

*Van Jole v Cole* [2000] NTSC 18

PARTIES: DENNIS VAN JOLE  
and  
ROCHELLE COLE

TITLE OF COURT: SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NOS 9920715 (AS60/1999)

DELIVERED: 4 April 2000

HEARING DATES: 28 March 2000

JUDGMENT OF: RILEY J

**REPRESENTATION:**

*Counsel:*

Appellant: J. Waters QC  
Respondent: A. Young

*Solicitors:*

Appellant: Caroline Scicluna & Associates  
Respondent: Northern Territory Legal Aid Commission

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ril0006

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT ALICE SPRINGS

*Van Jole v Cole* [2000] NTSC 18  
No 9920715 (AS 60/1999)

BETWEEN:

**DENNIS VAN JOLE**  
Appellant

AND:

**ROCHELLE COLE**  
Respondent

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 4 April 2000)

- [1] The appellant and respondent lived together in a de facto relationship between September 1986 and November 1993. There are two children of that relationship.
- [2] Upon cessation of the relationship the parties entered into a separation agreement which agreement was said to be made pursuant to s 44 of *The De Facto Relationships Act (NT)* (“the Act”). The separation agreement was dated 7 February 1994 and recorded arrangements that provided for the finalisation of the financial relationship between the parties.

- [3] The respondent subsequently commenced proceedings under the Act against the appellant seeking an order for the adjustment of property interests as between the parties. She also sought a declaration under s 46 of the Act that the separation agreement be set aside or varied on the basis that enforcement of the agreement would lead to serious injustice between the parties.
- [4] The matter came before the Local Court at Alice Springs and on 20 August 1999 that Court found that the respondent received “far less than she should have under an equitable distribution” of the relevant property and that the imbalance was so great that “there would be a serious injustice unless the separation agreement was set aside”. An order was made setting aside the agreement and, further, directing that the appellant pay to the respondent an additional sum of \$36,000.
- [5] The appellant appeals from that decision and seeks an order that the decision to set aside the separation agreement itself be set aside and the separation agreement be reinstated.

### ***The De Facto Relationships Act***

- [6] The *De Facto Relationships Act (NT)* makes provision with respect to the property rights of de facto partners and allows for the creation of cohabitation agreements and separation agreements.

- [7] The Act permits a person to apply to a court for a declaration as to the existence of a de facto relationship and, in proceedings between de facto partners with respect to existing title or rights in respect of property, the Court may declare the title rights that a de facto partner has in respect of such property.
- [8] Further, under Division 3 of Part 2 of the Act a de facto partner may apply to a court for an order adjusting the interests with respect to the property of the de facto partners or either of them. Subject to certain preconditions being satisfied the Court may make such order adjusting the interests of the parties in that property as the Court considers “just and equitable”, having regard to the criteria set out in s 18 of the Act.
- [9] There is imposed upon the Court a duty, so far as is practicable, to make orders that will finally determine the financial relationships between the de facto partners and avoid further proceedings between them (s 36).
- [10] The Act also permits a man and a woman who are not married to each other to enter into a separation agreement (s 44) and provides that such an agreement is subject to and enforceable in accordance with the law of contract. Where a separation agreement has been entered into the Court may still make an order for the adjustment of interests in property under Division 3

of Part 2 the Act, or for maintenance under Division 5 of Part 2 the Act. However, by virtue of s 45 it shall not make an order which is in any respect inconsistent with the terms of the separation agreement except insofar as this may be permitted by operation of s 46 and s 47 of the Act.

[11] Section 46 of the Act is in the following terms:

“(1) On an application by a de facto partner for an order under Division 3 or 5 of Part 2, the court may, in the circumstances specified in this section, vary or set aside all or any of the provisions of a cohabitation agreement or separation agreement made between that de facto partner and the other, being an agreement which is in writing and is signed by that other.

(2) The court may exercise its powers under subsection (1) in respect of a cohabitation agreement or separation agreement only if, in its opinion -

(a) enforcement (whether on the application before the court or on any other application for any remedy or relief under any other Act or law) of the agreement would lead to serious injustice between the parties; or

(b) circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out.

(3) A court may exercise its powers under subsection (1) notwithstanding any provision to the contrary in a cohabitation agreement or separation agreement.”

