NZLR

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.1310/83

686

BETWEEN J TOTTY of Auckland, Graphic Artist

Appellant

AND J TOTTY of Puhoi, Musician

Respondent

Hearing: 23rd and 25th May, 1984.

Counsel: R.J. Asher for Appellant.
H.K. Gladwell for Respondent.

Judgment: 25 May, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

This is an appeal from a judgment of the Family Court at North Shore given on 23 August, 1983 by Judge B.J. Kendall, Esq., The judgment was one given in respect of an application by the appellant seeking orders for division of matrimonial property in terms of the Matrimonial Property Act 1976 or, alternatively, for an order in terms of s.182 of the Family Proceedings Act 1980 for the variation of the terms of an agreement entered into between the appellant and the respondent on 29 July, 1974. In order to be able to proceed with the first-mentioned application the appellant was, of course, obliged to shew that the circumstances did not bring the matter within the terms of s.57(5) of the Matrimonial Property Act 1976. That subsection provides:

> "Nothing in this Act shall affect the validity of any agreement entered into before the commencement of this Act by way of settlement of any question that has arisen in relation to matrimonial property and every such agreement shall have effect as if this Act had not been passed."

The Judge, in the judgment referred to, reached the conclusion that the agreement was by way of settlement of a question in relation to matrimonial property within the meaning of those words as used in the section and accordingly the appellant was in his view limited to her application to the relief provided for in terms of s.182 of the Family Proceedings Act 1980.

Mr Asher on behalf of the appellant does not seek to contend that this conclusion reached by the Judge was erroneous and the appeal, therefore, is concerned solely with the refusal of the Judge to make any order for the variation of the agreement entered into between the parties. The matter was the subject of lengthy evidence in the Family Court as shown by the volume of the recorded evidence and I adopt gratefully the succinct summary of the events leading up to the execution of the agreement as these are set forth in the judgment:

> "The parties were married on 1961 and had two children T Totty born on 1962 and S Totty born on 1964. The parties commenced their married life in Christchurch where they resided in a home which had been purchased by the Respondent prior to marriage. That home was sold in 1963 when the parties purchased the home of the Applicant's mother. In 1968 the parties moved to Auckland and purchased a property at Takapuna, with the assistance of financial help from the Respondent's parents which was later gifted to them.
>
> In 1972 the parties sold the property at Takapuna and purchased a 10 acre block at Puhoi. That

property had an old house on it and the purchase price was $10,500.00. In 1973 the parties won a ballot with the Northern Building Society as a result of which they took up an interest free loan of $20,570.00 and $5,000.00 in cash. The cash was used on living expenses and towards the purchase of a motor vehicle whilst the $20,000.00 mortgage advance was used towards the cost of erecting a 1600 sq ft studio on the property and carrying out improvements to the old house, notably the reroofing of the house and going some way towards the renovation of the interior.

In July 1974 the parties separated. At that time although the old house on the property had been reroofed, little had been done towards improving the interior whilst the studio had been built to the stage of being a shell with roof, framework and flooring and some windows installed.

Upon separating the parties entered into an agreement the effect of which was to vest in the Respondent sole ownership of the Puhoi property and there was an unequal division of chattels between the parties. As part of the work of carrying out improvements and developing the Puhoi property the parties had acquired a large number of antiques and old chattels with a view to incorporating these into both the renovation of the old house and the construction of the studio.

Subsequent to the parties separating, the Respondent has continued to live at the Puhoi property. He has continued with the improvements to the old house and with further construction of the studio. The land has been subdivided into three lots; a vacant piece of land has been sold, the studio has been removed from being adjacent to the old house on one of the sub-divided lots and has been shifted to a third lot of land, the intention being that the Respondent would continue with the development of the studio on that piece of land so that it would eventually become his own home. The remaining lot of land with the old house on it has been sold.

When the Applicant became aware that the Respondent was sub-dividing the land she commenced these proceedings in April 1982."

Mr Asher for the appellant accepted the foregoing as an accurate summary of the facts except for the point that the home purchased in the year 1963 was not, he said, that of

the applicant's mother but was one purchased with the aid of financial assistance from her.

