GAVIN -v- GAVIN

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 249 of 1989
Hearing: 1 August 1990
Judgment: 7 August 1990

J. Corrin for the Plaintiff
A. Nori for the Defendant

WARD CJ: The plaintiff claims specific performance of a written agreement. She is the wife of the defendant and, following a breakdown in their relationship, they entered into a Separation Agreement on 23rd September 1988 which provided, inter alia, that the defendant should pay the wife half his nett monthly salary for the maintenance both of her and their adopted daughter, Rebecca. It is agreed such payments amounted to $1500 per month.

Payments were made at that rate until the end of July 1989 when the defendant reduced the payments to $750 per month. The plaintiff sues for the balance for the months of August to November and specific performance of the agreement.

The defendant claims that clause one of the agreement is contrary to public policy on the grounds that it is sexually immoral and is therefore void.In the alternative he pleads that the wife has breached clause 4 by cohabiting with another man thus allowing reduction of the payments. He counterclaims on the same grounds and prays for an order that the agreement be terminated.

The agreement entered into by the parties, as far as is relevant, is as follows:

"WHEREAS unhappy differences have arisen between the parties hereto by reason whereof they have agreed to live separately and apart from each other and to enter into arrangements after appearing.

Now this Agreement Witnesseth:

1. The said Mary Winefride Gavin may at all times hereafter live separate and apart from her husband as if she were unmarried, may live at such place or places and be engaged in such activities as she may think fit.

2. *As far as is possible, the wife and daughter Rebecca shall not move out from their present accommodation until such time as the wife has managed to organise suitable alternative accommodation.*

3. *The parties shall not molest, annoy or anyway interfere with each other with respect to anything whatsoever.*

4. *The husband shall pay to the wife and daughter Rebecca by way of maintenance half his net monthly salary, which shall be forwarded by the husband to the wife monthly promptly in arrears to her last known place of residence or according to her last written instructions. If however, Mary Winefride Gavin cohabits, receives support from another man or re-marries in the future, then Robin Michael Richardson Gavin's maintenance payments shall be reduced accordingly.*

7. *The said Mary Winefride Gavin shall have custody of their daughter Rebecca, but the husband shall have reasonable access to Rebecca for periods agreed between the parties."*

Prior to the agreement, the defendant had moved into the servant's quarters leaving the house to his wife but, after the agreement was made, the plaintiff left the matrimonial home in December 1988 and moved to accommodation provided by her employer in White River.

It is admitted that, during the time she lived at White River, she started a sexual relationship with another man. Up to 1st April 1990 he visited her at her house and sometimes stayed the night with her. On 1st April 1990 she moved into a house with him and has continued to live with him to the present time.

Whilst she was living at White River, the defendant wrote to her stating that -

"I am advised that since I have strong evidence that for considerable periods you have been in breach of Clause 4 of the Separation Agreement, I should reduce the monthly maintenance. I am advised to provide support for Rebecca in the sum of $750 until the sum is decided by the Court which will happen as part of the Divorce proceedings which you state you intend to institute.

My cheque number 248204 in the sum of $750 is enclosed for the benefit of Rebecca."

There is no dispute about these facts and Mr Nori, for the defendant, bases his case on two points.

The first is that clause one of the agreement is illegal because it encourages adultery and as such is contrary to public policy. He urges on the authority of *Goodinson v. Goodinson* (1954) 2 All E.R. 255 that such a contract falls within the category of illegal contracts that are contra bonos mores. If that is so, the agreement as a whole must be tainted and cannot be saved by the deletion of the phrase in clause one that allows the plaintiff to live separate and apart from her husband "as if she were unmarried".

I accept that contracts that are sexually immoral would be contrary to public policy but I do not feel this is such an agreement. Had it been an agreement that the wife would commit adultery under the agreement and was intended to bring that about, it could fall into that category but that is not the meaning of clause one as I see it. Allowing her to live as if she were unmarried may mean she will have a sexual relationship with a man other than her husband but it is a clause that refers to a far wider concept. I do not accept that such a phrase necessarily anticipates such an event and I reject the defence claim.

