NZLR(1)

No Special Consideration

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

M.558/71

IN THE MATTER of the Magistrates' Courts Act 1947, and

IN THE MATTER of an Appeal from an order made by H.Y.Gilliland S.M. in the Magistrate's Court at Auckland

BETWEEN [redacted] ERICKSON of 44a Athens Road, Onehunga, Shop Assistant

APPELLANT

AND [redacted] ERICKSON of Flat 2, Victoria Avenue, Remuera, Auckland, femme sole

RESPONDENT

Hearing: March 3, 1972

Counsel: Gould for Appellant
Towle for Respondent

Judgment: March 13, 1972.

JUDGMENT OF McMULLIN, J.

This is an appeal from a judgment of H.Y. Gilliland, Esquire, Stipendiary Magistrate, given in the Magistrate's Court at Auckland in which he made an order, on terms, extending the time for the making of an application by respondent as applicant in the Court below for the determination of her interest in the former matrimonial home. Although a decree absolute in divorce has long since been made, I will, for convenience, refer to the parties as "the husband" and "the wife". The wife on the 2nd September, 1971, applied for leave to bring proceedings seeking an order under the Matrimonial Property Act 1963 as to her interest in a former matrimonial home. This application for leave was opposed by the husband but the learned Magistrate granted leave to the wife. From that order the husband now appeals.

The parties were married on 7th September, 1957, and lived together until 2nd May, 1964, when the wife left

the husband and went to live with one, Coates, for whom she had formed an affection. The husband instituted proceedings for divorce on the grounds of the wife's adultery with Coates and on 1st October, 1964, obtained a decree nisi which was made absolute on 1st March, 1965. At the time that the decree absolute was made an order was made giving the wife custody of the two childre of the marriage with access reserved to the husband.

It was contemplated by the wife that she would marry Coates when the decree absolute had been made but in February 1965 Coates suddenly left her and went to England. She was then pregnant to him. When the baby was born she adopted it out. About the time of the making of the decree absolute the wife was advised by her solicitor that she might be entitled to make a claim under the provisions of the Matrimonial Property Act but, as she was then going through a period of emotional distress, she was unable to face up to further legal proceedings or to meet the expense of them and, because she accepted that the situation in which she found herself was to a large extent of her own making, she made no claim about the time that the decree absolute was made for any share in the matrimonial home.

At that time the Matrimonial Property Act imposed no time limit in which applications under the Act had to be brought, but on 12th December, 1968, the Matrimonial Property Amendment Act 1968 was passed. This Act came into force on 1st January, 1969. Section 5 of the amendment enacted a new provision to the principal Act, s.5A, which provided that such applications should be brought within twelve months after the sealing of the decree absolute. There was, however, a saving clause enacted, the relevant part of which was in these terms:

> "(3) Notwithstanding anything in subsection (2) of this section, a Judge or the Magistrate's Court, as the case may be, may extend the time for making an application, after hearing the applicant and such other persons having an interest in the property that would be affected by the order as the Judge or Magistrate thinks necessary; and this power shall extend to cases where the time for applying has already expired, including cases where it expired before the commencement of this section."

It is this saving clause that the wife invokes on the application the subject of this appeal. In support of the application the wife swore an affidavit in which she said that during her married life she had made a contribution to the matrimonial home of an economic and domestic kind. If accepted, her affidavit would establish that:-

(1) She gave $200 from her savings before marriage to the husband for use as a deposit on the section on which the matrimonial home was subsequently built. Title to the section was taken in the husband's name.

(2) She worked in a clerical position for almost three years of her married life with the husband. She used her earnings within this period to purchase for the matrimonial home furnishings costing approximately $775 in value, and she used some of her earnings for the running and maintenance of the home and for the purchase of clothing for the children and the provision of nursery furniture.

(3) She paid a deposit and made hire purchase payments on a car purchased for their joint use and when this was sold the proceeds of $280 were used to purchase items for the home.

(4) The section on which the home was built had been owned by the wife's grandfather and was sold to the husband at a price which was less than its real value. Thus there was a partial gift to the husband from the wife's relatives.

(5) The wife was a frugal housekeeper.

(6) She had little money of her own when she left the matrimonial home and she took very little of the household equipment.

(7) Since the day that she left the husband has remained in occupation of the matrimonial home. At that date there was an equity in the home of approximately $4,000.