It is convenient to refer at this point also to certain further events which have occurred subsequent to the execution of the agreement. The situation which arose subsequently with regard to the children was that instead of remaining with the respondent as was contemplated by the terms of the agreement the elder child in 1976 went to live with the appellant and had remained with her right up to the time of the hearing of the proceedings in the Family Court. The younger child remained with the respondent until 1979 when he too went to live with his mother although, as is mentioned in the judgment, he, in 1982, returned to live with the respondent for a while. The children were each aged about 15 at the time when they made the change from living with their father the respondent to going to reside with the appellant.

It is necessary to set out again the terms of the deed entered into by the parties at the time when they separated in July 1974:

> "THIS DEED made this 29th day of July 1974 BETWEEN J , TOTTY of Puhoi Printer (hereinafter referred to as "the husband") of the one part AND J: TOTTY of Auckland Artist (hereinafter referred to as "the wife") of the other part WHEREAS unhappy differences have arisen between the husband and the wife and they have accordingly agreed to live separate from each other henceforth upon the terms hereinafter set forth
>
> NOW THEREFORE THIS DEED WITNESSETH THAT it is mutually agreed as follows:
>
> 1. THE wife shall and may at all times hereafter notwithstanding her coverature live separate and

apart from the husband as if she were unmarried and shall henceforth be free from the control and authority of the husband and may reside in such place or places and in such manner whether in business or out of business as she shall think fit.

2. NEITHER the husband nor the wife shall nor will at any time hereafter require the other of them to live with him or her not institute any legal proceedings to take any steps whatsoever for any maintenance order separation of decree for restitution of conjugal rights nor molest or interfere with the other of them in her or his manner of living or otherwise.

3. THE husband shall properly maintain and care for the two children of the marriage and in consideration thereof shall be entitled to sole occupation and ownership of the parties' joint property at Puhoi, namely those pieces of land CONTAINING FIRSTLY 1 ACRE 3 ROODS 14 PERCHES (1: 3: 14) more or less being Lot 1 on Deposited Plan 60308 and being part of Allotment 2 of the Parish of Puhoi being all the land comprised and described in Certificate of Title 21B/466 (North Auckland Registry) AND SECONDLY 8 ACRES 3 ROODS (8: 3: 00) more or less being Sections 1 and 2 of the Suburbs of Puhoi being all the land comprised and described in Certificate of Title 20D/722 (North Auckland Registry). The wife will execute a Transfer of such pieces of land to the husband pursuant hereto and the husband shall thenceforth assume full obligation for all mortgage payments, rates or other liabilities arising from such property and will save harmless and keep indemnified the wife and her estate in respect thereof. The parties hereby acknowledge that the division of all other assets owned jointly by them has been agreed upon between them and that each of them will carry out his or her part of such agreement.

4. IF the parties hereto shall at any time cease to live separate and apart from eath other but shall live together as man and wife or if their marriage shall be absolutely dissolved for any reason then this deed shall be void and of no effect, except for Clause 3 hereof so far as the same relates to division of assets between the parties, which shall remain in full force and effect PROVIDED HOWEVER that resumption of cohabitation by the parties on one occasion for a continuing period of not more than three months where the sole or principal motive is that of reconciliation shall not make this deed thus void and of no effect

IN WITNESS WHEREOF the parties have hereto set their hands the day and year first abovementioned.

SIGNED by the abovenamed
TOTTY in the presence of:- (Sgd) J Totty

(Sgd) P D Wakeman
Solicitor
Auckland

SIGNED by the abovenamed
J TOTTY in the presence of: (Sgd) J Totty

(Sgd) P D Wakeman
Solicitor
Auckland"

The situation as regards the appellant in relation to her entering into this agreement was that she, as her evidence showed, had become involved with another man and wished to leave the respondent and go to live with this other man. The agreement was thus one entered into as a consequence of the breaking up of the marriage for this reason. The evidence also indicates that there was something of a mutual situation in this regard affecting the respondent also, the other two parties being also husband and wife and the solicitor who prepared the agreement between the appellant and the respondent was also concerned with the arrangements made with regard to the other two parties on their separating for the same reason.

