IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-008105

BETWEEN	RAM SUMER SHANDIL Appellant
AND	ARUNA LALA SHANDIL Respondent

Hearing: 12 May 2010

Appearances: M L Clark for the Appellant
R A Edwards for the Respondent

Judgment: 25 May 2010

RESERVED JUDGMENT OF PRIESTLEY J
(Application to adduce further evidence)

This judgment was delivered by me on 25 May 2010 at 4.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

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Introduction

[1] On 10 November 2009 Judge Malosi released a judgment, which had been reserved for six months, in the Manukau Family Court.

[2] The judgment involved a dispute under the Property (Relationships) Act 1976 (the Act) between the parties who are Fijian nationals of Indian descent.

[3] The couple have two adult children. At the time of their separation in 2004 they had been married for 24 years.

[4] The appellant husband has been employed for many years in a Fijian government department. As a result of political instability in Fiji the entire family was granted permanent residence in New Zealand in early 2001. The respondent wife came to live in New Zealand but the appellant, despite his permanent residence status, chose to continue living and working in Fiji.

[5] The relevance of this narrative explains a relationship property pool which, by the time the parties had separated, comprised realty in both New Zealand and Fiji. There was also Fijian personalty which included bank accounts, life policies, and a superannuation entitlement. The appellant's continuing residence in Fiji was also a factor before and during the Family Court hearing.

[6] I say nothing further about the location of relationship property assets and the appellant's litigation stance since these matters may well be prominent in the pending substantive appeal.

[7] The hearing before the Judge was tantamount to a formal proof hearing. However, despite his absence (the original Family Court hearing was adjourned to enable the appellant to travel to New Zealand to participate but in the event he did not), the Judge had narrative and disclosure affidavits from the appellant and a considerable volume of materials he had provided.

[8] Relevant to the application before me is a finding by the Judge ([18]) that the appellant's stance had demonstrated a general lack of co-operation at times and a further finding (at [28]) that the appellant "[had] made a calculated decision not to co-operate in having his superannuation scheme valued…."

[9] The hearing of the substantive appeal was originally scheduled in this Court on 12 May. The appellant filed an application for leave to adduce further evidence. As a result, directions were made for that application to be heard first. The substantive appeal will now be heard on 8 July.

[10] At the conclusion of the half day hearing of the appellant's application to adduce further evidence I expressed the view (both parties were represented by competent counsel as was the case in the Family Court) that with some commonsense and a modicum of give and take, all outstanding substantive matters should be settled. Although the bi-location of assets gave rise to interesting issues, it was difficult to see that the division of assets effected by Judge Malosi was so egregious that ongoing litigation was economic. Counsel have filed a memorandum advising that ongoing settlement negotiations have not been fruitful. A judgment is thus required.

Application to adduce further evidence.

[11] The appellant's application seeks leave in respect of three assets. The proposed evidence is:

a) An updated valuation of residential property at 32 Grassways Avenue, Pakuranga.

b) Further affidavit evidence relating to the terms and conditions of the appellant's superannuation fund with Fiji National Provident Fund.

c) Further evidence relating to the surrender value of two insurance policies on the appellant's life with Colonial Fiji Life Ltd.

[12] Counsel were agreed on the correct approach. Ultimately an appellate court retains a discretion to admit new evidence on an appeal. The discretion is informed, inter alia, by whether evidence would, with reasonable diligence, have been available at the first instance hearing, and by the interests of justice.

[13] Rule 20.16(3) of the High Court Rules refers to leave being granted only if there are "special reasons". The authorities suggest that the power is exercised sparingly.

[14] Of more direct relevance, however, is s 39B(3) of the Act which empowers a court on an appeal to receive further evidence if "the interests of justice so require". In *Bourneville v Bourneville*,[1] Williams J suggested that the orthodox restriction, (the exercise of reasonable diligence which could have produced evidence in the Family Court), might not be fatal in a s 39B(3) situation since the interests of justice arguably denoted a broader and less restrictive test. Williams J suggested that a criterion might be whether the relevant evidence could have made a material difference to the outcome in the first instance court (at [34]).

