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NZLR

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M.274/83

1113

BETWEEN C MACKINNON
Appellant

A N D C MACKINNON
Respondent

Hearing: 17 August 1984

Counsel: R.J. Asher for Appellant
C.J. Rushton for Respondent

Judgment: Delivered 12 SEP 1984

C.W. ENTWISTLE
Deputy Registrar

JUDGMENT OF GALLEN J.

On 1980 the appellant and the respondent entered into a separation agreement which specifically provided for the division of matrimonial property. This agreement was executed and certified in accordance with the provisions of s.21 of the Matrimonial Property Act 1976. Some 2 years after the agreement had been executed and its provisions implemented, the respondent brought proceedings in the District Court at Taupo under the provisions of s.21 (9) of the Matrimonial Property Act 1976 seeking an order declaring the agreement void. This application was heard by Judge Maxwell and after an extended hearing, he gave a decision on 6 December 1983 declaring the

agreement void. This appeal is against that decision.

There was voluminous material before the learned District Court Judge by way of affidavit and extensive evidence was called before him with exhaustive cross-examination. There was a complete conflict of evidence between the parties on almost all issues and the learned District Court Judge stated:-

> "At the outset I must say that the affidavits of each party certainly generate more heat than light and while by and large main issues are agreed on, how the parties arrived at certain decisions is certainly an area for much speculation."

Under those circumstances, the conclusions of the learned District Court Judge as to credibility and on factual matters, assume considerable importance.

It is convenient to refer to the parties as "the wife" and "the husband". They first met in 1974 at which time the wife was teaching and the husband working as a sharemilker on his parents' farm at . At some time in 1975 and 1976 the wife had a position at College and during that period lived with the husband. It was apparently suggested that the relationship was one of convenience and could be described as flatting, but the learned District Court Judge rejected this contention and accepted that the wife assumed domestic responsibilities in the house.

In 1976 the wife took up a position in Wellington. She was followed by the husband who persuaded her to return and they were married on 1977. Shortly after the

marriage, an arrangement was entered into for the purchase of the family farm from the husband's father. There is considerable dispute over this transaction but the purchase was concluded with the husband and the wife acquiring the property as tenants in common in unequal shares, the husband holding two-thirds and the wife a one-third interest. The learned District Court Judge in considering the application, took the view that he should avoid considering the matter as a substantive application for the actual division of matrimonial property. For this reason, he did not analyse in detail the farm purchase as a transaction. It is clear however from the material on the file, that to some extent at least it was a family transaction and concluded on the basis of the advantages to the parties which are not uncommon when such a relationship provides the impetus for acquisition of such a property.

Following the marriage, the wife continued teaching. The wife maintained that she worked on the farm. The husband contended that she made little or no contribution to the farming enterprise. In her turn, the wife was derogatory about the work done by the husband in relation to the farm.

The learned District Court Judge effectively found that the husband did commit himself to a significant input of both physical labour and management skill and that the farm under his management was highly regarded in the area. He also found that the wife did assist in farm management and maintenance, rejecting a contention that she did nothing on the farm, but accepted that her responsibility was not as great as that of her husband. There was a dispute over contributions of income allegedly made by the wife. The learned District Court Judge found that she did not endeavour to retain her own income for her own benefit.

In March 1979 the wife consulted a solicitor in Rotorua with particular reference to matrimonial property rights. There was evidence that the interview was extensive and that she was given detailed advice. On 9 May 1979 a child of the marriage was born, but even by this time the marriage was clearly deteriorating and there is evidence that the wife was suffering from emotional problems. These were attributed by the husband to post-natal depression.

In her initial affidavit, the wife stated that the parties separated on 1 September 1979. Subsequently she maintained that in fact she merely went to a beach cottage for a period of rest. Whether this was so or not, the parties clearly separated permanently from mid-January 1980 and there is confirmation of this from evidence that she removed from the matrimonial home, chattels at this time. The date does

have some significance because the learned District Court Judge made it clear in his decision that he was concerned over whether or not this was to be regarded as a marriage of short duration and undoubtedly this was a relevant consideration since it would have a major bearing on the division of matrimonial assets. He specifically did not make a finding as to the date of separation.

