms Moncur honoured their agreement. Mr Moncur, who now lives in Australia, did not. Ms Moncur has a judgment against him for the business debt in the District Court.

[3] Under the agreement Mr Moncur was also to assume as his separate property the debit balance in their shareholders' current account in Monocrane. According to the financial statements for the year ended 31 March 2010, to which Mr Moncur alone subscribed as sole director in July 2010, he and Ms Moncur then shared a liability to Monocrane on shareholders' current account of $137,426; and, after 1 April 2010, Monocrane advanced Ms Moncur a further $8,500 and met insurance premiums totalling $661.50.

[4] On 20 September 2010 Mr Moncur, as sole shareholder, by special resolution placed Monocrane in liquidation and appointed the present liquidators. In the first instance the liquidators looked to both Mr Moncur and Ms Moncur to meet their separate shares of the current account liability, but then looked to Ms Moncur only. On 13 June 2012 the liquidators brought a claim in debt against Ms Moncur in the District Court, Tauranga, for $146,587 holding her accountable for the full shareholders' current account liability and her further advances. Ms Moncur counterclaimed and protested the jurisdiction of the District Court. On 14 November 2012 the case was transferred to this Court.

[5] In this Court, as in the District Court, Monocrane seeks judgment against Ms Moncur in debt, in her capacity as a shareholder. Monocrane also pursues her as a director on the basis that she improperly received or benefited from the entire current account drawings, and also the other advances, and has equally improperly retained them or withheld repaying them.

[6] Ms Moncur contends that any liability on either basis can only lie with Mr Moncur as a result of their relationship property agreement. In the event that this is not so, she looks to Mr Moncur for indemnity as a third party. She also seeks to set off a liability she contends that Monocrane has to her; the business loan for which she became responsible under the relationship property agreement - a $281,222 loan recorded in an agreement between Monocrane and Mr Moncur and herself, dated 1 April 2008. She has brought a related counterclaim.

[7] Mr Moncur denies any liability to Ms Moncur under the relationship property agreement. He has applied to the Family Court to have it set aside. So far as I am aware that application has still to be resolved. Monocrane's claim against Ms Moncur must then be resolved on the basis that it remains in force.

Issues

[8] The first issue, in point of time, is whether Ms Moncur has a counterclaim or set off against Monocrane in respect of the loan recorded in the 1 April 2008 finance loan agreement and, if she has, whether it exceeds or is less than Monocrane's claim against her. Conceivably, it could be a complete answer.

[9] The second and necessarily related issue is whether, in a threshold sense, Monocrane has a claim in debt against Ms Moncur as a shareholder for the whole, or at least that part attributable to her, of the current account liability as at 31 March 2010, and for the later advances; or, distinctly, has a claim against her as a director for compensation under s 301 of the Companies Act 1993.

[10] The third issue is whether, if Monocrane does have a claim against Ms Moncur on either of these bases, which survives her set off and counterclaim, Ms Moncur can rely on the transfer of liability to Mr Moncur made in the relationship

property agreement, which they entered into under ss 21 and 21A of the Property (Relationships) Act 1976, at least to obtain an indemnity from Mr Moncur. Is it possible under such an agreement to transfer a debt as opposed to property in a positive sense? Can debts only be taken into account to establish the net value of property under s 20D?

[11] The fourth issue is whether, assuming the agreement is effective as between the Moncurs, it is effective against Monocrane. Can it bind Monocrane, which is not a party to it? Can it extinguish any right which Monocrane may have as a creditor under s 20A? Must it be set aside in whole or part under s 47, if on no other basis, as entered into either with an intent to avoid, or with the effect of avoiding, any liability to Monocrane?

