IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-4758

IN THE MATTER OF	the Property (Relatiionships) Act 1976
BETWEEN	JULIE-ANN PRIDHAM Appellant
AND	EDWIN RONALD JAMES PRIDHAM Respondent

Hearing: 24 November 2009

Appearances: C F L Godinet for the appellant
K A Young for the respondent

Judgment: 9 December 2009

JUDGMENT OF CLIFFORD J

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[1] The appellant and her former husband, the respondent, separated in July 2007 after approximately 15 years of married life together. Prior to their marriage, they had lived together for some 11 years in a de facto relationship. They have one child, whose care they share.

[2] The parties were unable to agree on the division of their relationship property. Their dispute on that matter was heard by Judge Ryan in the Family Court at North Shore on 2 July this year. On 6 July Judge Ryan issued a judgment. That judgment records that the parties agreed that certain property – namely, the family home, a second property, the appellant's current account in Jenjoco Enterprises Limited, the family chattels, a boat and the credit balances in a number of joint bank accounts – was relationship property and was to be divided equally between them. Judge Ryan also recorded agreement between the parties that certain property owned by the respondent was his separate property.

[3] The parties were unable to agree on various matters, including the status of the shares in the company Jenjoco Enterprises Ltd, principally owned by the respondent, the status of the respondent's shareholder current account in Jenjoco Enterprises, and the status of credit balances in various bank accounts in the name of the respondent.

[4] Judge Ryan ruled that the shares in Jenjoco Enterprises were relationship property, but that the respondent's current account in Jenjoco Enterprises was his separate property, as were the whole or part of the credit balances in the various bank accounts.

[5] The appellant now appeals against Judge Ryan's decision that the following are the respondent's separate property:

a) The respondent's current account in Jenjoco Enterprises (valued at $226,549 at 31 March 2009); and

b) The credit balances in two bank accounts (BNZ suffix 011 and BNZ suffix 002) (the BNZ bank accounts) in the respondent's name, identified by him as being the proceeds of an investment in the companies Macks Sea Foods Ltd and Macks Sea Foods (1994) Ltd.

[6] The appellant also asks this Court to order that the respondent pay occupational rent to her for his occupation of the family home as from the date of separation.

[7] Finally, the appellant also applies to this Court to exercise its discretion under s 2G(2) of the Property (Relationships) Act 1976 and order that the family home be valued for the purpose of the division of the property not at the date of separation, but in effect as at the date of this hearing.

[8] The respondent does not challenge any aspects of Judge Ryan's decision, but denies all of the appellant's claims on appeal.

Background

[9] On 10 September 1992, two days before they were married, the appellant and the respondent signed a "contracting out" agreement pursuant to the provisions of s 21 of the then Matrimonial Property Act 1976 ("the Agreement"). In the Agreement the parties agreed that, subject to certain conditions, the respondent's interest in the property listed in the first schedule was to be and remain the respondent's separate property. Similarly, the property listed in the second schedule was to be and remain the appellant's separate property. As relevant to this appeal, the first schedule reads as follows:

> THE FIRST SCHEDULE
>
> (a) All real estate in the sole name of the husband or owned jointly or as a tenant-in-common with any person other than the wife other than the principal residence situated at 77 Stredwick Drive owned by the husband which shall be subject to the normal provisions of the Matrimonial Property Act.
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> (b) Any bank accounts in the sole name of the husband.
>
> (c) All shares, stocks, bonds, term investments, unit trust investments or commodity investments.

[10] Pursuant to clause 2, the property to be and remain the respondent's separate property further included "any form of property into which [the respondent's interest in the property in the first schedule] or any part thereof or the proceeds thereof may pass" (together, the "first excepted property"). The operative clauses of the Agreement went on to provide (as relevant):

> ... the status of the first excepted property as separate property shall not be affected by the use to which the first excepted property is put or by amalgamation with other property in co-ownership of the asset or assets which for the time being may represent the first excepted property...

[11] In addition to the reference to the principal residence situated at Stredwick Drive in the first schedule, clause 6 of the agreement provided as follows:

> It is agreed between the parties and specifically by the husband that in the event of the parties separating the house situated at 77 Stredwick Drive, Torbay shall be deemed to be owned by the parties as to a half share each.

[12] The Stredwick Drive address was the property the appellant and the respondent were living in at the time of their marriage, and was a property that the respondent had owned prior to entering into the relationship with the appellant.

