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IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. D.359/75

No Special Consideration

BETWEEN [redacted] QUENNELL of Christchurch, Married Woman

Petitioner

A N D [redacted] QUENNELL of 14 Glengyle Street, Dunedin, Builder

Respondent

Hearing: 14 March 1977
Judgment: 20 OCT 1977
Counsel: K.J. Jones for Petitioner
J.M. Hanan for Respondent

JUDGMENT OF ROPER J.

I shall refer to the parties as husband and wife although they were divorced by a decree absolute made on the 20th February 1975. On the 13th October 1975 the wife issued proceedings under the Matrimonial Proceedings Act 1963 seeking an order concerning her interest in the matrimonial home at 14 Glengyle Street in Dunedin. She sought an order that the property be sold and the nett proceeds divided. Her proceedings were issued out of the Christchurch Registry, and thereafter a good deal of time was wasted while the husband sought, unsuccessfully, an order for a change of venue to Dunedin. The substantive application came before me on the 14th March last as an application under the 1976 Act.

By that time the property in issue was the matrimonial home and a block of flats said to be owned by the husband. However it transpired that the flats are not owned by the husband but by his company, [redacted] Quennell Limited, so that it is really the wife's interest in the shares in that company that is at stake. As the case was not presented to me on that basis I called for Memoranda from Counsel but there was delay in their presentation for

a variety of reasons and the last was not received until the 31st August.

The parties were married in 1957, the husband then being 24 and the wife 23. They lived in flats for some months and at the end of 1957 the husband purchased the section in Glengyle Street for about $900. The money came from a legacy left to him by his mother. The couple lived in temporary, and seemingly rather primitive premises on the section while the husband built the matrimonial home himself with the aid of a loan from the Housing Corporation, supplemented by his earnings and those of the wife, who worked until approximately April 1958. The husband deposed that the house was built entirely by himself without any help whatsoever from his wife. The wife on the other hand claims that she gave some assistance. She does not claim that it was substantial, and I believe that it is in the very nature of things that she would have given such help as she was able, until pregnancy prevented it. Their first child D[redacted] was born in [redacted] 1958, followed by A[redacted] in 1960, S[redacted] in 1963 and M[redacted] in 1965. The unfortunate M[redacted] suffers from a form of disfiguring skin cancer covering almost half the body area, and has been rejected by the wife. The building of the dwelling was finished by 1960 and in 1962 the husband set up as a builder on his own account. In 1969 the wife formed an association with a man L[redacted] and according to the husband divorce proceedings on the ground of adultery were in contemplation. However, in 1970 the parties agreed to separate, and on the 15th December 1970 signed a separation agreement whereby the wife was given custody of all four children, exclusive occupation of the matrimonial home, with the husband paying the outgoings, and total maintenance of $30 p.w. The husband lived in a caravan for a time and then occupied one of the flats he was building for his company.

In 1971 the wife decided to leave the matrimonial home and move to Christchurch with the three older children,

leaving M[redacted] with her father. The wife has lived and worked in Christchurch ever since. It was suggested that over the years she had lived with a number of men but there was no proof of any such associations.

On the 21st December 1971 the parties executed a further agreement. It provided for a variation in the earlier maintenance provisions and gave custody of M[redacted] to the husband. I believe that at the time of the hearing all the children except S[redacted] were actually living with their father in Dunedin. Clause 3 of the 1971 agreement grants the husband exclusive occupation of the matrimonial home. As typed that clause ends with the words "but without prejudice to the rights of ownership thereof". Those words have been crossed out and initialled by the husband only, with a date 10/10/72. It appears that the document was executed by the wife first on the 21st December 1971 but that the husband would not sign until the words referred to were deleted. The authority for their deletion was the following letter to the husband's solicitors:-

" GILBERT, FRANCIS, JACKSON & KNUCKEY
Barristers and Solicitors

10th July 1972

Messrs Albert Alloo & Sons,
Solicitors,
P.O. Box 292,
DUNEDIN

Dear Sirs,

re: Mrs [redacted] & [redacted] Quennell

We have now received instructions from our abovenamed client concerning the question of ownership of the former matrimonial home at 14 Glengyle Street, Waverley and advise that Mrs Quennell relinquishes any claim to ownership in the house.

We therefore confirm that it will be in order to strike out the words 'without prejudice to the rights of ownership' contained in Clause 3 of the agreement and would be pleased to receive same duly executed in due course.

