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NZLR X

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.130/78

189

IN THE MATTER of the Matrimonial Property Act 1976

BETWEEN: CUBIS of Brisbane, Australia, Femme Sole

Applicant

A N D: CUBIS formerly of Cambridge but now of Mount Maunganui, Company Director

Respondent

Hearing: 13 and 14 February 1984

Judgment: 7 March 1984

Counsel: M B O'Brien and Miss Adams for applicant
A L Hassall for respondent

JUDGMENT OF BISSON, J.

The applicant and the respondent were married on the 28th January 1950. There were four children of the marriage · , born on the 1953; on the 1955; on the 1958; and on the 1959. The parties have been living apart since the 29th November 1974, when the applicant left the matrimonial home in Cambridge to live in Brisbane. She said she returned after eight months and an attempted reconciliation was unsuccessful, lasting only one week. She returned to Brisbane on the 28th August 1975, where she has worked to support herself.

When the applicant left the matrimonial home in 1974 was two months short of 21 years of age, was 19, was aged 16, and aged 15. , who had just been married, left home a week later and has resided with her husband in Palmerston North since that time.

The parties were divorced by decree absolute on the 21st August 1979. The respondent then remarried and continued living in the matrimonial home with his second wife until June 1980, when they moved to live in Mount Maunganui. Since that time, the matrimonial home has not been occupied and has been on the market for sale.

On the 29th March 1977 the applicant consulted a solicitor, who wrote to the respondent regarding the division of matrimonial property. Her application under the Matrimonial Property Act 1976 for orders determining the respective shares of each spouse in the matrimonial property was filed on the 10th May 1978. The applicant's own account of the marriage, in her affidavit of the 19th April 1978, is quite brief ;

> "IN anticipation of our marriage the respondent purchased a section at 166 Shakespeare Street, Cambridge. After we were married we built a small bach on the property to live in and I worked in a department store while the respondent made concrete blocks and built two shops on the property. I then worked in one of the shops being a grocery/ milk bar on a full-time basis, seven days a week up until my first child was born some three and a half years later. During this time I suffered five miscarriages. A house was built behind the two shops and after that two more shops were added. In 1957 the respondent purchased a house property adjoining the shops and we moved into this house.

(Cont'd.....)

"In 1952 a company known as N. Cubis Limited was formed and it later purchased 166 Shakespeare Street. As my various children were born between 1953 and 1959 I worked intermittently attending to the books. When the four shops had been built on the property the grocery/milk bar was closed and we then ran a milk bar in one of the shops. I worked another two years full-time in the milk bar and the business was sold in August 1965. After 1965 I worked part-time in various jobs. The respondent was employed as Relieving Manager in various grocery shops. ... ... When the company was formed I subscribed for two hundred and ninety-nine (299) two dollar ($2.00) ordinary shares, the respondent subscribing for one thousand two hundred and one (1201) ordinary two dollar ($2.00) shares a total of one thousand five hundred (1500) shares.. ... ...

7. THAT I paid for many of the items of furniture and in particular all the beds in the house property at Cambridge. I also paid for such things as curtains, lino, wallpapers, paint and general items over the years. These were all paid for in cash from savings from my own work over the years. Apart from the usual housekeeping payments I received no remuneration for my work initially for the Respondent and subsequently for the company. Since I separated from the Respondent I have received no moneys from him or from the company."

The respondent, in his affidavit in reply dated the 18th October 1978, said that in 1972 he and the applicant went to the Inter-Dominion Trotting Championships at Brisbane where they met a man named 'Alan'. He was a friend of a long-standing penfriend of the applicant and he showed them around the city and the countryside. In 1973 the applicant and the children, , went back to Brisbane for a visit, when she again met up with the man named Alan. The respondent said that the marriage relationship commenced to deteriorate about then until suddenly, on the 29th November 1974, the applicant left the matrimonial home without warning and went to Brisbane. He

had no doubt in his mind that the reason for the deterioration in the marriage relationship and the subsequent 'desertion' by the applicant was her involvement with the man named Alan. The respondent, in his affidavit in reply, said that he had not purchased the section at 166 Shakespeare Street, Cambridge, in anticipation of marriage, but purchased it before he even knew the applicant, on his return from overseas service in the armed forces, paying fifty-five pounds for it out of his War gratuity. A small bach was built on the section at a cost of one hundred and fifty pounds - also paid from his War gratuity - and it became their first matrimonial home. The Memorandum of Transfer in respect of the section is dated in the month following the parties becoming engaged, but it is not necessary to decide whether or not it was purchased in anticipation of marriage because this property was ultimately transferred to the company, in which both parties hold shares. There is no dispute that these shares are matrimonial property. The respondent said that the first two shops were built on this land by his uncle, at a cost of twelve hundred pounds, financed with a loan from his mother's cousin, the respondent personally making the concrete blocks which were required for the shops. A house was then built on the land by his uncle, the respondent assisting personally whenever possible. This house cost fifteen hundred pounds, which he was able to pay by using rents from one of the shops, and profit from the grocery/dairy business. It was the next matrimonial home. Two additional shops were built by the respondent's uncle, at a cost of about

twelve hundred pounds, again being financed out of rents and profits.

