

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

M.392/83

887

BETWEEN

M \_\_\_\_\_ TURNER

Appellant

A N D

M \_\_\_\_\_ TURNER

Respondent

Hearing: In Chambers  
29 June 1984

Counsel: G.M. Brodie in support  
T.M. Abbott to oppose

Judgment: 17 JUL 1984

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JUDGMENT OF HARDIE BOYS J.

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This is an application under s 67 of the Judicature Act 1908 for leave to appeal against a judgment of the Chief Justice given on 3 April 1984 on an appeal from a decision of the District Court delivered on 4 August 1983.

The proceedings were brought under ss 21(8)(b) and 33(3)(n) of the Matrimonial Property Act 1976, for first an order declaring void an agreement whereby the wife was to acquire the husband's interest in the matrimonial home, and secondly an order that the wife pay the husband a sum of money to be fixed by the Court. The parties had in 1979 entered into a separation agreement whereby the wife was permitted to

occupy the home for a period likely to end in 1987, and it was then to be sold and its proceeds divided equally. In May 1981, the parties, acting through their respective solicitors, agreed that the wife should forthwith purchase the husband's share for \$14,000. That figure was approximately half the then equity calculated in accordance with a valuation of \$33,500 which had been obtained in April 1981. But it was not until 1 October 1981 that the wife signed the deed which the husband's solicitor had prepared to give effect to the agreement. By that time she had decided to sell the house and had found a buyer for \$49,000. She did not disclose that figure to the husband and he did not find out about it until some time later. It meant that on the sale of the property and after repayment of the mortgages, the net proceeds were \$41,000, of which she received \$27,000 and he \$14,000.

The District Court Judge held that by not disclosing the sale price when she knew that the husband's agreement to sell to her had been based on the lower figure, the wife had displayed a lack of good faith such as to make it unjust to give effect to the agreement. He therefore declared it void and in order to give effect to that conclusion he ordered the wife to secure to the husband from the proceeds of sale the further sum of \$5,000, payable without interest at the time the matrimonial home would have been divisible in accordance with the original agreement.

On appeal, the argument for the wife appears to have been in two areas: first as to whether this was indeed a case

for the application of s 21(8)(b), or in other words whether on the facts it was indeed unjust to give effect to the agreement; and secondly as to what should follow if the agreement were to be set aside.

In the first area, it was contended that the proper comparison for the purpose of testing the allegation of unfairness was between the payment of \$14,000 and what the position would have been had the arrangement included in the original agreement remained in effect; that the parties were dealing at arms length through their solicitors, and there was thus no duty on the wife to disclose the sale price; and that in any event the Judge had erred in concluding that had the husband known that price, the parties would have agreed upon a higher figure. The learned Chief Justice rejected these submissions. He held that as the parties were intent on making a new agreement any unfairness should more properly be looked at by considering what each of the parties thought he or she was to receive under that new agreement; that the necessity under the Matrimonial Property Act to examine the justice of a transaction may well require the Court to insist upon the making of adequate disclosure; and that there were no grounds for interfering with the way in which the District Court Judge had exercised the discretion conferred upon him by the section. The Chief Justice summed up the matter in this way:

" What is required of a Judge in applying s 21 is that he should exercise a subjective judgment on the facts of the case and if he is led to the view that it would be unjust to enforce the

agreement then he is required by s 21(8) to declare such agreement void."

On that basis, he was not disposed to differ from the Judge below in the view he had taken, which he held was a view open to be taken on the evidence.

In the second area of the appeal, the learned Chief Justice does not appear to have considered the particular point Mr Brodie raised before me, which, expressed simply, was whether, having set aside the agreement, the District Court Judge was entitled to order a payment to the husband or whether the parties should have been left with the situation created by their first agreement. Subsection (12) of s 21 provides that where any agreement is avoided the provisions of the Act shall have effect as if the agreement had never been made. Mr Brodie pointed out to the District Court Judge the difficulties that such a result would produce, for although the original agreement would remain in force, its relevant subject matter, the matrimonial home, had been disposed of. As I understand his submission at the time, Mr Brodie advanced these difficulties as a reason for the Court not to set aside the second agreement. The District Court Judge however saw an order under s 33(3)(n) as the solution. For it avoided the difficulties and provided a means of giving effect to the order under s 21. He overcame the apparent jurisdictional problem raised by s 33(1), which restricts the orders the Court is empowered to make under the section to those needed to give effect to an order made under any of ss.25 to 32, by holding that the order setting aside the agreement was made not only

under s 21 but also under s 25(1)(b).

It is well established that the legislative intention expressed in s 67 of the Judicature Act is that litigation commenced in the District Court may go by way of appeal as far as this Court, but shall go no further save in special cases and for special reasons; and that it is for the applicant to prove that such reasons exist: Rutherford v Waite [1923] GLR 34, 35. An applicant must therefore show that an appeal raises some question of law or fact which is capable of bona fide and serious argument and further that there is involved some interest public or private of sufficient importance to outweigh the cost and delay of a further appeal: Donald v Baldwyn (No.2) [1953] NZLR 653, 654.

Mr Brodie argued that although the practical point involved in this case is whether the husband should be paid the further sum of \$5,000 (a sum which is no doubt significant to the wife and payment of which may cause her some difficulties in view of the commitments into which she has entered - but a consideration such as that is not sufficient to enable leave to be granted), the appeal also raises the question, and it is one he said of public importance, whether it is right to impose a higher obligation of disclosure and good faith as between husband and wife, dealing at arms length as these parties were, than is required of strangers in the course of ordinary contractual negotiations. That is no doubt an important question, but I do not think it is one that is capable of serious argument, because s 21 plainly enables the Court to

interfere in contractual negotiations between husband and wife in circumstances where that would not be possible as between strangers. Transactions between strangers cannot generally be set aside on the grounds provided by s 21(8)(b). In any event, in this respect the case raises no question of principle for, as the Chief Justice observed, the section confers on the Court a discretion to do justice in the circumstances of the particular case. Thus, not only is it unlikely that the Court of Appeal would interfere with the way in which the District Court Judge exercised his discretion, but even if it did, its decision could not have any real effect on other cases for it would be a decision on the particular facts in this case.

Greig J had to deal with a similar kind of application in Donnelly v Donnelly (1982) 5 MPC 31, and I respectfully adopt his reasoning, which leads to the conclusion that leave to appeal ought not to be given in respect of the exercise of discretion under s 21.

I have had greater difficulty in determining whether leave to appeal ought to be granted in respect of the jurisdictional question, for I do not have the advantage of the Chief Justice's views upon that question. The amount involved is not great and in any event its calculation was a matter within the District Court Judge's discretion. But the husband has not been accorded judicial consideration of this aspect of his appeal. And the question of whether or not an order may be made under s 33 for the purpose of giving effect to an order under s 21, especially where the result is, despite s 21(12),

to alter the terms of another agreement which remains binding, clearly has significance beyond the immediate interests of these parties. As the sum is not presently payable, and carries no interest, the delay occasioned by an appeal is not a material consideration. The matter of cost is ultimately in the hands of the Court of Appeal. Taking these various considerations into account, it is my conclusion that leave to appeal ought to be granted, but only in respect of this particular ground. The wife may however wish to reconsider her position in the light of this restriction and accordingly this motion is adjourned to Friday 3 August 1984 when I will make the order indicated if it is desired that I should do so.



Solicitors:

Anthony Polson & Co, CHRISTCHURCH, for Appellant.  
Harper, Pascoe & Co, CHRISTCHURCH, for Respondent.