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NZLR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1304/88

2250

UNDER THE Matrimonial Property Act 1976

BETWEEN

HOGGART of Auckland,

Appellant

A N D

HOGGART of Auckland, Married Woman

Respondent

Hearing: 5 December 1989

Counsel: L J Ryan for appellant
B M Cropper for respondent

Judgment: 5 December 1989

ORAL JUDGMENT OF EICHELBAUM CJ

This is an appeal against a judgment of a Family Court Judge setting aside a matrimonial property agreement in terms of S 21(8) of the Matrimonial Property Act 1976 and declaring the agreement void on the grounds that it would be unjust to give effect to it.

The parties commenced to cohabit in 1972, at which time the appellant was already married. For purposes of this judgment it will be convenient to refer to the parties as the husband and the wife. A son was born to the relationship in 1976. They married in 1978. The wife worked prior to the birth of her son, and again for some months afterwards, but eventually became engaged full time as a mother and

housewife. However, there is evidence that from time to time during the marriage she worked for wages. The husband was employed throughout as a carpenter.

The parties separated in October 1982 and executed the agreement in issue in December of that year. At the time the solicitor acting for the wife, Mr Mather, advised her that in his opinion it was grossly unfair. In October 1983 the parties reconciled; but they finally separated three years later.

Clause 7 of the agreement provided as follows:

> "Effect of Cohabitation and/or Order for Dissolution of marriage:
>
> 7. IN the event of the husband and the wife at any time hereafter with their mutual consent cohabiting as man and wife (subject to the provisions of Section 24 of the Family Proceedings Act, 1980) or in the event of an order for dissolution of marriage being granted between the parties hereto, IT IS HEREBY AGREED that none of the agreements and provisions contained herein shall become void or lapse."

In terms of the agreement the husband received the house property which he brought to the marriage, having bought out the share of his first wife at an earlier stage. The wife placed the value of the property at $50,000, a figure which appears to have been accepted throughout. The wife received a motor vehicle. The family chattels were divided half and half, and there was a cash payment from the husband to the wife of $5,000. On resumption of cohabitation the wife brought back to the marriage various chattels including a number which she had purchased out of the cash sum of $5,000. When the parties finally separated, in terms of the agreement she then retained the family motor car, a different vehicle from the one which she took with her on the occasion of the first separation, now said to be valued at about $7,000. She also took the majority of the matrimonial chattels - according to a valuation these were worth $1145. In the calculation which has been put before me this morning on behalf of the appellant it was therefore stated that the

wife received a total of $13,145 comprising the car, the chattels and the cash sum of $5,000. The husband received the house, still shown at a value of $50,000, and retained his superannuation rights. No valuation of those rights was ever made, but for purposes of the calculation they have been shown as worth $5,150 being the total of the employer's contributions, there being no contributions by the employee. It should be noted that there is no provision for the husband to receive any superannuation until age 60 except on grounds of ill health. At the time of the first separation he was aged 47. The value of the superannuation was not the subject of any argument in the District Court, nor understandably has it been possible on the information available to address much attention to it today. However, the net result of these figures, looked at in the best light from the appellant's point of view, is that the wife received just over 20% of the total matrimonial assets. I think that that calculation involves an element of double counting as between the chattels which the wife finally acquired and the sum of $5,000 which she received in terms of the agreement, so the true percentage is probably even a little less than that.

Evidence was provided on the wife's behalf by way of affidavit from Mr Mather who confirmed that he had strongly advised the wife not to enter into the agreement, which had been negotiated directly between the parties. Mr Mather took the precaution of obtaining a written acknowledgement of his advice that the wife should properly receive a further $8,000 to $10,000. He also wrote an open letter to the husband's solicitors to that effect at the time and put them on notice that there could be an application under S 21 in the future. At his urging the wife gave the possibility of reopening negotiations some consideration over a period of days, but in the end instructed his solicitor that rather than have the ongoing hassle and worry, she wanted to end the matter by signing the agreement as it stood.

In this Court the argument has centred on the question of the prospects that there would be a finding of extraordinary circumstances in terms of S 14 of the Matrimonial Property Act, arising from the husband's contribution of the house. The husband's evidence was that at the time of the marriage, there was only about $1000 owing on the house.

In dealing with the critical issues, the Family Court Judge cited Aldridge v Aldridge [1983] NZLR 576, and Docherty v Docherty [1983] NZLR 586. He dealt with the essential points in three following sentences. In the first he referred to the situation on the hypothesis that there would be equal sharing. Having regard to the following two sentences I do not think it is right to say that he made an assumption that equal sharing would necessarily result. However, in the event that it did, he concluded that the disparity between what the applicant received in terms of the agreement, and her entitlement in terms of the Act under equal sharing, would be so great that it would be unjust to give effect to the agreement. In Aldridge v Aldridge disparity was regarded as an important consideration, although of course not the only one, Cooke J going on to say:

> "It is unlikely that an agreement would ever be set aside unless a significant disparity, or at the reasonable likelihood of one, was apparent." (p 579)

On the facts set out, the conclusion that in the event of equal sharing the disparity was so great that it would be unjust to give effect to the agreement really is self-evident, and understandably Mr Ryan, who has urged everything that could be said in support of the appeal, felt unable to argue otherwise. The Family Court Judge then went on to refer to an argument concerning marriage of short duration. That has not been pursued in this Court. The third sentence related to the possibility that extraordinary circumstances would be held to be applicable. With respect, the way the Judge dealt with this aspect is a little elliptical, but I think the overall effect is reasonably

clear. The formula to which regard should be had in terms of Aldridge v Aldridge is the reasonable likelihood of a significant disparity. What the Judge was saying in this portion of the judgment, as I read it, is that even if an argument as to extraordinary circumstances succeeded, as to which he really expressed no opinion, there was still a reasonable likelihood of a disparity of such an extent that it would be unjust to give effect to the agreement. As to this, the Judge did not go into further detail but counsel have carefully taken me through the evidence this morning. However, the fact remains that subject to one year's break this was a marriage of seven years duration. The wife throughout carried out the duties of a wife and mother, in terms in which having regard to the District Court Judge's findings of fact no complaint can be made, and when one looks at her contributions and has regard to the possibility that on unequal sharing there might have been a finding of say one third/two thirds in the husband's favour, the arithmetic of the matter remains that, as the Judge found, there was the likelihood of a significant disparity. I have dealt with the two alternative hypotheses in deference to the arguments submitted, but a simpler way of viewing the matter is just that on the evidence there was every justification for a finding that there was a reasonable likelihood that the argument under S 14 would fail, when the disparity would be beyond question.

As pointed out in Aldridge v Aldridge, having regard to the wide language of S 21 the ordinary constraints on appellate review of discretionary decisions have to apply with special force. No basis has been shown for saying that the Judge applied incorrect principles, that he took into account matters which should not have been taken into account, or failed to have regard to relevant considerations; or that his conclusion was plainly wrong. Accordingly, and concentrating as I say solely on the argument relating to extraordinary circumstances, I conclude that no grounds have been shown for upsetting the decision,

and indeed having regard to the Judge's findings of fact I think he was plainly right. In the circumstances I do not need to go into the additional grounds on which the Judge relied, that is the finding of coercion and the change of circumstances following the reconciliation and before the final separation. I note however that to the extent that these findings stand, they could only strengthen the Judge's final conclusion. The appeal is dismissed with costs in favour of the respondent in the sum of $750.

Thomas J, CJ

Solicitors for appellant: Morgan-Coakle Ryan & Bierre, Auckland

Solicitors for respondent: Thomas & Co, New Lynn, Auckland