2008 business finance loan agreement

[12] Ms Moncur's set off and counterclaim against Monocrane relies on the efficacy of the business finance loan agreement, dated 1 April 2008, which the Moncurs entered into in their capacities as Monocrane directors, binding it as borrower, and secondly in their personal capacities as lenders. Its essential terms are these:

Loan Amount:	$281,222.00
Loan Term:	Loan No. 12 3236 0466337 01 - $249,222.00 - Sovereign Go Fixed 24 months facility. Loan No. 12 3236 0466337 00 - $32,000.00 - Sovereign Go Floating facility. (*Lenders mortgage insurance fee: $2222.00)*
Interest Rate:	Interest only, initially, or as structured as Interest and Principal.
Interest Payment:	$2097.64 approximately, fluctuating.
Principal Payment:	when required, to reduce principal.
Repayment:	Monthly.
Pay Structure:	Monocrane NZ Limited to pay Moncur's current Financiers Direct (in this as Sovereign bank account, or as structured).
Security:	First Registered General Security Deed – Priority.

Date of Agreement: 1 April 2008

Monocrane NZ Limited agrees to borrow the above funds at current interest rates and make repayments by way of automatic direct debit to Lender's bank account, every month, per instructions, until fully paid out.

[13] The two Sovereign loans to which this agreement refers were made to the Moncurs on 4 August 2006 for the express purpose of enabling them to repay a loan to their then company, Moncur Engineering Limited, from Prime Business Finance Limited.

[14] The loan agreement between the Moncurs, or more strictly their family trust, and a Sovereign lending entity, Mortgage Holding Trust Company Limited, required them to repay Prime in full and to discharge its then mortgage security. They had also to register a variation to a mortgage security that the Sovereign entity must then have had to increase the priority amount to $1,380,000. It was on that basis that on 4 August 2006 the Moncurs' solicitors repaid Prime $290,246 from a $297,000 Sovereign advance and registered the discharge and variation.

[15] The result was that MEL benefited. Its current liability to Prime, $260,283 as at 31 March 2006, ceased; and, because the Moncurs did not require MEL to enter into any offsetting loan agreement with them its deficit, $348,233 as at 31 March 2006, reduced to $195,990 by 31 March 2007.

[16] On 31 March 2008 MEL, in an agreement Mr Moncur executed as director of both companies, MEL sold to Monocrane its 'crane manufacturing business'; a sale which included MEL's 'fixed assets and stocks as per … (the) financial statements dated 31 March 2008 and any hire purchase liabilities with respect to those fixed assets if applicable.' MEL's liabilities then exceeded its assets and MEL undertook to settle the resulting debt to Monocrane before 30 June 2008. The agreement makes no reference to the Sovereign loan, even implicitly.

[17] The result is that in the business finance loan agreement, dated 1 April 2008, the Moncurs imposed on Monocrane a liability, which they had elected not to impose on MEL; and whereas MEL had enjoyed the benefit of the Sovereign advances, Monocrane had not, except to the extent that it had obtained the MEL assets free of

the Prime liability. That has to be one reason for pause. There is also this further reason, arising from the evidence of Elizabeth Groenewegen of RSM Prince, the accountants to MEL and Monocrane between April 2007 – September 2010.

[18] In the year ended 31 March 2006, during which MEL had traded at a substantial loss, the Moncurs withdrew on current account $105,272, leaving their shareholders' account overdrawn by $102,620. Ms Groenewegen understands that MEL's then accountant then offset against that liability the Sovereign advance to bring the shareholders' account into credit, $86,602 as at 31 March 2007; a credit which the Moncurs reduced by further drawings to nil by 31 March 2008. If that is what happened, MEL may arguably have repaid the Moncurs at least $189,222 of the Sovereign advance, despite the fact that it was under no formal liability. There is no contrary evidence.

[19] Finally, it remains to mention that in the relationship property agreement itself the Moncurs treated the Sovereign loans as their personal liabilities, without making any reference to the 1 April 2008 business finance loan to Monocrane. The principal loan, that described in the 1 April 2008 agreement as the Sovereign Go Fixed 24 months facility, $249,222.00, became Mr Moncur's separate debt as to $200,000; the debt in respect of which Ms Moncur obtained judgment in the District Court.

