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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M. No. 34/84

759

BETWEEN

KELT

Applicant

A N D

KELT

Respondent

Hearing: 21 June 1984

Counsel: G.W. Calver for Applicant
R.H. Hill for Respondent

Judgment: 11 July, 1984

JUDGMENT OF QUILLIAM J

This is an application for an order setting aside an agreement as to matrimonial property made between the parties and for an order granting leave to apply out of time for orders under the Matrimonial Property Act 1976. I refer to the parties as the husband and the wife.

The parties were married on June 1945 and there were three children of the marriage, the youngest of whom is now 32 years of age. The marriage appears to have been a satisfactory one until the late 1960's when the wife noticed a cooling off in the relationship. In about 1972 an association started between the husband and a Mrs Hardy. This was not apparent to the wife for some time, but it is clear that it was a developing and adulterous association. The wife eventually became aware of the association and was naturally disturbed over it. She first consulted her solicitor about the marriage in June 1978. Her solicitor wrote to the husband who then went with her to see the

solicitor and the matter of his relationship with Mrs Hardy was discussed. The husband did not wish the marriage to end and he signed a form of acknowledgment prepared by the wife's solicitor in which he accepted that the problems in the marriage were due to his relationship with Mrs Hardy and in which he undertook to terminate that relationship.

Matters seemed to improve for a short time but then it became clear that the husband had resumed seeing Mrs Hardy. In September 1978 the wife again consulted her solicitor who wrote once more to the husband expressing the wife's concern at the continued relationship with Mrs Hardy and at the apparent dissipation by the husband of his assets on that relationship. In 1979 the wife gave instructions for the issue of separation proceedings but after staying with one of her sons for a time she cancelled those instructions. In an attempt to achieve a reconciliation the parties went for a trip to Britain and Europe and the husband undertook that this marked a final break with Mrs Hardy but, in fact, communications between them continued even during the trip. In April 1980 Mrs Hardy's husband, who was as concerned over the matter as was the wife, called to discuss the situation with the parties and the husband again undertook that the association had ended. The question of divorce was raised and the husband said that he did not want there to be a divorce. The wife left the matrimonial home and went to stay with her daughter.

On 28 April 1980 she consulted her solicitor again and he spoke to the husband's solicitor, Mr Robertshawe. A divorce petition was filed and was served on the husband on 12 June 1980. The parties then discussed their position further and it was agreed that the wife would return to the matrimonial home but it would then be sold. There were further discussions and it was agreed that the

matrimonial home would be transferred into the wife's name, together with a capital investment of \$16,000.

A deed was then prepared by the wife's solicitors and sent to Mr Robertshawe for perusal on the husband's behalf. The deed recited that it was made by way of reconciliation of issues over matrimonial property and referred to the history of disharmony. It then provided that all personal effects of the husband and the wife already in their possession were to remain the property of each of them respectively, and that all other matrimonial chattels and contents in the home were to go to the wife. The motor car registered in the wife's name was to remain her separate property. The personal bank accounts were to remain the separate property of each respectively, and any joint account was to be divided equally. An investment of the wife of \$10,000 in a company called A.M.G. Limited, together with any accrued interest, was to be and remain her separate property and the husband was, upon demand, to transfer to the wife a capital investment of \$16,000 of his in the same company. Until demand was made the income from that investment was to go to the husband. Finally, the matrimonial home was to be transferred into the sole ownership of the wife free from encumbrances.

This deed was duly signed by both parties and is dated 12 September 1980. It bears the certificates of both solicitors in accordance with s 21 of the Matrimonial Property Act. After the completion of the deed the separation and divorce proceedings which had been commenced were withdrawn and the parties continued living together, but in July 1983 the wife learned that the husband had renewed his association with Mrs Hardy. She then decided she had had enough and so she sold the matrimonial home. The sale price was \$118,000. She purchased an apartment for \$79,000 and invested \$25,000 in a mortgage. There remained

some \$10,000 which was applied mainly in furniture and furnishings for the apartment. The wife has never made demand for the transfer of the \$16,000 and when that investment matured it was paid to the husband. This was with the wife's knowledge and so she has waived her right to receive that sum.

Once the home had been sold and the parties had separated the husband sought to have the terms of the deed renegotiated. The wife would not agree and so the present application was filed. Section 21 (8) and (10) of the Act provide:

" (8) An agreement under this section shall be void in any case where -

(a) Subsections (4) to (6) of this section have not been complied with; or

(b) The Court is satisfied that it would be unjust to give effect to the agreement.

(10) In deciding whether it would be unjust to give effect to an agreement under this section the Court shall have regard to:

(a) The provisions of the agreement:

(b) The time that has elapsed since the agreement was entered into:

(c) Whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was entered into:

(d) Whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was entered into (whether or not those changes were foreseen by the parties):

(e) Any other matters that the Court considers relevant. "

Subsections (4) to (6) of s 21 were complied with and so the husband is required to establish that it would be unjust to give effect to the agreement and this is to be determined by having regard to the matters referred to in subs (10). I deal with those in turn.

