

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.581/75

BETWEEN: [REDACTED] QUIRKE

of [REDACTED]

Plaintiff

AND: [REDACTED] QUIRKE

of [REDACTED]

Defendant

Hearing: 10 February 1976

Counsel: W. Olphert for Plaintiff
M.J. Quirke for Defendant

Judgment: 10 February 1976

ORAL JUDGMENT OF WILD C.J.

This is an action by a wife against her husband seeking specific performance of an agreement that the husband would execute a registrable transfer of his estate and interest in the matrimonial home or, alternatively, an order under the Matrimonial Property Act 1963 to the same effect.

The parties were married on [REDACTED] 1966 and had three children now aged 8, 7 and 3. In 1969 they purchased in their joint names a home at [REDACTED], [REDACTED]. It is not a joint family home. The price was \$8,600. There was a State Advances mortgage for \$5,500. The balance of \$3,100 and the legal expenses were paid, as I find on the evidence, by an advance of \$1750 from the wife's mother, \$860 by her father, and \$1200 by a friend of her parents. That latter sum was gifted by the friend to the wife shortly before his death. The sums advanced by the wife's mother and father apparently remain owing. I find on the evidence that the husband did not make any specific monetary contribution to the purchase.

The parties lived in the home for approximately 4 years. For part of that period the husband, who was contemplating entering a business, did not have any regular income. The wife worked to maintain the home.

No Special Consideration

N10.

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In 1973 the husband, as he admits, formed an association with another woman and left the home. Shortly afterwards the parties entered into a written agreement to separate dated 9 August 1973 under which custody of the children was given the wife with a provision as to maintenance. It was provided that the matrimonial home would "immediately be henceforth held in the wife's sole name", the husband agreeing contemporaneously to execute a registrable transfer of his interest to the wife so that thenceforward he would have no interest. He also agreed to pay the costs incidental to the transfer of the property. There were other provisions as to chattels to which I need not refer. It appears that the husband had independent legal advice and on the evidence I am satisfied that he entered into the agreement quite freely and voluntarily.

The evidence is that on 12 September 1973 a memorandum of transfer was submitted by the wife's solicitor for execution in accordance with the agreement. It was not executed. Hence this action. Though served with a written statement of claim on 16 October 1975 the husband has taken no formal steps in the action. He is, however, represented by counsel today and on counsel's undertaking to file a proper warrant to act and statement of defence I have heard the action on the basis that the defence is properly before the Court. It arises from a further provision in the agreement that "in case the husband and the wife shall at any time hereafter with their mutual consent cohabit as man and wife the covenants hereof shall be void". The substantial defence is that that provision operates because of incidents to which I will refer and that accordingly the husband is freed from his obligation to transfer his interest in the property.

Very shortly after the signing of the agreement the parties went at the instigation of the wife, as I find, to a Marriage Guidance Counsellor. Partly for that reason

and partly because the husband came to the home to care for the children during the wife's absence visiting her sick father in the Wairarapa, the husband was at the house and acts of sexual intercourse took place. The wife says that there were two such acts which occurred in the course of an attempt by the parties to reconcile their differences. Her evidence in that regard is consistent with the statement that she made in writing in an application of 30 November 1973 to the Magistrate's Court at Wellington for a separation order. The reason she made that application was that she was advised that there was at least doubt as to whether the separation agreement continued in force following the acts of intercourse. The husband's version given in evidence today is that there were more than two, he says four, acts of intercourse. I find his evidence vague as to dates and occasions. In contrast to the fact that the wife's evidence today is consistent with what she said in 1973, the husband did not at that time allege that there were four acts of intercourse. Indeed it appears that his evidence today is his first assertion to that effect. On the evidence, then, I find as a fact that there were two acts of intercourse in the circumstances described by the wife.

The question then is whether they were sufficient to avoid the agreement by reason of the provision to which I have referred. In my opinion they are not. The provision is that cohabitation "as man and wife" will avoid the agreement. I am prepared to hold that two isolated acts of intercourse occurring in the course of an attempt at reconciliation do not amount to cohabitation as man and wife.

The remedy sought being an equitable one other factors are relevant, and I mention two. The first is that the marriage is obviously dead. The wife says, and there is no answer given, that the husband has not seen his wife or children for some 18 months. The second is that the

husband said in evidence that his wife could have the home but in his view she should pay the expenses.

For the reasons given the Court will order specific performance of the agreement. If necessary counsel for the plaintiff may submit a draft of the formal order which, as in all cases of specific performance, requires to be expressed in careful and precise detail. I hope, however, that that will not be necessary. I will make an order for costs in the sum of \$150 and disbursements to be paid by the husband.

Solicitors:

Olphert & Bornholdt, Wellington, for Plaintiff.

Sladden, Stuart, Joseph & Moulder, Wellington, for Defendant.