[20] In the result only one thing is clear. The Moncurs' debt to Sovereign continued until Ms Moncur satisfied it by refinancing it, relying on advances from her sister and the ASB Bank, before eventually selling the home in order to satisfy those further liabilities. As to that she has her judgment against Mr Moncur. On the evidence as it is she has no claim, or none that she has established affirmatively to the civil standard, against Monocrane. I decline the offset Ms Moncur claims and dismiss her counterclaim.

Current account debt claim

[21] Monocrane's claim against Ms Moncur in debt for the full sum outstanding on current account as at 31 March 2010, principally, rests on the ordinary principle that 'absent any proper explanation for the drawings or a valid resolution classifying

the drawings in some other way, such as distributions or salary, drawings remain as advances repayable on demand.'[1]

[22] The current account balance liability, in the names of the Moncurs, as at 31 March 2010 accrued entirely during that financial year. They had a zero balance in the preceding year. They did not as directors, during that year, pass any resolution under s 161 of the Companies Act 1993 classifying those drawings as salary or as any other form of distribution. They did not otherwise agree in writing to them being so classified under s 107. Accordingly, that liability is repayable on demand.

[23] The issue remains whether Ms Moncur is, as the liquidators contend, jointly and severably liable for the whole amount, on the basis that it is a relationship debt the Moncurs incurred jointly in their common enterprise, Monocrane, to maintain relationship property, their home, by meeting their mortgage and insurance costs, and to bring up their sons.[2] Or, whether Ms Moncur is only liable for those drawings attributable to her, $73,859.78.

[24] The Moncurs separated in January 2009. Ms Moncur then opened a separate bank account and Mr Moncur retained their joint bank account. Ms Groenewegen had no difficulty, when the liquidators asked her to do so, dividing the 2010 advances between Ms Moncur and Mr Moncur. She conceded in evidence that the financial statements for the year ended 31 March 2010 should have set out their advances separately.

[25] Nor is it to be assumed uncritically in this civil proceeding that the entire drawings constituted a relationship debt for which Ms Moncur, individually, was wholly liable. In *Walker v Walker*,[3] to paraphrase the head note, the Court of Appeal held that the Property (Relationships) Act 1976 is a code. It classifies and deals with debts in its own distinct way. The distinction it makes between personal and relationship debts does not mirror that between separate and relationship property. Nor does it reflect the way debts are viewed outside the relationship property regime.

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1 *National Trade Manuals Ltd (in liq) v Watson* HC Auckland CIV-2005-404-7335, 20 September 2006; (2006) 9 NZCLC 264,163, (2006) 3 NZCCLR 981 at [37].

2 Property (Relationships) Act 1976, s 20(1).

3 *Walker v Walker* [2002] 1 NZLR 155.

A debt incurred to obtain relationship property is not inevitably a relationship debt, and personal debts usually lie with the one who incurs them.

[26] Be that as it may, the decisive issue in this case is whether the liquidators are able to pursue Ms Moncur in debt for the entire shareholders' current account liability, in the face of the relationship property agreement under which Mr Moncur assumed that responsibility.

Section 301 claim

[27] In their alternative cause of action, the liquidators contend, under 301 of the Companies Act 1993, Ms Moncur ought as a director to be required to repay or to restore to Monocrane the current account advances in their entirety, or to contribute such sum to Monocrane's assets by way of compensation as is just.

[28] As a director of Monocrane, the liquidators contend, Ms Moncur authorised during the year ended 31 March 2010 the advances made to Mr Moncur and to their creditors, as well as to her, in every instance for her own direct or indirect benefit, knowing that Monocrane was then insolvent. She did not provide any consideration for those advances. Nor did she take any steps to reduce her drawings or her debt. That caused serious loss to Monocrane.

[29] Ms Moncur does not accurately respond to that assertion, when she contends that the liquidators' claim is one founded on simple retention; and that they do not assert any breach of duty on her part, or any negligence or recklessness. Plainly they do. The issue is rather whether, as Ms Moncur also contends, she is answerable under s 301 at all and, if she is, whether that can only be for what she received herself or her share of what was paid on her behalf, an issue subject finally to the effect of the relationship property agreement.