[12] Section 47 of the Act is as follows:

“On an application by a de facto partner for an order under Division 3 or 5 of Part 2, a court is not required to

give effect to the terms of a cohabitation agreement or separation agreement entered into by that partner if the court is of the opinion -

- (a) that the de facto partners have, by their words or conduct, revoked the agreement or consented to its revocation; or
- (b) that the agreement has otherwise ceased to have effect.”

[13] Section 46 provides a limited opportunity for a separation agreement to be varied or set aside. The intention of the legislation is to allow de facto partners to enter an agreement with respect to financial matters in contemplation of terminating a de facto relationship or after such a relationship has been terminated. However the provisions of s 46 are designed to provide safeguards against agreements which are unfair or unjust. The circumstances prevailing at the time of entry into such an agreement may be such that a party to it requires some form of protection from what have been termed “exploitive agreements”. In the Northern Territory Act the method adopted to provide this protection is found in the capacity for the Court to intervene and vary or set aside the separation agreement where, in the opinion of the Court, enforcement of the agreement would lead to “serious injustice” between the parties or where circumstances have arisen since the time when the agreement was

made which make it impracticable for its provisions or any of them to be carried out.

[14] In the present case the respondent contended before the Court below that the enforcement of the agreement would lead to serious injustice. The question of enforcement arose because the respondent sought an order for adjustment of the property interests of the parties and the appellant sought to rely upon the contents of the separation agreement as providing a defence to that claim. The focus of the parties in the hearing below was therefore upon the issue whether that enforcement would lead to serious injustice between the parties.

[15] It is clear that the Court will not interfere with a separation agreement simply because it believes a different form of agreement was more appropriate. Further it will not interfere where there is simple injustice. Rather, it must be satisfied that a failure to intervene would result in “serious injustice” between the parties. What it is meant by that expression is not defined in the Act and has not been explored in any helpful way in any case that either counsel or myself have been able to locate. The expression is not a term of art and does not have any technical legal sense. It is therefore to be understood in the sense in which it is commonly used in the English language.

[16] It is necessary for a court to look at the whole of the surrounding circumstances of such an agreement in order to determine whether, in accordance with the ordinary English usage of the words, a serious injustice arises. An injustice is the opposite of justice and includes the concepts of a wrong or unfairness. The word serious in this context suggests weighty, grave or considerable. I agree with the submission made by Mr Young, who appeared on behalf of the respondent, that in the circumstances of this matter the expression “serious injustice” should be given its ordinary meaning of a considerable wrong or unfairness.

### **The Reasons for Decision**

[17] In her reasons for decision the learned Magistrate set out a history of the relationship. She found that at the time the agreement was entered into the principal concern of the respondent was to ensure that the children of the relationship remained with her. The appellant indicated to the respondent that some form of agreement would have to be entered into in order to finalise the financial relationship between them and he told her that if she signed the house and the business to him he would not seek custody of the children. The respondent said she

was prepared to sign any document so long as she could have custody of the children.

[18] The appellant had his solicitor prepare the separation agreement which was subsequently signed by both parties. The respondent signed the document without obtaining legal advice and without proper consideration of the terms included within it. There was some discussion between the parties regarding the value placed upon several of the items referred to in the agreement. However the respondent maintained that she really did not know what was the effect of the agreement.

[19] Her Worship noted that the case presented on behalf of the respondent was that a serious injustice would occur if the separation agreement entered into between the parties was not set aside. She said that the case for the respondent was “that the serious injustice in this case, is that the defendant [appellant] received a substantially greater proportion of the assets under the deed, than was received by the plaintiff [respondent]. ... On the face of the document, it is submitted that there has been substantial imbalance as between the parties, and that there has therefore been a serious injustice.”

[20] The financial and non-financial contributions made directly and indirectly by each of the partners were then analysed. The

learned Magistrate declined to accept the evidence of the appellant in relation to some matters and indicated that where there was conflict between the parties she accepted the evidence of the respondent over that of the appellant.

[21] Her Worship accepted that the respondent signed the agreement “on the basis that the [appellant] would not contest her having custody of the two children of the relationship” and found that the appellant “deliberately took advantage of the [respondent’s] concerns”. She described the conduct of the appellant as “unconscionable” and expressed the view that the respondent “acted under duress in the sense that she felt under substantial pressure from the [appellant] to sign the document, in order to secure the custody of the children”. She concluded that the document was signed when the respondent was at a considerable disadvantage in the bargaining process.