(a) The Provisions of the Agreement

There is no doubt that from a financial point of view the agreement is very one-sided. It was argued for the husband that he had, in effect, conceded to the wife some 90%-95% of all matrimonial property. It has not been easy to see with any accuracy what the extent of the disparity was, but on any basis it was considerable. The wife has asserted that the husband would have had available to him a good deal more than he had if it were not for the fact that he frittered much of it away on drinking and gambling and on Mrs Hardy. This has not been established. There is no evidence to support the allegation that the husband either drank or gambled to excess. He did both in moderation but I do not see any evidence of his assets being significantly diminished as a result. No doubt his attentions to Mrs Hardy will have involved some expense but again there is nothing to suggest that any large sums were involved.

In 1978, which was not long before the deed was signed, the husband sold his interest in the family firm of which he had been Managing Director. He received \$135,000. In 1982 he received a further payment of \$22,000, being the balance of the same transaction. These payments represented the bulk of his capital receipts over the relevant period. Although the details are rather vague I have endeavoured to trace from the evidence what happened to that money and also to a repayment of \$11,000 made to him by his son. The total received in the three payments referred to is \$168,000.

using round figure approximations, and the way in which this sum was disposed of appears to be as follows:

Loan to son	\$ 52,000
Additional sum said to have been given to son	10,000
Farm bike and tractor for son	5,250
Investment for wife in A.M.G. Limited	10,000
Balance for wife's car	5,000
Repayment of mortgage on home	2,000
Investment in A.M.G. Limited	16,000
Overseas trips, approximately	20,000
New roof on house	4,750
Repayment of bank overdraft	20,000
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	\$145,000
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This leaves \$23,000 unaccounted for. There were some payments of tax which will reduce that balance. The result of this rather rough calculation is that it must be accepted there is no large sum which has been frittered away by the husband. It must, therefore, be accepted that at the time the deed was entered into the husband conceded to the wife the majority of the matrimonial property.

(b) The Time Elapsed

A period of 3-1/2 years elapsed between the date of the deed and the filing of the present application and a further three months have gone by since then. No matter of significance arises in respect of the lapse of time alone.

(c) Whether the Agreement was Unfair or Unreasonable

I was referred to the decision of Greig J in Donnelly v Donnelly (1981) 4 MPC 52 as to the way in which the expression "unfair or unreasonable" should be construed. What Greig J said, at p 53, was:

" The terms 'unfairness' and 'unreasonable' can often be construed as being alternative words for the same thing. I think however in the context they are intended to have distinct meanings and that, as was suggested in submission, fairness relates to the freedom of consent of the parties in all the circumstances while unreasonableness relates to the agreement itself and a comparison of the terms of the agreement and the terms of what might be a just division between the parties if there were no agreement. "

In Gerard v Gerard (1981) 4 MPC 82 Casey J thought that the word "unfair" could not be given quite so restricted a meaning. He dealt with the matter, at p 83, in this way:

" Mr Maling submitted that other elements of unfairness should also be taken into account under this paragraph. He instanced an agreement which may be fully understood and appreciated, but still be unfair or unreasonable because of the results it achieves, in contrast with subsection (10) (d) which speaks of an agreement 'becoming' unfair or unreasonable in the light of any changes of circumstances since it was entered into. He therefore concludes that 'unfair' means more than simply freedom of consent, otherwise it would be meaningless in the context of paragraph (d); and that the Court is also entitled to look at other matters - in this case in particular, the

respective bargaining positions of the parties. "

Casey J accepted that submission and I tend towards a similar view. However, the difference, if any, between the two words does not seem to me to have any special relevance in the present case. There is no doubt that the husband understood precisely the nature of the contract he was making and that he was being strongly advised by his solicitor not to sign it. There is nothing to suggest that there was any unfairness in the circumstances of the completion of the deed.

Some attempt was made to suggest that perhaps Mr Robertshawe was less experienced in matrimonial property matters than he might have been and that another solicitor may have taken a stronger line in trying to prevent the husband from signing the deed. I can see no force in this. Mr Robertshawe seems to have told the husband in the bluntest of terms that he ought not to sign. According to the husband Mr Robertshawe told him, "No Judge would agree with what you are doing." It is not clear what more he should have done.

The deed was certainly unreasonable in so far as concerns the imbalance between the parties which it achieved by comparison with any order which a Court was likely to have made upon a normal application under the Act. The deed cannot, however, be considered in that light alone. It was a bargain struck between husband and wife arising out of the husband's infidelity. The wife was prepared to end the marriage and had petitioned for divorce. The only way the husband could persuade her to allow the marriage to continue was by giving her the security of transferring to her most of the matrimonial property. He was well aware that this was the price he must pay for his own actions and he was prepared to pay it.