Both the wife and the husband had been friendly over a period with an Auckland solicitor, a Mr Akel and on 30 January, the wife wrote to Mr Akel requesting him to prepare an agreement dealing with separation and maintenance. The letter is detailed. It is expressed in clear terms and refers Mr Akel to the parties' accountant. Mr Akel very properly indicated in reply that he could not act for either party and drew attention to the requirement for independent advice. He had further discussions with both husband and wife subsequently and both made it clear that they wished him to act for one of them. It is important to note in this connection that the learned District Court Judge specifically held that he was impressed with the care tht Mr Akel brought to the situation and that he acted properly throughout. Mr Akel stated that the wife wished him to act for the husband and despite his objections, he was eventually persuaded to do so. The wife informed Mr Akel that she intended to consult a solicitor in Whakatane. In early March, proposals for settlement which are described as being, "Terms of Separation from Cynthia's Point of View" were delivered to Mr Akel.

These deal with custody, access, maintenance and matrimonial property. That part which deals with matrimonial property is in the following terms:-

"Matrimonial Property:

- Household Goods ½'d a/c to each needs.
- Farm Property: C contribution over the past 5-6 years, when de facto, and later married has been in the form of aid, unpaid, on & around the actual farm, regardless of the household duties. - Also by means of a teaching salary to subsidise living by way of paying for booze, fruit & veg, dogmeat, TV. rentals, household appliances, farm worker, C ; personal bills of dentist, insurance, car repairs etc. - that all these incidentals be regarded in a lump sum as contribution to getting C established on the farm as his means of existence. - The amount of this sum to be calculated generally, i.e. $15-$20,000) and that that amount be lent back to C as a paper transaction to prevent undue financial strain on farm accounts, and to provide an investment in real terms for C - that should only be realised in the event of farm sale, or if C should see his way and desire clear to finish that arrangement.

  In order for something like this to be arranged I would like the marriage to be termed one of short duration so that the present matrimonial law of 50:50 does not apply. The farm partnership must be dissolved & the farm transferred into C name alone.

  If C doesn't agree to any or parts of this - he can write up his own agreement.

  I shall seek an independent Whakatane solicitor if C agrees. If he does not or thinks I am being unreasonable, I shall turn the whole question over to G Gotleib, and it shall be settled through Court.

  If you could please advise C on points he finds confusing, and threatened by.

  I do not wish to seek your advice or involve you in any way - I am perfectly well aware of your sensitivity round the subject.

C

On 29 April 1980, a note was given to Mr Akel in the following terms:-

"Pay wife full & final settlement $10,000 of all Mat. prop. claims.

She keeps:

1.

2. Sum of 2,000 to be pd forthwith hus to wife

Wife keeps all furn & contents in her name.
Hus. keeps all his furniture
All other stuff in their own various possession they keep
Main to be decided by further agreemt by themself otherwise by court
Wife child with husband access."

Mr Akel stated that at some time in the week between 28 April and 2 May, he was approached by the wife. There was then a discussion as to her seeing a solicitor of her own. Mr Akel says that he discussed the possibility of referring her to an independent solicitor and he suggested Mr Kendall as he then was, of Fortune, Manning and Partners. He understood she did not wish to see other solicitors previously mentioned. On Sunday 4 May 1980, the husband and the wife at their request saw Mr Akel at his office. He had prepared the agreement, the subject of these proceedings and he went through it with them. There is a considerable dispute as to the manner in which this interview was conducted. It is clear there was a discussion as to an increase in the payment contemplated to the wife and the amount so contemplated was increased by $1,000. The wife maintained that she was subjected to pressure and what she described as a high powered attack to persuade her to sign the

agreement. The learned District Court Judge specifically found that there was no high powered attack and he rejected totally any suggestion that Mr Akel brought pressure to bear on the wife. He states in his decision, "There is nothing to suggest that she felt at a disadvantage."