[15] I now apply these principles to the evidence the appellant wishes to adduce in respect of the three specified assets.

32 Grassways Avene, Pakuranga

[16] The Judge dealt with the Pakuranga property at [19] – [20] of her judgment.

[17] The property was purchased in May 2003 by virtue of a $55,000 deposit and an ASB mortgage of $217,000. The appellant appears to have paid the outgoings on the property until May 2007. Possibly an appeal issue will be whether the Judge made appropriate adjustments for post-separation outgoings.

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[1] *Bourneville v Bourneville* HC AK 2007-404-002656, 11 February 2008, Williams J.

[18] The Judge fixed the value of the property at the date of hearing at $385,000. She calculated the equity (there being a $212,000 mortgage) at $173,000. The Judge specifically stated:

> The husband did not raise any objection, through his counsel, to that valuation or the net equity.

[19] A $385,000 valuation figure was placed before the Family Court by the respondent wife in the form of a valuation dated 12 March 2009 from Morley and Associates.

[20] An earlier affidavit of the respondent wife in October 2007 had given the value of the property as $420,000. It is unclear on what basis that figure was reached.

[21] The appellant's affidavit in support of his application exhibits a letter from Morley and Associates dated 2 March 2010 which says the appellant has sought an "opinion as to the movement and value of the property since the [12 March 2009] valuation". Morley and Associates refer to an uplift in the intervening 12 months in the Pakuranga area. Based on the assumption the property was in the same condition as when it was inspected, the valuers opine that the property's current market value would be in the $400,000 - $415,000 range.

[22] The appellant says that when he was in New Zealand in April 2009, because he was forced to return to Fiji to save his employment, he had been unable to obtain an updated valuation of his own. He notes that the March 2010 valuation is similar to that provided by his wife in 2007.

[23] It is trite law that in most circumstances, the value of relationship property assets to be applied is at the date of the first instance hearing s 2G(1). The $385,000 valuation factored in by Judge Malosi was the result of a report prepared a few weeks before the hearing to which the appellant's then counsel did not object. There are no factors which warrant this Court (or indeed the Family Court) adopting a valuation date other than the hearing date.

[24] There is absolutely no principled basis on which the appellant should be permitted to produce further valuation evidence, which would inevitably lead to the respondent wanting to provide her own updated valuation and a constantly moving valuation figure.

[25] The application as it relates to 32 Grassways Avenue, Pakuranga is refused.

Fiji National Provident Fund superannuation

[26] I have already referred to the Judge's finding as it relates to investigation of the appellant's superannuation entitlement.

[27] The Judge dealt with this asset at [27]–[31] of her judgment. To assist her she had a report from Mr J Eriksen, an actuary, prepared on 30 March 2009. Mr Eriksen produced an updated report on the day of the hearing.

[28] Mr Eriksen's valuation is orthodox. (He had to prepare the second report, because, so the Judge found, the appellant had been late in divulging interest payments.) It considered such matters as the appellant's age, the dates of marriage and separation, the December 2004 balance in the fund, and a discount for contingencies.

[29] On the basis of the 29 April report the Judge fixed the relevant valuation of the appellant's superannuation entitlement at F$127,997.

[30] In a Family Court affidavit the appellant stated that his savings in the fund were worth F$200,000 and at separation date F$136,000.

[31] The additional evidence which the appellant wishes to adduce is:

- Information from the Fiji National Provident Fund website giving information as to when full withdrawal is permitted (being retirement, migration, incapacity, or special death).

- The Provident Fund's definitions of "retirement" and "migration".

- Email exchanges with the principal legal officer of the Fiji National Provident Fund indicating that, under Fiji's Family Law Act, only the Family Courts of Fiji are empowered to make orders in respect of the relevant fund, and in particular are restricted from making any such orders until such time as an entitlement date is reached.