[30] In immediate answer to the liquidators' s 301 claim, Ms Moncur contends that during the year ended 31 March 2010 she had cause to be confident that Monocrane was solvent. She relies on an indicative valuation she obtained from Tony Weber Associates Limited in November 2009 in which Mr Weber ascribed to Monocrane's shares a value in the range $385,000 - $450,000. In January 2010, she

says, she prepared a profit and loss statement, and a cash flow forecast until March 2011, believing that, prudently managed, Monocrane could be made viable.

[31] The Weber valuation, however, relied on unaudited management accounts, dated 31 October 2009, when the Moncurs owed Monocrane some $60,000. Mr Weber did not have the financial statements as at 31 March 2009, which showed Monocrane then to be insolvent. Its net losses for that year stood at $60,811. Nor could he have had those for the year ended 31 March 2010, which had still to be prepared. They show that during that year annual revenue dropped during the year from $4.45M in 2009 to $2.39M, and that gross profit dropped from $788,951 to $477,806.

[32] On this issue I prefer Ms Groenewegen's evidence, which squares with the financial statements for the 2009 - 2010 years, that in 2010 there were insufficient profits either to pay shareholder salaries or to leave in retained earnings to resolve the insolvency issue. Monocrane continued to trade in an insolvent state.

[33] Ms Groenewegen also says that Ms Moncur knew that Monocrane was then insolvent. In May 2009, she says, when the financial statements and tax returns for the year ended 31 March 2009 were signed, RSM Prince sent a standard letter to the Moncurs, as directors, advising them that Monocrane was trading while insolvent. They did so again, she says, in July 2010.

[34] By July 2010 Ms Moncur had ceased to be a shareholder or director of Monocrane and, if a letter was sent to the Moncurs in 2009 by RSM Prince, that letter is not in evidence. Only their standard form letter is. I accept, however, that during 2008 - 2009 RSM Prince prepared monthly accounts for Monocrane and at regular meetings, some of which Ms Moncur attended, discussed trading results, cash flow, forecasts, and the effect of Monocrane's then state of insolvency.

[35] Ms Moncur may, I accept, have believed in January 2010 that Monocrane could still be rescued. But, if she did, that had to be highly optimistic. On her own evidence she kept a close eye on Monocrane's books. She was also particularly concerned about Mr Moncur's drawings. In that year, most notably, he purchased in

Monocrane's name a Range Rover for $128,000. She expressed her concern about that as late as 17 February 2010.

[36] The issue as to this claim under s 301 however, is not primarily evidential. It is whether the liquidators are able to invoke s 301, in the face of the relationship property agreement, which renders the sum they are seeking, the 2010 shareholder advances, the entire responsibility of Mr Moncur.

[37] The RPA is, as I have said, a code.[4] It governs transactions between spouses or partners and third persons.[5] It requires that where any issue of relationship property arises, whether between spouses or partners, or with any other person, that be decided as if it were raised in a proceeding under the Act.[6] Other acts are to be read subject to the RPA unless they expressly say otherwise.[7]

[38] Further, and critically, a relationship property agreement, entered into under ss 21 and 21A, as the agreement in issue was, has effect according to its tenor, assuming its subject matter lies within the boundaries that s 21D sets, unless there are grounds to set it aside. Section 47 displaces s 301 and other such remedies.[8]

Relationship debt

[39] To challenge the efficacy of the agreement, the liquidators first contend that it could not have the effect of releasing Ms Moncur from her shareholder liability, or of imposing that liability entirely on Mr Moncur, because a current account liability is not relationship property.

[40] Relationship property, the liquidators say, as defined in s 8 of the PRA, and s 2, may include 'any debt or thing in action'. But a debt owed by the Moncurs to the company is not a debt they own. It is a debt they owe. It cannot be relationship property. Insofar as it deals with the current account liability, the agreement is a

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4 Property (Relationships) Act 1976, s 4.
5 Section 8(1)(b).
6 Section 4(4).
7 Section 4A.
8 *Johnson v Felton* [2006] 3 NZLR 475 (CA) (SC); *Smith v Official Assignee* [1992] NZFLR 241; *Neill v Official Assignee* [1995] 2 NZLR 318 (CA); *Official Assignee v Williams* [1999] 3 NZLR 427 (CA).

nullity.

