Date: 20020619
Docket: 1205-001689

IN THE SUPREME COURT OF NOVA SCOTIA

[Cite as: Works v. Works, 2002 NSSC 159]

Between:

Orrin Irvin Lewis Works

Petitioner

-and-

Rhonda Elaine Works

Respondent

D E C I S I O N

Heard Before: The Honourable Justice D.L. MacLellan

Place Heard: Pictou, Nova Scotia

Date(s) Heard: May 23, 2002

Decision Date: June 19, 2002 **Written Release:** June 19, 2002

Counsel: Hector J. MacIsaac, Esq., for the petitioner
Ian A. (Sandy) MacKay, Q.C., for the respondent

MACLELLAN, J.

[1] This is an application by the petitioner Orrin Irvin Lewis Works to have this divorce set for trial. The respondent Rhonda Elaine Works opposes the application on the basis that the parties had settled all issues and had agreed to proceed uncontested based on Minutes of Settlement.

FACTS

[2] This action was originally set for trial on June 16th, 2000 in Pictou. On that date Counsel for both parties indicated to the Court that all matters had been settled and that an uncontested divorce would proceed based on Minutes of Settlement.

[3] No such uncontested divorce came forward and in April 2001 counsel for the petitioner indicated that he wanted a new trial date scheduled because the parties were no longer in agreement on the issue of spousal support.

[4] Counsel for the respondent then communicated with the Court and advised that he wished the Court to decide if the parties should be bound by the oral agreement entered into between the parties prior to the scheduled trial date. It was agreed by counsel that the issue would be dealt with in Chambers based on submissions from both parties and that the Court would either re-schedule a trial hearing date or bind the parties to the agreement.

[5] It was agreed by both parties that in the days prior to June 16th, 2000 counsel for the petitioner, Mr. MacIsaac, concluded an agreement with Mr. MacKay, counsel for the respondent, whereby the petitioner would deed his interest in the former matrimonial home to the respondent on the understanding that it would satisfy any claim she had for spousal support. The parties had been married for 15 years and the petitioner's interest in the home would be valued at approximately $15,000.00

[6] There is generally no dispute about the terms of the proposed settlement. However, Mr. MacIsaac now advises the Court, and his client confirms by affidavit, that the arrangement was made on the understanding that the petitioner would be entitled to claim the property settlement as a lump sum payment of spousal support which he would be able to claim as a tax deduction. Counsel for the petitioner confirms that he so advised the petitioner and when he later discovered his error, the petitioner was not prepared to sign the Minutes of Settlement.

[7] It was also agreed that the respondent's counsel was not aware of the advice being given to the petitioner about the tax consequences of the proposed settlement and that counsel did not discuss that issue during the negotiations.

ARGUMENT

[8] The petitioner argues that he should not be forced to abide by an agreement entered into based on mistaken advice from his lawyer and that therefore there was no consensus ad idem and the agreement should not be enforced.

[9] The respondent submits that the parties had reached agreement with legal counsel and should be bound by that agreement and that the petitioner should look to his lawyer for compensation if he was given bad legal advice.

FINDINGS

[10] I conclude that here it is clear that the petitioner came to an agreement to convey his interest in the matrimonial home to the respondent on the understanding that he would be able to claim the amount of $15,000.00 as spousal support and get some tax relief. I also conclude that the respondent was not aware of this advice being given to the petitioner and did nothing to induce the petitioner to believe that he would be entitled to such tax relief.

THE LAW

[11] The law on unilateral mistake is somewhat confused. There are many cases dealing with the issue. Recently, the Ontario Court of Appeal dealt with the issue in ***Bogue v. Bogue*** [1999] 1 R.F.L. 5th(213). There the Court dismissed an appeal from a trial decision which forced the husband to abide by the terms of an oral agreement entered into with his wife. Both parties were represented by legal counsel and had, based on a settlement conference with a Judge, reached agreement on all issues. During the settlement discussions the husband's lawyer had not raised as an issue the form of release he would be asking his wife to sign. Following the oral agreement, his lawyer drafted Minutes of Settlement indicating an unusual form of release which contained a penalty clause indicating that if the wife applied to vary the agreement she would have to forthwith re-pay the lump sum of $400,000.00 which she had received in the settlement. The wife refused to sign such an agreement and brought an action to force the husband to sign the Minutes of Settlement without the penalty clause.