Then, in 1957, the respondent purchased a house property adjoining the shops, paying a deposit of $300.00 and raising a loan for the balance, again from his mother's cousin. This then became, and remained, the matrimonial home. The property, comprising four shops, bach (now storeroom) and house, was transferred to the company in 1958. The respondent said that while the applicant did work each day in the grocery/milk-bar, she did not work a full day as some staff were employed. He said that her work attending to the books between 1953 and 1959 was limited to assisting with the banking and the monthly accounts. He agreed, however, that she did work full-time in the milk-bar until its sale in August 1965, and that thereafter she did work full-time at various jobs. He said she retained her own wages, and was able to use these moneys for her own purposes, and did so. However, I regard her earnings as a contribution to the marriage partnership as it relieved the husband of providing money for his wife's own purposes, and he admitted that she did pay for some of the less costly items of furniture and household effects from her own earnings.

The respondent referred to the applicant's conduct in his affidavit. He said she had walked out of her responsibilities in respect of the assets acquired by 'him' during the marriage; making no arrangement whatsoever

for the care and management of them; that she embarrassed him by leaving within 23 days of 's wedding, which cost him $1600.00; that she showed no gratitude for 'his' paying for three overseas trips for her; that she had also deserted the children, in particular, , who was then aged 15 years, leaving him to care for her and causing him very considerable worry and anxiety. He said he was obliged to do everything in connection with the property and the maintenance thereof since the applicant's departure, without any contribution from her at all.

On the 10th April 1979 the applicant's Dargaville solicitor wrote to a firm of Hamilton solicitors, as agents, with instructions for counsel to appear on the hearing of the application. They enclosed very lengthy notes written by the applicant in reply to the respondent's affidavit, but no further affidavit by the applicant was filed and apart from the two affidavits, one by each party already referred to, both filed in 1978, no further affidavits were filed. The solicitor for the respondent also instructed counsel. On the 20th May 1981 a ready list application, signed by counsel for both parties, was filed. A fixture was made for the hearing of the application on the 13th July 1981. In an affidavit dated the 23rd September 1982 the respondent deposed to having attended at the office of his counsel on the 3rd July 1981 for discussions concerning settlement, and the applicant's counsel attended during part of those discussions. The applicant did not attend, she being in Brisbane.

Although the applicant's counsel also acted as a solicitor on agency instructions, it will be more convenient if I refer to him as "counsel for the applicant". He is not Mr O'Brien who appeared for the applicant in this Court. Following the meeting on the 3rd July 1981, he telephoned the applicant at the factory where she worked concerning the terms of settlement, and she said she was persuaded to reluctantly agree to accept $27,000.00 as her share of matrimonial property. On the 10th July 1981 she sent a cable to her counsel:

"Go ahead as planned".

A file note, dated the 10th July 1981, made by her counsel records that both counsel conferred on the 10th July, and part of the note reads :

"Sep Date values $27,000 - 12 months to pay ..."

A month later, on the 10th August 1981, counsel for the respondent wrote to counsel for the applicant as follows :

"Re: CUBIS - Matrimonial Property Settlement

I confirm settlement of the Matrimonial Property Claim of your client Mrs CUBIS No. M.130/78, in the Hamilton Court upon the following basis:

1. Mr Cubis to pay Mrs Cubis the sum of $27,000.00 at the expiration of 12 months from the 7th day of July 1981 or upon earlier sale of the shop property at Leamington.

2. Mr Cubis to pay Mrs Cubis interest on the said $27,000.00 at the rate of 7½ per cent such interest amount to be added to the sum of $27,000.00 and be payable when such sum is payable.

3. Mr Cubis to apply in reduction of the said sum of $27,000.00 the proceeds of any Mortgage investment he has with his Cambridge solicitors if the same fall due prior to payment in full of the $27,000.00.

(Cont'd....)

"4. Mrs Cubis to transfer to Mr Cubis or his nominee her shares in the Company.

5. All items of property presently in the ownership or possession of Mr Cubis including the Matrimonial Home and the shares in the Company are to become his separate property.

Would you please confirm settlement on this basis.

I understand that you are preparing an appropriate form of Agreement for execution.

Please let me have same for perusal."