[41] Alternatively, the liquidators say, the only way in which the Moncurs could have dealt with their current account liability in the agreement, a relationship debt under s 20(1)(a) of the PRA, was as 20D prescribes. Section 20D requires that the total value of relationship property first be established and then that debts be deducted to establish its net value. That did not happen. In their agreement the Moncurs confirmed that they had agreed on 'the extent and value of the relationship property assets', as a 'compromise … intended to achieve a division they consider to be fair'; and they acknowledged having done so without any valuation of the home or the company shares despite advice.

[42] In this submission, I consider, the liquidators construe the PRA unduly narrowly and with that the potential ambit of agreements entered into under ss 21 and 21A. The current account debt may not be relationship property in a positive sense, under s 8, but that does not mean that it cannot be dealt with discretely under the PRA, whether by Court order or agreement; an issue which arises most acutely where parties are in a negative equity position.

[43] I agree with Wild J, when he said in *Tapuae v Mawson* that the function s 20D serves is not to define property; it is to identify the net value of property.[9] I agree also with his larger point that jurisdiction under the PRA is not confined to those cases where there is an overall positive equity. Even where there is an overall negative equity, there can be relationship property though with a negative value. Even where there is no relationship property, the Court has jurisdiction to make compensating orders under s 18C, where that applies.[10]

[44] Furthermore, parties who enter into contracting out agreements under s 21, or agreements to settle differences concerning their property under s 21A, are entitled to 'make any agreement they think fit with respect to the status, ownership, and division of that property', subject to s 47.

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9 At [22](d).

10 *Tapuae v Mawson* HC Napier CIV-2009-441-464, 10 December 2009 at [20] – [22](a), (b).

[45] As long then as the Moncurs confined the subject matter of their agreement to that prescribed by s 21D, which enabled them to classify their property as relationship or separate property, and to define their respective shares, and to prescribe how their property was to be divided, they were free to strike their own bargain. They were not obliged to adhere to the letter of s 20D.

Privity

[46] The liquidators then say that, even if the agreement was effective as between the Moncurs, and gave Ms Moncur a right to claim indemnity for the current account liability from Mr Moncur, Monocrane cannot be bound by the agreement. There was an absence of privity. Monocrane was not a party to the agreement, and did not agree to the assignment of the current account debt.

[47] The liquidators rely as well on s 20A of the PRA which provides:

> Secured and 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 this Act had not been passed.

And, as to the effect of s 20A, on *Tonkin v Tonkin* where McGechan J held:[11]

> The obvious legislative intention is that with only limited exceptions the Matrimonial Property Act is not to affect the normal position prevailing consequence upon bankruptcy and the normal expectation of creditors in that event.

Accordingly, they contend, Monocrane retains its right to require Ms Moncur to meet the current account liability, as if the PRA had not been passed.

[48] Ms Moncur contends, in response, relying on *Ready Mark Ltd v Grant*, that there was such a mutuality of interest between Monocrane and its shareholders as to make the one the privy of the other and thus that their current account liability to Monocrane was not a conventional third party debt.[12] As the sole shareholders, she and Mr Moncur able to determine where liability for that debt should lie.

[49] *Ready Mark*, as the liquidators say, concerned the distinct issue whether that

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11 *Tonkin v Tonkin* HC Napier CP55/85, 21 November 1896.
12 *Ready Mark Ltd v Grant* [2012] NZCA 445.

company could obtain summary judgment in debt against the former wife of the then sole shareholder, in the face of a Family Court decision that had divided their relationship property, taking that debt into account. The issue there was as to the application of the doctrine of res judicata. Here the issue is whether, analogously, the liquidators' claim is precluded by the relationship property agreement.

