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N2LR SET 3.

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

[redacted] MCW RJS

M.179/88

BETWEEN SANDRA LEE HODDLE

Plaintiff

458

AND PETER LESLIE BERRY

Defendant

Hearing : 7 February 1990

Counsel : Mr M A MacLennan for the Plaintiff
Mr M J Hammond for the defendant

(ORAL) JUDGMENT OF FISHER J

The plaintiff claims half the value of a dwelling house purchased in the joint names of herself and the defendant during a relationship of de facto marriage. Although he has filed his pleadings in the form of a statement of defence only, the defendant in substance counterclaims for the enforcement of an agreement following separation purporting to settle the rights of the two parties.

Facts:

The Plaintiff and Defendant commenced living in a relationship of de facto marriage in November 1980. That relationship lasted until they separated on 11 April 1987. During that period there were two children of the relationship, the first being born on 8 June 1981. No doubt because of the children the earnings came from the defendant, while the plaintiff fulfilled the normal role of a housewife and mother.

During the first two or three years the parties lived in rented accommodation. Neither had substantial assets at the commencement of the relationship. However, on 29 June 1983, the couple were able to purchase their own property at 7 Westgate Street, Ngaruawahia. It is that property which is now in contention. After discussion between the parties, including discussion with their solicitors, the property was purchased in the joint names of both. It was expressly recognised at the time that although the couple intended to marry (thereby enjoying the benefits of the Matrimonial Property Act 1976), the purchase in joint names would nevertheless provide some measure of protection for both in case of unforeseen circumstances.

At about the time that the couple separated in 1987 they discussed the fate of their jointly owned property. They agreed on an informal basis that in addition to the

$4,000.00 which the Plaintiff received at about that time in cash, the Plaintiff was to be paid a further $6,000.00 by the Defendant in return for his acquisition of the sole interest in the property. In addition to that there was a division of chattels which favoured the Plaintiff to the tune of approximately $2,750.00. A formal agreement incorporating those basic terms of settlement together with other arrangements over custody and separation was drawn up by the solicitors who had hitherto acted for both. These solicitors were on this occasion consulted by the husband alone. In essence, the agreement provided that the defendant would continue to have exclusive occupation of the property and would be required to pay out the Plaintiff her $6,000.00 without interest within a period of 12 months.

That formal written agreement was brought to the Plaintiff by the Defendant's father. She declined to sign it on the occasion of that meeting. There then followed a period which seems to have varied between a few hours and a few days, during which the Plaintiff kept the agreement in her possession. There is little evidence as to what she did during that period so far as consultation with others is concerned, but at all events she eventually took the agreement back to the property where she spoke to one of the occupants of that property who happened to be boarding there. The Defendant and his father were not present on this occasion. After some discussion between the Plaintiff

and the occupant of the property, the Plaintiff signed the agreement and it was witnessed by that occupant.

Several months later the Plaintiff decided to resile from that bargain. The first that the Defendant was aware of this was when he received a letter of 26 February 1988 from the Plaintiff's Solicitors advising that the implementation of the agreement would be contested and seeking in substance, a half interest in the equity of the property. That was contested by the Defendant and led to the issue of the present proceedings on 24 June 1988.

Rights without the Agreement

Before I assess the legal consequence of the agreement, it is useful to consider the legal position had there been no such document. In that regard, both parties were on the title as joint tenants. Prima facie each was therefore entitled to severe that joint tenancy and enjoy a half interest as tenant in common or take an appropriate half share in the value of the equity.

For the Defendant, Mr Hammond has challenged that prima facie position. He has submitted that notwithstanding the state of the legal title, the Defendant would nevertheless have been entitled to more than a half share. I am unable to uphold that submission. It seems to me that the deliberate act of the parties in choosing to vest the

property in a joint tenancy, coupled with the surrounding circumstances at the time, amounted to an express agreement and an express (if informal) understanding as to the underlying equitable interests at the time of the purchase of the property. That is, I think, reinforced by the background circumstances. Certainly all of the cash for the purchase came initially from the defendant but much of this had come from earnings which had been enjoyed by him during the de facto relationship that had preceeded this. The cash contribution was not large compared with the overall purchase price of the property. The Plaintiff incurred full joint liability under the mortgages at the time. Everything therefore points to the prima facie position on the title, namely an intention to have a joint tenancy in equity as well as in law. Nor do I find any evidence that that common intention ever changed thereafter until the separation. As one might expect the Defendant was the one who more actively contributed in both labour and cash to the improvements effected to the property. That however, tends to be simply a reflection of what has sometimes been referred to as " the functional division of co-operative labour" whereby in one household one partner performs one role and the other partner (usually the wife) makes another contribution of a domestic nature.

The question here was whether the defendant, in all the circumstances, could have justifiably and reasonably expected that by virtue of his efforts and contributions to

the property, there was to be some change in the initial equitable ownership. I can see no such reasonable expectation on his part. The result is that by the time we come to the separation Agreement of September 1987, the two parties were each entitled to an equal share in the equity of the property.