In his affidavit in opposition to the motion the husband said nothing concerning the wife's allegations as to the extent of her contributions. His affidavit was directe more to the question of delay, but he asked that, if leave were

granted to bring the application, he might file a further affidavit. It would be quite wrong, therefore, to make any final finding against the husband concerning the wife's allegations as to the extent of her contributions and, if leave were granted, the extent of her contributions would have to be established in what might be an area of serious dispute.

But the significance of the wife's claims to the present application is that the wife has put forward the extent of the contribution which she claims to have made as being a matter which is relevant to the exercise of the Court's discretion on her application for leave to proceed out of time. For the purposes of determining this appeal I propose to accept what she says as to the extent of her contributions as prima facie correct, but I emphasise thatno final determination of this matter can be made on the present appeal.

The husband in his affidavit makes these points:-

(1) That he has at all times acknowledged his responsibility to the wife and children and has paid maintenance for the children.

(2) That on the 24th September, 1970, he remarried. His new wife comes from England and he paid her air fare to come to this country and still owes $150 in respect of it.

(3) That he has no substantial assets other than the house property and that, had he known there was any risk of not being able to share the former matrimonial home with his new wife, he would not have contemplated remarrying five years after the divorce. He also says that he believes that his new wife would not have married him if there was any risk that he could not provide for her a home in which to live.

On the hearing of the application the learned Magistrate, having considered counsel's submissions, gave an oral judgment. Each counsel has made available to me a transcript of his note of what the Magistrate said in the course of that

judgment. There is some variation but no real dispute between the two transcripts and the points made by the learned Magistrate were as follows:

(a) He had an unfettered discretion which he had to apply to each caseon its own merits.

(b) The Court in deciding the application had to do substantial justice and to have regard to what was just and right.

(c) The wife's affidavit made out a prima facie case of substantial contribution; all matters in issue between the parties would still be within the knowledge of the parties, and, if there had been any subsequent improvements to the property or other factors of significance, account could be taken of these in considering the substantive application.

(d) There was no substantial proof of prejudice against the husband.

(e) The wife's reasons for the delay in bringing the application were somewhat unusual.

I was informed by both counsel that so far as their knowledge extends no formal judgment has yet been delivered on applications for leave to bring proceedings under the Matrimonial Property Act out of time. Both counsel were agreed that the proper view to be taken by an appellate court in reviewing the exercise of a discretion is now stated in Re O. (1971) 2 All E.R.744. In that case Davies, L.J. discussed some earlier dicta to the effect that the discretion of a court of first instance should not be lightly interfered with. It is to be remembered, however, that the cases referred to by him as being cases in which these dicta were enunciated were cases concerning the custody of infants in which a court of first instance would enjoy the advantage of seeing parents and children. In that kind of case there would understandably be a reluctance to interfere with the discretionof the court of first instance. In my view, putting aside the peculiar context of cases concerning the custody of infants in which a court

of first instance enjoys an advantage of seeing and hearing, the true principle governing the review of the discretion of a court of first instance in a matter such as the present appeal was set out by Denning, M.R. in Ward v. James (1966) Q.B.273, 293A; (1965) 1 All E.R. 563, 570 (C) where he said:

> ".....in what circumstances will the Court of Appeal interfere with the discretion of the Judge? At one time it was said that it would interfere only if he had gone wrong in principle; but since Evans v. Bartlam that idea has been exploded. The true proposition was stated by Lord Wright in Charles Osenton & Co. v. Johnston. This court can, and will, interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him."

Davies, L.J. subscribed to this same approach in Re O. (supra) when he said at p.748 (g):

> "In my considered opinion the law now is that, if an appellate court is satisfied that the decision of the court below is wrong, it is its duty to say so and to act accordingly. This applies whether the appeal is an interlocutory or a final appeal, whether it is an appeal from Justices to a Chancery Judge or from Justices to a Divisional Court of the Divorce Division. Every court has a duty to do its best to arrive at a proper and just decision. And if an appellate court is satisfied that the decision of the court below is improper, unjust or wrong, then the decision must be set aside."

In support of his submission that the learn Magistrate wrongly exercised his discretion in the wife's favour, Mr. Gould has submitted:

(1) That he failed to give sufficient weight to the evidence disclosed in the affidavit of the husband.

(2) That he failed to find that the affidavit of the wife failed to disclose any sufficient reason for the delay in making application to the Court.

(3) That he failed to place the onus of proof on the wife to the extent required by the Legislature.

