Domestic Contracts

by Cheryl Goldhart

In *Dubin v. Dubin*[1], a case that deals with lack of financial disclosure upon the signing of a cohabitation agreement, Mesbur J. explores the difference between cohabitation agreements and marriage contracts on one hand and separation agreements on the other.

Although there is no indication that the legislators intended different rules to apply to determine the validity of different types of domestic contracts under the *Family Law Act*, Mesbur J. drew a clear line between separation agreements and other domestic contracts. **She held that marriage contracts and cohabitation agreements were contracts of the utmost good faith but separation agreements were not[2].**

At paragraph 35 Mesbur J. states "Unlike separation agreements, marriage contracts are contracts *uberrimae fidei*, contracts requiring the utmost fidelity and good faith between the parties. A greater dealing in good faith is owed in marriage contracts. Because of the special relationship between the parties as intended spouses, they are not entirely at arms length and thus owe one another duties of good faith and fair dealing." **The implication is that separation agreements are akin to traditional contracts, and they require no more fair dealing than any standard business contract.**

In ***Pruss v. Pruss***[3] a wife failed to have a separation agreement set aside based on her husband's lack of disclosure of the value of his pension, as well as for unconscionability. It was held that Mr. Pruss did not fail to disclose any assets when the agreement was executed. He disclosed that he had a pension plan, but not the exact value of the plan. There was no misrepresentation on the part of Mr. Pruss, nor was he held to have concealed the existence of the asset. **This**

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1 2003 CarswellOnt 534 [hereinafter "*Dubin*"].

2 *Supra* at page 2, annotation par. 1.

3 2000 CarsewellOnt 3548 [hereinafter "*Pruss*"].

decision leads to the conclusion that only a complete lack of disclosure of the existence of an asset or assets will fulfill the requirements of 56(4)(a).

Further, in *Pruss*, the court adopted the following factor in determining whether a separation agreement should be set aside based on lack of disclosure: **whether the non-disclosure was a material inducement to the aggrieved party entering into the agreement; in other words, how important the non-disclosed information would have been to the negotiations.**

In ***Trick v. Trick,***[4] Seppi J held that although the husband had not provided formal financial disclosure regarding the value of his assets at the time the separation agreement was signed, the wife was aware of his assets. **Seppi J held that the wife had not proven that the husband had not disclosed significant assets. This seemed to shift the onus to the wife to prove that what was not disclosed was significant.**

In *Reinhardt v. Reinhardt*[5] it was held that under s.56 (4)(a) a party has a positive duty toward financial disclosure. Although the party has a positive duty to disclose, the court still has discretion to decide whether to set aside the contract for lack of disclosure. Some facts relevant to the decision are whether the party who did not make full disclosure was asked to do so, whether that party refused to do so, whether that party concealed or misrepresented financial facts, whether the other party had full financial information in any event and whether the other party would have signed the contract even if the disclosure had occurred.

<u>Unconscionability and financial disclosure in Separation Agreements</u>

In *Pruss* the court determined that the parties had equal bargaining power. Mrs. Pruss was held to have read the contract and not to have signed it under duress, despite her testimony to the contrary. Granger J. held that Mrs. Pruss was

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4 2003 CarswellOnt 1103 [hereinafter "*Trick*"].

5 2004 CarswellOnt 3275 [hereinafter "*Reinhardt*"].

satisfied with the terms and implications of the separation agreement, despite the fact that she did not get independent legal advice. Granger J. agreed with and quoted the following:

"In *Farquar v. Farquar*[6] Zuber J. A. held "I start with the proposition that the parties should settle their own affairs if possible. I think that they are more likely to accept their own solution to their problem than one imposed upon them. I think it is obvious that the settlement of matrimonial disputes can only be encouraged if the parties can [except] that the terms of such settlement will be binding and will be recognized by the courts. In my respectful view, as a general rule in the determination of what is fit and just, courts should enforce that agreement arrived at between the parties".

Granger J. then stated that the above comments do not apply to unconscionable agreements.

The proper test for unconscionability is referred to by Granger J. as the words of Schroeder J. A. in *Mundinger v. Mundinger*: "[t]he equitable rule is that if the donor is in a situation in which he is not a free agent and is not equal to protecting himself, a Court of equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so because of their position".

Granger J. then states that the question becomes, **whether there was an inequality between the parties, a preying of one party upon the other, which combined with improvidence, casts the onus upon one party to act with scrupulous care for the welfare and interests of the other?**

In *Rosen v. Rosen*[7], the wife brought proceedings to set aside a separation agreement, alleging that she had not known the agreement would bar her equalization rights, that she had not received independent legal advice, that the

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7 1994 CarswellOnt 390 [hereinafter "*Rosen*"].

husband owed her a fiduciary duty, and that the agreement was unconscionable. She lost on appeal.

At the court of first instance the agreement was found to be unconscionable based on the following: the husband was an experienced business person whose occupation involved negotiating contracts. The wife, on the other hand, left all financial matters to the husband who admitted in his testimony that she would sign whatever documents he put before her. The parties were therefore considered to have been of unequal bargaining power, and the husband not to have satisfied the onus of being scrupulously considerate of the wife's interest.

On appeal, the court held otherwise. At paragraph 13 Grange J. A. states "it is not the ability of one party to make a better bargain that counts. Seldom are contracting parties equal. It is the taking advantage of that ability to prey upon the other party that produces the unconscionability". In Rosen the wife had business experience. There was no evidence of abuse or intimidation, or of learning or other disability, of anxiety or stress or a nervous breakdown or indulgence in drugs or alcohol. The wife consulted with lawyers but ultimately decided not to use a lawyer because of the costs. When the final agreement was drawn the husband told her to see a lawyer but she did not. Grange J. A. held that she was "foolish and penny wise, but knowledgeable and acting with free will. The husband did nothing to deny her proper advice.