[22] Having reviewed the contributions made by each of the parties to the relationship her Worship found that they contributed equally to the relationship.

[23] She then analysed the division of property and concluded that the assets of the relationship were valued at \$128,000. She found that under the agreement the respondent received cash and property to the value of \$28,000, and that the respondent

therefore had received “far less than she should have under an equitable distribution.” The learned Magistrate then went on to say:

“The imbalance is so great, that I consider, given what I have already said about the circumstances of the separation agreement being entered into, that there would be a serious injustice unless the separation agreement was set aside. Accordingly pursuant to s 46, I am satisfied a serious injustice would occur if the separation agreement entered into by the parties were not set aside, and pursuant to s 47 of the *De Facto Relationship Act*, I order the agreement be set aside.”

[24] In that passage her Worship referred to setting aside the agreement pursuant to s 47 of the *De Facto Relationship Act*. It is clear that her Worship intended to refer to s 46 of the Act. Section 47 does not permit a separation agreement to be “set aside” and neither does it refer to the prospect that a serious injustice may arise. Section 47 of the Act has no application to this matter and, as Mr Waters QC for the appellant observed, there is no pronouncement, reasoning or determination comprised in the judgment that would entitle the respondent to any relief under s 47.

[25] Her Worship then went on to order that the appellant pay the respondent an additional amount of \$36,000.

[26] It was the submission of the appellant that the observations of her Worship made in the paragraph set out above demonstrated

that she took into account irrelevant considerations in the decision making process. It was conceded that she properly considered the issue concerning the inequality of the distribution as being, in itself, a basis for a finding of serious injustice. However it was submitted that she improperly took into account as well the circumstances under which the separation agreement was entered into. The reference by her Worship to “the circumstances of the separation agreement being entered into” was said to relate back to her earlier observation that the appellant had acted in an unconscionable manner, that the respondent had acted under duress in that “she felt under substantial pressure from [the appellant] to sign the agreement in order to secure the custody of the children” and that the appellant took advantage of the circumstances of the respondent. I accept that to be so. It was submitted that those matters were irrelevant considerations and that her Worship wrongly applied the principles of duress and unconscionability to the discrete issue with which she was required to deal under s 46. It was submitted she therefore fell into error.

[27] I do not regard the circumstances leading to the entry into a separation agreement as necessarily being irrelevant to whether or not enforcement of that agreement would lead to serious injustice between the parties. Misconduct in that pre-agreement

process may lead to a circumstance which would otherwise be characterised as a mere injustice between the parties as being characterised as a serious injustice between the parties.

[28] Although the findings may have been more felicitously expressed a reading of the whole of the reasons for decision makes it clear that her Worship considered that the respondent's case was, as she expressed it, "that the defendant received a substantially greater proportion of the assets under the deed, than was received by the plaintiff" and that this gave rise to a serious injustice between the parties in this case. She dealt with that issue by considering how it came to be that the respondent entered into the separation agreement and then by determining that the imbalance was so great that it would give rise to a serious injustice unless the separation agreement was set aside. In my view it was not an error in that process to take into account the circumstances in which the separation agreement was entered into. Those circumstances explain why it was that the respondent entered into an agreement in which the imbalance was so great.

[29] I do not accept that her Worship found that the "serious injustice" arose from the circumstances surrounding the execution of the separation agreement and then went on to consider an adjustment under s 18 of the Act. In my view she

determined that the imbalance was sufficient by itself to give rise to the prospect of serious injustice between the parties. The circumstances of the execution of the agreement explained how the respondent came to enter into such an agreement and, possibly, added to the existing serious injustice.

[30] It was not submitted that her Worship incorrectly characterised the imbalance. Given the findings of her Worship regarding the contributions of the parties and her findings that the respondent was to receive \$28,000 out of a total pool of \$128,000, her conclusion was compelling.

[31] Having determined that the agreement should be set aside under s 46, and having set it aside, her Worship made an order for the adjustment of the interests in the property under Division 3 of Part 2 of the Act by directing that the appellant pay the respondent an additional sum of \$36,000. In all the circumstances that was an appropriate course to adopt and an appropriate order to make.

[32] I dismiss the appeal.

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