[12] At trial the Court found that there was an agreement reached between the parties and the clause, subsequently inserted in the formal document, was not

discussed prior to the settlement and while the parties would normally expect to have a standard release clause in such an agreement this was an unusual clause and the wife should not be bound by it.

[13] At the appeal level, Rosenberg, J.A. writing for the Court discussed the issue of oral agreements: He said: [page 4]

> It is an over simplification to say that there cannot be an agreement to agree. The true legal position was explained by Robins, J.A. in Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at pp.103-04:
>
> > As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
> >
> > However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself...

And at p. 105:

> If no agreement in respect to essential terms has been reached or the terms have not been agreed to with reasonable certainty, it can only be concluded that such terms were to be agreed upon at a later date and until that time there would be no completed agreement.

[14] He also dealt with the issue of mistake. He said: [page 5]

I find it difficult to characterize what occurred here as a case of mutual mistake as that term is understood: se Fridman, The Law of Contract in Canada, 3rd ed. (1994), a pp. 258-60. In any event, the test to be applied is set out in Smith v. Hughes (1871), L.R. 6 Q.B. 597 at p. 607, [1861-73] All E.R. Rep. 632:

> If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

Thus as Houlden J.A. held for this court in Walton v. Landstock Investments Ltd. (1976), 72 D.L.R. (3d) 195 at p. 198, "Mutual assent is not required for the formation of a valid contract, only a manifestation of mutual assent . . . Whether or not there is a manifestation of mutual assent is to be determined from the over acts of the parties." There was abundant evidence from which the motions judge could find that this test had been met. In fact, there is really no evidence to the contrary. Neither the husband nor his lawyer claimed that there was no agreement at the end of the discussions on December 10. The evidence at its highest shows that after the fact, the husband and his lawyer realized that there had been no discussion about releases and, in particular, a repayment clause. This then was, at most, a case of unilateral mistake.

In cases of unilateral mistake, if the unmistaken party is ignorant of the other's mistake the contract is valid in law: Fridman, supra at p. 261. Assuming a mistake was made in this case, in that the husband agreed to the settlement without realizing that it did not contain a repayment clause, there was no evidence that the wife or her lawyer were aware of the mistake. Nevertheless, the husband may be entitled to an equitable remedy if the wife ought to have known of his mistake: Stepps Investments Ltd. v. Security Capital Corp. (1976), 14 O.R. (2d) 259 at p. 272, 73 D.L.R. (3d) 351 at p. 364 (H.C.J.). On this aspect of the case, the motions judge made the following finding:

> Having observed the repayment clause in a draft proposal six months earlier should the wife and her counsel have expected that this was the release clause to be included? Was there anything in the husband's words or conduct to cause the wife to think that the repayment clause was still part of his earlier position? A majority of family law counsel would expect a release clause to state that neither party would seek spousal support from the other in the future and not the wording of this repayment clause which is potentially punitive. If the parties intended a release clause this unusual, I find they would have discussed it in detail before reaching a "settlement".

I take this as a finding that neither the wife nor her counsel ought to have known that the husband was still insisting on a repayment clause. In my view, this finding was open on the evidence and I would not interfere with it.

[15] In ***J.C. v. A.M.M.*** [2002] O.J. 391, the Ontario Superior Court of Justice dealt with a similar issue. There, the Court considered the situation where after a settlement agreement had been signed the parties discovered that a mistake had been made in the calculation of the husband's assets in that a reduction was not made for the income tax consequences resulting when he cashed in his R.R.S.P.s. The amount involved was close to $10,000.00. The wife also wished changes in the agreement because subsequent to the signing of the agreement she discovered a Canada Savings Bond in the husband's name which had not been factored into the property settlement.

