G.R. 228/76

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IN THE SUPREME COURT OF NEW ZEALAND

HAMILTON REGISTRY

[redacted]

IN THE MATTER of the Matrimonial Property Act 1963

MPC 89

BETWEEN [redacted] F[redacted]

Intended Applicant

AND [redacted] F[redacted]

Intended Respondent

Hearing and Judgment: 18th April, 1978

Counsel: Burnet for Intended Applicant
Chatwin for Intended Respondent

(ORAL) JUDGMENT OF BARKER, J.

This is an application originally filed under the Matrimonial Property Act 1963, which falls now for determination under the Matrimonial Property Act 1976.

The initial matter for consideration is whether leave to bring proceedings out of time should be given to the applicant (to whom I shall refer, for the sake of convenience, as "the wife"). The relevant section of the 1976 Act is s.24, which provides, as a time limit for the bringing of applications under the Act, a period of 12 months from the date of decree absolute, leaving to the Court power to extend the time in its discretion, including those cases where time has expired before the commencement of the 1976 Act.

The parties were married in January, 1957 and signed a separation agreement in November, 1968. A decree absolute was pronounced on 12th June, 1972; the ground for the divorce was the existence of the separation agreement for 2 years.

These proceedings were filed in the Hamilton Registry in September, 1976, some 3 years and 3 months after the expiration of the time limit.

The wife says that at the time her separation agreement was negotiated, she had discussions with her then solicitor in Whakatane about matrimonial property and it was always her intention to make a claim in respect of the matrimonial property of the parties. An affidavit from the husband indicates that the value of this matrimonial property at the date of separation was in the vicinity of $15,000.

However, the wife says that the solicitor in Whakatane did nothing about it, and it was only in 1974, that fresh solicitors in Auckland made inquiries from the Whakatane solicitors, with the result that information was not received for some further 2 years, sufficient to enable the application to be lodged. However, I find it of very great consequence that throughout the period after decree absolute, there was no notice at all given to the husband of a possible claim, apart from a possible telephone call in August, 1975, when the wife says that she telephoned the husband asking for financial assistance for the purchase of a house and offering to settle her matrimonial property claims for $6,000. The husband denies that there was any suggested compromise of a matrimonial property claim. I am not in a position to resolve this conflict of evidence, not having heard the parties. However, I do not think it matters very much, because in August, 1975, any claim was already well out of time and formal advice to the husband should have been given long before then. It appears to me (and Mr. Chatwin agrees), that, had Matrimonial Property proceedings been launched under the 1963 Act, at the appropriate time, the wife would have received something, though the exact

quantification of what she would have received is a matter of some debate, since in those days the Court had much greater discretion in Matrimonial Property matters than it has today under the new Act.

I refer to the decision of Chilwell, J. in Devine v. Devine, [1977] Recent Law 56, the decision of McMullin, J. in Beuker v. Beuker, (1st June, 1977, A. 102/72, Whangarei Registry) and my own decision in Crouth v. Crouth, (17th October, 1977, M. 1289/77, Auckland Registry.) I think those decisions, together with Mr. Chatwin's helpful memorandum, state fairly exhaustively the various headings under which an application for leave should be considered. First of all, it is clear that the onus of proof rests on the applicant. Secondly, one considers the length of the delay; unreasonable delay militates against the exercise of the relief sought. One must, of course, consider the explanation for the delay, and I call to mind the numerous decisions under the Limitation Act, 1950, where an applicant for leave had been ill-served by a solicitor and the distinction that the Court of Appeal appears to have made in such cases as Tokoroa Earth Movers Ltd. v. Currie, [1966] N.Z.L.R. 989, between the situation where the intending plaintiff, himself, does all he can to keep his solicitors active, and the situation where the client virtually "goes to sleep" along with the solicitors. Mr. Chatwin pointed also to a family protection decision where a solicitor had died, as is the case here. That case was Sheehan v. Public Trustee [1930] N.Z.L.R. 1, where Kennedy, J. said at p.8: "Although the death of her solicitor was said to be the cause of the delay, it is clear that a delay of 18 months ensued between the death of the solicitor's notification of intention to apply and the death of the solicitor."

I next consider the conduct of the parties and I

regard as extremely relevant, the fact that no formal intimation was ever made to the husband of an intention to claim until some 4 years after the death of the decree absolute. This factor does distinguish this case from a number of others, where the proposed defendants knew all along that a claim was pending. Finally, a consideration which weighs with me very greatly in this case, I consider the prejudice to the husband. Had the application been commenced expeditiously, it would have been determined under the 1963 Act. However, under the 1976 Act, the application, if granted, must be heard under provisions which are more favourable to the wife. So that therefore, apart from the usual prejudice in combating a stale claim which, in the present circumstances might not have been a very weighty factor, there is found here the very real prejudice to the husband of having to fight a claim under the rules of the new Act. To allow the wife to proceed would be a reward to a tardy application which, in my view, is not justified on the facts.

Therefore, in the exercise of my discretion, I refuse leave under s.24(2) of the 1976 Act.

Before parting with the matter, I express my regret that I have had to come to this decision, because it is quite clear that this lady was entitled to something, under the old Act. She may well have been entitled (and this is purely a guess) to something between 25% to 33% of the matrimonial property. She may, however, have an action against her former solicitors; I cannot, in this judgment, attempt in any way to pre-judge any such action that may be brought. But the Court is always sorry to see a person suffering through delay and inaction on the part of the legal profession.

However, it does seem to me that if I were to grant leave in this case, it would make a mockery of the limitation provision in the Act, i.e. s.24. I also mention that this is one occasion where I considered it proper to deal with the limitation point first before embarking on a detailed consideration of the merits under the new Act. I think that, had the limitation situation been less clear, I might have allowed a more detailed discussion of the merits under the new Act; I think it better to leave the procedure flexible, as I mentioned in the Crouth judgment.

The husband is entitled to costs, which I fix at $50 and disbursements.

R.J. Barker J.

Solicitors

Shale & Burnes, Auckland, for applicant

Chatwin & Hemara, Hamilton, for respondent