Frances

M.18/78

IN THE SUPREME COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

BETWEEN [redacted] SHANNON of [redacted]

Appellant

AND [redacted] SHANNON of [redacted]

Respondent

Hearing: 9 May 1979

Counsel: B.A. Boivin for Appellant
D.W. Irvine for Respondent

Judgment: 9 May 1979

ORAL JUDGMENT OF O'REGAN J.

Appeal against orders under the Domestic Proceedings Act, as to custody and as to matrimonial property.

This matter has a long and chequered history. The decision of the learned Magistrate was delivered on 25 November 1977 when as far as matrimonial property was concerned he ordered that the matrimonial home be sold and the proceeds after payment of the expenses divided equally. He vested a car and caravan in the parties in equal shares and he made orders disposing of the matrimonial chattels. The case came before the Magistrate in my opinion before it was ripe for trial. There was no valuation provided of the chattels in Mrs Shannon's possession nor would it seem that there was any requirement made of her to value them, so that the learned Magistrate was bereft of information as to them. As far as I can see there were no valuations of the car

and the caravan. There was a passing reference to the appellant's superannuation in the evidence, but there was no data provided even as to the name of the company or concern which carried his superannuation and certainly nothing as to its terms or as to its then present value. On this appeal I was asked to deal with a heating system which had apparently been purchased shortly before the respondent left the matrimonial home which was then at but not installed in the premises. There is no evidence whatsoever as to its value at the date of hearing and indeed there was no evidence that it was still the property of either the husband or the wife or both of them as at the date of hearing. In those circumstances it was impossible of course for the learned Magistrate to deal with the heating system or with the superannuation and in putting it to me that I should deal with them I think it was entirely overlooked that this was an appeal and not a hearing at first instance.

I said earlier that the orders of the learned Magistrate were made on 25 November 1977. On 11 December the present appellant lodged an appeal. It was in most general terms and was wide enough to encompass all the orders, that is the ones I have just been referring to, plus the custody orders, separation orders and so on. The appeal was filed by a notice under the Summary Proceedings Act 1957, which was appropriate only to that part of the intended appeal which related to the Domestic Proceedings orders. The Matrimonial Property Act 1976 and its predecessor and The Guardianship Act 1968 respectively rendered appeals from orders under those Acts ~~are~~ akin to civil appeals under the Magistrates' Court Act. Accordingly these appeals were not in proper form but it is too late in the day to do anything about

that but I say in passing the appellant has escaped having to provide security on appeal and perhaps having to pay other court fees in fairly substantial amounts.

Nearly 18 months have now elapsed since the orders were made and the respondent is still out of her share of the matrimonial property except for the chattels that were in her possession. The matter came before Somers J. in November last. His Honour appreciated the situation, took the trouble to settle conditions of sale as to auctions of the matrimonial property and the [redacted] property and ultimately they were submitted to auction. Unfortunately, neither property reached the reserve fixed. The appellant once the auction was in prospect seems to have taken appropriate action to facilitate buyers seeing the property and so on and I was told from the bar that he moved out of the property about the time of the auction. I am told from the bar this morning that he likewise made some endeavour to assist with the sale of the home during the period between December to February when he showed buyers through. Those things apart, however, it seems beyond peradventure that with some active and a lot of passive resistance he has resisted the Court orders. He has had the use and occupation of the matrimonial home at Invercargill since before and the making of the orders - true he has paid most of the outgoings but he has made no payments in respect of a second mortgage to the Public Service Investment Society, the instalments upon which are substantially in arrears and the Society has, I am told, issued a notice under s.92 of the Property Law Act and a mortgagee's sale is in prospect. The threat of a mortgagee sale perhaps might have been regarded

as a lever to bring his wife to some sort of settlement advantageous to the appellant.

When the matter was before Somers J. he recorded that the then unsatisfactory state of affairs was one, which in his judgment for which the appellant was substantially responsible and I am sorry to say I find myself in agreement with him. The Matrimonial Property Act provides that all assets shall be valued at the date of hearing unless the Court thinks otherwise. The learned Magistrate took What seems to me to have been a very prudent course. He directed the sale of the properties. It followed that if they were sold within a reasonable time the parties stood on an equal basis having regard to the then market. Here we are some 18 months later and the market has depreciated, property values have fallen. The matrimonial home was valued at the time of the hearing at $36,000 and the [redacted] section was valued at $10,500. Having regard to the advantages that the appellant has had by the delay and the corresponding disadvantages that have accrued to the respondent, I think the order that should now be made should ensure that the respondent receive half the nett value of both those properties as at the date of hearing before the learned Magistrate. There must be an end to this matter. This matter cannot be allowed to drift on. The orders I make in respect of the matrimonial property and the [redacted] property are :

(1) That they both be submitted to public auction without reserve and that after the payment of the costs of auction and other costs, to which I will allude in a moment, and the outstanding charges upon them the wife be paid half of the nett proceeds

as on sales at $36,000 and $10,500 respectively and the balanc e be paid to the husband.

(2) That the sales be conducted by the Registrar of the Supreme Court at Invercargill who is appointed the Court's agent in the matter and that his reasonable expenses in the matter be a first charge on the proceeds of sale.

(3) That the conditions of sale with appropriate amendments as to dates and such other amendments as to detail as the exigencies require be the same as the conditions of sale in the auctions previously held.

(4) As to the car and the caravan, these two have been in the use of the appellant since the Court order. They no doubt have depreciated in value also but I see no practical way of compensating the respondent for any depreciation that has occurred since the making of the orders. I order also that the car and the caravan be also sold b y public auction under the conduct of the Registrar on the same terms as to his appointment as with the properties and that the nett proceeds be divided equally.

(5) I decline to make any orders in respect of the heating system or of the superannuation, first because I do not think it is an appropriate matter for me to deal with as at first instance on an appeal and secondly, because there is no material before me upon which any order could be founded or based.

The appellant submitted to me that the orders in respect of the matrimonial property should be varied to make appropriate allowance for a sum of $1664.15

which was borrowed from the Public Service Investment Society to pay for certain alterations to the house. He said that at the time the alterations were done the arrangement with the respondent was that he would provide the labour and she would meet the repayments of the capital borrowed for the project. There was no finding of fact as to that in the court below but I think that is of no real moment. However, the fact is that this was in respect of the matrimonial home which has to be shared equally unless there are extraordinary circumstances and I do not think by any measure that the facts he advanced could be regarded as extraordinary or that their existence would "render it repugnant to justice" that there should be equal sharing.

When the hearing of the appeal commenced, counsel for the appellant informed me that the appeal against the only custody order which is at present current was being abandoned and there never at any time seems to have been any intent to appeal against the orders under the Domestic Proceedings Act.

The appellant was aggrieved that the wife had not provided a valuation of the chattels in her possession. In fact neither did he, but apparently he had the chattels in his possession valued subsequent to the hearing, the valuation I am told from the bar being $909. Like the Magistrate I have not the appropriate information to vary the orders. Again they were for equal sharing but the exigencies were such, that is, some of the chattels were in Invercargill in the possession of the appellant and the rest were in Christchurch in the possession of the respondent and the exigencies left the Magistrate with no basis for the making of orders other than those he in fact made. Some cash adjustment would, no doubt, have been made if the information had been available.

That information should have been before the Magistrate initially.

Costs have been reserved on adjournments and there are costs of the hearing before me. I think the justice of the situation is met if I make a global order as to costs and I order the appellant to pay the respondent costs in the sum of $250.

Solicitors :
Hanan Arthur & Co., Invercargill, for Appellant
Broughton Henry & Galt, Invercargill, for Respondent