N2LR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

HC 139/95
(FP 004/775/94)

MEDIUM PRIORITY

BETWEEN: **HARRISON**

Appellant

AND: **HARRISON**

Respondent

Hearing: 20 February 1996

Counsel: J Mather for Applicant
L J Ryan for Respondent

Judgment: 20 February 1996

(ORAL) JUDGMENT OF BARKER J

Solicitors:

Pratt & Co. for Appellant
Morgan-Ryan & Bierre (Auckland) for Respondent

This is an appeal against a decision of Judge O'Donovan given in the Family Court at Auckland on 6 September 1995. The learned Judge refused to set aside under s 21 of the Matrimonial Property Act 1976 ('the Act') a prenuptial contract entered into between the parties to whom it will be convenient to refer to as *'the husband'* and *'the wife'*.

The parties had met in the in August 1987, the wife being a citizen of that country. In November 1987 they decided to marry and reside in New Zealand. The respondent entered New Zealand on what has been referred to as a *"fiancée visa"*.

The husband made it clear in evidence in the Family Court that he did not wish to marry the wife unless she signed a prenuptial agreement whereby she renounced any rights under the Act to any property of his. His attitude was possibly understandable; he had previously been involved in an unhappy marriage and had experienced the effects of the Act. He wanted to protect his property.

The parties married on 5 March 1988 when the wife was aged 26 and the husband, 53. The prenuptial agreement was dated 24 February 1988. A first draft was prepared by the husband's solicitor: Arrangements were made for the wife to be separately advised by a solicitor at Whangaparoa. The agreement is as follows:

> "1. THE assets set out in the Schedule hereto are to be deemed Henry's "separate property", the term "separate property" to bear the meaning as defined in Section 9 of the Matrimonial Property Act 1976 ("the Act").
> 2. THAT notwithstanding the provisions of Section 11 of the Act, the property situated at 16 Monyash Road, Manly, Whangaparoa shall not at any time be the matrimonial home as defined in the Act, nor shall the contents of that home be family chattels as defined in the Act.
> 3. NEITHER Section 9(6) or Section 3(ee) shall apply in the event of the parties ceasing to live together.
> 4. ANY assets acquired during the marriage in the parties joint names shall be deemed to be matrimonial property as defined in the Act.
> 5. ANY assets acquired by the parties in their separate names during the marriage including any bank accounts, life insurances or investments that have not otherwise been provided for in this Agreement shall be the separate property of the party in whose name the individual assets stand.
> 6. IN all other respects the Act shall apply to the parties in the vent that they cease to live together as husband and wife.
> 7. agrees to take out and maintain a life policy over his life in favour of is owner of the policy.
> 8. THIS agreement shall be binding on all the parties in all circumstances including bankruptcy, taking of property and execution by creditors, separation (whether on one more occasions), dissolution or the death of one or both of the parties.
> 9. EACH party acknowledges that before signing this Agreement he or she had independent legal advice as to its effect and implications."

The document was signed and certified in accordance with the requirements of s 21(4), (5) and (6) of the Act. Clause 5 was inserted by the wife's solicitor; the schedule referred to in Clause 1 included a house property at Manly, to become the matrimonial home of the parties, together with certain shareholdings, bank balances, vehicles and a boat.

Clause 7 referred to a life policy. A term life policy was taken out by the husband for $20,000.00: it was to expire when he reached the age of 65; by the time of the hearing in the District Court, the policy had lapsed because the premiums had not paid.

The parties lived together until November 1993: the Court was therefore looking at a marriage of five and three-quarter years. During the time the parties lived together, they had no children, they did journey to the with the intention of establishing a home where they could live for part of the year.

There they became involved in a resort venture. A company was formed for the purpose of acquiring land which was in the wife's name. However, this venture did not succeed and the parties returned to New Zealand. The husband, as found by the Judge, lost money on the venture; the amounts repatriated to New Zealand represented less the total sum he had invested. The property in the was taken in the name of the wife: it was thought that this factor would have made the accomplishment of the venture easier because the wife was a national; there were said to have been commercial advantages flowing from the fact that the company appeared to have a principal.

The Judge held that the wife was never intended to be more than a front for the husband: the Judge did not accept that it was intended that the wife should acquire a beneficial interest of the property in the or in the shares in the company formed to run the venture.

What is of concern, both to this Court and to the District Court Judge, is paragraph 7 of the agreement. The Judge found:

> "There appears to have been no discussions between the parties or their respective advisers as to this particular provision and I am satisfied that at no time was there any agreement between the parties as to the sort of policy which the husband should purchase, the amount for which his life should be insured in terms thereof, and how the wife's rights with regard thereto should be preserved in the event of separation."

The Judge noted that, until the time of the hearing, no-one had given much thought to this particular provision: it was really as a result of his own inquiries that the relevant history of the matter was ascertained. The Judge noted that the policy had been taken out on 1 February 1988 for $20,000 and that it had later lapsed. He noted, too, that paragraph 7 was quite uncertain as to the precise obligations to be assumed by the husband: he held, having seen and heard the witnesses, that it was clear that the wife was never consulted about the policy and certainly did not agree to the sort of cover provided by the policy. The Judge found that the provisions of paragraph 7 were intended to be and did in fact form part of the contracting-out agreement into which the parties were entitled to enter pursuant to s 21.

