N.Z. Law Reports. (2)

IN THE SUPREME COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY A.93/73.

NO.

BETWEEN: ERICKSEN of Married woman

Plaintiff

AND: CARTER of

Defendant

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Hearing: 1 May 1975

Counsel: D. C. Dron for plaintiff
D. C. McKegg for defendant

Judgment: 12 May 1975

JUDGMENT OF WILD C.J.

The plaintiff and defendant were formerly wife and husband. The husband owned a house property at As a result of unhappy differences they entered into a separation agreement dated 15 December 1959 which, in addition to providing for custody, access and maintenance, contained the following paragraphs:

> "6. THE husband shall permit the wife for a period of not less than three years from the 2nd day of December, 1959, to occupy as her home the residence known as No. and to use the household furniture and effects therein (save only that the husband may at any time remove the wardrobe and the writing desk) and during such occupancy the wife will pay outgoings consisting of rates insurance premiums and mortgage instalments PROVIDED that the said outgoings shall be apportioned as at the 2nd day of December, 1959, and again apportioned if and when the wife shall cease to occupy the said residence.
>
> 8. IF the parties hereto shall at any time cease to live separate from each other but shall live together as man and wife or is (sic) a decree absolute for divorce between the parties shall be made by a Court of competent jurisdiction then henceforth this agreement shall be void and of no effect. "

Contemporaneously the husband signed a document, also dated 15 December 1959, the material part of which was

> "I hereby acknowledge that you have made substantial contributions in cash from your own separate money towards the residence, No. [redacted] purchased in my name. This will place on record that I undertake that in the event of the said residence being sold at any time hereafter to pay the net proceeds of sale for you and myself in equal shares. "

The husband's signature to both documents was witnessed by the same solicitor.

Following the making of a decree absolute on the wife's petition on 12 July 1963 the wife re-married and, presumably, left the house. About April 1973 the husband sold the house for $15,000, including $500 for chattels. The wife alleges that the equity in the house amounted to $13983.48 of which her half share was $6991.74 and she sues for that sum.

The wife called the Deputy Registrar of the Court to produce the separation agreement. She herself gave evidence producing the undertaking signed by the husband. Two letters from the husband's solicitor relating thereto, and a certified photo-copy of the memorandum of transfer, signed by the husband in favour of the purchaser, and a letter of 19 April 1973 addressed to her solicitor from the different firm of solicitors acting for the husband on the sale, were also produced. This last letter recited figures from which it can readily be calculated that a half share of the proceeds amounted to $6991.74.

Mr. McKegg called no evidence but made submissions which I deal with as follows.

First, that the husband's written undertaking did not on its own evidence a valid contract because it showed no consideration. That is true, but in my opinion, contrary to Mr. McKegg's submission, the whole agreement between the parties at the time of the separation is evidenced by the separation agreement and the undertaking read together, the link between those documents being

established by the two letters from the husband's to the wife's solicitor dated respectively 2 and 16 December 1959. The first enclosed the separation agreement and the undertaking "for approval". The second forwarded the same documents "duly executed by the husband" and asked that they be returned "for stamping in due course" - inferentially, after the wife had signed the separation agreement.

In my view those two letters are admissible as extrinsic evidence to show that the whole agreement was represented by reading together the two documents therein referred to. Upon that view it is plain that the consideration for the husband's undertaking was the wife's execution of the separation agreement.

Secondly, Mr. McKegg submitted that consideration is still lacking because the separation agreement in terms of clause 8 became void upon the making of the decree absolute. I do not accept that. In my view the consideration was real because the agreement to separate came into being contemporaneously with the signing of the undertaking which provided for equal division of the net proceeds on a sale "at any time hereafter".

Thirdly, on the ground that there was no proof of the amount claimed, Mr. McKegg applied for a non-suit, submitting that the letter of 19 April 1973 was not admissible because it was the first of a number of letters passing between the solicitors which were marked "without prejudice" relating to a possible compromise of the claim. It is true that three letters following that of 19 April were marked "without prejudice". I regard them as inadmissible and I leave them out of account. The letter of 19 April is not, however, so marked. In support of his argument that that letter is nevertheless inadmissible Mr. McKegg cited Peacock v. Harper (1877) 7 Ch.D.648

which is cited in 15 Halsbury (3rd Ed.) 407 for the proposition that "where a letter offering terms, but not stated to be 'without prejudice', is followed by another saying that the communications between the parties are to be 'without prejudice', the former letter is protected". As is stated on the same page, however, the rule against admitting letters written "without prejudice" is "strictly confined to cases where there is a dispute or negotiation, and suggestions are made for the settlement thereof". When the letter of 19 April was written there was no dispute or negotiation. The letter was merely the first reaction of the husband's solicitors on receiving from his original solicitor a copy of the undertaking. They said that the husband "was speechless. He had entirely overlooked the existence of this document". The letter offered no terms but merely enquired whether the wife was prepared to negotiate.

In my view these contentions all fail and, upon the evidence, there must be judgment for the plaintiff for the amount claimed, with costs according to scale, witnesses expenses and disbursements.

Solicitors:

Opie & Dron, Palmerston North, for Plaintiff.

McBride, Elwood, Wadham & McKegg, Palmerston North, for Defendant.