IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-242

BETWEEN	JANE ELIZABETH SMITH Appellant
AND	ASHLEY PENN SMITH Respondent

Hearing: 27 October 2009

Counsel: B A Corkill QC for respondent/applicant
C D Batt for appellant/respondent

Judgment: 29 October 2009

ADDENDUM TO JUDGMENT OF DOBSON J

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[1] This is a second application for recall of a judgment I delivered on 20 June 2008, resolving an appeal and cross-appeal from a Family Court judgment dated 14 December 2007.

[2] The relevant details of the assets dealt with and the issues in the relationship property litigation are sufficiently described in the 20 June 2008 judgment. The dispute focused upon the respective entitlements of the parties to a parcel of shares owned by Mr Smith that had been issued to him by the company by which he has been employed. The shares were issued on condition that their ownership was only to be enjoyed during the term of an employee's employment. The company facilitates sale of shares held by an employee, once the employee leaves the employment of the company.

[3] When the appeal was argued, Mr Corkill QC raised an uncertainty as to the ultimate value of the shares because of the prospect that Mr Smith would have to account for capital gains tax on the increase in value between their acquisition and their forced re-sale. No indication was given during the argument of the appeal as to the likely extent of that liability. I observed:

> There is no evidence of the detail of how that liability will arise, or its quantification. However, the prospect is a real one and it would be unjust to ignore it. [26]

[4] Mr Smith has now left the employment of the relevant company, requiring re-sale of the shares to the company, thereby crystallising the capital gains tax liability referred to earlier in general terms. The present application is brought because the parties disagree on whether the unequal entitlement in respect of the value of the shares provided for in my judgment was intended to reflect the gross position, so that the 30 percent I attributed to Mrs Smith was free of any deduction for a proportionate part of the capital gains tax on their re-sale, or on a net basis so that the liability for capital gains tax on re-sale was deducted first, before the 30 percent entitlement of Mrs Smith was quantified.

[5] Although not explicit, the tenor of my judgment proceeded on the assumption that the relationship property dispute would be resolved whilst the extent of any capital gains tax liability on the shares remained unquantifiable, and the larger proportionate entitlement determined in Mr Smith's favour was, in part, to take account of the contingent liability that he would most probably have to meet in the future. This was reflected, for instance when I dealt with the dividends earned on the shares in the period since the parties had separated. I observed:

> Because the imponderable on any future tax liability influencing the outcome on shares themselves is not present with the dividends, the apportionment should be slightly more even. [31]

[6] Accordingly, the question posed by the present application for recall on behalf of Mr Smith is resolved by confirming that the 70 percent/30 percent entitlements to the shares is to be calculated on a gross basis, so that he alone is liable for the capital gains tax liability arising on their re-sale to the company.

[7] Whilst I accept the mutual interest for both parties in having this question answered, I am not satisfied that it constitutes a situation justifying a recall of my earlier judgment. The three situations in which recall may be warranted are not apt to encompass the present situation. (See generally *Horowhenua County v Nash (No 2)* [1968] NZLR 632.) This is the second application for recall, and the parties could not be confident that further directions would not be required in applying the terms of my judgment. Accordingly, it has now become apparent that leave ought to have been reserved to either party to apply for further directions in implementing the terms of my original judgment. The point now requiring attention was not raised in any way at the hearing of the appeal, but it is an instance of further directions that is warranted in circumstances such as the resolution of the details of a relationship property dispute.

[8] I accordingly prefer to deal with the issue by way of an addendum to my earlier judgment, rather than attempting to justify the response required by the parties, by means of a recall.

[9] I am reinforced in that view by the second issue that was raised at the hearing.

[10] In the course of exchange of positions on the point clarified above, the prospect of another arithmetical difference in approach to the application of my judgment was identified. Whereas the argument on the appeal had focused upon the respective entitlements to the increase in value of the share parcel between the date of separation and the date of the Family Court hearing (it being common ground that the shares themselves were relationship property as at the date of separation, but the fluctuation in value between separation and the Family Court hearing had been significant), it was now suggested for Mr Smith that the outcome ordered addressed the respective entitlements by a 70 percent/ 30 percent division of the total value of the shares rather than accepting as a base the equal entitlements to one half of the value at the date of separation, and then directing disproportionate awards in respect of the increase in value between that date and the date of the Family Court hearing.

[11] As Ms Batt pointed out, the analysis in respect of the shares focused very much on the appropriateness of an adjustment under s 18B of the Property (Relationships) Act 1976, which deals with contributions made to property after separation. That analysis is reasonably treated as starting from the premise that the parties shared equally in the asset being considered, as it was valued at the date of separation.

[12] However, the only part of my judgment dealing with the "arithmetic" affecting this is paragraph [28]. That provided:

> [28] Having regard to all these elements contributing to the value of the shares at hearing date, I consider the just apportionment is:
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> a) To confirm the valuation of the shares at the date of hearing. All influences on post-separation contribution are appropriately reflected under a s 18B adjustment, but do not discharge the onus of establishing that a date other than the hearing date is appropriate.
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> b) To recognise that Mr Smith's entitlement to compensation for contributions to the value of shares after separation should be reflected in an unequal division in his favour by 70-30%.
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> c) To reflect that adjustment by means available under s 18B, it should be directed that Mrs Smith be obliged to pay, in the sense of giving credit to Mr Smith for a sum amounting to 20% of the hearing date valuation, as a pre-condition of Mr Smith's obligation to immediately thereafter pay to Mrs Smith the sum amounting to 50% of that value (able to be netted off as an obligation for Mr Smith to pay Mrs Smith 30% of the total value, in consideration for which the shares and all future income/gains derived from them are to become his separate property).

[13] All aspects of the valuation and calculation of proportional entitlements were simply reflected in the valuation at the date of hearing. In relation to the value of the shares, I directed an unequal division, being 70 percent to Mr Smith and 30 percent to Mrs Smith. The ultimate obligation directed is for Mr Smith to pay Mrs Smith 30 percent of the "total value" and each of the calculations leading to that point simply related to the value of the shares at the date of hearing. Had the formula for calculation required a separate accounting by way of equal division of the value of the shares at the date of separation, then it needed to be separately provided for, as a consequence of which the terms in my paragraph [28] would have been confined to

percentages of the increase in value between the two dates, and not by reference to the total value of the shares.

[14] Accordingly, I am bound to interpret my earlier direction as to apportionment on the basis now contended on behalf of Mr Smith.

[15] Although beyond the scope of the current application, I record the concern I conveyed to counsel on learning that the vast majority of the relationship property settlement contemplated by my judgment has yet to be transacted. If either of the parties is contemplating seeking additional guidance on the mechanics of carrying into effect the earlier decisions, then the Court is likely to be unsympathetic if progress has not been made in a practical way, in carrying out the implications of the judgment. Although no further applications for directions are encouraged, I now make explicit what ought to have been implicit in my original judgment, namely that leave is reserved to either party to apply for directions on the implementation of the orders made.

[16] There is no order as to costs on the present application.

Dobson J

Solicitors:
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