The solicitor for the wife was called to give evidence, as was the wife herself. The wife claimed: she just signed the agreement and never understood it; she never read it; she knew that the husband would not marry her if she did not sign the agreement; she would never have married him if she had told her the truth about what was in the agreement; he had made the appointment for her to see the solicitor saying that he (the husband) had to make arrangements for her future, unlike the situation of a friend whose husband had died without leaving anything for her. She thought the reference to the solicitor making arrangements for her future had something to do with immigration.

This evidence was denied by the husband and by the solicitor. The Judge found that the solicitor and the wife were alone when she signed the document, although the husband had come in with the wife initially. The Judge found that the solicitor would have explained to the wife that she was signing away her rights under the New Zealand law; the solicitor claimed some knowledge of the Act: he acknowledged that the wife was not a very communicative lady when asked about her understanding of English. He said:

> *"I had it in my mind that she knew if she did not sign the marriage would not take place and that she could not stay in New Zealand. So she may have thought that it may have something to do with immigration."*

The learned Judge correctly referred to the high standard imposed on a solicitor certifying a Matrimonial Property agreement under s 21(5): he quoted from

Coxhead v Coxhead, (1993) 2 NZLR 397, 403 where it was stated by Hardie Boys J in the Court of Appeal decision:

> "...the requirement under subs(5) of independent legal advice is no mere formalism. Each party must receive professional opinion as to the fairness and appropriateness of the agreement at least as it affects the party's interests. The touch stone will be the entitlement that the Act gives, and the requisite advice will involve an assessment of that entitlement, and a weighing of it against any other considerations that are said to justify a departure from it. Advice is thus more than an explanation of the meaning of the terms of the agreement. Their implications must be explained as well. In other words the party concerned is entitled to an informed professional opinion as to the wisdom of entering into an agreement in those terms. This does not mean however that the adviser must always be in possession of all the facts. It may not be possible to obtain them. There may be constraints of time or other circumstances, or the other spouse may be unable or unwilling to give the necessary information. The party being advised may be content with known inadequate terms. He or she may insist on signing irrespective of advice to the contrary. In such circumstances, provided the advice is that the information is incomplete, and that the document should not be signed until further information is available, or should not be signed at all, the requirements of subs(5) have been satisfied. Subs(8)(a) does not protect one who ignores or disregards advice. If there is any remedy for such a one, it can only be under subs(8)(b)."

The Judge found that the advice given to the wife by the solicitor had the effect clearly of informing her of her rights under the statute and of the extent to which those rights were affected by the agreement. He was satisfied that she understood what was meant by the agreement and by the advice proffered by the solicitor. He rejected the wife's evidence that she was under a misapprehension as to the nature and implications of the document she was being asked to sign. No doubt there was some pressure, in the view of the Judge, having regard to the husband's statement that he would not marry the wife without the agreement and to her knowledge of the implications.

The Judge held that it would not be unjust to give effect to the agreement. He concluded that this a fairly common sort of prenuptial agreement which could be said to have been unfair or unreasonable in the circumstances.

He cited in *Lowry v Lowry* (1994), 11 FRNZ 651. In that case, a husband had married an Asian immigrant: the prenuptial agreement had given the wife relatively little, the learned Judge found that the passage of time, alone, would not make the agreement unreasonable or unfair in the light of the circumstances after it had been signed. Thorp J stated at 655, that it was undesirable for public policy reasons if such agreements could readily be set aside: parties may be significantly less willing to enter into marriages, particularly second marriages, because of their limited ability to effect contracting-out arrangements.

Judge O'Donovan then debated reconsidering the matter for further evidence and submissions; he concluded that the more appropriate course was for him to fix a sum which he believed to be just having regard to the intentions of the parties as evidenced by paragraph 7 of the agreement, and bearing in mind other facts obviously unknown to the parties when the agreement was executed.

The Judge then referred to fact that the marriage had lasted five and a half years; that there were occasions where the wife was engaged in gainful employment outside the matrimonial home and that her earnings were used by her for purposes connected with the marriage. He referred to the period when the parties lived in the ıe was satisfied the wife was there fully engaged in assisting the husband in the running of the resort which ultimately failed.

The Judge then concluded that in determining the amount for which he would insure his life, the husband would have tended to take a generous approach. He saw the difficulty with the arrangement proposed by paragraph 7 was that it required the parties to continue a form of partnership, or association, which—given all the circumstances—they would probably prefer to avoid. The Judge considered that one way to get over the problem, would be to require the husband to pay a significant lump sum to a trustee to create a fund from which premiums could be paid. He decided not to take a step of that nature, but ordered the husband to pay the wife immediately the sum of $20,000.00.

The basic problem about this case is the uncertainty surrounding Clause 7 which renders the whole agreement void for uncertainty. It was held by the Judge that the benefit that the wife was to receive under Clause 7 was part of the consideration for the agreement; that at no stage did she know what the husband was offering; nor is there any evidence that she accepted what was being offered.