[13] During the course of the marriage, the parties moved out of the Stredwick Drive property, and into a property at Wrights Road in which they were living at the time of their separation and which was agreed – in these proceedings – to be the family home and relationship property. The Stredwick Drive property was transferred to Jenjoco Enterprises. The shares in Jenjoco Enterprises were held as to 999 by the respondent, and to one by the appellant. Stredwick Drive was then rented out, through Jenjoco Enterprises.

[14] At the hearing in the Family Court it would appear that the respondent asserted that the shares in Jenjoco Enterprises (registered in his name) and the credit balances in the various bank accounts (opened in his sole name) were his separate property. He based that argument on the wording of the Agreement, which defined the first excepted property as meaning "all the interest *for the time being* of the husband in the property described in the First Schedule" (my emphasis). The respondent asserted that the words "for the time being" meant, in effect, now and at any time in the future. The Judge rejected that submission. The Judge found that the words "for the time being" meant at the time the Agreement was signed. Therefore, the fact that the shares in Jenjoco Enterprises were registered in his name, and the relevant bank accounts were under his name, did not establish that they were separate property. Therefore, in terms of both the shares in Jenjoco Enterprises and the credit balances standing to the bank accounts in the respondent's name, the Judge had to consider not only the provisions of the Agreement but also the general principles of the Property (Relationships) Act.

[15] Because the argument in the Family Court focused on the interpretation of the Agreement (and particularly the phrase "for the time being), less attention was paid to the detailed history of the property in dispute than might otherwise have been the case. Be that as it may, as regards that property the Judge found:

a) Because the shares in Jenjoco Enterprises were acquired after the marriage commenced, they were relationship property. On that basis, the equity in Jenjoco Enterprises was relationship property.

b) As noted above, it was agreed that the appellant's current account with Jenjoco Enterprises was relationship property. The Judge found, however, that the respondent's current account with Jenjoco Enterprises was his separate property. The Judge reached that conclusion on the basis that:

i) That credit balance represented moneys owing to the respondent on the sale of the Stredwick Drive property to Jenjoco Enterprises.

ii) At the time of that sale, the Stredwick Drive property was no longer the family home.

iii) In terms of the Agreement, as the parties had not separated at the time of that sale, the Stredwick Drive property was not deemed to be jointly owned pursuant to clause 6 of the Agreement. In terms of the words in the first schedule, the "normal" provisions of the (now) Property (Relationships) Act applied. The provisions of that Act meant that Stredwick Drive, upon ceasing to be the family home, reverted back to being the respondent's separate property. Therefore, funds due to the respondent from the sale of Stredwick Drive to Jenjoco Enterprises, represented by his shareholder's current account, were separate property.

c) The credit balances in the BNZ bank accounts represented the respondent's share in the sale of a company Macks Seafood (1994) Limited. On the basis that the Judge accepted the respondent's evidence that his share in that company represented the proceeds of moneys standing to the credit of his personal bank accounts at the

time the Agreement was signed, those shares and those sale proceeds, represented by those bank accounts, were also his separate property.

The respondent's current account in Jenjoco Enterprises

[16] The appellant advances her appeal against the Judge's findings in relation to the respondent's current account in Jenjoco Enterprises on the following grounds:

a) The Judge wrongly interpreted the Agreement. Correctly interpreted, the Stredwick Drive property remained relationship property so that the respondent's current account balance was itself relationship property.

b) Even if the Stredwick Drive property at the time of sale was separate property, there was simply no evidence that the credit balance represented moneys owing to the respondent for the sale of that property.

[17] It is accepted that the Stredwick Drive property was no longer the family home at the time that it was sold and, as a result, was not relationship property in terms of s 8(1)(a). The issue is whether, in terms of the first schedule of the Agreement, the provisions of the Property (Relationships) Act applied to that property – in which case it would be separate property – or whether, under clause 6 of the Agreement, the parties had agreed to share the property equally.

[18] The Judge held that clause 6 only applied if the Stredwick Drive property was owned by the parties at the date of separation. I am not persuaded that that is the correct interpretation of that clause. The clause does not, in my view, require that the property still be owned at the date of separation in order for it to be deemed to be held jointly. There is nothing in the clause that calls for that qualification to be read in, nor anything in the practical operation of the clause, or the Agreement, which would require it.