The Judge for the purposes of his judgment in this case accepted and acted upon certain principles which were concisely stated by Chilwell, J. in an unreported decision, Watson v. Watson D.747/77, Auckland Registry, 19 November, 1978, a summary of which can be found in Recent Law, May 1979, p.120. Both parties in presenting their submissions for the purposes

of this appeal have accepted that the principles thus set forth in summary are those which should be acted upon and that the Judge was correct in so doing. Their submissions are directed however, to the question of whether or not on the facts of this case the principles were correctly applied by the Judge.

It will be convenient for me to discuss and state my conclusions regarding the various points arising following the same order and with reference to the five principles set out in the decision referred to. The first of these is that the discretion should be exercised where it is shown that the continuance without variation of the settlement has been rendered unjust by divorce or conduct which occasioned divorce. Although the parties were in agreement that the principles set out in Watson v. Watson (supra) remained relevant they must of course be now considered in the light of the very similar but nevertheless somewhat different terms of s.182 of the Family Proceedings Act 1980 in respect of which this application came to be determined. It is necessary therefore to refer to the terms of the section as they stood at the time of the hearing in the Family Court, there having then been inserted in s.182 two new subsections by s.2(1) and (2) of the Family Proceedings Amendment Act 1982:

> "(1) On, or within a reasonable time after, the making of an order under Part IV of this Act or a final decree under Part II or Part IV of the Matrimonial Proceedings Act 1963, a Family Court may inquire into the existence of any agreement between the parties to the marriage for the payment of maintenance or relating to the property of the parties or either of them, or any antenuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of

any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or of the parties to the marriage or either of them, as the Court thinks fit.

(2) Where an order under Part IV of this Act, or a final decree under Part II or Part IV of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, a Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.

(3) In the exercise of its discretion under this section, the Court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the Court considers relevant."

It is to be noted, first, that the references to the agreement being rendered unjust by divorce or conduct which occasioned divorce no longer appear in the section and, furthermore, by subsection (3) the Court's discretion is stated in somewhat wider terms than previously. The first principle now, therefore, of those which are stated in Watson v. Watson (supra) which is relevant for the purposes of this appeal is that the Court will be slow to defeat a solemnly proclaimed settlement. That statement of course rests upon the various decisions under s.79 of the Matrimonial Proceedings Act 1963 and in particular on the statement made in the judgment of Henry, J. in Hammond v. Hammond [1974] 1 NZLR 135. I think it is of importance and assistance, however, to note how the matter was expressed by Cooke, J. in his statement Roome v. Roome [1976] 1 NZLR 391 where it was said:

"It (the case to which I have just referred) also illustrates that the court will be slow to exercise the jurisdiction under that section by way

> of varying a carefully drawn settlement in respect of the making of which no injustice or unfairness has been proved and where no new matter not then fairly in the contemplation of the parties has arisen."

The factor referred to regarding the question of the deed or agreement being one appearing to have been carefully drawn is clearly simply one which must be considered in the light of the other factors, as indeed must of course be all the principles to which reference was made in Watson v. Watson (supra). With regard to this matter of the agreement between the parties being or not being a carefully drawn one, the Judge reached the conclusion that the agreement was carefully drawn but he, it is to be noted, qualified that statement by wording the matter thus:

> "I am satisfied that in the circumstances of this case, the agreement was carefully drawn as expressing the wishes of the parties and recording the agreement which they had reached."

Mr Asher for the appellant did not seek to argue that the agreement as drawn up by the solicitor Mr Wakeman was not so expressed as to record the actual intention of the parties at the time. His submission was that it could nevertheless not be regarded as a carefully drawn and conclusive legal settlement of matrimonial property. He, in this regard, referred to the fact that there was no statement included that the agreement was entered into in full and final settlement of matrimonial property matters. There was no reference to maintenance or other matrimonial matters such as custody and access except for the oblique reference in clause 3 dealing with the occupation and ownership thenceforth of the property jointly owned by the parties at Puhoi. He further drew attention to the fact that the consideration expressed for the appellant's agreeing to the transfer of that property to the respondent, viz., that he should properly

maintain and care for the two children of the marriage, was vague and probably unenforceable. He referred also to the absence of any recitals as to intention to deal with matrimonial property.