The price may well appear to have been a very high one but this does not mean it is to be regarded as having been unreasonable to the point of making it unjust. The bargain cannot be looked at on the basis only of ownership of property. So long as each party kept to the bargain the husband had suffered little, if any, disadvantage. The home was to be in the wife's name but he was to continue living in it indefinitely. Outwardly there was no change. Most of the contents were to go into the wife's ownership but again the husband was to have the use of them by virtue of his continued occupation. The car and the \$10,000 investment in A.M.G. Ltd were already in the wife's name and so no change resulted in respect of them. The \$16,000 investment was in the husband's name and the wife was given the right to require it to be transferred to her. This was plainly not expected to occur precipitately as the husband was given the right to the income in the meantime. Accordingly, on the basis that the bargain was kept by both parties, the husband's immediate situation was virtually unaffected. Perhaps it can be said that the deed, on its face, was unreasonable, but in all the circumstances then existing it does not seem to me that it was.

(d) Whether the Agreement Has Become Unfair or Unreasonable

It was the husband's case that the deed was never really intended to be acted upon and that, in particular, it was agreed between them that the house would not be sold as it was to be kept for the two daughters. This is what he said in his oral evidence, but in his affidavit he expressed it differently. What he said was:

" I understood that the home was to be vested in my wife, but I really did not ever think that that would have any

practical significance because I knew that as soon as I signed the agreement my wife would be agreeable to a reconciliation and I thought, having regard to the number of years our marriage had already endured for, once the reconciliation took effect that would be a permanent reconciliation and accordingly the transfer of the home to my wife would just be academic. "

Plainly this would have been the position had the husband not broken the bargain.

It is necessary then to consider what has changed since the deed was entered into and whether the terms of the deed should now be regarded as unfair or unreasonable.

The substantial change, of course, is that the husband resumed his association with Mrs Hardy. By doing so he at once destroyed the whole basis upon which the deed was entered into. As to the assets dealt with in the deed the house has been sold and the value of the house is now reflected in the apartment bought by the wife and some of its contents, and in a mortgage investment of \$25,000. She has waived her right to call for the \$16,000. What has happened is that the deed has operated in the way it was intended to operate. So long as the husband kept to his promise he was not in any way adversely affected. The probability is that that situation would have continued indefinitely. It changed solely because he failed to keep his promise. In those circumstances it is not easy to see why he should now be entitled to expect the Court to relieve him of the bargain he made.

It is true that the majority of the matrimonial property has now gone to the wife but the fact that it has done so is due entirely to the husband himself. It was said that the husband, after some 39 years of marriage, has

finished up with assets of under \$20,000 and the wife with assets of about \$200,000, notwithstanding that it was the husband's earnings which produced nearly all the matrimonial property. These figures are not quite correct. The husband has a car valued at about \$10,000, \$6,000 in cash, and the balance of the loan to his son of \$37,000. It may be that he did not originally intend to call for repayment of that loan but it remains an asset of his and he acknowledged in evidence that he expected payment to be made if things went right for his son. The husband's total assets, apart from personal possessions, are therefore of a value of about \$53,000. The wife has the apartment which she bought for \$79,000, a car valued at \$12,000, the investment in A.M.G. Limited of \$10,000, and a mortgage investment of \$25,000. These total \$126,000 and do not include her furniture, personal possessions and jewellery. The disparity between them is substantial but, as I have said, it need not, in practical terms, have been a disparity at all. I am not prepared to say that the deed has become unfair or unreasonable.

(e) Other Matters

I find it convenient to adopt, under this heading, the considerations which I found helpful in Steel v Steel (1980) 4 MPC 190 at p 192:

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1. The demand of public policy that there should be certainty in agreements between parties.
 2. The parties' own view of the agreement.
 3. The conduct of the parties in the negotiation of the agreement.
 4. The ability of the parties to understand properly the nature and

effect of the transaction.

5. Whether or not the parties were properly advised before concluding their bargain. "

I emphasise that these are not exhaustive but there do not appear to be any other considerations in the context of the present case.

I do not need to discuss the five matters separately. I have set them out in order to demonstrate that there are no other matters which ought to require me to take a view of the case different from that I have already expressed. Clearly the parties both understood the terms of the agreement and the basis on which it was entered into. The husband was an experienced businessman well able to appreciate the significance of what he was doing and he was advised of the effect of it.

In all these circumstances I am satisfied that it would not be unjust to give effect to the deed and the application to set it aside is declined.

The motion seeks also an order for leave to apply out of time for orders under the Matrimonial Property Act. In view of the decision I have reached that application must also fail.

There will be no order as to costs.

Solicitors: Bate, Hallett & Partners, HASTINGS, for Applicant

Dowling & Co., NAPIER, for Respondent