[50] In *Ready Mark*, in this Court, Venning J said that, for the purpose of the doctrine of res judicata, 'in an appropriate case a company may be regarded as privy to a previous action pursued by its shareholders or the parties who ultimately stood to gain by the company's action'.[13] In that case, he held, the shareholder effectively controlled and directed Ready Mark and there was sufficient mutuality of interest between them to make the one the privy of the other. The company as well as the shareholder was precluded from pursuing the debt by the doctrine of res judicata.

[51] In the Court of Appeal that conclusion was not in issue, and the Court went materially further. It held that the Judge in the Family Court could have resolved the company's claim against the shareholder's wife in the relationship property proceeding. The Judge was mistaken when he concluded that the Family Court did not have that jurisdiction. 'It was not a third party debt. The Family Court had jurisdiction to consider it as between the parties and it did so.'[14]

[52] If the Family Court had that jurisdiction, it seems to me, the Moncurs must equally have been competent to reallocate their current account liability in their relationship property agreement.

[53] One of the informing principles of the PRA is that 'questions arising under this Act about relationship property should be resolved as inexpensively, simply and speedily as is consistent with justice'.[15] And the PRA enables couples to divide their relationship property, without Court order, under ss 21 and 21A, effectively as between themselves and third parties, subject to the Courts' ability to set aside the agreement as seriously unjust or as entered into with the intent or effect of defeating

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13 *Ready Mark Ltd v Grant* HC Auckland CIV-2010-404-008264, 18 November 2011 at [20].
14 *Ready Mark v Grant* [2012] NZCA 445 at [35].
15 Property (Relationships) Act 1976, s 1N(d).

creditors.[16]

[54] The Moncurs' shares in Monocrane were relationship property. Their current account liability was relevant to the net value of those shares. How that liability was allocated was essential to their overall division of property. As a distinct source of liability to them, it was also an issue in itself. As sole shareholders and directors they could, conceivably, have passed a resolution allocating the entire current account liability to Mr Moncur. That they did not do so cannot be fatal to their agreement.

[55] In short, I conclude, Monocrane is not a third party creditor in the sense that s 20A contemplates. But that apart, I conclude also, the relationship property agreement renders Ms Moncur immune from the liquidators' claim, unless they are able to have it set aside under s 47.

Section 47 discharge

[56] The liquidators contend that Ms Moncur entered the agreement with the intent to defeat her creditors. When questioned she stated that the purpose of the agreement was to extinguish her liability to Monocrane and to increase Mr Moncur's liability. Therefore she had the intent to defeat its claim against her. To that extent the agreement is void under s 47 of the PRA.

[57] Section 47 says:

> (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.
>
> (3) For the purposes of subsection (2), an agreement between spouses or **[**partners**]** with respect to their relationship property is deemed to have been made for valuable consideration if—

[16] Section 21J, 47.

(a) a situation described in section 25(2) has arisen; and

(b) the agreement is made for the purpose of settling (wholly or in part) their rights under this Act with respect to that property.

(4) …

(5) This section applies regardless of any other provision of this Act.

[58] Two issues arise. The first is whether, on the liquidators' submission, Ms Moncur, at least, had the intent to defeat any claim Monocrane had against her on the current account, making the agreement to that extent void under s 47(1). The second is whether, even if she did not have that intent, the agreement had that effect, and the liquidators are entitled to that extent to invoke s 47(2).

Intent to defeat Monocrane's claim: s 47(1)

[59] The liquidators carry the onus of establishing to the balance of probabilities that the agreement was entered into with the intent to defeat creditors, but do not have to prove that both Mr Moncur and Ms Moncur shared that intent, only that Ms Moncur had that intent.[17]

[60] To discharge that onus, moreover, the liquidators need go no further than to prove Ms Moncur had an intent to hinder, delay or defeat Monocrane's claim; and in this context 'intention' is not the same as purpose.[18] Knowledge of consequence can be enough:[19]

> Whenever the circumstances are such that the creditor must have known that in alienating property, and thereby hindering, delaying or defeating creditors' recourse to that property, he or she was exposing them to a significantly enhanced risk of not recovering the amounts owing to them, then the debtor must be taken to have intended this consequence, even if it was not actually the debtor's wish to cause them loss.