Mr Gladwell on behalf of the respondent contended that the agreement in fact was an adequate agreement and he submitted that there was no suggestion that the solicitor had drawn the agreement in any way contrary to the expressed intentions of the parties which had in fact been recorded in writing by them prior to the agreement being drawn up. He referred to the fact that there was reference to a previous agreement as to the division of the matrimonial chattels and his suggestion was that the other matters adverted to were mere matters of form and not of substance.

I must say as to this aspect that in my view although it has been, I think, properly accepted that the agreement was one falling within the terms of s.57(5) of the Matrimonial Property Act 1976, nevertheless, as a settlement between husband and wife who were contemplating a final parting as these parties seem clearly to have been, the agreement was in its terms clearly inadequate in the respects to which Mr Asher has referred. This of course is not to be regarded as in any way a criticism of the solicitor who prepared the agreement. He indeed, the evidence shows, was brought into the matter simply as a friend of all four persons who were involved in this matrimonial break up and he was, it seems, an unwilling adviser brought in simply to play the role

of recording in some proper form the matters which the parties themselves had agreed upon. He made it abundantly plain that he considered that the appellant should have independent advice and he certainly suggested to her that she was entering into a very disadvantageous and unfair agreement so far as she herself was concerned. The situation indeed was clearly in my view the kind of situation which commonly arises when other emotional attachments have been formed and everybody concerned becomes exceedingly anxious to reach some form of agreement which will allow the parties to take up their new liaisons.

The Judge seems clearly to have considered that this factor could be put aside altogether for the reason which he gave as to the agreement expressing the wishes of the parties. I do not think that it can be so disregarded. It is clear that, for whatever reason it was, this appellant did not receive advice as to matters which should have been incorporated in the agreement in order to achieve effectively all that she wished and, furthermore, to ensure that she, even though she was the one who was seeking to leave the matrimonial home and set up a new life, did receive a fair share of the matrimonial property. It has to be borne in mind here that this was very clearly indeed a case where, in my view, equal sharing of the matrimonial assets was warranted. Mr Gladwell was not prepared to accept as Mr Asher had suggested that the whole hearing in the Family Court was conducted on the basis that equal sharing would have been appropriate but he did not seek before me to argue that the situation was in fact otherwise. I think that that was realistic having regard to the clear evidence as to the appellant having been in employment in the jointly run business that the parties

conducted throughout the greater part of their married life and to the other material contributions which she made to the marriage partnership apart altogether from her contribution in caring for and bringing up the children. That accordingly in my view was a factor which must here properly be taken into account as favouring to some degree the revision of the agreement. It is closely connected of course with the second aspect referred to as to the questions of the parties being legally advised, being an aspect to which regard must be paid. Here again, the Judge took the view that this factor should not be brought into the scales in favour of the appellant because of her declining to accept the definite advice which she, on the evidence, received from Mr Wakeman that she should seek independent advice. The situation, however, is that she did not receive any such advice. Mr Wakeman obviously could not be expected to give her full and adequate advice in the circumstances to which I have referred. The factors of a wife having entered into an agreement in such circumstances as these where there are emotional factors connected with the break up of a marriage and a pressing situation as regards attachment for another person involved, are factors that the Courts have taken account of in relation to agreements affected by s.21 of the Matrimonial Property Act 1976 and I think that it is proper that account should be taken of them under s.182 also. That is so, I think, even though, as is pointed out, the situation in respect of the two statutory provisions is very different in that there are the special mandatory provisions of course in the later section and parties know that such agreements are liable to be set aside however carefully drawn they are and notwithstanding the fact that independent advice has been obtained.