On the 2nd September 1981 the applicant's Dargaville solicitor wrote to counsel to report on progress as he had heard nothing from counsel since 27th March 1981. Counsel for the respondent wrote to counsel for the applicant on the 14th November 1981, and again on the 18th January 1982, asking for the form of agreement. It was not until the 29th January 1982 that counsel for the applicant wrote to the solicitors for the respondent enclosing the agreement and confirming the settlement in terms of the letter of the 10th August 1981 of the respondent's counsel. Counsel for the applicant, in his letter of the 29th January 1982, sought payment of $27,970.89, including interest to the 2nd February 1982, and said :

"We note that the funds will be available on Tuesday, 2nd February. If you anticipate a delay in Mr Cubis signing the Deed could you please place the funds on call earning interest for Mrs Cubis and once the Deed has been signed could you forward it to us with the matrimonial property proceeds and in addition interest if applicable on the basis that we will obtain undisbursed all proceeds until the Deed has been executed by Mrs Cubis in Australia and returned to us."

On the 2nd February 1982, counsel for the applicant wrote to her. It was his first letter to her since her cable to him to go ahead, nearly seven months earlier. He did not set out the terms of settlement, but said :

> "We are pleased to advise that the Cambridge property has been sold and accordingly we will shortly receive the matrimonial property proceeds as negotiated. These will be forwarded to Mr... along with an agreement which will require your signature. We anticipate the funds being available to us within the next three or four days."

Counsel for the applicant had still not reported settlement to his instructing solicitors but on the 8th February 1982 wrote to them, apologizing for the delay, reporting a settlement, but not giving any particulars of how it was reached or its full terms. This letter followed his receipt from the solicitors for the respondent of a letter dated the 3rd February 1982 from the respondent's solicitors with their cheque for the above amount and enclosing the Deed, duly executed by Mr Cubis and certified by the witness in terms of s.21(6) of the Act. They said :

> "If the document is to be signed in Australia we will require a certificate from the attesting solicitor that he has read the Matrimonial Property Act and amendments and accordingly has been able to explain to her the effects and implications of the Act and the deed. This certificate should be annexed to the deed."

This requirement was conveyed to the applicant's solicitor in counsel's letter of the 8th February 1982, which enclosed the Deed for signature by the applicant, and he said :

> "As advised a term of settlement consists of our holding the matrimonial property proceeds undisbursed until the documents are executed and returned to Mr Cubis' solicitors."

On the 5th March 1982 the applicant's Dargaville solicitor wrote to her enclosing the Deed for her signature, but with no information at all concerning the basis of the settlement or explanation of the effect and implications of the Deed. Such an explanation was left for an Australian solicitor, who was to be given the enclosed copy of the Matrimonial Property Act 1976 with one Amendment, and his attention directed to "Sections 8, 9, 11, probably 15, 16, 17 and 18 and particularly clause 21". As this letter was wrongly addressed, it was not received by the applicant and was "Returned to Sender" eventually, through the post. It is not surprising that when the applicant heard in March or April 1982 that the shop property had been sold for $93,000.00 she had grave doubts that $27,000.00 as her share in all matrimonial property was reasonable. She returned to New Zealand and saw her solicitor at the end of June 1982. He wrote to counsel on the 1st July 1982 that the applicant refused to sign the Deed and "felt that she was being done". The letter said:

> "We have generally discussed the position with Mrs Cubis but she is adamant that she feels the agreement is not fair and we do have regard to the provisions of Section 21 of the Matrimonial Property Act 1976, and in particular subsections 8, 9 and 10, and it is possible that the agreement reached could be set aside by the Court if Mrs Cubis' feelings on the matter turn out to be accurate.
>
> However, before we can take the matter any further, we naturally would like to be able to assess the basis of the suggested settlement in the light of all of the agreed facts, and we would be much obliged if you could urgently let us have full details of the value of all property as at the date of the apparent settlement - presumably there were valuations made of the shop premises and the house and of the two sections also owned by the company

> "and of the company car and we would be pleased to receive copies of all valuations and any other details that you have as will enable us to try and assess whether the apparent settlement reached was a reasonable one in the circumstances."

To this letter, counsel replied on the 27th July, 1982. Counsel was not called as a witness, and as it sets out his version of the basis for settlement, I quote his reasons in full :

> "We refer to our previous correspondence and discussions in this matter and in summary form we list the matrimonial property which was considered at the conferences held between the writer and Mr Hassall, these details being as follows :

		1974	1977	Current
(a)	House property..	$10,000.00	$18,000.00	$28,000.00
(b)	Shops..	25,000.00	30,000.00	65,000.00
(c)	Company assets..	6,000.00	6,000.00	6,000.00
(d)	Motor vehicle..	?	3,600.00	1,500.00
		$41,000.00	$57,600.00	$100,500.00

> The above represented the major items of matrimonial property which were under discussion and for settlement purposes the negotiations surrounded 1974 valuation, 1977 valuation and 1981 valuation. On a fifty-fifty splitting, and taking into account the 1977 valuations which had been obtained we discussed these figures with Mrs Cubis. We advised her that if the matter proceeded to trial, on the one hand the 1981 valuations may be accepted and on the other hand the date of separation valuations may be accepted and after lengthy discussions with Mrs Cubis we received her confirmation to settle on the basis of payment of $27,000.00, being one-half of the 1977 valuation."

