

BETWEEN [REDACTED] EADE of
Christchurch, Driver

Appellant

A N D [REDACTED] EADE of
Christchurch, Married
Woman

Respondent

Hearings: 29 August 1978
Judgment: 131 AUG 1978
Counsel: B.J. Drake in Support
D.H. Hicks to oppose

JUDGMENT OF ROPER J.

This is an appeal against an interim order made in the Magistrate's Court on the 7th August 1978 in the wife's favour granting her the right to exclusive occupation of the matrimonial home. The order purports to be made under the provisions of the Matrimonial Property Act 1976, Both ss.25(3) and 27 of the Act provide for such orders but in this case s.27 must have been relied upon.

The parties were married in December 1966 and have three children who are now 11, 6 and 5. They had been separated by Court order but in December 1977 they reconciled and resumed cohabitation in the matrimonial home at [REDACTED] Esperance Street, Christchurch. I was informed by Counsel that after the resumption of cohabitation the separation, custody and other orders, which had been in force, were terminated.

On the 23rd June 1978 the wife left the matrimonial home taking the three children with her and went to live in her parents' home at [REDACTED] Weston Road. On the 7th July she filed an application in the Magistrate's Court for separation, maintenance and custody orders, and orders granting her the exclusive right to occupy the matrimonial home and

possession of the furniture therein. Paragraph 8 of that application reads:-

"8. THAT I refer to my previous Application, I confirm the truth of the matters contained in that Application. Since that Application was filed the Defendant and I resumed cohabitation in the month of December, 1977. I was obliged to leave the Matrimonial home on the 23rd June, 1978. The Defendant has not been violent towards me or the children since we resumed cohabitation."

On the same date, the 7th July, the wife made application for an interim order for exclusive possession of the home pending determination of the separation proceedings. That application was supported by an affidavit dated the 30th June, which is only one week after her departure from the home. Paragraph 4 of the affidavit reads:-

"4. THAT I have no means of support apart from an Application I have made to the Department of Social Welfare for an Emergency Benefit. That I have also withdrawn some money from the joint bank account of the Defendant and me but this cannot last very long. It is not possible for the reasons I have already set out in my earlier Affidavits for the children and me to stay for any extended period with my parents. The accommodation is cramped and quite unsuitable for the children and me except for a very short time."

The husband filed an affidavit in opposition to the wife's application for separation and custody in which he stated that he did not know of his wife's intentions to leave home until he returned on the evening of the 23rd June and found that she and the children had left. He deposed that his wife was living in a property owned by her parents at [redacted] Weston Road and that he believed that her parents were actually living in another property owned by them in New Brighton. He also deposed that in July he had suffered an injury to both knees and was presently on sick leave from the Christchurch Transport Board, receiving \$62 per week as sick pay. In a further affidavit by the husband dated 18th August filed in support of an application for a stay of the order for possession made on the 7th, he deposed that he was still on sick leave and that he had been

unable to find alternative accommodation. He had no funds to pay a bond should he rent premises and was unable to live with his mother who occupied a one bedroomed pensioner's flat. He has taken the stand throughout that he will defend the wife's application for a separation order, and intends to seek custody of one of the children. The separation proceedings have yet to be heard.

The "earlier affidavits" referred to in paragraph 4 of the wife's affidavit were not before me, and it is not known whether the learned Magistrate considered them for he gave no reasons in writing for making the interim order. I was informed by Mr Hicks from the bar that those earlier affidavits by the wife contained allegations "of violence and threats" by the husband. Be that as it may they do not appear to be relevant at this point because in her present application for separation and associated orders the wife has stated that the husband has not been violent towards her or the children since the resumption of cohabitation, and it seems that her only reason for leaving was "lack of real communication". Further, the fact that there was a reconciliation suggests that the earlier conduct complained of could not have been of a particularly serious nature.

Mr Drake's main complaint was that the conflicts in the opposing affidavits were never resolved, for the learned Magistrate did not hear evidence and was dependent upon the conflicting affidavits before him and the submissions of Counsel. These and other questions remain unanswered: Why did the wife leave and was she justified in so doing? Did the husband make a genuine attempt to have his wife return, and to find out the reasons for her leaving, or did she refuse to discuss the matter? So far as occupation of the matrimonial home is concerned, where does the balance of convenience lie pending the determination of the real issues between the parties? Are the

wife's parents at [REDACTED] Weston Road or has she the exclusive use of the property? Mr Hicks submitted with some force that the children's place was in their own home. One could hardly argue with that as a general proposition but must they of necessity be there with their mother? The husband is home on sick leave.

From a strictly legal viewpoint the provisions of the Matrimonial Property Act (and in particular s.27) do appear to provide the jurisdiction for an exclusive occupation order in the present circumstances, but I am not convinced that the legislature contemplated such a use. The order is in no way associated with a property dispute.

I am not suggesting that it is the position here, for the evidence is just not available, but it seems unjust that a wife who has left home for no good reason, and is completely in the wrong by so doing should be able to oust an innocent husband from the matrimonial home pending the determination of their dispute simply because she has had the foresight to take the children with her. That amounts to using the provisions of the Matrimonial Property Act as a substitute for a non-molestation order, which in the circumstances she could not obtain. I believe there is an increasing misuse of the provisions of the Matrimonial Property Act in this way.

Returning to the present case, accepting that it was within the learned Magistrate's discretion to grant the order sought can it now be said that he exercised his discretion on wrong principles. Mr Hicks submitted that it could not. However, I take Mr Drake's point that it could not be said that the discretion was exercised judicially when the disputes as to the relevant facts in issue were never resolved. The welfare of the children is of course important but any inconvenience they might suffer is temporary. I am satisfied that on the meagre information available the interim order should not have been

made. I might say that if an applicant desires the Court to take the rather drastic step of bundling the other spouse out of the matrimonial home pending final determination of the issues between them, and the present applicant must have had that in mind when she left home, something more is required than the practically worthless affidavit that was filed in support of this application.

The appeal is allowed and the interim order for exclusive occupation quashed.

No order for costs.

Solicitors:

B.J. Drake & McGillivray, Christchurch, for Appellant
Rhodes & Co., Christchurch, for Respondent