Recd: 31/10.

IN THE SUPREME COURT OF NEW ZEALAND A. 316/76

CHRISTCHURCH REGISTRY

503

[redacted] Atkinson & Co

BETWEEN [redacted] STOKES of Kaukapapa near Auckland, Farmer

PLAINTIFF

A N D [redacted] BROWN of Christchurch, Married Woman

DEFENDANT

Hearing: 6th and 7th October 1977

Judgment: 21 OCT 1977

Counsel: Mr A.B. Lawson for Plaintiff
Messrs M.G.L. Loughnan and P. Jarman for Defendant

JUDGMENT OF CASEY J.

Mrs Brown (married to her present husband in 1975) was the owner of a house at 74 Bordesley Street, Christchurch which she sold shortly after her marriage, using the proceeds to repay a Housing Corporation mortgage and to buy another home at Pines Beach, where she now lives with her husband. She had been married before to a Mr O'Malley and had a daughter R[redacted], and they separated before 1960. She is now faced with a claim by Mr Stokes for a declaration that she held the proceeds of the sale of the Bordesley Street property on trust for him to the extent of his interest based on his contributions to that property. Mr Stokes' wife had left him with five children, and Mrs Brown came in 1961 as his housekeeper, bringing R[redacted] with her; shortly afterwards they lived together as man and wife until July 1966. During this time three children were born to them - L[redacted], E[redacted] and G[redacted]. Originally they lived in a rented house and Mr Stokes was employed as a carpenter. In 1963, as a result of discussions with his employer, Mr Stokes determined to build a house of their own and the section at Bordesley Street was purchased. Neither party had any assets and depended entirely on Housing Corporation finance and capitalisation of the family benefit. The two children selected for this purpose were R[redacted] and L[redacted], and

G[redacted]'s benefit was capitalised in 1965 for three years. There was some confusion in the Department for a couple of years over E[redacted], and for about two years her benefit payable to Mr Stokes ceased. Because of the requirements of the Department, the land had to be held in Mrs Brown's name as a condition of capitalisation. Were it not for this stipulation, I believe it would have been held by the parties jointly, and Mr Lawson conceded this intention on behalf of Mr Stokes. They treated it as a joint enterprise for the benefit of the whole family, and planned to marry as soon as they were free to do so.

Although Mr Stokes claimed to have paid money from his own pocket for wages etc. in the construction of the house, - this being disputed by Mrs Brown - I am satisfied that any such payments would be of little significance in assessing the overall contributions of the parties. Virtually the full cost of the house was met by the advances totalling $7,600.00 from the Housing Corporation (then the State Advances Corporation) through Mrs Brown's solicitors into her bank account, which she used to pay the various bills for the house as it progressed. They ran into problems with cash shortages and construction was held up by liens, and this led to accusations of mismanagement by Mr Stokes. Their relationship deteriorated and she finally left to live with Mr Brown in July 1976. They had moved into the new house only nine months before, in October 1975. Mr Stokes was left with the children of his first marriage plus L[redacted] and E[redacted], while Mrs Brown had R[redacted] (who had gone some time previously) and the youngest child, G[redacted]. While they lived together she said the instalments and outgoings were up-to-date, as she managed all the finances. Mr Stokes remained in possession until February 1969, paying the mortgage instalments but fell into arrears with them and the rates because of an accident at work. He evidently regarded the rates as Mrs Brown's responsibility, as owner. In that month he handed the keys in to the Housing Corporation and some time later Mrs Brown returned to live there with Mr Brown. They paid off the arrears and remained without any indication of a claim from Mr Stokes

until this Writ was issued in September 1976.