It is to be noted at once that "the matrimonial property which was considered" is not a complete list as family chattels, life policies and bank accounts are not mentioned.

On the 6th September 1982, the applicant's solicitor wrote to the respondent's solicitor requesting information regarding the sale of the shop property and possible sale of the matrimonial home. They submitted that on 1981 values the applicant should have received $50,000.00, and concluded that if a satisfactory settlement was not reached the matter would have to proceed to Court for an order.

On the 1st December 1982 there was filed in Court an application by the respondent for an order declaring that the agreement made by the applicant and the respondent, by their respective solicitors, on or about the 10th day of August 1981, whereby the applicant's claim in these proceedings was settled, shall have effect in whole, notwithstanding non-complaince with Section 21(4) to (6) of the Matrimonial Property Act 1976, upon the grounds that the non-compliance has not materially prejudiced the interests of any party to the agreement and in particular has not prejudiced the interests of the applicant.

In his affidavit in support of this application, the respondent enclosed copies of some of the letters already referred to. He also annexed a valuation by the company accountant of the shares in M.M. Cubis Limited, at $3.00 per share, at the 30th September 1978, and a valuation by a registered valuer of the shop property owned by the company at $30,000.00. This valuation is

dated the 9th October 1975. This valuation refers to the property not being attractive to a potential purchaser because of its physical appearance and the low rentals being obtained at that time, and stated that a substantial sum would need to be spent on renovation and re-decoration of the premises to ensure that any further erosion of value does not occur. However, following the settlement reached in July 1981, the respondent through his solicitor arranged for increases of rent and then for the sale of the property in June 1982 at $93,000.00. The respondent said that previously, for some considerable time, the shop property had been on the market for $70,000.00, and had not attracted any buyers at all. In June 1982 he purchased a home unit at Mount Maunganui where he has lived with his wife since that time. The matrimonial home has been on the market since May 1982 at $53,000.00, but has not yet been sold.

On the 24th May 1983 the applicant filed a Notice of Motion for an order declaring that the agreement made between the applicant and the respondent, by their respective solicitors, on or about the 10th day of August 1981 is void upon the grounds that the provisions of sub-sections (4) to (6) of s.21 of the Matrimonial Property Act 1976 have not been complied with, or that it would be unjust to give effect to the agreement. She also filed, on the same date, an Amended Notice of Motion under the Matrimonial Property Act 1976, seeking various orders in respect of the matrimonial property in the event of the agreement being declared void.

In an affidavit dated the 16th May 1983, in support of her motion for the agreement to be declared void, she traced the history of the matter which commenced with her Dargaville solicitors writing to the respondent on the 7th April 1977, submitting that the applicant was entitled to a half share in all matrimonial property. Following the commencement of her proceedings in May 1978, the applicant was advised in April 1979 by her solicitor of the appointment of counsel, and she said that over subsequent months she telephoned counsel or his office on a number of occasions from Brisbane, to learn that no real progress in her claim was being made. Eventually she learned that a fixture for the hearing had been given for the 13th July 1981, and she intended to come to New Zealand for that hearing. She received two telephone calls from counsel in or about June 1981, when she was advised to settle her claim for $27,000.00 plus interest, being advised in strong terms that that was a fair deal for her. She said that she indicated that she was not satisfied, but as counsel was quite clearly insistent that the deal was a fair one, she said, "In the end my patience was exhausted and I sent him a telegram authorizing him to settle on that basis." She then heard no more from counsel but did not regard this as unusual because there had been long periods in the past when she had not heard from him, and telephone calls to his office in the past had not brought any satisfactory response. She said that she spent over $200.00 on toll calls to counsel up to about May 1981.

On the 28th May 1982 her Dargaville solicitor telephoned her to enquire about the Deed which he had sent to her but which she had not received. She was

coming to New Zealand and she arranged to see him on the 30th June 1982. In the meantime, she had become aware that the company property had been sold for $90,000.00 and her original feeling of dissatisfaction about the settlement was strengthened. When she saw her solicitor she told him that she did not consider the agreement fair, and that she would not sign it.

