C.A. 24/70

IN THE COURT OF APPEAL OF NEW ZEALAND

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BETWEEN PETER JOHN PLAISTOWE
of Auckland, Chief Officer
Appellant

A N D JACQUELINE GRAEME WILKIE PLAISTOWE
of 19 Herald Road Glenfield, Auckland, married woman
Respondent

Coram: North P.
Turner J.
Haslam J.

Counsel: Douglas for Appellant
Robinson for Respondent

Hearing and Judgment: 12 March 1971

ORAL JUDGMENT OF NORTH P.

This is an appeal from the judgment of the late Hardie-Boys J. on an application heard by him in April last, determining a wife's rights to permanent maintenance under the Matrimonial Proceedings Act 1963.

For the reasons given by him, the learned Judge awarded the wife a capital sum of $500 together with a weekly sum of $10. The appellant now appeals against the order for the payment of the weekly sum but is content to accept the judgment of the Court below as to the award of the capital sum of $500.

The facts are very fully set out in the judgment under appeal and I do not think any good purpose would be served by my attempting to repeat them in any detail. But

I think it is necessary for me to say this. The parties were mature people when they married on 12 September 1964. She was 30 years of age and he was 29. There were no children of the marriage and both continued in their respective employments. Two years later they entered into an agreement for separation. It is obvious, that quite sensibly, they came to the conclusion that they were unsuited one to the other, and the proper course to adopt was to enter into an agreement for separation, the terms of which plainly show that they had in the mind that in due course they would bring an end to the marriage by a decree of divorce in accordance with the law of this country. The husband and the wife as the agreement for separation shows, recognised that each was well able to earn an income sufficient for their present needs. Thus a term of the agreement - which is a little unusual - provided that during the joint lives of himself and his wife so long as they shall live separate from each other he would pay to the wife on the Friday of each week the weekly sum of one shilling (1/-) for the maintenance of the wife. Contemporaneously with that agreement for separation, the parties entered into a tenancy agreement in respect of the matrimonial home. This agreement provided that for a period of 3 years - linked I would imagine with the statutory provisions relating to a divorce based on a mutual agreement for separation - she would pay a rent of one shilling (1/-) per week (if demanded), for the premises. The wife undertook to keep the premises in good order and condition and to pay the annual rates and other outgoings, but not the interest on the mortgage. The agreement provided that the tenancy was to come to an end when the three year period expired and it further provided that she would then "do all things necessary or

expedient to be done on her part to have the telephone connection transferred to the landlord or his nominee." This provision obviously showed that the tenancy was intended to be but a temporary measure pending the parties regaining their freedom. I am of opinion that the one shilling (1/-) per week maintenance was introduced because that had become a habit in the legal profession under the provisions of the earlier Act. But as we said in Hare v. Hare (not yet reported), that precautionary measure is no longer necessary.

Nevertheless, now that a decree of divorce has been pronounced the wife is fully entitled to bring the present application though she was bound to recognise that her rights would be decided according to the view the Court took as to her present needs for maintenance (s.40). The principles upon which the Court should act are set out in s.43, namely:-

(a) The ability of the wife to support herself;

(b) The means and responsibilities of the husband or the extent of the husband's estate;

(c) If an order is sought for a capital sum, regard is to be had to any contribution she has made to the assets of her husband, whether in the form of financial assistance or otherwise;

(d) The conduct of the parties;

(e) The length of time that has elapsed since the making of the decree; and

(f) Any other circumstances that the Court thinks relevant.

In my opinion, on the facts of the present case and particularly when regard is had to the fact that the wife is earning $53 per week and the husband only $44 per

week, and there are no children, there was no need for the learned Judge in the Court below to make any provision for a weekly payment in her favour at the present time, particularly when he granted her a capital sum of $500 which no doubt was intended to be a contribution for the assistance she had given in connection with the matrimonial home. This sum, I imagine, was intended to recognise that she had rendered her husband financial assistance when the house was purchased.

Furthermore, on the calculations we made with the assistance of counsel, it is reasonably clear that each party possesses capital assets of very nearly the same amount. In my opinion, the learned Judge acted on a wrong principle in considering what weekly payment, if any, the wife was entitled to. He seems to have been of opinion that it was his responsibility to restore the wife to the position she was in at the time when the separation agreement was signed. At that point of time she had a house in respect of which she was not required to pay anything more than a nominal rent. Now of course, she will have to find her own accommodation. But as I have said, she was given the free occupation of the house for a limited period only as part of the arrangement for separation. This being the view I take, in my opinion the appeal should be allowed to this extent, namely that the order made in the Court below should be amended by deleting the provision for the payment of $10 per week for permanent maintenance. In all other respects the order will stand.