I heard detailed calculations of contributions. Mr Stokes organised the building of the house and arranged for the supply of materials at cost or trade discounts through his firm and other merchants. He was helped by Mr Lawrence (Mrs Brown's father) with whom he worked at Williamsons, and by another man and an apprentice, the work being done mainly at weekends. The two latter helpers were paid. There was also voluntary assistance from the family and friends, Mrs Brown pulled her weight when she could, but I am satisfied that with her family commitments and the difference in experience and ability, her physical contribution was nowhere near that of Mr Stokes. No doubt her efforts in the domestic sphere and her prudent management played their part in enabling the house to be built. I treat Mr Lawrence's voluntary help (which I think was substantial) as a donation to them both. By a curious coincidence the total payments of principal during the period Mr Stokes occupied the house and was responsible for payment (October 1975 to February 1969) was virtually the same as that made by Mr and Mrs Brown over the next six years - about $490.00 each. Mrs Brown says that for the first nine months when they lived together the contributions should be treated as jointly made; in addition to domestic efforts she was working and contributed money to the family exchequer for four months in 1976. Mr Loughnan also made detailed calculations of what the capitalised family benefit had cost each party over the years until the house was sold and the mortgage repaid, establishing that Mr Stokes had lost only $480.00 with L[redacted], while she had forfeited $1,218.00. This took into account a period of joint contribution when they were living together, by applying a "prudent management" approach in her favour, in arranging the household finances to cope with this benefit reduction in what must have been barely enough income to sustain such a large family group.

Mr Loughnan also made a study of the value of the working hours put into the house by Mr Stokes and the cost of

fences, paths etc. and deferred maintenance carried out by Mr and Mrs Brown and concluded that by 1975 (when the house was sold) her contribution was about $3,000.00 in value compared with $900.00 for him, so that the shares should be assessed at one-quarter to three-quarters.

Mr Lawson started off claiming one-third for Mrs Brown and two-thirds for Mr Stokes, and felt that this could be justified on contributions. However, he abandoned this in favour of a 50/50 approach on the common intention of the parties when purchasing the property to hold it in equal shares, basing his submission on the Court of Appeal decision in Gough v. Fraser (1977) 1 NZLR 279. While Mr Loughnan's detailed accounting approach has its attractions, I think it ignored the realities of the situation regarding Mr Stokes. There is no doubt that without his experience and contacts, this house would never have been achieved, and while due credit must be given for the voluntary and paid work done by others (including Mrs Brown) the plain fact is that he carried by far the major responsibility and burden. Everyday experience suggests the owner-builder does (and is expected to do) the lion's shares, and I can see nothing to indicate otherwise here. Also very significant as a contribution are his work contacts and ability to get supplies cheaply, resulting in a house for these people which would have been impossible for anyone else in similar circumstances. I accept that it would have cost one-third more if an independent builder had been engaged. On the other hand, Mrs Brown's contributions after she returned (and the "salvage" effect of that action) must be balanced against the fact that she and her present husband had the benefit of Mr Stokes' contributions to the house for the six years they lived in it.

In these cases the contributions are to be assessed on a broad basis - see the remarks of Lord Denning M.R. in Cooke v. Head (1972) 2 All E.R. 38 at p. 42. Leaving aside the effect of Mr Stokes' departure from the property in 1969, and dealing with the case solely on the basis of contributions,

I consider a 50/50 division comes closest to recognising what each party has put in over the years until it was sold, both directly and indirectly. I reach this conclusion independently of Mr Lawson's submission based on a common intention at the outset of equal sharing; the situation is not the same as in Gough v. Fraser. An initial intention to acquire joint legal ownership is not necessarily a "common intention" to share it equally on sale. Here, it is simply an indication that the property was to be shared, without constituting an assessment or quantification of their respective interests which were to be determined later on the basis of contributions. The principle analysed by Lord Diplock in Gissing v. Gissing (1971) AC 886 was referred to by Richmond P. in Gough v. Fraser at p. 283:-

