NOVA SCOTIA COURT OF APPEAL
Citation: ***Majaess v. Majaess***, 2004 NSCA9

Date: 20040120
Docket: CA 203945
Registry: Halifax

Between:

Rima Majaess

Appellant

v.

Joseph Majaess

Respondent

Judges:	Glube, C.J.N.S.; Roscoe & Hamilton, JJ.A.
Appeal Heard:	January 15, 2004, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $1,000, including disbursements, payable by the appellant to the respondent, as per reasons for judgment of Hamilton, J.A.; Glube, C.J.N.S. & Roscoe, J.A.
Counsel:	Ruben Dexter, for the appellant Robert G. Cragg & Elizabeth Wozniak, for the respondent

Reasons for judgment:

[1] This is an appeal by Rima Majaess from the corollary relief judgment granted by Justice Douglas C. Campbell on June 11, 2003, following a settlement conference and subsequent correspondence and court appearances.

[2] At the conclusion of the hearing of this appeal we indicated the appeal was dismissed with reasons to follow. These are the reasons.

FACTS

[3] The settlement conference was held on August 19, 2002, with Justice Campbell as the settlement judge. Both parties were present and represented by counsel; Ms. Majaess by Mr. King and Mr. Majaess by Mr. Cragg. At the commencement of the settlement conference it was agreed that the conference would not be recorded so that negotiations would be confidential and private. The settlement judge indicated however that if a settlement was reached, the terms of the settlement could be read into the record. The record indicates that at the end of the settlement conference the settlement judge read into the record the terms of settlement he thought had been agreed upon. Both counsel confirmed their agreement with these terms.

[4] Mr. King was to draft the required divorce order and corollary relief judgment on the terms agreed to. After several weeks, when these orders were not forwarded to Mr. Cragg or the court, Mr. Cragg sent numerous letters to the settlement judge requesting that orders reflecting the settlement be granted. By letter dated September 24, 2002, Mr. King indicated no orders were signed on behalf of Ms. Majaess because: ". . . the settlement conference went too quickly for her to adequately digest and consider." and because she wanted to obtain an appraisal of a property allocated to Mr. Majaess.

[5] With no appraisal from Ms. Majaess and with Mr. Cragg pressing for orders, the settlement judge wrote to counsel on November 1, 2002 as follows:

> Further to Mr. Cragg's recent correspondence, I take the view that, provided the draft consent order is consistent with the settlement as read on the record, I have the authority to sign the order on those terms and it would then be up to Mrs.

> Majaess to attempt to set aside the order if she feels there would be any legal grounds to do so, which would be rare.
>
> I do not however feel that I am in a position to draft the order. I would recommend that Mr. Cragg prepare the order (or indeed utilize the draft already prepared by Mr. King) and forward it to me. If I find that it is consistent with the recorded settlement, I will issue it.

[6] Mr. Cragg sent orders to the settlement judge by letter dated November 14, 2002.

[7] On December 20, 2002, an unrecorded telephone conference was held between the settlement judge and counsel. The court file indicates the following transpired during that telephone conference:

> Telephone conference was held this date with counsel. Mr. King's position on behalf of the wife is that a property in East Chester may be worth considerably more money, because it has been subdivided into three lots, than he was relying on at the settlement conference. Mr. Cragg offered to attend with the appraiser at the property to make sure all of the tenants permit entry of the appraiser. I indicated that if the appraisal was exactly the same as the figure used at the settlement conference, I would conclude that there was a binding settlement and I would issue the order. I commented that if the appraisal was higher than the figure used at settlement conference, my decision would depend upon the extent of that difference. With a minor difference I might still issue the order. A major difference would require renegotiation. I confirmed that the balance of the settlement would remain valid if the parties can renegotiate the impact of the valuation of the subject property.

[8] The trial was set for March 17, 2003. By letter dated March 12, 2003, Mr. King indicated he was no longer representing Ms. Majaess, sought an adjournment of the trial to give her time to engage new counsel and indicated the appraisal that Ms. Majaess was to have provided by March 6, 2003 was not completed because Ms. Majaess could not get access to the property.

[9] On March 17, 2003, Ms. Majaess appeared before Justice Deborah K. Smith unrepresented and Mr. Majaess appeared represented by Mr. Cragg. Mr. Cragg provided an appraisal of the property dated January 24, 2003, valuing it at

$174,000. He indicated he had sent a copy of the appraisal to Mr. King previously. Ms. Majaess indicated she wanted her own appraisal done and Justice Smith set a date by which this was to be done. A date was also set for the parties to appear before the settlement judge to have him determine whether a settlement had been reached on August 19, 2002.