The third factor referred to in the judgment, that is to say the question of whether or not injustice or unfairness has been proved in the making of the settlement was clearly recognised by the parties themselves and by the Judge as the major element involved in this case. I do not propose in this judgment to attempt to refer to and analyse all the matters which were traversed in evidence and which are referred to in the judgment. The situation is that in his judgment the Judge set out certain figures which he referred to as asset values and figures put forward on behalf of the respondent. These were as follows:

"Land and Buildings at Puhoi	23,000.00	
Less mortgage	18,650.00	4,350.00
Equity in car		3,000.00
Chattels retained by Applicant		3,150.00
Chattels retained by Respondent		7,500.00
Gift		1,000.00
Loan		1,000.00
		$20,000.00

It should be said, however, with regard to these figures that there is some question raised on behalf of the respondent as to the figure of $7,500.00 in respect of chattels retained by the respondent. I think, however, that I can properly disregard that for the purpose of this judgment because both parties concede there was a valuation obtained by an independent valuer of the chattels retained by each of the parties and when regard was had to that there was not very much difference in the discrepancy between what the appellant wife obtained and the respondent husband obtained under this heading from that which is revealed by the figures which the Judge adopts for the purposes of an

assessment of the disparity between the shares obtained by each party. It is to be noted, however, that the figures that are thus set forth include the valuation of the land and buildings at Puhoi which formed the principal asset of the marriage partnership at the valuation which was tendered on behalf of the respondent. This figure is very much lower indeed than a valuation which was tendered on behalf of the appellant by a registered valuer, Mr Burton. He valued the land in 1974, as the judgment mentions, at $18,250 and with improvements of $27,750 arrived at a capital value of the asset of $46,000 as at July 1974. The figures set forth using the valuation tendered on behalf of the respondent would show a disparity of $11,000. The Judge however reduced this by $2,000 because he considered that there should not be included the sum of $1,000 referred to as gift or the sum of $1,000 referred to as a loan. The $1,000 was a sum which the appellant apparently obtained from her mother and paid over at the time of the settlement to the respondent to assist him at that time because of the fact that he was to be looking after the children and she was concerned that he should be in no immediate financial difficulties. There was also a loan of $1,000 made which has not, it is said, been repaid. The Judge simply rejected the first $1,000 on the basis that it was a gift made at the time of the separation and therefore should not be included in the marriage partnership assets at all. There may be some argument, I think, to justify his exclusion of the loan item but I must say that I cannot see any basis upon which the $1,000 gift could be properly excluded. The main matter, however, is the question of the valuation of the property. This aspect was extensively canvassed at the hearing in the District Court. The valuers were cross-examined

at length and the Judge in his judgment rejected completely the evidence of the valuer Mr Burton previously mentioned and instead considered that he should adopt the much lower value supported by two valuers who were called on behalf of the respondent. With great respect, I find myself unable to conclude that he acted in accordance with the evidence before him in so doing. He, as his judgment shows, rejected completely the valuation of the land suggested by Mr Burton and gave as a reason for so doing that the references made by Mr Burton to the prices of sections in the vicinity sold in late 1975 was not supported as a basis of his valuation because the valuer "did not establish the link or the method by which he worked back from the value of individual subdivided sections to the value of a piece of land not yet subdivided, but with some subdivisional potential." With respect, it appears to me that the Judge has in so stating the matter really assumed the role of a valuer himself in that I can find no basis in the evidence of the other two valuers for the use of other sales in this way by a valuer of very long experience being rejected as not a proper mode of valuation. In fact, the situation as Mr Asher pointed out, that one of the other valuers, Mr Baker, freely conceded that the comparative sales quoted by Mr Burton were useful evidence as to the value of the subject property and the other valuer called for the respondent clearly did not really attempt to deal with comparative sales in the vicinity at all but simply when confronted with these sales suggested that they might be disregarded to some extent at all events because of some change in the level of values between 1974 and 1975. That however is not of course the reason which the Judge himself gave for rejecting Mr Burton's valuation.

One other matter to which he refers as justifying a rejection of the evidence on the basis of this reliance upon comparative sales is that the valuer, he says, in his report said this:

> "These sections were in the main quite a bit smaller and of gentle contour without the high and steep wooded hillsides at the rear as has the subject lot."