> "I have carefully read Lord Diplock's analysis relating to the creation and operation of resulting implied or constructive trusts. It seems to me that Lord Diplock makes a clear distinction between cases where it is possible to establish an express agreement between the parties as to their respective interests, that is to say cases where it can be seen that their common intention was to have certain fixed shares, and those in which their common intention was that one of the parties should have some beneficial interest without any express agreement as to what the respective shares of each party should be. Lord Diplock discusses this particular situation beginning at p. 908D. In such a case he thought there would be nothing inherently improbable in the parties acting on the understanding that each should be entitled to a fair share having regard to the total course of events at whatever might be the material point in time as, for example, when a mortgage was totally repaid or the property disposed of. That, I think, was essentially the position in Cooke v. Head and also in Eves v. Eves, but the present case is clearly one where Mr Gough acted on an express arrangement between the parties that he should have a half share. In that type of case I do not think that the Court is free to arrive at a "fair" share for each party in the light of the evidence as to their subsequent contributions and transactions unless that evidence is sufficient to establish affirmatively some subsequent agreement between the parties to depart from their original arrangement."

There is no question of any "express arrangement" for half shares in this case, which has some similarities to Cooke v. Head. There the house had been completed with contributions from a man and his mistress, but the parties split up before they occupied it. Mr Head lived in it for

two years with someone else, meeting the outgoings. When it was to be sold Mrs Head applied for an order protecting her interest, based on her contributions and was held entitled to one-third.

However, the circumstances relating to Mr Stokes' dealings with the property after his departure are unusual. In his letter to the State Advances Corporation enclosing the keys he said:-

> "As the owner is coming back to the above address, or is making arrangements for same on legal advice am leaving and placing a Judgment Summons on same for monies owing. Have paid up rent and part of rates for the time I was living there. But do not pay rates for the time she was in the above abode as property and rates in her name."

The reason he gave for departing was that he had been advised on medical grounds as a result of his accident to live in a warmer climate, and he intended to leave Christchurch permanently. I also think he intended living with the lady he subsequently married. Mrs Brown was not told by him of his departure, and moved into the house only after she learned of it being vacant from other sources.

Mr Stokes also wrote to his Christchurch solicitors in 1968 (following threats from the State Advances about arrears of rates) indicating he wanted the house transferred to him or his money in it protected. He wrote again in February 1969 stating that he was leaving and asking them to take action to recover $1,000.00 which he assessed as his wages for building the house and installing paths, and he also wanted a refund of the capitalisation for L[redacted], who was in his custody. Those solicitors were also pursuing his accident claim, and they did nothing about his instructions over the house, and very little about his other claim, which was not finally settled until February 1976, after Mr Stokes had complained to the Law Society. I am not sure whether that complaint included inactivity about the house. So Mr Stokes clearly had every intention of claiming for his work on the property in 1969 when he left, and was concerned with the continuing loss of L[redacted]'s benefit.

It must also be noted that Mr Stokes' guarantee of the mortgage enured until it was repaid on the sale in 1975.

These factors lead me to the view that no change in their original common intention to share the beneficial interest of the property can be inferred from Mr Stokes' action in leaving it. As Mr Lawsons points out, Mrs Brown did much the same in 1966 and stayed away for three years. The possibility of a subsequent change of intention affecting the parties' original arrangements was recognised by Richmond P. in Gough v. Fraser at p. 283, and by Lord Diplock in Gissing v. Gissing. I have very much in mind the latter's comments at p. 906E about the objective approach to be adopted by the Courts in ascertaining common intention. This is undoubtedly the case in the initial stages of a property transaction, when the Court is attempting to discover what the parties meant from conduct in a situation where, more often than not, the sharing of the property on its disposal or on the breakdown of their relationship never occurred to them. The concept of "common intention" in this field is something of a legal fiction, developed by the Courts to do justice in an area of social change. It may be (as Lord Denning seems to suggest in Cooke v. Head, p. 41) that the parties' interests in the property no longer depend on it. After referring to the Court's earlier unsuccessful efforts to use the Married Women's Property Act, he said:-

> "So the courts had recourse to another way. They said that shares in a home depended on the common intention of the parties; and they used considerable freedom to ascertain that common intention. This too has recently come into disfavour, because of the difficulty of ascertaining a common intention. So the courts, under the guidance of the House of Lords, have had recourse to the final way, the law of trusts. It is now held that, whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. The legal owner is bound to hold the property on trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too."