[10] The parties appeared before the settlement judge on May 20, 2003, both represented by counsel, Ms. Majaess by Mr. Leahey and Mr. Majaess by Mr. Cragg. Mr. Leahey indicated his client did not feel a settlement had been reached on August 19, 2002 because she believed the property she wanted appraised had a value greater than that used at the settlement conference, the matrimonial home allocated to her had suffered flood damage March 31, 2003, seven months after the settlement conference, and Mr. Majaess had an interest in land in Lebanon that was not dealt with at the settlement conference. Mr. Leahey indicated he had a draft appraisal at his office valuing the property at $225,000. It was suggested that the value of this property used at the settlement conference was $190,000. After the recorded discussion the settlement judge met with each party off the record and the court notes indicate the following conclusion:

> Review hearing. Matter adjourned to June 1, 2003 at 1:30 p.m. at the Law Courts. Court directs that Mr. Leahey have the appraiser present at that hearing. By the close of the workday May 21, 2003 Mr. Leahey shall forward a copy of that appraisal to Mr. Cragg and the Court. Court will address at that time whether that appraisal frustrates the contract. If the Court finds that that is so, then it is the Court's view that that re-opens the entire contract, if Mr. Majaess wishes to do so. Court will also conclude on the adjourned date whether flood damage is purely the responsibility of Ms. Majaess alone. . . .

[11] The parties represented by counsel again appeared before the settlement judge on June 11, 2003 and the settlement judge granted the orders reflecting the terms read into the record on August 19, 2002. The settlement judge stated as follows before granting the orders:

> . . . I had stayed involved after the settlement was over because there was, at first appeared to be difficulty over the form of the order. But then I learned that it's not so much the form of the order but rather that Mrs. Majaess believes that she, that the agreement should be set aside for the two reasons: One, that she believes the subdivided land in Chester is worth more money than she was asked to work with

at settlement. And secondly, that there's land in Lebanon that should have been part of the settlement.

Now, so really we're not arguing over the form of the order, we're arguing over whether or not that settlement ought to be set aside because of some, either lack of disclosure or whatever.

In my view the, there was no question about the fact that a settlement was recorded on the record at the end of the last settlement conference and that I, as the settlement judge, was directed, not directed, that I was authorized to issue an order which would reflect the terms of that settlement, which terms were consented to.

Now, I see that as being no different from a situation where an order is already issued and one party then raises a question of lack of disclosure or misrepresentation or fraud or anything like that. Orders can be set aside if that remedy is appropriate. So it seems to me that I was both, I was authorized and invited to issue that order last time, at the time of the settlement conference and that I should do so.

So I've decided that I am going to grant the orders as drafted in Mr. Cragg's recent correspondence, that would be both the divorce judgement and the corollary relief judgement. Noting that any order of the court can be, that there can be a remedy for any order of the court that meets the legal tests involved.

Now, because I was the settlement conference judge, I believe, and because this is really just a continuation of that settlement conference to finalize the housekeeping associated with it, I won't hesitate to offer a couple of gratuitous remarks.

Firstly, I have recognized that there is some disagreement on various facts. If this matter now, later comes back to court for a question of whether or not the order should be set aside by me, whatever legal principle might apply, it should come to a judge other than me because I was the settlement judge and it should come by way of formal application. What I noticed about the situation is that it seems to me there was significant compromise on the part of both sides, it was give and take at the settlement conference. And I think that the Chester property that is the subject of the dispute was valued at something of a compromise on the part of Mr. Majaess. In other words, he may have already agreed to a price that should be attractive to Mrs. Majaess, whether or not the subdivision adds to that is doubtful in my view.

> As for the Lebanon properties, they were, they are clearly inherited properties, section 41(a) of our Matrimonial Property Act defines inheritances as being an exception to the definition of matrimonial assets, except to the extent to which that asset is used in the family, and for the benefit of the family and children. It seems to me, therefore, to be a very, it seems to me there, prima facie would be a matrimonial asset, sorry, a non-matrimonial asset and therefore not subject to prima facie division.

ISSUE

[12] The issue before us is whether the settlement judge erred in granting the corollary relief judgment reflecting the settlement terms read into the record following the settlement conference on August 19, 2002, in the light of the subsequent issues raised on behalf of Ms. Majaess.