This is put forward as showing that the land being valued did not compare with the subdivided land on which the valuer relied for his opinion. In fact the report shows that the situation is really quite the opposite because the passage reads:

> "These sections were in the main quite a bit smaller and of gentle contour without the high and steep wooded hillside at the rear as has the subject lot and basically formed a usable section of more or less comparable size."

Altogether, without traversing a number of other matters which were argued in considerable detail on this appeal with regard to the respective valuations I have reached the clear conclusion that there was insufficient justification for rejecting entirely the evidence of Mr Burton as to the value of both the land and the buildings and of course if Mr Burton's valuation had been accepted the discrepancy between the share which the appellant obtained and the share which the respondent obtained would have been a very great discrepancy indeed. Overall, my conclusion is that there is here an injustice or unfairness demonstratably shown as regards the share received by each party by reason of the very small amount of value which the appellant obtained in comparison with that received by the respondent. The fact that the house and the section have

since been sold for such substantial amounts must of course be viewed in the light of the work done subsequently by the respondent. It nevertheless must serve in some measure to highlight how great a discrepancy there was in the sharing in this case.

Furthermore, there is no account at all taken, as I commented during the course of the argument, of the fact that the respondent has obtained the whole benefit - and the very considerable benefit - of the interest-free loan which the parties obtained during the course of the marriage from the Northern Building Society and which was all expended as the evidence shows on the property at Puhoi during the course of the marriage.

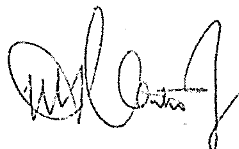
There are other matters, too, which in my view lead to a conclusion that the agreement is one which should be varied in terms of principles which have been well accepted. There is of course the matter of the change in circumstances through the children going to reside with the appellant. That was clearly not a matter which was in the contemplation of the parties at the time. The agreement itself recites the fact that the transfer of the house was to be made to the respondent in consideration of the fact that he was to care for the children for the future. There is, furthermore, the point that instead of the property being retained as the appellant obviously contemplated at the time of the agreement as a home for the children as it stood so that they would, as the appellant says she contemplated, receive in due course from the property the share which she was giving up, the land has been subdivided and sold in the way referred to in the brief statement of facts which

I have included at the commencement of this judgment.

I accordingly conclude that there was indeed here a manifestly unjust settlement which required revision in terms of the section and I think that the appeal against the judgment must for this reason be allowed. The question is whether the matter should be remitted back to the Family Court for a consideration of the degree to which the agreement should be amended. My conclusion is that that, in all the circumstances, would not be a satisfactory course particularly having regard to the question of delay. I have not hitherto in this judgment referred to the question of the appellant being debarred from seeking revision by her delaying so long in bringing the application. In all the circumstances, however, I think that that factor is outweighed in any event by the other factors to which I have adverted and, moreover, there has to be considered in relation to this matter of delay that she only learnt, it seemed, a few months before she commenced her proceedings that there was to be the dramatic change in the circumstances in that the respondent was setting to work to subdivide and sell off substantial portions of the property as he has proceeded to do. In these circumstances I think that this Court should undertake the variation and on consideration of all the various figures that have been put forward by Mr Asher showing how the matter could be differently regarded in the light of the valuations tendered on both sides and on the basis of the present-day valuations which incidentally shows a total figure of $117,850 (after allowing for the mortgage of $18,650), I have concluded that some allowance should properly be made for the fact that the true value of the property was almost certainly somewhere

between the value arrived at by Mr Baker and the opposing value arrived at by Mr Burton. With these considerations in mind I adjudge that the agreement should be varied by the inclusion therein of a provision for the payment to the appellant of the sum of $10,000 but the respondent should have 12 months from the date of the judgment to pay that sum. I think that the appellant is entitled to interest on that sum as well, which I leave to the parties to compute but it should be computed on the basis of the Judicature Act percentages pertaining over the period.

Having regard to the fact that the appellant has indeed delayed for a long time in bringing these proceedings I do not think that she should have any allowance made towards her costs but each party should be left to pay their own costs.



SOLICITORS:

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