Whatever the approach, I find it unrealistic to spell out a common intention by Mr Stokes and Mrs Brown that he

no longer had any interest in this property after leaving it in 1969, when it is only too clear, from his overt actions (though not communicated to her), that he intended to press for his rights; and when she knew all along that he was still involved in contributing to the property by loss of the family benefit, and remained liable under his guarantee of the mortgage. This is in a different category from the cases Lord Diplock had in mind, where there is no overt expression at all of such an intention at the outset of the transaction, and it can only be ascertained from the parties' conduct in relation to the property.

Although Mr Loughnan submitted that such conduct amounted to an estoppel precluding Mr Stokes from now claiming an interest, he could not point to any detriment suffered by Mrs Brown as a result. I accept that a sharing of the proceeds at this late stage will be inconvenient and may affect the settled lifestyle that she and her husband have come to expect, on the assumption that the property belonged solely to her. But she has not altered her position for the worse, not entered into extra commitments she could not otherwise have afforded through relying on this conduct. The new house cost less than the equity in the old, and she spent the difference on furnishings etc. She has simply had the benefit of Mr Stokes' money for this period. I find it difficult to read an estoppel into the simple fact of his going out of possession. Had he made a claim a year or so afterwards (as Miss Head apparently did in Cooke v. Head) there could be no such defence, and the lapse of time during which he did nothing cannot avail Mrs Brown, in the absence of some detriment occasioned by her belief that he would make no claim. The Limitation Act was not pleaded nor raised, and assuming the cause of action arose when the property was sold in 1975 and the proceeds used by Mrs Brown, the claim is well within the limitation period. The equitable principle of laches does not apply where the situation is covered by the Act - see e.g., Snell's Principles of Equity (27th Edition) p. 33. Her own situation was much the same when she left in 1966, and stayed away for three years. All

I can infer from both these situations is that each party acquiesced in the other having exclusive possession of the house for the respective periods. But the legal rights and their liabilities under the mortgage remained as before, and their respective contributions by way of family benefit capitalisation continued without alteration. In the light of the letter Mr Stokes wrote to the State Advances Corporation and the dealings with his solicitors, there was clearly no intention by him to abandon or waive his rights, although I find it difficult to understand why he left this matter for so long in the hands of solicitors who had clearly demonstrated their incompetence. Mr Stokes is not the first client to find himself in this uncertain situation, in the hope that they will eventually achieve something. They continued to handle his accident claim, although at a snail's pace. It was only after it was settled in 1976 that he sought other advice (at their suggestion) about his rights against them, and the present action was commenced by his new solicitor shortly afterwards. I do not think it would be realistic or just in these circumstances to impute a waiver or abandonment because of his solicitor's default.

I therefore make a declaration that the Plaintiff was entitled to a half interest in the net proceeds of the sale of 74 Bordesley Street, Linwood and that the Defendant holds such proceeds in trust for him to that extent. Mr Lawson has indicated that after costs and expenses incidental to the sale have been deducted, the net proceeds can be taken as $14,000.00, and Mr Stokes' half share as $7,000.00. I accept this as a proper figure. Counsel also inform me that the parties may be able to agree on the form of an order to protect this interest; the Plaintiff merely seeks declarations at this stage. I therefore adjourn the matter for further submission about an appropriate order, should this be necessary. The plaintiff is entitled to costs as on a claim for $7,000.00 together with witnesses expenses and disbursements to be fixed by the Registrar.

B.J.R. Fox, Auckland for Plaintiff
Loughnan Burns & Co, Christchurch for Defendant