

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

DP No 6/2004

IN THE MATTER

of the Matrimonial Property Act 1976 (as applied in the Cook Islands by the Matrimonial Property Act 1991-92)

BETWEEN

PHILOMENA TUARA of New Zealand, Airline Employee

Applicant

AND

DAVID ROSE of Rarotonga, Manager

Respondent

Hearing date: 13 November 2009

Counsel: ✓ Mr Little for the Applicant
✓ Mrs Browne for the Respondent

Decision: 13 November 2009 (Oral)

JUDGMENT OF GRICE J

- 1. COSTS AWARD FOLLOWING DECISION OF NICHOLSON J IN OCTOBER 2005;**
 - 2. IMPLEMENTATION OF DIVISION OF MATRIMONIAL PROPERTY;**
 - 3. COSTS.**
-

1. Ms Tuara and Mr Rose have been separated since April 1998. The division of their matrimonial property has been awaiting final resolution since Ms Tuara filed proceedings in June 2004.
2. Since then Orders have been made for division of property in a Decision of Nicholson J dated 19 October 2006. The resolution of the actual implementation was then the subject of consent Orders. These were subsequently set aside after another hearing in this Court.
3. The matrimonial property is agreed by Mr Rose and Ms Tuara as being:
 - The Aroko property and household chattels at an agreed value of \$376,500.00;

BSA motorcycle	\$ 2,000.00;
Toyota ute	\$ 6,000.00.
4. Mr Rose wants to keep the BSA motorcycle and the Toyota ute. Ms Tuara wants to buy the Aroko property and family chattels. The Aroko property is her family land. Both agree on these arrangements.
5. The valuations are also agreed between them.
6. Therefore the parties are in agreement that:
 - i. The Aroko house be transferred to Ms Tuara as her separate property;
 - ii. The family chattels presently in the house be transferred to Ms Tuara as her separate property;
 - iii. The BSA motorcycle be transferred to Mr Rose as his separate property;
 - iv. The Toyota ute be transferred to Mr Rose as his separate property;
 - v. Ms Tuara pay to Mr Rose a sum which takes into account the following adjustments:

A half share of the Aroko property and chattels	\$188,250.00
<u>Less</u> i. An agreed adjustment for a half share of the net rental from the Aroko property	
ii. Half share of BSA motorcycle	\$ 1,000.00;
iii. Half share Toyota ute	\$ 3,000.00;
iv. Plus allowance to Mr Rose for costs on the Nicholson J Judgment	to be fixed
<u>Plus</u> v. Costs on Setting Aside Judgment of Grice J	\$ 2,000.00.

Costs Award on Decision of Nicholson J 16 October 2006

7. There was no award of costs following the Decision of Nicholson J in 2006. I have heard counsel this morning on that issue. Mr Rose was successful in his claim for a half share of the matrimonial property. Ms Tuara had been resisting this claim and seeking a greater than equal share in the property. The solicitor/client costs incurred by Mr Rose at the time amounted to \$3,937.50.

8. Ms Tuara also asked that a further issue be taken into account in awarding costs. She had, through her lawyer, consulted Mr George (Mr Rose's then lawyer) on fixing a date for the hearing of the matrimonial property matter for the Court hearing dates of 5 April to 22 April 2005. There was no reply. A fixture was applied for and was set down on 22 April. Ms Tuara booked airfares from New Zealand for herself and the children to return for that date. She could not get a babysitter in New Zealand for the children so had to bring them back with her. She also lost a week's wages of \$650.00. The airfares all up were \$350.00. After she had made those arrangements Mr George advised (the day after the fixture notice) that Mr Rose would not be available for the hearing. Ms Tuara seeks the \$350.00 airfares which were a discounted amount given she was Air New Zealand staff together with her lost wages.

9. Mrs Browne agrees that there should be an allowance for Ms Tuara's lost airfare and wages. Otherwise I see no reason to depart from the common starting point of two thirds of the actual fees for an award of costs. Both counsel agreed that this is the accepted "rule of thumb".

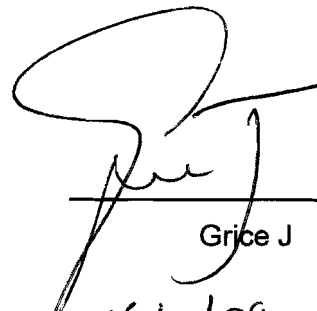
10. Accordingly I award costs for the Nicholson J hearing of 16 October 2006 at 66% of \$3,937.50 or a total of \$2,598.75 less airfares of \$350.00 and wages of \$650.00, a total of \$1,000 to be credited. Therefore I award costs in favour of Mr Rose of \$1,598.75 plus disbursements as fixed by the registrar.

Rental

11. While the parties have now agreed on the rental figures. I must address this given the lack of regard Mr Rose showed for the Orders of the Chief Justice made in November 2005 directing the payment of rental into Court.

12. During the period of separation Mr Rose had the effective control of the Aroko property. He rented out the property periods. He did not consult Ms Tuara. He has paid the outgoings on the property out of the rental proceeds.
13. The Order for payment into Court of the rental income was made by Williams CJ. Payments into Court were erratic. Mr Rose also deducted expenses without the leave of the Court and retained funds also without the leave of the Court. Mr Rose has looked after the Aroko property since 2006 at least. He made a number of claims which have been accepted, but a number which have not been accepted. Ms Tuara felt that she did not have any control over the property. It became clear that she didn't even agree to the present tenancy which expired earlier this month. The parties have now come to an agreement about the compensation that should go to Ms Tuara as a result of that adjustment for rentals.
14. Mr Rose ignored the Court Order. He made no attempt to seek leave of the Court to vary the Order or to pay expenses from the rental. Part of the problem may be a communication problem with his previous counsel, and it is only that, that allows any excuse to Mr Rose. But for the agreement between counsel as to costs I would have made an award of costs in favour of Ms Tuara over Mr Rose's failure to account for the rental. However it has been taken into account in the settlement and I propose to do nothing more than note the Court's concern at disregard for the Court Order.
15. Accordingly I make the following Orders:
 1.
 - i. The Aoko house will be transferred to Ms Tuara as her separate property;
 - ii. The family chattels presently in the house will be transferred to Ms Tuara as her separate property;
 - iii. The BSA motorbike will be transferred to Mr Rose as his separate property;
 - iv. The Toyota ute will be transferred to Mr Rose as his separate property.
 2. Ms Tuara will pay to Mr Rose an agreed total sum of \$172,792.00 on such terms and conditions as is agreed to between the parties in the Deed of Settlement made between them and includes an adjustment for the rental credit to Ms Tuara as well as for the items of property Mr Rose takes as his separate property.

3. Ms Tuara will pay to Mr Rose \$1,598.75 in costs awarded on the Nicholson J judgment together with disbursements as fixed by the Registrar
4. Leave is reserved for any further Orders in relation to the implementation of these Orders on seven days notice.
5. The money paid into Court may be paid out to the party named in a Direction signed by both the Applicant and the Respondent to be filed in the Court.
6. The bank account in Mr Rose's name is his separate property and he shall have full control over that account in terms of the Deed of Settlement.
7. Counsel have agreed that no Orders are sought on costs



Grice J
15/11/09

Date