The Court being unanimously of that opinion, there will be an order accordingly. There will be no order as to costs.

Solicitors for Appellant: Messrs Kensington, Haynes and White, Auckland

Solicitors for Respondent: Messrs Robinson and Morgan-Coakle, Auckland

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. NO. 24/70

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BETWEEN PETER JOHN PLAISTOWE of Auckland, Chief Officer,

Appellant

A N D JACQUELINE GRAEME WILKIE PLAISTOWE of 19 Herald Road Glenfield, Auckland, married woman.

Respondent

Coram: North P.
Turner J.
Haslam J.

Hearing: March 12th 1971

Counsel: Douglas for Appellant
Robinson for Respondent

ORAL JUDGMENT OF TURNER J.

I agree entirely with the judgment which the President has just delivered, and add a word or two only because we are differing from the learned Judge in the Court below. This is a case of parties of reasonably mature years, who separated after a marriage of short duration, without children. Their separation agreement provided for nominal maintenance only; and it also provided that the wife for a period of three years should be able to occupy the matrimonial home without payment. Mr Robinson, for the wife, attempted to build upon that foundation the proposition the parties had recognised the wife's need for a free home; but for myself I am willing to go no further than to say that these parties, behaving decently one to the other, thought that in the interim period which should follow on the agreement for separation

the wife might appropriately be allowed at least that degree of accommodation. The question now is simply: having regard to the matters specified in the section, what does justice require the Court to order for the wife's periodical maintenance?

I will not attempt to do again what the President has done, that is to review the figures. I agree with him that those figures show that, as matters at present stand, the wife does not require any order for periodical maintenance; and particularly is this so in view of the capital provision which the learned Judge made, which has not been the subject of any appeal in this case. As this Court pointed out in Hare v. Hare the Act of 1963 is in terms which do not preclude the wife from making further application later, should circumstances warrant that application, notwithstanding that the present one has failed. Such an application, if it is ever made, will of course have to be decided in the light of the facts as they then stand; but subject to that observation the period of the delay is no longer as important as it was under the earlier statute, and certainly does not operate to preclude an application being made.

For the reasons which I express I am in agreement with the President that this appeal should be allowed to the extent that he has indicated.

Solicitors for Appellant: Kensington, Haynes & White, AUCKLAND

Solicitors for Respondent: Robinson & Morgan-Coakle, AUCKLAND

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No. C.A. 24/70

BETWEEN PETER JOHN PLAISTOWE of Auckland, Chief Officer

Appellant

A N D: JACQUELINE GRAEME WILKIE PLAISTOWE of 19 Herald Road, Glenfield, Auckland, married woman

Respondent

Coram: North P.
Turner J.
Haslam J.

Hearing: 12th March, 1971.

Counsel: Douglas for Appellant
Robinson for Respondent

Judgment: 12th March, 1971.

ORAL JUDGMENT OF HASLAM J.

I also agree with the pronouncement of the other Members of the Court. Although the learned Judge was careful to limit the permanent maintenance in making it run as from the date that the wife vacated the former matrimonial home, this is a case of a wife of a marriage now dissolved, that marriage having been of brief duration and there having been no children. She has at all material times been able to support herself fully. The capital sum of $500.00 awarded to her in satisfaction of her claims under s.41 of the Matrimonial Proceedings Act 1963 is not challenged. Mr. Robinson endeavoured to develop an attractive argument that this feature of the learned Judge's award, which is now the subject matter on appeal, was given to the wife in recognition of the fact that she would require some assistance to provide her with a new home on vacating the matrimonial property. In my opinion, the $500.00 was awarded to her in full satisfaction

as the learned Judge said, and perhaps in recognition of the fact that as sensible parties they had come to an arrangement that did not deprive her of a home for the first few years after the separation. That capital sum can also be used towards setting up a new home. There is no relevant consideration as I see it under s.43 of the Act entitling her to the $10.00 per week, nor to any permanent maintenance on the present facts.

I agree with the order suggested by the President.

Solicitors for Appellant: Kensington, Haynes & White, Auckland.

Solicitors for Respondent: Robinson & Morgan-Coakle, Auckland.