Similarly, it is common ground that so far as the chattels are concerned, if one puts to one side the question of a vehicle, the parties were entitled to equal shares. I have excepted the vehicle on the basis that the defendant already owned a vehicle at the commencement of his relationship with the plaintiff. To complete the picture I should say that the Defendant also developed an engineering business which he owned by the date of separation but it is common ground that it was in financial difficulties and had a nil value.

Effect of the agreement

It was with that background of entitlement to 50% of the house and the chattels that the parties entered into their Agreement. At this point one must consider the actual figures. The gross value of the property as at the date of the separation was $65,000.00 with mortgages totalling approximately $32,000.00. The Plaintiff has contended that one of the three mortgages represented recently acquired finance which went solely to the benefit

of the Defendant. However, I have heard no submissions pursuing that aspect, nor do I presently understand the evidence upon which it is based. I therefore proceed on the basis that the equity potentially available for division between the parties was simply $33,000.00. I did not understand Mr MacLennan, for the Plaintiff, to seriously contest that. This meant that as at date of separation the Plaintiff was entitled to $16,500.00 as the value of her interest in the property, together with half the chattels. Following separation she received chattels which exceeded in value those enjoyed by the defendant to the extent of $2745.00 and she also received a payment of $4,000.00 in cash. The agreement provided that the parties would retain those assets which they already had and then in addition to that, provided for the extra $6,000.00 to be paid to the Plaintiff. This means that in total the Plaintiff was to receive $12,745.00 - some $4,000.00 less than the $16,500.00 interest in the property to which she would have been entitled. In addition to that, she had the loss of interest on that $6,000.00 for a period of up to 12 months from the date of the Agreement.

Unconscionable bargain

The main thrust of the Plaintiff's case is that the agreement of September 1987 was unconscionable and should be set aside. I accept the submissions of both Counsel as to the legal principles applicable on this topic.

The three leading reported authorities in New Zealand appear to be Moffat v Moffat [1984] 1NZLR 600, CA, O'Connor v Hart [1985] 1NZLR 159 CPC and Nicholls v Jessup [1986] 1NZLR 226, CA. To that I would add the recent unreported decision of the New Zealand Court of Appeal Jenkins v NZI Finance Limited & Ors CA 214/88 9.11.89. From those decisions it appears that the three elements which would need to be established by the Plaintiff in order to overcome the separation Agreement would be:-

(a) inequality of bargaining power;

(b) manifest inadequacy of consideration; and

(c) knowledge on the part of the defendant of those two factors.

As to inequality of bargaining power, Mr MacLennan has pointed to a number of matters. The first is that the Plaintiff had no legal advice at the time that she signed the agreement. This must certainly be one factor in her favour. On the other hand it was a situation in which she had several months to think about the proposition and she had the document itself in her possession over a significant period without the presence of any other person applying pressure to sign. While I count the absence of legal advice in favour of the plaintiff, I do not consider it as strong as would be the case in many other instances where a person is put under pressure to sign in the presence of the competing party or that party's advisers or representatives.

The second matter advanced by Mr MacLennan was the Plaintiff's lack of business acumen compared with the defendant's own experience which included running his own business. I accept that this is a relevant factor in favour of the Plaintiff - again scarcely a decisive one.

Next, Mr McLennan refers to the Plaintiff's misapprehension that she would be able to obtain alternative accommodation herself whereas it would be more difficult for the Defendant to do so. I am prepared to take that into account in her favour - again very much a peripheral consideration.

Next, Mr MacLennan refers to the Plaintiff's lack of any close confidante to whom she could turn. While that is not entirely irrelevant it must be borne in mind that this document was ultimately signed some five months after the separation and that the $6,000.00 payment proposal was a live one during the whole of that period. Again it seems to me that the Plaintiff really had ample time to discuss the transaction with any number of people whether friends, relatives or professional advisers over that period.

Next there is the plaintiff's lack of knowledge of the facts surrounding the value of the equity in the property and therefore her entitlement in financial terms. That I think is a matter also to be taken into account in

her favour - again perhaps fairly peripheral when one takes into account the fact that the benefit which she did derive from this transaction was not too far different from the entitlement which was ultimately demonstrated when the whole matter was enquired into.

Finally, although Mr MacLennan has not advanced the point in his submissions, there was some suggestion that the Plaintiff felt herself under a degree of pressure from the Defendant and his father. I am prepared to accept that without any criticism of those two men, she no doubt felt that they were strongly of the view that she should go along with the transaction. But there was a reasonably lengthy period for consideration on her part and there is no suggestion that either the defendant or his father was present at the material times when the Plaintiff made her own decision, and in particular, decided to physically sign the document itself.

Those are the matters relevant to inequality of bargaining power. That is then to be compared with the alleged inadequacy of consideration. I have already dealt with the relevant figures. Whereas the Plaintiff was entitled to $16,500.00, she received in money or in kind, only $12,745.00 of which part was deferred for up to 12 months. There was therefore some inadequacy of consideration although far from dramatic.

The third requirement was the Defendant's knowledge of the first two factors. In that regard I accept that the Defendant knew all of the more material matters which I have referred to.