Yours faithfully,
GILBERT, FRANCIS, JACKSON & KNUCKEY
Per: 'C.S. Withnall' "

On this aspect the husband deposed in his affidavit of the 23rd July 1976:-

> "6. AT the time of the parting my recollection is that the property had a value of about $12,000 and a Government Valuation of $9,400 and discussions took place concerning settlements of the property. As part of these arrangements I let my wife have the car which I recall had a value of Two thousand five hundred pounds ($5,000) and in addition she took numerous items of furniture. For my part I relinquished the intention of going ahead with an adultery action and claiming damages and acted upon the promises then made by my wife which have in some ways disadvantaged me and was taken by surprise when after close to five years later I received notice of this present claim. I believe I have carried out the agreement reached part of which agreement was that my wife relinquished any claims to the property purchased out of my mother's legacy and the house I had built. Attached is a letter from her solicitors (photocopy) referring to this part of the agreement."

The wife countered in her affidavit of the 13th December 1976 as follows:-

> "7. AT THE time we originally agreed to separate in 1970, the Respondent and I had entered into a written separation agreement dated the 15th December 1970 in terms of which I was to have possession of the matrimonial home. This agreement made no arrangements regarding ownership of the home. When I left Dunedin the next year, a further agreement was prepared dated the 21st December 1971. It was agreed that the Respondent should have occupation of the matrimonial home but this was to be without prejudice to the rights of ownership in the home. The Respondent refused to sign this agreement for many months, and my Dunedin solicitors contacted me in Christchurch regarding his refusal to sign. I understood the Respondent's objection to relate to ownership of matrimonial furniture and effects which were still in the home, and the car, which I had taken with me. I did not appreciate that in authorising my solicitor to consent to the amendment of the separation agreement, which had already been signed by me about 10 months beforehand, I was giving up my rights to any share in the matrimonial home.
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> 8. I DID not know the market value of the Glengyle Street property at the time I left Dunedin. I admit that the Respondent and I had come to an agreement regarding furniture and other chattels prior to my leaving Dunedin. However I deny that the car had a value of $5,000.00. In fact it is a 1964 Ford Zephyr, which cost less than $3,000.00 when purchased new. At the time I left it was worth

> approximately $1,500.00, and this is the valuation the Insurance Company put on it when I insured in Christchurch soon after I left. The only items of furniture I took with me were a television, table, rocking chair and stereo set (which were gifts owned by me), 2 single mattresses, pots and pans, sewing machine and a heater which I had purchased with my own money. I had no beds, no crockery, no cutlery, and no other household utensils. I had to purchase beds for the 3 children and over the years I was obliged to purchase all other items of household furniture and effects. The Respondent was left with all other furniture contained in the matrimonial home, which was fully and comfortably furnished, at the time I left."

In cross-examination before me the wife denied that there had been any agreement as to a division of the chattels prior to her departure for Christchurch, and that she had more or less had to accept what she was given. She could not remember whether her own solicitors had advised her of the husband's grounds for refusing to sign the 1971 agreement, and could not remember whether she wrote to her own solicitors authorising the despatch of Mr Withnall's letter of the 10th July 1972. She claimed that she had never actually met Mr Withnall and that her dealings had been with Mr Knuckey, who was then in the same firm. In short she claimed that she had misunderstood the position, had not realized that she might have an interest in the matrimonial home, and certainly had not intended to forgo it. She admitted that she had received a copy of Mr Withnall's letter but could not remember when.

The husband in cross-examination confirmed that the value of the chattels taken by the wife would have been about half the nett value of the matrimonial home at that time. He further claimed that the fact that his wife had rejected M[redacted], so that he was solely responsible for her welfare, was a factor taken into account in the discussions concerning settlement of their property dispute. It may be significant that the wife did not issue the present proceedings until almost four years after the agreement of 1971 was executed.

As for the wife's claim to an interest in the husband's company, [redacted] Quennell Ltd was incorporated in March 1965 as a building company, finally employing four carpenters and two apprentices. The husband holds 5998 of the 6000 $1 shares. His solicitor holds the other two.

In April 1969 the company commenced building a block of four flats on land it owned with the aid of mortgage finance. It appears that there was a building recession at the time and work on the flats was used as a "fill in" job when other work was not available. In answer to questions from me the husband deposed that if the work on the flats had not been available he would have had to sack his men. By the time the parties separated only two flats had been completed. The wife claimed that because her husband's time was spent on the flats instead of on outside work their income and standard of living suffered. This the husband denied. He claimed that at that time the building trade was going through a recession and that if he and his men had not been working on the flats, they would not have been working at all. The wife conceded that she took no substantial part in the running of the company although from 1962 until 1965 she received £2 p.w. from the company. In her affidavit the wife claims that after 1965 "she spent more and more time on the company's affairs", although what she could do in a building company is not clear to me. The company has now given up building and it seems that its only activity is to administer the flats.