In an affidavit of the respondent dated the 2nd February 1984, he deposed that at the time of the settlement discussions on the 3rd June 1981 he was present with both counsel and he had with him a valuation of the property owned by the company, showing a valuation of $30,000.00 as at 1975. He also said that he was asked at the settlement discussions what he considered to be the value of the matrimonial home, and stated that he considered the then value was $30,000.00, based on the sale price of the house next-door. He also said that at the date of settlement discussions, he had a valuation of the shares in the company by the company's accountant, showing the shares to be worth $45,000.00. He said that as the 1969 Valiant car was an asset of the company, its value was included in the valuation of the company's shares.
It should be noted that the Annual Accounts of the company do not show it owned a motor vehicle until the year ended the 31st March 1982, when a motor car is included under "Fixed Assets" at $5192.00, being cost less depreciation, and the valuation of shares he exhibited to his affidavit did not include a motor vehicle as an asset of the company.
He said that he made it plain - as did his counsel - at the

meeting that if the matter were not settled he would certainly claim that he was entitled to a greater share of the matrimonial property than the applicant because of his greater contribution to the marriage.

The first question for determination by this Court is whether the settlement reached between counsel with the approval of both parties should be upheld or declared void. Mr O'Brien, for the applicant, submitted that there was no intention that the parties be bound in law by the terms of the settlement until such time as they had both completed an agreement under s.21(2) which complied with s.21(4) to (6) of the Act. He relied by analogy with the position in respect of contracts for the sale of land (see Carruthers v Whittaker & Anor (1975) 2 NZLR 667). Mr O'Brien submitted logically that if there were no binding agreement in existence the provisions of s.21 (9) and (10) could have no application. I had occasion to refer to that case in Walker v Walker 5 MPC 172, 174, but the facts are distinguishable. There the parties were negotiating an agreement direct but looking to their respective solicitors to settle its final form as with contracts for the sale of land. Here, counsel for both parties negotiated, with the approval of the parties, a settlement which I believe was intended then and there to be binding but that it would be recorded in the appropriate fashion to comply with s.21 (4) to (6) of the Act. On the facts of this case, I find that there was an agreement between the parties for the purpose of settling their differences concerning matrimonial property within the meaning

of "agreement" under s.21(2), but that subsections (4) and (6) were not complied with. Mr Hassall asked the Court to exercise its discretion under subsection (9) to uphold the agreement as both parties had had the benefit of independent legal advice. In those circumstances, he submitted that efforts by counsel to settle disputes should not be discouraged by the Court intervening too freely when, as he put it, as a result of subsequent events one of the parties has second thoughts.

I am sure the Court is always grateful to counsel for their efforts to negotiate a fair and reasonable settlement of a matrimonial dispute. Such a settlement would not be set aside at the mere whim of one of the parties. In Aldridge v Aldridge (CA. 185/82 27th September 1983, unreported) Cooke J., in the course of his judgment in the Court of Appeal, said :

> "Obviously a properly executed agreement, where the applicant has had independent legal advice, could never lightly be declared void under the section; but it is no less obvious that the Court cannot add to the statute by laying down black-and-white criteria or conditions which an applicant must comply with to discharge the onus of showing injustice."

But matrimonial property settlements whether or not recorded in writing with full compliance with subsections (4) to (6) of s.21, are subject to review by the Court to ensure justice is done between the parties. If one party drives too hard a bargain, whether with or without the assistance of counsel, the Court will ensure that the other party is not unfairly or unreasonably deprived of his or her

proper share in the property of the marriage partnership. In this case the settlement was negotiated on the eve of a Court fixture, but the approval of the Court was not sought. Instead it was, quite properly, intended to record the settlement in a fashion which complied with s.21 of the Act. This would afford both parties the added protection intended by Parliament, and reduce the danger of any misunderstanding or dispute. In this case, they both had independent legal advice, but in the case of the applicant it was only by telephone. She did not have the opportunity to read the terms of the settlement before agreeing to them. She did not have the benefit of a specified class of witness to explain to her the effect and implications of a written agreement, setting out in detail the terms of the settlement, before signing it. The solicitors for the respondent were at pains to ensure an Australian solicitor would qualify himself to give that explanation. The circumstances in which she gave her approval of the proposed settlement were, for reasons I shall give later, not fair to her and were not such as to ensure she fully appreciated the effect and implications of the agreement, it being intended that the safeguards of subsections (4) and (6) would follow. In the absence of those safeguards, I am not satisfied in the particular circumstances of this case that the applicant has not been materially prejudiced by non-compliance with subsections (4) and (6). The agreement is accordingly by s.8(a) void, but as Mr O'Brien argued that in any event it would be unjust for the Court to give effect to it, I shall also consider the question under subsections (8)(b) and (10), whether it would be unjust to give effect to the agreement.