On the following day, Mr Akel arranged for the wife to see Mr Kendall which she did and eventually signed the agreement which was certified by Mr Kendall as contemplated by the Act. Mr Kendall had no direct recollection of the interview, but informed the Court of his general practice in such matters and suggests that the interview would have taken approximately half an hour. The learned District Court Judge expressed some hesitation over the practice revealed but stated he gathered it was relatively common in such matters. There was certainly no criticism of Mr Kendall. The parties then effectively went their own way. The wife has re-established herself elsewhere and the husband maintains that he has made substantial improvements to the farm since the date of the separation. The learned District Court Judge found the effect of the agreement was as follows:-

> "As a result of the agreement Mrs MacKinnon's interest in the property was assessed at $11,000 and was to be paid as follows:
>
> (a) A motorcar in the name of the wife was valued at $8,000 and was regarded as her sole, separate property.
>
> (b) Mr MacKinnon was to pay his wife $3,000.
>
> In her turn Mrs MacKinnon was to acknowledge that the farm property was the separate property of the husband."

The wife based her application according to the learned District Court Judge, on three matters. Firstly, a contention that the amount she received was inadequate bearing in mind the extent of the matrimonial assets and the partnership under which the parties operated. Secondly, that her mental and emotional state was such that she was unable to negotiate in a proper and rational manner. Thirdly, that she had no proper and adequate independent legal advice.

As far as the first of these is concerned, it depends on an assessment of the position and of the kind of division which the wife could have expected to receive had the matter been dealt with in the Courts rather than by agreement. While it is not the only consideration, it is certainly a major one and has been of considerable significance in the two decisions in the Court of Appeal which have been most recently dealt with in applications of this kind, that is Aldridge v. Aldridge 1983 N.Z.L.R. 576 and Docherty v. Docherty 1983 N.Z.L.R. 586.

At the commencement of his judgment, the learned District Court Judge made it clear that he endeavoured to keep to one side evidence which related to a substantive application for division, except where he considered it as referable to the application in respect of the possible re-opening of it. I am not entirely clear as to what he meant by this. It is possible that he considered it undesirable to pre-judge what could have become a major issue if the agreement were set aside and a division of matrimonial property undertaken. He appreciated the

significance of the duration of the marriage in relation to division, but specifically avoided coming to a conclusion on this aspect. He did say towards the end of his decision that:-

> "Other calculations may result in her receiving a larger sum than $11,000."

Effectively therefore, he did not arrive at any conclusion as to the amount which the wife could have expected to receive if her entitlement had been assessed by the Courts and not dealt with by agreement between the parties. While the assessment of the amount is by no means decisive, it is clearly an important factor and one which has been of considerable significance in the reported decisions under the provisions of s.21 (10). It is difficult to see how the justice of the arrangement could be assessed without reference to its practical consequences and I think that the learned District Court Judge's concern with the second of the contentions put forward by the wife - that is, her state of mind at the time - led to his overlooking the importance of an assessment of the appropriate division without reference to the agreement of the parties. In this case, where the dispute extends to almost every aspect of the marriage, as well as the acquisition of property during the course of it, it would be impossible for me to come to any conclusion on the material before me as to the amounts which the parties might have expected to retain because I cannot resolve questions of credibility.

The learned District Court Judge was concerned substantially with the second basis of the wife's application.

This depended on evidence which was given by Dr Hibbs and Mr Pearson and it seems clear that by October 1980, the wife was suffering from a severe degree of agitated depression which had gradually become worse in the previous six months and which required treatment by way of hospitalisation and subsequent medication. While neither Dr Hibbs nor Mr Pearson were in a position to give direct evidence as to the state of mind of the wife at the time she entered into the agreement, the learned District Court Judge accepted a view put forward by Dr Hibbs that in his opinion anyone suffering from depressive symptoms is unable to make any realistic assessment of a situation or to act with any degree of reasonable judgment, with feelings clouded by illness. He considered that the Doctor had misgivings as to the wife's ability to make a rational decision as to her business affairs and he concluded that her judgment was faulty, accepting the medical evidence as it was presented.