[16] Aston, J. concisely summarized the issue of unilateral mistake and the Ontario Court of Appeal decision in Bogue. He said:

> The second stage in the Bogue analysis is to examine the question of mistake. Does the failure to address the husband's claim for a notional tax deduction on the R.R.S.P.'s constitute a mistake, such that the parties were not ad idem? Does it deprive him of the consideration for which he bargained? Does equity assist him in the form of rescission or rectification? Or as a defence to the remedy of specific performance? A fundamental mistake, one that negates the real intention of the parties or deprives a party of the basic consideration for which he bargained, may lead to the conclusion the parties are not ad idem and, hence, that there is no contract. Lesser mistakes (including unilateral mistakes which the other party knew or ought to have known about) may not render the purported agreement void or a nullity but may, nevertheless, attract equitable relief if it is inequitable or unconscionable for a party to be permitted to take advantage of the mistake. Even if the mistake is not induced by one party, equity may come to the rescue of the mistaken party in the form of rescission or rectification, or in allowing an equitable defence to an equitable remedy such as specific performance.

> In the case at hand, the intention of the parties was to implement an equitable property settlement. In my view, the husband's "mistake" is not so fundamental that it negates that intention. It was not so material that it deprives Mr. C. of the consideration for which he bargained. Although Mr. C. would probably be entitled to a notional deduction for future income tax on the R.R.S.P.'s, the $9,640 he claims would probably represent his best case scenario. The amount he actually would have been able to negotiate is uncertain.

[17] I have also considered a number of other cases dealing with unilateral mistake. They include:

(a) Akenhead v. Akenhead (2000), 6 R.F.L. (5th) 1;
(b) Racz v. Rudolph (1998), 41 R.F.L. (4th) 264 (Yukon C.A.);
(c) Wilde v. Wilde (2000), 9 R.F.L. (5th) 442 (Ont. Sup. Ct.);
(d) Bailey v. Plaxton (2001), 15 R.F.L. (5th) (Ont. S.C.J.);
(e) Goodger v. Goodger (1997) 33 R.F.L. (4th) 397;

[18] I conclude that generally the law is that where one party only is mistaken about something significant to a contract, the Court will exercise its discretion to not enforce the agreement only if it is satisfied that it would be unfair, unjust or unconscionable to do so considering all the circumstances, including whether the other party was aware of the mistake or should have been aware of it and also whether it was central to the agreement itself.

[19] In this case, I conclude that it would not be unfair to enforce the agreement entered into between the parties. I find that the issue of tax deductibility for a lump sum payment of spousal support was not discussed between counsel and that the respondent's counsel would have no reason to believe that the agreement was based on that assumption. I understand that the amount involved in this dispute is simply the tax saving going to the petitioner if he was able to claim a deduction. Based on a $15,000.00 claim it would appear that he may be entitled to something in the range of $6,000.00.

[20] I believe the settlement entered into between the parties is fair considering the length of the marriage. I am not prepared to exercise my discretion to relieve the petitioner of his obligations under the oral agreement. It is clear to me that the petitioner understood exactly what he was doing in that he was trading his property rights against his wife's claim for spousal support.

[21] Counsel for the petitioner has, following the hearing of this matter in written submissions, raised the issue of the Statute of Frauds. He submits that Section 7(d) of that Statute would require that the agreement to convey his client's interest in the matrimonial home be in writing. Section 7 provides:

Action Upon Agreement:

7 No action shall be brought:

a) whereby to charge an executor or administrator upon any special promise to answer damages out of his own estate;

b) whereby to charge any person upon any special promise to answer for the debt, default or miscarriage of another person;

c) whereby to charge any person upon any agreement made upon consideration of marriage;

d) upon any contract or sale of land or any interest therein; or

e) upon any agreement that is not to be performed within the space of one year from the making thereof,

unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person there unto by him lawfully authorized.

[22] I reject this argument. Here the oral agreement was that there would be written Minutes of Settlement covering the agreements arrived at by the parties. I have found that the petitioner is bound by that oral agreement and therefore must sign the written Minutes of Settlement thereby satisfying the requirement under the Statute of Frauds.

[23] I would order that the Minutes of Settlement as agreed to by the parties be signed by both parties and subject to any right of appeal that the matter proceed by way of an uncontested divorce.

[24] The respondent is awarded costs of this application and if the parties cannot agree on the amount, I will hear them on that issue.

J.