In giving the judgment of the Court of Appeal in Docherty v Docherty (C.A.119/82, 30th September 1983, unreported), Somers J. said :

> "The requirement as to intrinsic validity emerges from s.21 (8) (b) and (10). ... ... There are only two observations we propose to make about this remarkable discretion conferred

> "on the Court. First the enquiry in any case is whether it "would be unjust to give effect to the agreement". Although the justice of the agreement is to be assessed when the issue falls to be decided the ingredients of that assessment may be past, present or expected future events. Secondly the legislature has contemplated that an agreement may be unjust despite independent advice and explanation on signing or that it may by reason of subsequent events become unjust. While the disabling condition may include such matters as fraud or mistake or other features which will afford remedies at law or in equity it extends as well to cases in which such features do not exist. In them the division of property which but for the agreement would be effected by the Act must afford an important yardstick or measure."

In Aldridge (supra), Cooke J. stressed the wide discretion of the Court. He said :

> " The discretion given to the Court by the combined operation of s.21 (8)(b) and (10) to decide whether it would be unjust to give effect to an agreement is a very wide one. That is sufficiently brought out by noting the reference in subsection (10)(c) to all the circumstances at the time the agreement was entered into, and the words of subsection (10)(e) 'Any other matters that the Court considers relevant'. Any tendency to try to narrow the discretion so deliberately given by Parliament would have to be discouraged."

With regard to the disparity "yardstick" referred to by Somers J. in Docherty, Cooke J. in Aldridge said:

> "The circumstances of marriages, persons and assets differ so widely that I do not think one could usefully generalize as to acceptable or questionable disparities in terms of percentages. It can safely be said though that the greater the disparity between benefits under a challenged agreement and likely benefits on an award under the Act, the readier the Court will be to find that it would be unjust to give effect to the agreement. Disparity is far from the only factor but it is undoubtedly an important one and it is unlikely that an agreement would ever be set aside unless a significant disparity, or at least the reasonable likelihood of one, was apparent."

I shall now consider what in my view is the applicant's share of matrimonial property under the Act. It is accepted that she is entitled to a half-share in the matrimonial home and family chattels, as s.14 of the Act does not apply. However Mr Hassall submitted that the respondent was entitled to a greater share than the applicant in other matrimonial property because of his greater contribution to the marriage partnership. The only feature of the matrimonial history which Mr Hassall advanced as supporting a greater contribution to the marriage partnership was the respondent's initial contribution of the section of land and an unlined one-room bach, which the respondent had provided out of his War gratuity of two hundred pounds. The applicant brought to the marriage the linen, crockery and other household equipment. That was their start in married life. Thereafter, for nearly 25 years, the applicant not only played her full part in the management of the household and the performance of household duties, and despite some miscarriages raised and cared for four children of the marriage, but also worked in and for the family business and took other employment thereby making a substantial financial contribution to the marriage. In Williams v. Williams (1980) 1 NZLR 532 at p.534, Richardson J., in delivering the judgment of the Court of Appeal, said :

> "The statutory scheme recognises that in the general run each spouse contributes in different but equally important ways to the common enterprise which constitutes the marriage partnership and the legislation presumes that in the ordinary circumstances of marriage the respective contributions of the spouses, whatever form they have taken, will be in balance at the end of the day.

> "The longer the marriage and the less ample the financial resources, the more difficult it will often be to establish a case for unequal sharing. But in the end the answer must turn on consideration of the facts of the particular case."

Although the value of land increased to $4000.00 when it was transferred to the company, and has increased substantially more since then, it should not be looked at in isolation. The property in question was the first matrimonial home but became a commercial property, and the investment it represents today is the result of the combined efforts of both parties. I am satisfied that after 25 years of marriage the respective contributions of both spouses were in balance, and the respondent has not discharged the onus on him by a positive demonstration of proving his contribution is greater to a significant degree so that disparity really stands out in the circumstances of this case. (Barton v Barton (1979) 1 NZLR 130, 132).

The next question is at what date the assets of the matrimonial property should be valued. If the matter had gone to Court in 1981, I consider the Court would have applied valuations at the date of hearing in respect of the matrimonial home and the company shares. As the applicant was entitled to a half-share in each at the date of separation, she should enjoy a half-share in subsequent increases in value due to inflationary trends, subject to any adjustments necessary for post-separation contributions. I would not exercise my discretion under s.2(2) to fix valuations of these principal assets at the date of separation on the ground that the applicant then deserted

her husband and children. The applicant said in her affidavit in reply to the respondent's allegation of desertion :

> "17. APART from the very early part my marriage to the respondent was not a happy one. I accept that there may have been faults on my part as well but the main difficulty I experienced was that the respondent was very domineering and also fault-finding. Nothing I did was ever satisfactory as far as he was concerned. For instance at times he would belittle the work that I was doing in the shop and he would do this in front of customers. I stuck it out with the respondent for the sake of the children but I found it extremely difficult to discuss anything with him. We fought verbally and occasionally physically to an increasing extent throughout the marriage. I actually left the respondent on the 29th November 1974 but I had made it clear to him some years before that once the children were grown up I would be leaving. I left because I could not take any more of the criticism and fighting."