The learned Judge was not prepared to make a finding that if the marriage were one of short duration a smaller amount would have been paid to the wife than was contemplated by the agreement. He was not prepared to find that the marriage was one of short duration and considered that other calculations might have resulted in her receiving a larger sum than the $11,000 contemplated by the agreement, but he made no attempt to assess the amount. He said:-

> "I am not prepared to say Mrs MacKinnon was functioning rationally when she entered into the agreement. I am satisfied she was severely depressed and was really trying to go it alone when she was not mentally fully competent. I do not suggest she was unable to function in society but I do say her business acumen may well have been affected."

The learned Judge was also concerned with the question of proper and adequate independent legal advice. While not making any criticism of the advice which she received, he was concerned that she did not appear to have had the continuous services of a legal adviser throughout. If she had had, he indicated he might have viewed the situation differently.

S.21 (10) sets out the criteria to be taken into account in deciding whether it would be unjust to give effect to an agreement. The scope of the discretion has been emphasised in the two decisions of the Court of Appeal already referred to. The Court is first required to have regard to the provisions of the agreement.

In my view, for the reasons already expressed the learned District Court Judge because of his concentration on the state of mind of the wife, did not adequately consider the agreement itself or come to any specific conclusion with regard to the justice of its provisions in relation to the circumstances and as I have already stated I am in no position to arrive at any conclusion with regard to this on the material before me.

The second consideration is the time that has elapsed since the time the agreement was entered into. In this case the time is 2 years. I do not think that it can be regarded as so long as to be decisive having regard to the circumstances and I think it is also important to bear in mind that during this period the mental state of the wife was certainly such as

to provide some explanation for any delay.

The third consideration is whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was entered into. This depends on an assessment of the surrounding facts and is in a sense related to the first consideration. The state of mind of the wife does not of itself affect whether or not the agreement was unfair or unreasonable. The findings of the learned District Court Judge are not sufficient for me to arrive at any conclusion with regard to this.

The fourth consideration is 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. Having regard to the situation in this case, I do not consider that this aspect could have been or was regarded as significant.

Finally, there is the very wide provision that the Court may take into account any other matters it considers relevant. It is I think only in this very wide discretionary power that the learned District Court Judge could properly have taken into account the state of mind of the wife, but in my view the important element is still an assessment of the agreement rather than the state of mind of one of the parties. It is quite possible that the agreement itself could in regard to the circumstances, be fair and reasonable even

although the capacity of one of the parties at the time was open to question.

Effectively therefore, the learned District Court Judge has resolved this matter by coming to the conclusion that in view of a doubt as to the capacity of the wife at the time the agreement was entered into, the interests of justice require that the agreement should be set aside. I accept that the state of mind is a relevant consideration and in some cases it has been a matter of great significance. It was a factor of some significance in Aldridge v. Aldridge because the wife's state of mind had a bearing on her capacity to assess the importance of business interests in the overall settlement. The importance of this appeared in relation to the extent of the assets and the ultimate settlement that was arrived at. Here there is nothing to indicate whether or not the settlement was itself unreasonable and therefore the wife's state of mind has not been directly related by the learned District Court Judge to the agreement arrived at. I think therefore, he has approached the problem incorrectly since the section contemplates an analysis of the transaction as a primary function of the Court assessing the situation. While the state of mind of the parties can have a bearing on this, it is not itself the principal factor and in making it decisive in this case, I think the learned District Court Judge was wrong. I also bear in mind that the evidence was by no means conclusive with regard to her state of mind and any affect it may have had on the decision to enter into the agreement.

I note the importance which the section attaches to the availability of independent advice and it is true that in the absence of such advice a transaction may not stand up however fair or reasonable it may be. In such a case, there is clearly a presumption that it will not bind the parties but the approach which the legislation adopts in subs.10 is different. I am in no position to substitute my view for that of the learned District Court Judge or to come to any conclusion in this case as to the fairness or otherwise of the agreement.

In my view the learned District Court Judge has understandably adopted an approach which is not contemplated by the section.

In all the circumstances, the appeal will be allowed and the application remitted to the learned District Court Judge to deal with it in terms of the statutory provisions. Having regard to the circumstances, there will be no order for costs.

Solicitors for Appellant: Messrs Kensington, Haynes and White, Auckland

Solicitors for Respondent: Messrs Hannah, McKechnie and Morrison, Rotorua