[19] Moreover, the interpretation that the Stredwick Drive property was to be shared equally on (any) separation regardless of whether it was still owned by the

respondent at that date accords with the respondent's statement in evidence that he believed he had given half of the property to the appellant. In an exchange with the Court the respondent stated:

> Q. You think you gave her half the property?
>
> A. I believe that was the intended purpose because I gave her half of it and we sold it and all the money from the sale of it went to Wrights Road, so yes I gave her half of it.

[20] Reading clause 6 in this way, the reference to the Stredwick Drive property being subject to the normal provisions of the (now) Property (Relationships) Act, means that the property is relationship property in terms of s 8(1)(c) – property owned jointly or in common in equal shares by the spouses. As such, the proceeds of the disposition of the Stredwick Drive property are relationship property under s 8(1)(l).

[21] As noted, the Judge found that it was "clear" that the credit balance in the respondent's current account ($226,549.00 as at 31 March 2009) represented the balance of monies due back to the respondent when Jenjoco Enterprises acquired the Stredwick Drive property from him. On that basis, and on my interpretation of clause 6, the balance in the respondent's current account is relationship property.

[22] The appellant alleged (in the alternative) that the Judge could not be satisfied that the respondent's current account balance represented the proceeds of the sale of the Stredwick Drive property. In that case, and absent any other evidence that it should be characterised as separate property, the current account balance would again be relationship property under s 8(1)(e), being property acquired after the marriage. Given the view I have taken of the correct interpretation of the Agreement, it is not necessary for me to consider that argument, and I do not do so.

BNZ bank accounts

[23] Here the appellant argues that there was insufficient evidence that the BNZ bank accounts represented the sale of separate property constituted by Macks Seafoods (1994) Limited, particularly as that company had been incorporated, and

therefore the respondent must have acquired his shares in it, after the marriage commenced.

[24] Again, the respondent relies on Judge Ryan's decision, and submits that his findings were as to the respondent's credibility, represented by the Judge's acceptance of the evidence the respondent gave.

[25] The Judge expressly acknowledged that the "evidence was somewhat sketchy" and that the respondent was "vague about dates and amounts". He also noted that there was a lack of corroborating documentary evidence. Nevertheless, he was satisfied that the credit balances in the BNZ bank accounts represented the respondent's share in the sale of Macks Seafood (1994). In particular, he accepted the respondent's evidence that, at the time of the Agreement, the respondent had some $120,000 invested in bank accounts that he subsequently applied towards a smoked fish processing business run by Macks Seafood (1994), of which he was a shareholder and director. Under the Agreement, that separate property invested in the company retained its status as separate property.

[26] I acknowledge that the evidence indicates some degree of confusion between the companies Macks Seafood Ltd (which was incorporated before the marriage on 15 July 1986) and Macks Seafood (1994) Ltd, which was incorporated two years after the marriage. I further acknowledge, as did the Judge, that the evidence was less than clear.

[27] Nevertheless, it is well accepted that, in the context of family property disputes it will often be the case that the evidence is less than clear, yet the Judge is required to come to a finding. As stated by Thorp J in *Cozzolino v Cozzolino* (1982) 5 MPC 19, 20:

> It is well established that in the Matrimonial Property Act jurisdiction the Court is commonly required to reach findings of fact on evidence that is less precise and complete than one would wish. The legislature recognised the likelihood of that circumstance and enacted s 36 of the Matrimonial Property Act to permit the Court to receive evidence not otherwise admissible at law. Certainly the need for a 'broad brush' approach to the determination of facts in this jurisdiction has been recognised in many cases.

[28] Here, the experienced Family Court Judge was satisfied, after hearing the respondent's evidence, that the balances in the bank account represented his capital return on the investment in Macks Seafood (1994) sourced from his separate funds. The appellant did not, either in the Family Court or on appeal, provide any evidence to the contrary. Judge Ryan noted that she "whilst she was unsure of the details of various transactions, she did not seriously challenge the respondent's evidence on this issue". His impression was that both parties were "truthful witnesses who were not attempting to mislead or to muddy the waters". In these circumstances, and given the advantage of the Family Court Judge who heard the parties give evidence, the appellant has not persuaded me that the Judge's decision was wrong.