[61] Ms Moncur's concessions to the liquidators, when cross examined, hinge on the term in the relationship property agreement, cl 2.3, which concerns the shareholders' current account, the effect of which is implicitly, as Ms Moncur accepted, to impose the entire current account liability on Mr Moncur and to release

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17 *Official Assignee v Johnson* [2007] NZCA 348 at [20].
18 *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433 at [52], [53].
19 At [54].

her from it. The issue remains whether that term, in itself, demonstrates an intent on her part to defeat any claim against her by Monocrane.

[62] That issue must first be set against the reason why the Moncurs entered into the relationship property agreement. It was not, as was the case in *Gateshead Investments Ltd & Paranui Properties Ltd v Harvey*,[20] to safeguard relationship property against a possible future claim by creditors. The Moncurs had by then been apart for in excess of a year and their intent was to divide their relationship property, principally their home and their interests in Monocrane.

[63] The issue must be set, secondly, against all the terms relating to Monocrane which, as I said earlier, begin with those concerning the business loan, which was to be Mr Moncur's separate debt as to $200,000, but was to be Ms Moncur's debt in the first instance. The remaining terms of the agreement relating to Monocrane are these (there was no cl 2.6):

> 2.2 Paul and/or his nominee shall take a transfer of the shares in Monocrane New Zealand Limited ('the Company') owned by either the Trust or Angela personally and shall retain those shares as his separate property.
>
> 2.3 Angela shall transfer the current shareholders' account in the name of Angela or the Trust as recorded in the Company's financial records to Paul. He shall retain the same as his separate property.
>
> 2.4 Paul shall secure a discharge of the personal guarantee given by Angela of the Company's obligations to the National Bank Limited in respect of the overdraft and any other liability of the Company.
>
> 2.5 …
>
> 2.7 Angela shall resign as a Director of the Company.
>
> 2.8 Paul shall provide the Trust with a personal guarantee and a general security agreement to secure the accommodation between the Trust and Paul and the Company in respect of the business loan.
>
> 2.9 Angela shall not enter into the premises of the Company or do anything in relation to the conduct of the Company's business effective from the date of this agreement.

[64] The clear intent of these terms together with those relating to the business loan, I consider, was to transfer to Mr Moncur complete ownership and control of

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[20] *Gateshead Investments Ltd & Paranui Properties Ltd v Harvey* [2014] NZCA 361.

Monocrane, and to exclude Ms Moncur from both. That he also entirely assumed their liabilities to or in respect of Monocrane, and that Ms Moncur was released from those liabilities, was a natural incident of their property division. On the face of it, it was nothing more.

[65] Moreover, as the terms of the agreement also show, the Moncurs both then assumed that Monocrane was, if not then viable, still capable of becoming so. The six month business loan that Ms Moncur then assumed, subject to a right of indemnity from Mr Moncur within six months, confirms that to be so. She would never have assumed that liability had she suspected that Mr Moncur would place Monocrane in liquidation within four months.

[66] As at the date of the agreement, therefore, Ms Moncur clearly assumed, and was entitled to assume, that the current account liability to Monocrane was securely Mr Moncur's responsibility as sole shareholder and director. The possibility that, on a liquidation, Monocrane would no longer have any right to pursue her, as opposed to Mr Moncur, was simply not an issue. I find, therefore, that in subscribing to cl 2.3, Ms Moncur had no intent to defeat any claim by Monocrane against her.

Effect of defeating Monocrane's claim: s 47(2)

[67] I do accept, by contrast, that cl 2.3 did have the effect of defeating any nascent claim Monocrane might have had against Ms Moncur at the date of the agreement. The issue then becomes whether the liquidators are entitled to that extent to invoke s 47(2); and that depends on whether they did so sufficiently by 19 April 2010 within the two years after the agreement was entered into.