In the finish one must exercise a robust value judgment in these matters. Agreements are not to be set aside for unconscionable bargain without a substantial case. In the recent decision Jenkins v NZI Finance, for example, after reviewing the relevant decisions, Wylie J said in delivering the judgment of the Court (p.21):-

> "As will be seen from those extracts, strong terms are used to describe the kind of conduct or circumstance which will render a transaction unconscionable. Looked at in the light of the circumstances at the time, can this mortgage be seen as a contract arising out of 'an unconscientious use of power', 'victimisation', 'act of extortion of a benefit'?"

In that case the Court of Appeal decided that the requisite of strong inequity was not established. Similarly, I note that in those cases where the unconscionable bargain allegation has succeeded, the disparity in bargain is manifest. For example, in Nicholls v Jessup the Plaintiff's property was enhanced by $45,000.00 and the Defendant's diminished by $3,000.00 in a transaction where the Plaintiff was an experienced Real Estate Agent and the Defendant a 60 year old ex-Nurse. Similarly, in Moffat the husband took the whole of the house and chattels while the wife received nothing.

There was no such gross unfairness in the present case either in the inequality of consideration or in the circumstances by which the Agreement came to be signed. In all the circumstances I am unable to find unconscionable bargain established. The result is that the separation agreement of September 1987 stands.

Events since agreement

The Agreement being a valid one at the time that it was entered into, I do not consider that there have been any events since then which have changed that situation. I did not understand Mr MacLennan to submit otherwise. It is true that the $6,000.00 owing by the Defendant has never been formally tendered to the Plaintiff but on the other hand the Agreement makes it clear that the obligation to pay is dependent upon a simultaneous tendering of an executed Memorandum of Transfer on the part of the Plaintiff. Such a Memorandum was sent to the Plaintiff and by virtue of the matters raised in this litigation she has so far declined to sign. Mr MacLennan concedes that the Defendant has at all material times being ready willing and able to perform the Agreement in the terms I have described and there does not therefore seem to be any bar to an order for specific performance in favour of the Defendant. At one point the Defendant's Solicitor did write to the Solicitors for the Plaintiff suggesting that only a further $2,000.00 had to be paid. Apparently that was a misunderstanding of counsel

which was presumably cleared up long ago, otherwise the concession by Mr MacLennan would not have been made.

Remedies

The Defendant seeks a declaration as to the current legal position and an order for specific performance. Both seem appropriate although of course specific performance will need to be conditional upon payment of the $6,000.00. I am advised that a payment into Court has been made by the Defendant in the sum of $6,000.00. That does not seem relevant to anything that I may now order. The plaintiff did not claim judgment for $6,000.00 or any other sum based upon the contract. Nor could she have done so in view of her refusal to execute and to tender the Memorandum of Transfer.

There is, however, the question of interest on the $6,000.00. In that regard the Agreement provides that the $6,000.00 was at least initially to be paid without interest. Mr Hammond concedes that that contemplated only a deferment for up to 12 months. He concedes that it was an implied term that if the parties had foreseen the delay which has occurred, they would have agreed that interest at the current Judicature Act rate would be payable. It is a concession which is properly and helpfully made by Mr Hammond. In line with the concession interest is payable from 1 May 1988 down to the present.

So far as costs are concerned, I have previously mentioned that the payment into Court was not relevant. Normally of course, costs would follow the event. The defendant has succeeded on the main issues. However, it seems to me a matter of some criticism that the Defendant and his advisers did not ensure that the Plaintiff was aware that she should most certainly have had independent legal advice in this matter. The message intended by the Defendant's solicitors to reach the Plaintiff about independent legal advice did not reach her. I would have thought it appropriate that a letter be attached to the Agreement expressly pointing out to the Plaintiff the need for independent legal advice. No such legal advice having been obtained I think it wholely predictable that litigation of this kind would result.

For those reasons I do not make any order for costs in favour of either party in this action.

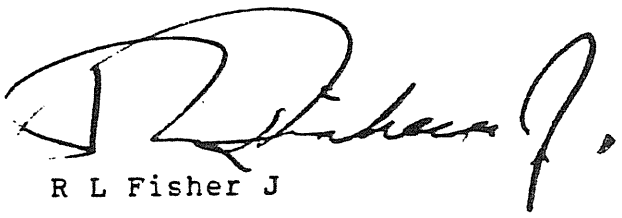
Result

There will be a declaration that the Plaintiff is a trustee of her legal interest in the property (being all the land in Certificate of Title Volume 165 Folio 224 Land District of South Auckland) for the Defendant.

There will be an order that the Plaintiff do specifically perform the Agreement of 4 September 1987 by executing and tendering an appropriate Memorandum of Transfer by way of settlement in return for her receipt of $6,000.00 plus interest at the rate of 11% per anum from 1 May 1988 down to the date of this judgment.

There will be no order for costs in favour of either party.

There will be an order for payment out to the defendant of the sum represented by his payment into Court and any interest derived thereon.



R L Fisher J