[29] I note that I did, during the course of hearing this appeal, raise with counsel the possibility that I might ask for further evidence. On reflection, and having considered Judge Ryan's decision further and in particular his comments as to the availability of documentary evidence, I was not persuaded that that course of action would prove fruitful. Furthermore, I concluded that I was able to properly decide this appeal without such evidence.

[30] I therefore dismiss the appellant's appeal in respect of the credit balances in the BNZ bank accounts.

Occupational rent

[31] As noted above, the appellant now claims occupational rent with respect to the period after the date of separation (October 2007) during which the respondent has continued to occupy the former family home. More specifically, she seeks half of the rental value of the family home since October 2007.

[32] Occupational rent was not a matter dealt with by the Judge, or addressed in the written submissions by counsel. It was, however, a matter mentioned briefly in an affidavit by the appellant (dated 30 June 2009) that was before the Family Court Judge, and may have been referred to by Mr Godinet, for the appellant, in his opening.

[33] In these circumstances the respondent says that there is no basis upon which to make an award of occupational rent. He submitted that the only reference to occupational rent was in the appellant's 30 June affidavit, and that no reference to occupational rent was made in counsel for the appellant's submissions in the Family Court. He says that he therefore did not cross-examine on case law supporting the proposition that occupational rent is not necessarily payable at all, but in any event need not be for the whole period. Nor did he provide evidence in relation to his expenditure on matters of rates, insurance and improvements, a substantial capital payment made to the appellant as a result of an interlocutory application, and the extent to which he also had varying lengths of childcare.

[34] In my view the respondent is not prejudiced by the matters raised. Case law on whether, and for how long, occupational rent should be awarded is a matter of legal submission and need not be the subject of cross-examination. Moreover, it was open for the respondent to adduce evidence as to the other matters on appeal (albeit with leave), the issue of occupational rent being squarely placed in issue. The respondent, at least to some extent, has done so. Finally, I note that the effect of s 36 of the Property (Relationships) Act is to allow some flexibility in the Court's approach to the admissibility of evidence, permitting the Court to admit evidence as it thinks fit, notwithstanding the traditional rules of evidence. In my view, it is appropriate to take account of the evidence in relation to occupational rent here so as to be able to finally and justly determine the matters in dispute between the parties.

[35] It is not in dispute that the respondent has resided in the family home since October 2007. Therefore, the respondent has had the use of a significant proportion of the parties' relationship property capital since October 2007. There is no mortgage owing against the family home, and therefore no mortgage repayments, but the respondent has been responsible for paying the usual outgoings and utilities in respect of the property. His evidence was that he has paid $7,770.92 in general and ACC rates and insurance in the time he has been in occupation, plus spent $2,200 on improvements to the driveway. The appellant accepted that the respondent had paid the rates and insurance, and that he had repaired the joint access driveway but had no knowledge of the costs.

[36] During that same time, the appellant has been living in rented accommodation. She says that she has paid rent of over $20,000 over this time. It is accepted, however, that in November 2008 the appellant received $107,000 as an interim distribution from the parties' relationship property capital.

[37] There is no invariable right to occupational rent. *Fisher on Matrimonial Property* comments at para 16.30:

> Despite the assumed jurisdiction for such claims [to occupational rent] they have not been regularly argued before the Courts, at least not in many reported cases. Occupation rental claims are often flagged in the course of proceedings, usually with the aim of pressuring the occupying party to move with greater alacrity towards a sale of the family home. Reported cases have seen occupation rental dealt with as more of a cross-claim in order to neutralise, in part, claims by the occupying party for post-separation contributions. It had been stated — at least prior to the enactment of ss 18B and 18C on 1 February 2002 — that there was no jurisdiction, under s 2G, to make occupational rental awards on their own and that, accordingly, such a claim for occupational rental could only come into consideration when considering an occupying party's claim for post-separation contributions. In addition, in the exercise of the discretion, there may be a judicial reluctance in some cases to reward the party who chose to leave and penalise the party who undertook continuing responsibility for the property. But that consideration would seem equally applicable in the numerous cases where the benefits of occupation have been set off against actively produced increases — and it is clear that under s 18B, as a "stand alone" provision, there is now power to make an occupational rental award in favour of one party, against the other — and this discretion is likely to be exercised when, in particular, one party has lived rent free in the sole family asset, ie the home, and the other has lived elsewhere with some level of sacrifice, for example, by having to pay rent. (footnotes excluded)

[38] In *E v G* HC Wellington CIV-2005-485-1895, 18 May 2006 Justice Ronald Young J confirmed that, where one partner or spouse (party A) makes their share of capital in the home available to the other partner or spouse (party B), it will qualify as a contribution for the purposes of s 18. As such, and in terms of s 18B, it is a contribution during the "relevant period" – namely after the marriage has ended but before the date of the first instance Property (Relationships) Act hearing – and "the Court, if it considers it just, may for the purposes of compensating" party A, order party B to pay party A sum of money, or transfer to party A any property (whether relationship property or separate property).