Accordingly, it seems clear under normal contractual principles that Clause 7 fails for uncertainty. In a matrimonial property context, it is clear from the Court of Appeal decision in *Sloss v Sloss* [1989] 3 NZLR 31, 38:

> "... that s 21 does not allow for a contracting out agreement to be voided as to some provisions and to remain valid as to others.

Also of note in the judgment of Richardson J at 38 is the following comment:

> "While a partial voiding is not possible, s 33(4) confers jurisdiction in the widest terms to make any order under the Act (subject only to specific provisions of which s 21 is not one) upon such terms and subject to such conditions if any as the Court sees fit."

It is clear from the findings of the learned District Court Judge that he regarded Clause 7 as an integral part of the agreement, in other words, part of the consideration for the wife's agreement to forego her rights under the Act was that she would receive the benefits of this insurance policy. However, the contract was too vague as to the details of the policy or the responsibilities of the husband in respect of the policy.

Mr Ryan submitted that under normal contractual interpretation principles, this contract could be saved. He referred to *Attorney-General v Barker Bros Ltd* (1976) 2 NZLR 495, and to *Money v Ven Lu-Ree Ltd* [1988] 1 NZLR 685 [HC]; [1988] 2 NZLR 414 [CA]; [1989] 3 NZLR 129 [PC].

In both those cases, one dealing with a lease and the other with an option over shares, the Court was able to import some machinery whereby the dispute of the parties could be settled. The District Court Judge himself referred to *Attorney-General v Barker Bros Ltd*. He summarised, correctly, the effect of the decision, recorded in Cheshire & Fitfoot, "Law of Contract" (8th NZ Edition) as follows:

> "These principles, which provide a useful framework within which to consider the cases relating to the certainty of contracts are:
>
> (1) If it appears that the true intention of the parties was not to enter into a binding arrangement until and unless certain unsettled terms of their bargain were settled by agreement between them, then no contract can come into existence in the absence of such further agreement ...
> (2) If ... the Court is satisfied that the real intention of the parties was to enter into an immediate and binding agreement then the Court will do its best to give effect to that intention ...
> (3) Apparent lack of certainty will be cured if some means or standard can be found whereby that which has been left uncertain can be rendered certain."

Whilst it is clear that the intention of the parties was to enter into a binding agreement and that the Court should do its best to give effect to that intention, there is no suggestion of any machinery whereby what has been left uncertain can be rendered certain. There is no statement as to the amount of the insurance policy or its duration; what type of policy it

should be; term insurance; whole of life; endowment or whatever; there are just too many uncertain factors caused by the vague nature of the clause. In those circumstances the Court cannot exercise the ingenuity shown in various commercial cases even allowing that the Courts have greater scope than hitherto to give effect to expressed contractual intention.

In those circumstances, it seems clear, on the authority of *Sloss v Sloss* that there being one void provision, the District Court Judge had no option but to void the whole agreement.

I do not find it necessary to embark on the more difficult question whether this agreement should have been set aside, even if the situation with regard to the insurance policy had been well understood and articulated. Accepting the view of Thorp J in *Lowry* that public policy allows persons entering into marriages to contract out of the Act, there is still the clear policy of the Act to give spouses a share in the matrimonial home where a marriage has been of more than three years duration. I refer to the approach of Doogue J in *Arundel v Wylde* (1991) 8 FRNZ 19. His Honour there referred to the disparity between what the wife would receive under the agreement and what she would receive under the Act.

There may well be grounds here for saying the wife was not entitled to anything that was the husband's separate property at the time of the marriage: however under the normal regime of the Act, she would receive a half share of the matrimonial home and chattels that part share would be of the order of $200,000.00 plus.

Moreover, I do not consider that the learned Judge had any jurisdiction to give judgment for $20,000.00 since the s 33 jurisdiction was clearly not available to him. (see *Sloss v Sloss* at 38)

I note that the learned Judge in assessing the $20,000.00 did not really address the calculation of loss to the wife in any detailed way; rather, he seems to have thought of what would be a reasonable figure, saying that the husband would take a 'generous approach'. However, I should not have thought, that with assets the husband appeared to have had, awarding the wife $20,000.00 could be said to be a 'generous' approach.

I have no option but to set the agreement aside and to remit the wife's application to the District Court. Mr Ryan, for the husband, advised me that he had presented detailed submissions to the Judge as to why equal sharing of the matrimonial home should not take

place in this case. I have no means of knowing whether those submissions are likely to succeed.

Accordingly, the appeal must be allowed and the application remitted to the District Court.

The wife has made application to be on Legal Aid. At various conferences in this Court, Mr Mather has advised various Judges of this pending application. He still has not been advised whether Legal Aid is available. The fact that this appeal has succeeded certainly demonstrates that it was not frivolous—one wonders why there should be this delay in dealing with what, on its face, seems to have been a meritorious application for Legal Aid.

It is my duty to consider costs. I consider it appropriate to award costs of $1,000.00 plus disbursements to the wife in respect of the hearing today. Appeal allowed and agreement set aside. Rehearing of the wife's application ordered in the Family Court.

R. J. Barker J.