[32] Ms Clark's submissions were to the effect that although the Judge had made an order which had the effect of obliging the appellant to pay out one half of the actuarial value of his superannuation entitlement to the respondent, in fact the appellant himself had no entitlement to receive the funds at the date of the hearing. Although Ms Clark accepted that this information could have been reasonably discovered before the Family Court hearing, the appellant's failure to place it before the Court resulted in the Judge proceeding under a misapprehension. Given that the appellant had no immediate entitlement to the superannuation funds, an appropriate order would have been one under s 31(1) of the Act vesting the portion of the appellant's superannuation entitlement in the respondent.

[33] There is force in Ms Edward's submission that the new evidence the appellant seeks to adduce is little more than an elucidation of the terms and conditions of the superannuation policy. There is absolutely no evidence that deferment of the appellant's entitlement until his retirement, death, or migration would in any way have affected the Eriksen valuation of the bundle of rights.

[34] Whether or not the Judge was right in preferring a clean break across all assets rather than vesting a share of the superannuation in the respondent (which would have presented foreign law and enforcement difficulties), will be a matter for a substantive appeal.

[35] The concept of an actuarial bundle of rights valuation being markedly different from current withdrawal or ultimate superannuation entitlements is well known to Judges and practitioners in the field.

[36] I do not consider that the new evidence would have made any material difference. Nor do I see any curtailment of the justice of the situation. After all, the appellant's superannuation entitlement is a valuable item of property which awaits him in the future. The benefits of the bundle of rights is properly subject to valuation. For these reasons the application to adduce new evidence in respect of the appellant's superannuation entitlement is refused.

Life policies

[37] At the date of separation the appellant owned two policies on his life with Colonial Fiji Life Ltd. The Judge dealt with this succinctly at [35] where she stated she accepted the appellant's evidence that the two policies had surrender values of F$11,900 and F$27,000 respectively. The Judge divided up relationship property on the basis the two policies would remain the husband's separate property at those figures.

[38] The husband's evidence, which the Judge accepted, was contained in his 25 March 2008 affidavit of assets and liabilities. In respect of each policy the appellant provided four figures, some of which were stated as approximates. The four figures appeared beside the following descriptions:

Basic sum insured

Estimated maturity value

Value at separation

Value at date of affidavit

The F$11,900 and F$27,000 figures appeared as the "value at separation" entries.

[39] In providing that information to the Court the appellant calculated the separation value on the basis of a misconception. He appears to have bundled together the face value of the policy and bonuses accumulated to date. That, of

course, is not the mechanism whereby the surrender values of life policies is calculated.

[40] The appellant has since obtained a letter from Colonial (an umbrella company of Colonial Fiji Life Ltd) dated 6 January 2010 which gives the surrender values for both policies as at October/November 2004 and 5 January 2010.

[41] The surrender values at approximate separation date are F$4,852 and F$13,086 respectively which represents a substantial difference from the figures used by the Judge.

[42] Although Ms Edwards is correct when she submitted that this information was not new and could, with reasonable diligence, have been placed before the Family Court, the fact remains that the information placed before the Court comprised figures misdescribed as "value at separation". The Judge, through no fault of hers, has deployed incorrect figures. This makes a material arithmetical difference to the value of the total pool and the respective allocation of assets between husband and wife.

[43] I am satisfied the overall interests of justice require a correction of this error (assuming the respondent has no evidence to the contrary). Accordingly leave is adduced for the appellant to produce as evidence on the appeal Colonial's 6 January 2010 letter setting out net surrender values of the two relevant life insurance policies.

Result

[44] Leave is refused to adduce new evidence relating to the 32 Grassways Avenue property and the appellant's superannuation entitlement. Leave is granted in respect of the surrender values of the appellant's two life policies.

Costs

[45] I intend to reserve costs for determination by the Judge determining the substantive appeal as part and parcel of any costs award which might be made there.

[46] Subject to the discretion to be exercised by another Judge I indicate that preparation and appearances for one half day on the 2B scale would be in order. Given the mixed result, and having regard to two thirds of the appellant's application being devoid of merit, a 50% award in the respondent's favour would not be untoward if this application had to be subject to a costs award in isolation.

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Priestley J