The wife's claim in relation to the shares presents a real problem and I do not know that I have received the help I am entitled to in resolving that problem. What I am supposed to make of the parcel of accounts, wages books, bank statements, invoice books and loose papers that accompanied the husband's last affidavit, presumably as "exhibits", but not marked as such, I do not know.

It is not disputed that the shares are matrimonial property, pursuant to s.8 of the 1976 Act, which in the normal course would be divided equally in terms of s.15. However two of the flats which now constitute the asset of the company were not built at the time of the separation. So far as the shares are concerned I propose to resolve the matter in this way: This was a marriage of 13 years duration during which the wife did her part as a housekeeper and mother, and suffered the rather bleak early years in substandard accommodation. The acquisition of these flats might be said to be the financial reward of the earlier years work. However as two of the flats were not built when the parties separated I think it would be wrong to assess her interest on the present day value of the shares. However I think it would also be wrong to assess her interest on the 1970/71 value, for inflation must have increased the value of the flats very considerably. On the basis that the Government Valuation of the flats is now $50,000 the nett equity is to the order of $42,000 for the four flats. I think the wife's interest should be assessed on half that sum, namely $21,500, making her interest $10,750.

As for the matrimonial home, I must now consider the effect of the 1971 agreement on the wife's claim. Section 21 of the 1976 Act provides that spouses may make agreements "for the purpose of contracting out of the provisions of this Act", but in my view, and despite certain submissions made by Counsel, s.21 has no application here. This was not an agreement in terms of s.21. The next provision in the 1976 Act dealing with agreements is s.55(1), which reads:-

> " (1) Notwithstanding the provisions of section 21of this Act, but subject to section 57(5) of this Act, where any application under this Act relates to the matrimonial property of any marriage that took place before the commencement of this Act, the Court shall, in dealing with that application, have regard to any agreement entered into before the commencement of this Act by the parties to that marriage."

I am none too sure what that subsection means, but in any event I believe it has no application here because the present application is not an application under the 1976 Act. It is an application under the Matrimonial Proceedings Act 1963, which, pursuant to s.55(3) must be "continued" under the 1976 Act. The next section dealing with agreements is s.57(5). That provides:-

> " (5) Nothing in this Act shall affect the validity of any agreement entered into before the commencement of this Act by way of settlement of any question that has arisen in relation to matrimonial property and every such agreement shall have effect as if this Act had not been passed."

That subsection is by no means clear either, and would be difficult to reconcile with s.55(1) where the latter section also applied. It might be argued that s.57(5) only relates to agreements made by way of settlement of proceedings earlier brought under either the Matrimonial Property Act 1963 or the Matrimonial Proceedings Act 1963, but in my opinion it is of wider application and applies to the agreement under consideration.

It seems to follow that if the agreement shall have effect as if the 1976 Act had not been passed one must consider what effect it would have had under the Matrimonial Proceedings Act 1963. Section 79 of that Act, so far as is relevant, provided:-

> " (1) The Court may, on making a decree of nullity, or of separation, or of dissolution of a voidable marriage, or of divorce, inquire into the existence of any agreement between the parties to the marriage for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or of the parties to the marriage or either of them, as the Court thinks fit.
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> (2) In the exercise of its discretion under this section, the Court shall have regard to the conduct of the parties, and may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement on settlement and any

other matters which the Court considers relevant."

The 1971 agreement, coupled with Mr Withnall's letter of the 10th July 1972, makes it clear that the wife had agreed to relinquish any interest she may have had in the matrimonial home. Now five or six years later there is only her bare assertion that that was not her intention, for there was no other evidence bearing on the matter. The husband claimed that when the wife left the matrimonial home she took with her chattels, including a motorcar, equivalent in value to half the then equity in the matrimonial home. The wife disputes the value and puts it no higher than $2,000, whereas the husband claims it was between $4,000 and $5,000. Furthermore, the husband agreed to bear the special burden of a child the wife had rejected. It is impossible on the evidence before me to tell where the real truth of the matter lies, and the wife's delay in issuing proceedings has not helped. I can see no basis on the evidence for varying the agreement in the exercise of my discretion pursuant to s.79.

The wife's claim in respect of the matrimonial home fails.

I propose to make allowance for the sum of $500 paid by the husband in April 1976 and there will be an order for payment to the wife of the sum of $10,250 within six months (or such extended period as the Court may allow) with interest thereon at 8% per annum as from the date of this order.

Leave is reserved to apply for any further order or direction as may be necessary.

The wife is awarded costs of $250 and disbursements as fixed by the Registrar.

Solicitors:
White, Fox & Jones, Christchurch, for Petitioner
J.M. Hanan, Dunedin, for Respondent