

19/11

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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. M.439/83

1410

IN THE MATTER of the Matrimonial Property Act
1976, Family Proceedings Act 1980
and Guardianship Act 1968

A N D

IN THE MATTER of an appeal against the District
Court Order dealing with
matrimonial property, maintenance
and access

BETWEEN

K
Appellant

A N D

- K
Respondent

Hearing: 31 October 1984

Counsel: E.T. Higgins for Appellant
T.M. Abbott for Respondent

Judgment: = 6 NOV 1984

JUDGMENT OF COOK J.

Judgment between the parties in relation to matrimonial property and other matters arising upon the break-up of their marriage was given in the District Court on 22nd August 1983, following a hearing earlier in the year and the subsequent filing of a memorandum clarifying certain matters of fact. Notice of appeal by the wife (now remarried) was filed on 9th September 1983. A further hearing before the District Court Judge was necessary, however, for certain directions in terms of leave reserved in the judgment; also,

as to costs and security for costs. An oral judgment on these matters was given on 14th November 1983. That they were matters of considerable moment and complexity which had to be determined, is apparent from the length of the judgment delivered. The respondent now applies for an order dismissing the notice of motion on appeal on the grounds that the appellant has not prosecuted her appeal with due diligence. In his supporting affidavit, the respondent maintains that since 14th November 1983, no steps have been taken by the appellant to have the appeal heard and determined. He points out problems that have arisen in respect of properties in Christchurch which are in their joint names and says that the delay is causing prejudice to him.

The question is governed by Section 75(2) of the District Courts Act 1947:-

" If the appellant does not prosecute his appeal with due diligence the respondent may by appropriate proceedings apply to the [High Court] to dismiss the notice of motion by way of appeal, and the [High Court] may dismiss the notice of motion accordingly."

In respect of the principles which apply, Mr Abbott has referred me to Cameron v Commercial Bank of Australia Ltd [1976] Christchurch M234/71 (Somers J), Lake Rotoaira Trust Board v Valuer-General [1976] 2 NZLR 556 (Barker J) and McMullen and Wing Ltd v Collector of Customs [1983] Auckland M445/80 (Sinclair J), and urged the importance of resolving disputes in respect of matrimonial property as expeditiously as possible.

This is no doubt correct, but all cases must be considered in the light of their particular facts. In the present case, Mr Higgins assures the Court that the appellant is willing and ready to proceed and only the filing of the present application held up the signing of a ready list application. He stressed that it is a difficult and complex matter,; that the appellant is now living permanently in

Australia and there have been problems in communicating with her and her solicitors there; time had to be spent in considering the judgment, advising and receiving instructions.

There could be no doubt that the finalisation of matters such as these should not be delayed and to achieve that end there is an onus on the appellant to exercise the due diligence contemplated by the Act. In the present case it is not easy to say whether such diligence has been exercised or not. Had a greater effort been made, I cannot but think that the matter could have been ready for setting down at an earlier date, but I do not regard the unnecessary delay as having been great. Even assuming that the diligence exercised has not been all that it should be, I would not be prepared to exercise my discretion to strike out the appeal. Clearly there are matters of substantial moment which will be the subject of the appeal and the appellant is entitled to have them determined. The application is dismissed. Costs are reserved.



Solicitors:

Cameron & Co., Christchurch, for Appellant
Harper, Pascoe & Co., Christchurch, for Respondent.