In developing these submissions Mr. Gould has referred to the decisions under s.9 of the Family Protection Act 1955 as furnishing a guide to the way in which the discretion of the Court ought to be exercised on applications under s.5A of the Matrimonial Property Amendment Act. I accept that there is a marked similarity in the wording of the two sections and that each of the statutes is concerned with the division of property. But the analogy cannot be taken too far, as Mr. Gould accepts, because in cases under the Family Protection Act the Court is concerned with an enquiry into breach of moral duty, whereas in cases under the Matrimonial Property Act the immorality of an errant wife is not a bar to the making of a claim. In some of the cases under the Family Protection Act leave to bring proceedings out of time has been refused on the basis that the explanation given for the delay is not sufficiently compelling or because the delay has been altogether too long. Thus, in Newman v. Newman (1927) N.Z.L.R.418, the length of time was obviously a factor which would have influenced the Court to refuse the application for extension had it not been able to deal with the matter on the merits. Again, in Sheehan v. Public Trustee (1930) N.Z.L.R.1 the length of delay weighed heavily with the Court in refusing leave. In In re Strang, deceased (1962) N.Z.L.R.472 the length of delay and the inadequacy of explanation for it were factors which weighed with the Court in refusing the application. But sight must not be lost, nor was it lost in the cases to which I have just referred, of the fact that in all cases the enquiry made must be as to whether it is just to grant the application, the length of the delay and the adequacy of the explanation for it being only two of the yardsticks, albeit important ones, in the light of which the more fundamental question is to be answered. Another and equally important matter bearing on the determination of whether it is just that leave should be given is the merits of the applicant's case. Thus, in Newman v. Newman (supra) it is apparent that the merits of the applicant's case were so poor that the substantive application for further provis-

ion could be declined without a decision being required on the application for leave to proceed out of time. In Sheehan v. Public Trustee (supra), Kennedy, J. at p.9 said that at the highest the plaintiff's affidavit left the moral duty under the circumstances in doubt, and In re Strang (supra) at p.477 Haslam, J. said that plaintiff's claim was so unsatisfying that she had not convinced him that there was prima facie any moral claim on her part on the bounty of the deceased.

That the real question to be decided by the Court on an application of this kind is whether it is just to grant leave is clear from the judgment of McCarthy, J. in In re McGregor, McGregor & or. v. Beattie (1960) N.Z.L.R.220 at p.231 where the learned Judge said:-

> "Included in the matters to be considered in a case such as this, where there is a considerable period of time between the death of the testator and the lodging of the claim, with all the uncertainties and difficulties of proof which such a lapse of time necessarily involves, is the question of the strength of the plaintiff's alleged moral right to provision as it existed at the date of testator's death. The more manifest it is that there was a breach of duty, the more inclined the court will be to grant leave even though the delay be lengthy".

In the present case the delay in bringing the applicationis a long one but the operative delay has only been since the 1st January, 1969, when the time limit was imposed by the Legislature. Up to that date the wife could have brought her application as of right. She says that she was unaware of the legislative change and she may well have been under the impression that she was free to bring the application at any time

I am of the opinion that the justice of this application and the subsequent appeal lies between considera tion of the positions of the husband and wife if the application is granted or refused. If the application is granted the husband will suffer a set back to his expectations in that, having entered into a marriage upon which he says that neitherhe nor his second wife would have embarked if he had entertained any doubt

that the ownership of the matrimonial home was at risk, he will face the possibility that the equity in that home, which he thought to be entirely his own, may be diminished by a declaratio that his first wife is entitled to an interest in it. But, if the present application is refused, then the respondent wife will be obliged to forfeit what may well be established to be quite considerable contributions which have been in part the means of enabling the husband to acquire the equity in the home which he at present holds in his name. While there are considerations operating each way, I am of the opinion on a considerationof the case that it wouldbe just to give leave to the wife to bring her application. To refuse it would be to allow the husband to retain the benefit of his present enjoyment of the whole property which only the limitation period at present preserves for him.

It follows from what I have said that I do not think that the learned Magistrate in granting leave can be said to have reached a decision which was improper, unjust or wrong, and accordingly one that should be set aside.

I note that the substantive application which the wife proposes to file seeks an order that she be entitled to a share or interest in the former matrimonial home. She does not specifically ask for any order that it be sold, but the Magistrate before whom this substantive application is heard may, if the wife obtains on the merits a declaration that she is entitled to an interest in the home, think it appropriate that the home should not be sold, in the near future at any rate, to enable her to be paid out any share to which she might be held to be entitled.

The appeal is dismissed. There will be an order that the husband pay to the wife for costs the sum of $40.

Solicitors: Butler, White & Hanna, Auckland, for Appellant
Towle & Cooper, Auckland,for Respondent