ANALYSIS

[13] Ms. Majaess does not deny that a settlement was reached on August 19, 2002. She argues the settlement judge erred in granting the corollary relief judgment giving effect to the recorded settlement after she raised the issues of the valuation of the property, the flood of the matrimonial home seven months after the settlement and Mr. Majaess's interest in the Lebanon property. She argues the settlement judge should have disqualified himself from any further involvement in the case until such time as another judge determined if the settlement had been "frustrated" by the issues she raised. Ms. Majaess did not raise with the settlement judge the issue of his recusing himself from further involvement with the matter.

[14] Ms. Majaess has not satisfied me that the settlement judge erred. What the settlement judge read into the record following the settlement conference on August 19, 2002, was the parties' agreement. The record indicates the agreement was reached after "significant compromise" by both parties. Both parties were represented throughout by very experienced counsel, available for private consultation concerning the issues raised during the settlement conference. The parties authorized and anticipated that the settlement judge would grant an order giving effect to their agreement once it was reached. The fact the settlement judge read it into the record suggests he was prepared, on the basis of the information before him, to grant the order on the terms the parties agreed to.

[15] As stated in **Zimmerman v. Zimmerman**, (1992) 104 Sask. R. 150 (Q.B.) at ¶ 12:

> . . . The resulting agreement should be recognized and enforced by our courts. Otherwise the primary purpose of the pre-trial conference is lost. A cost-saving and time-saving procedure would then be reduced to a meaningless step in the litigation process. I adopt the reasoning of Estey, J., in **Revelstoke Companies Ltd. v. Moose Jaw et al.,** (1984) 1 W.W.R. 52; 28 Sask. R. 115, at page 60 W.W.R. at page 60:
>
> > "Settlements of actions have been encouraged in our courts for a great many years and it appears to me that the courts should be hesitant in upsetting or rectifying minutes of settlement unless of course there be something in the nature of fraud, incapacity of a party, or the minutes of settlement are too vague to enforce or are obviously incomplete."

[16] There is no suggestion of fraud. Ms. Majaess was, prior to the settlement conference, familiar with the property she later decided she wanted to have appraised. The record suggests there was compromise as to the value of this property at the settlement conference, with the settlement based on $190,000, a value between the appraisals subsequently obtained by the parties. The flood was an act of God. Ms. Majaess knew of Mr. Majaess's interest in the Lebanon property long before the settlement conference.

[17] There is no suggestion either party was incapacitated. The terms agreed to are clear and complete.

[18] As Mr. Cragg set out in his factum, **Chapman v. Chapman**, (1996) 155 N.S.R. (2d) 19 also endorses the importance of the court enforcing settlements. Although **Chapman** was dealing with an agreement reached by negotiation between solicitors rather than a pre-trial conference before a judge, the principles stated in ¶ 12 are relevant to this appeal:

> Almost every single Justice of this court has, at one time, rendered a decision on the desirability of upholding agreements. For example **Durocher v. Durocher** (1991), 106 N.S.R. (2d) 215; 288 A.P.R. 215 (T.D.), where, after reviewing a number of authorities, I stated at p. 225:

> "Settlement is the only way to go in family law. The failure to reach settlement or the encouragement of parties to ignore settlements reached generally results in an enormous cost to the parties and this case is no exception.
>
> The cost is not to be measured in dollars and assets alone, although they are of great importance. The emotional cost can have a serious adverse impact on the individuals and their relationships to others particularly their children.
>
> The costs to be paid warrants every reasonable effort to reach settlement and the courts must continue to take the approach of encouraging settlements and not lightly setting aside settlements that have been reached."

[19] While a settlement was reached by the parties on August 19, 2002 and is usually to be enforced by the granting of an order, until the corollary relief judgment was granted, the settlement judge continued to have discretion as to whether he would grant it or not. The record indicates he exercised his discretion judicially. He considered the matters subsequently raised by Ms. Majaess and their effect on the settlement reached before granting the corollary relief judgment.

[20] He indicated that if the value of the property differed substantially from that used at the settlement conference he would reconsider the granting of the order. He gave Ms. Majaess time to provide an appraisal of the property to him, which her counsel apparently did by letter dated May 27, 2002. In the meantime, Mr. Majaess also had an appraisal done valuing the property over $15,000 less than the value apparently used by the parties at the settlement conference. He noted that the flood at the matrimonial home occurred months after the division had been agreed to. He noted the exception in the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 for inherited property with respect to the Lebanon property.

[21] Considering all of this he exercised his discretion to grant the corollary relief judgment reflecting the August 19, 2002 agreement. This court will give deference to his exercise of discretion since he was privy to the settlement negotiations which, for the most part, we do not even have a transcript of.

[22] Accordingly, I would dismiss the appeal and order Ms. Majaess to pay costs of $1,000 including disbursements to Mr. Majaess.

Hamilton, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.