[68] The liquidators contend that they did effectively invoke s 47(2) during those two years. On four occasions before 19 April 2012 they demanded from Ms Moncur her share of the current account liability, $73,859.78. On three occasions in February – March 2012 they demanded the full amount. Those demands, they say, sufficed. Ms Moncur contends, by contrast, that to invoke s 47(2) the liquidators had within the two years to bring a claim against her actually invoking s 47(2). They did not do so. As to that the record is also clear.

[69] The liquidators did not bring any claim against Ms Moncur before 19 April 2012. On 11 May 2012 they brought their claim in debt against her in the District Court, but Ms Moncur then protested its jurisdiction because only the Family Court and this Court have jurisdiction under the PRA. In this Court the liquidators did not plead s 47(2) before the date by which pleadings were to be complete, 30 October 2013, or at all.

[70] To contend that all they had to do to invoke s 47(2) was to make demand before 19 April 2012, the liquidators rely on what Blanchard J said, when delivering the judgment of the Supreme Court in *Felton v Johnson*, as to what had been required under the Statute of Elizabeth, from which s 47 in part derives. He said that it was essential that the creditors 'take some election or step'; and the liquidators say that that is exactly what they did.

[71] Before he made that remark, however, Blanchard J had described what the Statute of Elizabeth required more prescriptively and he was equally prescriptive when describing what s 47(2) required,[21] beginning with the effect of s 47(2) when set against s 47(1):[22]

> Subsection (2) is a modification of subs (1), but the underlying concepts are the same. The creditors of which it speaks are the same persons ('such creditors'). It deals with transactions which have unintentionally prejudiced them. Such transactions are 'void' against creditors only 'during the period of two years after [the transaction] is made'. Read against the historical background … , where 'void' has been understood to mean 'void if a creditor elects to treat it as such', the natural meaning of subs (2) is that the transaction must be challenged by a creditor 'within' the two years. It is 'void' only 'during' that time. Afterwards, it is not void.

[72] Then, as to what was called for to invoke s 47(2) within the two years, Blanchard J immediately went on to say this:

> If, within two years of the transaction, a creditor brings a proceeding under s 47(2) or levies execution of a judgment against the debtor spouse or partner on the property in question the transaction is avoided, and to the extent necessary to meet the claim the property re-vested in the person who disposed of it.

[73] In this case, as in that case, the liquidators did not bring any claim against Ms

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21 *Johnson v Felton* [2006] 3 NZLR 475 at [17].
22 At [21].

Moncur within two years and, in contrast to that case, when they did bring their claim they did not in their pleadings invoke s 47(2), or claim relief under it. They are not entitled to do so now. Even if the agreement were arguably void under s 47(2), had the liquidators brought a sufficient specific claim within two years, it is deemed in law now to be valid and effective. That is fatal to the liquidators' claim.

Conclusions

[74] I dismiss the liquidators' claim against Ms Moncur, and give judgment in her favour, for the following reasons:

(a) The liquidators' claim against Ms Moncur as a shareholder in debt for the whole current account liability she and Mr Moncur shared cannot exceed her discrete part of it, $73,859.78, but is answered by the relationship property agreement under which Mr Moncur assumed that liability, unless the agreement itself is to that extent void under s 47 of the Property (Relationships) Act 1976.

(b) The liquidators' claim against Ms Moncur as a director under s 301 of the Companies Act 1993 on the basis that she wrongly received or benefited from those advances and has wrongly retained or withheld paying them, is equally answered by the relationship property agreement unless to that extent it is set aside under s 47.

(c) The relationship property agreement is not void to the extent essential, under s 47(1) because Ms Moncur did not transfer her current account liability to Mr Moncur with intent to avoid any liability to Monocrane.

(d) The property relationship agreement cannot to that extent be held void under s 47(2), because it had the effect of defeating Monocrane's current account liability claim against Ms Moncur, because the liquidators did not invoke s 47(2) by specific claim within two years of the date it was entered into.

[75] On the principle that costs follow the event, Ms Moncur will have costs at scale 2B, and disbursements, in amounts to be settled by the Registrar, subject to any issue of principle which only I am able to resolve.

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P.J. Keane J