

OF NEW ZEALAND
REGISTRY

REC'D 30.1.76
Court File copy

D.8/76

18/78

IN THE SUPREME COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

BETWEEN [REDACTED] ELKERBOUT
of Marton, [REDACTED]
[REDACTED]
Petitioner

AND [REDACTED]
ELKERBOUT of Marton,
Married Woman
Respondent

Application for ancillary relief

Hearing: 12 October 1977

Counsel: J.R. Callander for Respondent in support
K.J. Bell for Petitioner contra

Judgment: 21 October 1977

JUDGMENT OF O'REGAN J.

The prime matter for consideration in this case is the contention of the petitioner that the respondent on or about 10 January 1976 bound herself by contract not to make any future claim in respect of matrimonial property. The background of the matter is that in late December 1975 the respondent told the petitioner that she was in love with another man. In the days immediately following there were many discussions as to the future of the parties during which, the petitioner alleges, the respondent had stated on 28 December 1975 - and I quote his evidence - "that she did not want any money from me but that if I wanted to give her something then that would certainly be appreciated." Petitioner deposed that respondent subsequently expressed herself to like effect on several occasions and he made particular reference to her having so done on 10 and 14 January 1976. On the latter occasion, the co-respondent was present during the discussion and it was alleged that

both he and the respondent stated - and I again quote the petitioner - "they did not want any of my money."

The appellant, respondent and co-respondent all gave oral evidence before me and were cross-examined. The following extract from the transcript is from the cross-examination of the petitioner.

- Q. "You say she freely and voluntarily offered to make no further claim against you?"
- A. Correct.
- Q. With regard to money and furniture is that what she meant?
- A. Yes, thats what she meant.
- Q. Tell us what money did you have at that time?
- A. What we talked about was not matrimonial property, we talked about the money that was in the house. That was the only money I had at the time plus \$4000 in debt.
. . . .
- Q. You say money meant to you something other than normal sense?
- A. Money meant to me and my wife the house. "

The co-respondent was present at one of the discussions. His evidence was to the effect that the respondent did not want anything from the petitioner.

Mrs Powell, presently the appellant's housekeeper was present at several of the discussions. She recalled respondent saying that "she did not want his money" and

on another occasion "I'm not after money, I can manage without it." In the end, however, she said that no final agreement was reached between the parties whilst she was present.

In my view, the existence of an agreement such as would preclude the respondent making claim to an interest in the matrimonial home has not been established. The petitioner acknowledged that he was unaware of the Matrimonial Property Act 1963. Whether the respondent knew of it was not revealed. Be that as it may, the use of the word "money" in the discussions was at the most, equivocal. In my view the probability is that it was a reference to maintenance. Furthermore, the references were to "his money" and "not wanting anything from him" and not to her own money or to any such expression as might encompass her interest in the matrimonial home. The affidavits disclose that the respondent made a significant contribution to the matrimonial assets and I think it clear that the matrimonial home was the product of "their money" rather than "his money".

It is not without significance that the petitioner's present claim was not raised with the respondent until his affidavit of 6 September last was served or just on a year after respondent's application was lodged.

Since the application was made, the petitioner has sold the matrimonial home and the respondent accepts that the nett proceeds of the sale were \$37,227. The petitioner has with part of the proceeds purchased another home but, of course, it is not a matrimonial home and accordingly

s.11(3) is of application. The petitioner, however, submitted that s.14 should be invoked in his favour in that "there are extraordinary circumstances" rendering equal sharing repugnant to justice. I need not consider repugnancy to justice because in my opinion the circumstances disclosed are, sad to relate, so commonplace, that they cannot be described as extraordinary. It is thus unnecessary to consider the contributions of each to the marriage partnership. I remark, however, that the contribution of the respondent was not insubstantial.

In the result, the respondent's claim succeeds. The petitioner is ordered to pay her \$18,613.50 on or before 15 December 1977. The petitioner informed me that there would be no great difficulty in meeting a commitment of that order but in case there is, leave is reserved to the respondent to apply further.

Baron R. J. J. J.

Solicitors:

Fitzherbert Abraham & Co., Palmerston North, for Respondent
in support

Goodman Taylor & Co., Marton, for Petitioner contra