And regarding her leaving the children she said :

> "18. AT the time I left had just married. was working and had left home. who was then 16 years old was working. He spent most of his time living with his work-mates away from home. Before leaving I made arrangements for to live with my mother in Dargaville after I had gone and for her to come to Australia (where I intended going) later once I had settled there. in fact stayed with my mother for a short time only before obtaining a live-in position as a stablehand in Cambridge. Then in or about November 1976 she came to stay with me in Brisbane for six or seven weeks. She then decided to return to New Zealand and obtained a live-in job in Matamata as a stablehand. In June 1978 she came to Brisbane to live with me. She has been in Brisbane ever since. She continued living with me until the last year or so when she went flatting. our eldest child who is separated from his wife came to Brisbane six years ago. came over to Brisbane in 1979 and stayed with me for about three years before he went flatting. All three children are residing permanently in Brisbane. lives with her husband in Palmerston North and I have stayed with her during my current visit to New Zealand."

Both parties were called for cross-examination . The applicant was not cross-examined on the above paragraphs 17 and 18.

The respondent gave some evidence which differed as to the length of time some of the children remained in the home with him. He had not referred at all to the said paragraph 17 regarding the break-up of the marriage in his affidavit in reply, nor was it mentioned in the course of his evidence at the hearing. The applicant's evidence in paragraph 17 therefore stands unchallenged and after seeing and hearing both parties I take the view that the separation was due to incompatability at the post-parental period. The applicant did not desert infant children who needed her daily care, and it is significant that except for the married daughter in Palmerston North the other three children now all live in Brisbane. Furthermore, she returned to the home to attempt a reconciliation but it was hopeless. Throughout most of the marriage she had been a working wife and she is still working to support herself. The respondent has remarried. Each should have a half-share of the matrimonial property so that they can go their separate ways. I do not regard the delay of the applicant in commencing proceedings as material. She consulted a solicitor soon after the Act of 1976 came into force. In any event, if valuations at 1974 were adopted , provision would have to be made for the respondent's enjoyment of the applicant's half-share in matrimonial property since that time.

Returning now to the extent of any disparity, on the figures made known by the applicant's counsel a half-share at a hearing date in 1981 would have amounted to $50,250.00.

I regard a settlement at $27,000.00 as a "significant disparity". Adjustments for post-separation contributions would not materially affect the imbalance as the respondent, although he preserved the assets, had the enjoyment of the applicant's half-share in them and was rewarded for his services in respect of the shop property by way of a director's salary of $2600.00 in the years ended the 31st March 1978 and 1979, $3500.00 in the year ended the 31st March 1980, and $4600.00 in the year ended the 31st March 1981. The applicant did not receive any return from the company in those years.

The disparity is not the only matter for the Court to consider. I must have regard to all the facts set out in s.21 (10) for consideration. I do not regard the provisions of the agreement itself, on its face, in any way exceptional; nor was the lapse of time after the agreement was reached and it first being challenged, as, in the circumstances, material. However I do regard the agreement as unfair and unreasonable in the light of all the circumstances at the time it was entered into because -

(a) it was unfair to the applicant to seek her approval in a telephone call to her place of work, a factory, on the eve of the fixture when she had not had any prior written advice from counsel for her to consider, nor any follow-up of the telephone call in writing, with time to consider before giving her approval.

(b) it was also unfair to the applicant that she was asked to approve a settlement without the benefit of any independent valuations to take into account when considering the proposed settlement.

(c) the terms of settlement were unreasonable, not only because of the substantial disparity already mentioned but also because of the premises on which they were based. The 1977 valutions were inappropriate, for the reasons already given, and the valuations themselves were also unreliable. Furthermore, the value of all matrimonial property was not brought to account. It was also unreasonable to adopt any figure as the then current value of the shop property without obtaining a valuation which took into account the prospect of increased rentals. It was also unreasonable to allow the respondent one year in which to pay out the applicant, with interest at only $7\frac{1}{2}\%$, when he stood to gain on the sale of the property, which he was to endeavour to sell, according to counsel's file memorandum, the whole of the difference between a 1975 value of $30,000.00 and the respondent's own estimate of the then current value of $65,000.00.

I also consider the agreement to have become unreasonable in the light of changes in circumstances since it was entered into, namely :

(a) in less than one year after the date of the settlement the shop property, valued

in the settlement at $30,000.00, was sold for $93,000.00 ($93,500.00 according to the company accounts).