However, the law has also long recognised a form of illegal contract that does not convey the same sense of illegality as does a contract that is sexually immoral. A contract that tends to prejudice the status or sanctity of marriage falls into such a category and may be void as a result. Separation agreements were once held to fall into such a category but it has been the law for over a century now that such agreements based on an immediate separation that occurs or one that has occurred are valid and enforceable.

Clearly public policy in Solomon Islands is to respect and support the sanctity of marriage. A separation agreement, breaking as it does the consortium of marriage, conflicts with that public policy but the common law has taken a realistic view in cases such as this where the marriage has, in fact, broken down.

Consortium in marriage embraces such things as love and affection between the husband and wife. It allows companionship, sexual intercourse, comfort and protection. Once a marriage has broken down and the parties separate, those ingredients are lost.

In dealing with the situation after decree nisi, Lord Atkin in *Fender v. Mildmay* (1937) 3 All E.R. 402 @ 410 described the position in this way:

> *"It is said that the status of marriage exists until decree absolute. Of course it does. It is said that, if either of the spouses has immoral intercourse with a third party, he or she commits adultery. Certainly. That follows from the continued existence of the status of marriage. But let us consider how far the normal obligations and conditions of marriage continue in ordinary circumstances, after decree nisi. They have disappeared. There is no consortium, and the parties are living apart. They owe no duties each to the other to perform any kind of matrimonial obligation. .....the petitioning spouse has said: "I have done with you.""*

Later Lord Wright at 429 said -

> *"If a separation has actually occurred or become inevitable, the law allows the matter to be dealt with according to realities, and not according to a fiction"*

Turning to Mr Nori's point, he accepts separation agreements as such are lawful but argues the licence, as it were, to live as if she were unmarried in this agreement takes the matter further and attacks the sanctity of marriage. I am afraid I cannot agree this takes the matter any further than any agreement to separate.

The agreement was to make provision for a marriage breakdown that had already occurred. As Lord Atkin said, the consortium was broken, they owed no duty to perform any kind of matrimonial obligation. Such a situation means they are already to all intents and purposes living as if they were unmarried. The law accepts agreements to separate in cases where there is already a breakdown and I feel the phrase Mr Nori attacks adds no more than that situation already embraces.

I find against the defendant on the grounds of illegality of clause one of the agreement as a whole.

The second point of defence is that the plaintiff had breached the terms of clause 4 in that she was cohabiting with another man.

Having heard of her relationship, the defendant wrote to her about it and, having received no response, reduced the payments. Mr Nori urges that the provision in such circumstances that the "maintenance payments shall be reduced accordingly" then allowed him unilaterally to decide a reduction and pay at that rate. He felt that half the agreed payments were for the maintenance of the wife and half for the child and, therefore, stopped the former. Mr Nori cites no authority for such a power and I am not surprised. The provision clearly allows a variation in the payments but that cannot allow one party arbitrarily and unilaterally to shed his obligations.

Even if the defendant had the right to alter such payments, it is clear to me, on the evidence, that there was no cohabitation by the wife and the other man until 1st April 1990 when they moved in together. Prior to that there was nothing to suggest cohabitation involving, as it does, the concept of living under a single roof as one family and so the last sentence of clause 4 could not have any effect until the date in April when that occurred.

The counterclaim fails.

The facts of the plaintiff's case are admitted except for the matter of cohabitation and I find in the plaintiff's favour that there was no cohabitation before April 1st.

I give judgment for the plaintiff.

The defendant is to pay the shortfall in the payments made between August and November 1990 which totals $3000 and interest at 10% per annum.

I order specific performance of the agreement to pay maintenance at the rate of half the defendant's net salary per month.

Costs to the plaintiff.

(F.G.R. Ward)
CHIEF JUSTICE