[39] In *C v C* HC Auckland CIV 2007-419-1313, 26 June 2008 Lang J agreed with the approach in *E v G* but observed (at [28]):

> The mere fact that one party has made such a contribution is not, however, sufficient to allow an award to be made under s 18B … the Court must also be satisfied that it is just in all the circumstances that such an order be made.

[40] Here, the respondent has had the use of the capital tied up in the family home for something over two years, in which time the appellant has been denied the use of that capital and has been required to pay for rented accommodation. During that time, the respondent has, however, paid the rates and insurance and paid for the repair of the driveway. In addition, since November 2008 the appellant has had the use of $107,000 of the parties' relationship property as paid out as an interim distribution.

[41] In these circumstances, I am not persuaded that this is a situation where the contribution made by the appellant – in terms of her making her share of her capital in the family home available for the use of the respondent for a period of around two years – is such that the payment of occupational rent by the respondent is appropriate. The position here is, in my view, simply that the respondent occupied the family home for a relatively short period after separation while the property dispute between the parties was being resolved. It is, in my judgment, almost inevitable that one party in a family property dispute will occupy the family home pending resolution and, absent any particular circumstances, that will not by itself make an order for occupational rent appropriate. That is especially so where, as here, the respondent has paid the outgoing utilities in relation to the family home and the appellant has also had the use of relationship property capital (albeit for a shorter duration).

[42] I therefore find that occupational rent is not payable to the appellant.

Valuation of family home

[43] The appellant finally asks this Court now to exercise its discretion in terms of s 2G(2) to order that, for the purposes of the division of the relationship property (as well as for the purpose of calculating the occupational rent), the value of the family

home should be set at or about the date of the hearing of the appeal, on the basis of a valuation that she has recently obtained.

[44] The respondent opposes that course of action, submitting that there is no reason to vary the valuation date as claimed for by the appellant.

[45] Under s 2G(1) property is to be valued as at the date of the first instance hearing – here, 2 July 2009. However, the Family Court, or the High Court on appeal, may in its discretion decide that the value is to be determined as at another date (s 2G(2)).

[46] All other factors being equal, a hearing date valuation generally will be appropriate where an increase in value is the result of inflation. An example is *De Malmanche v De Malmanche* [2002] 2 NZLR 838; (2002) 22 FRNZ 145 where the increase in the value of the family home was attributable to market forces rather than the efforts of either spouse to produce the gain. Justice Priestley held (at [148]) that there was no reason in principle to depart from the hearing date rule in s 2G(1).

[47] Here, Judge Ryan's decision records at [4] that "matters agreed" included that "the family home ... is worth $770,000 and is relationship property".

[48] That the appellant has not appealed against that finding would appear to give rise to difficulties in relation to her application that the Court on appeal endorse a different valuation in respect of the calculation of the value of her entitlement. In addition, and more importantly, the appellant has not provided any reason why the Court should exercise the s 2G(2) discretion to adopt a valuation of the family home as at the date of the appeal. In the absence of any such reason, I am of the view that, pursuant to s 2G(1), and indeed the agreement referred to by Judge Ryan, the value of the family home should be calculated as at the date of the hearing in the Family Court, namely $770,000.

Result

[49] I allow the appellant's appeal in part. The respondent's shareholder current account in Jenjoco Enterprises Ltd is relationship property and is to be shared

equally between the parties. However, I dismiss the appellant's appeal in relation to the credit balances in the BNZ bank accounts (suffixes 001 and 002). I disallow the appellant's claim to occupational rent, and to a post-hearing valuation of the matrimonial home.

[50] The appellant has been successful, but only in part, on this appeal. In those circumstances, costs should lie where they fall.

"Clifford J"

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