(b) in less than one year after the date of settlement the matrimonial home, valued at $18,000.00 in the settlement, was vacated by the respondent and remains empty on the market for sale at $53,000.00.

Accordingly, the respondent's motion to declare the agreement to have effect is refused, and the applicant's motion to declare the agreement void is granted. The applicant's amended motion becomes the substantive application for orders under the Act.

For reasons already given, the applicant is entitled to an equal share with the respondent in all matrimonial property, which is as follows :

(a) matrimonial home
(b) the family chattels
(c) all shares in M M Cubis Limited
(d) motor vehicle
(e) life policies
(f) bank accounts

These assets are to be disposed of as follows :

(a) It is ordered that the matrimonial home vest in both parties as tenants in common in equal shares. It is to be sold and the net proceeds divided equally. Leave is reserved for either party to apply for directions as to the sale.

(b) It is further ordered that the family chattels vest in the party with present possession of them, no claim being made either way.

(c) The applicant is entitled to a half share in the present value of the company shares. Mr O'Brien made a calculation but it cannot be regarded as a valuation. If the parties cannot agree on a figure, I shall order an independent valuation. If the company is to be wound-up the parties are entitled to share equally in the final balance available to shareholders. If the company is not to be wound-up then the respondent is ordered to pay the applicant her half-share in the agreed figure or valuation forthwith on her transfer to him or his nominee of her shareholding. It is true that the sale price of the shop property reflected to some extent an increase in rentals. The respondent deserves some credit for acting on his solicitor's advice in this regard, but he was paid a salary down to the date of realization and he has enjoyed a substantial interest-free advance from the company for his purchase of a property in Mount Maunganui thereby using partly moneys to which the

applicant is entitled. However, as the applicant makes no claim to interest on her share of these moneys, I see no occasion to make any adjustment for any post-separation contribution by the respondent in respect of the shop property.

(d) The respondent has retained the motor vehicle. In exercise of my discretion, I fix the value at $1500.00 as shown in paragraph 33 of his affidavit of the 23rd September 1982 as being the value at the date of the agreement. The respondent shall forthwith pay the applicant $750.00 in respect of her half-share.

(e) The respondent in the said paragraph 33 referred to a Royal Insurance endowment policy and two life policies and suggested values of $500.00 and $1000.00 respectively. He also referred to the applicant having an endowment policy of unknown value. In her evidence she said she had received $700.00 in respect of that policy. The applicant is ordered to pay the respondent his half-share of $350.00 in respect of that policy. In respect of the other three insurance policies held by the respondent, he is ordered to pay to the applicant her half-share in their surrender value at the date of the separation in November 1974.

(f) The respondent had bank accounts totalling $500.00 at the date of separation and the applicant a bank

account of $400.00. The respondent is ordered to pay the applicant $50.00 to achieve equality. Both parties had credit balances in advance accounts with the company at the date of separation which are matrimonial property, but no submissions were made regarding them so no order is made.

The above orders are subject to the following adjustments :

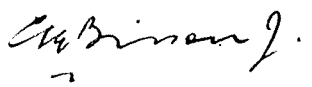
(a) The respondent is to receive a credit of $2700.00 to be paid out of the proceeds of the matrimonial home and contents prior to the equal division of thenet proceeds, to compensate him for his post-separation contribution of re-carpeting, blinds, drapes, shrubs and barbecue. I have accepted his figure, as I note Mr Tizard's current valuation includes $3000.00 for chattels such as floor coverings and drapes. I make no adjustment in favour of the respondent for his preservation of the asset, as he had the use and enjoyment of the applicant's half-share until he vacated. The applicant is not entitled to any adjustment in that respect, as she has the benefit of the increase in value due to market trends and inflation.

(b) The respondent made a payment of$27,970.89 on the 2nd February 1982 to the applicant's counsel in terms of the settlement. It is still held in the trust account of the applicant's solicitors' Hamilton

agents and is earning interest. As the respondent provided these moneys initially from borrowed funds to fulfil his obligation under the settlement, now set aside, he should have the full benefit of them with interest to the date of this judgment. Whereupon it is ordered that the total amount then held, with interest to that date, be paid to the applicant on account of moneys payable by the respondent to the applicant pursuant to this judgment.

It is further ordered that the moneys payable by the respondent to the applicant, pursuant to this judgment (that is, not including her share in the proceeds of the ultimate sale of the matrimonial home), shall bear interest at the rate of ten per cent (10%) from the date of judgment down to the date of payment.

Leave is reserved to either party to apply for any further orders as may be necessary to implement this judgment. Costs are reserved for submissions if either party seeks costs.



Solicitors:

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