

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M.855/76

156

IN THE MATTER of the Matrimonial  
 Property Act 1963

BETWEEN C MORRISON of Auckland  
 Boilermaker and Welder

PLAINTIFF

AND A SMEDTS of Holland,  
 Married Woman

DEFENDANT

Hearing: 28th February, 1984  
Counsel: Walker for Plaintiff  
 Gapes for Defendant  
Judgment: 28th February, 1984

ORAL JUDGMENT OF BARKER, J.

On the 17th July, 1978, I made a consent order in this matrimonial property dispute. The consent order provided that the principal item of matrimonial property, namely, the matrimonial home situated at 1 Street, Kelston, be vested in the parties as tenants in common in equal shares. By consent I adjourned other aspects of the matrimonial property dispute, including the question of compensation; what compensation, if any, should be allowed to the plaintiff for improvements to the matrimonial home since the parties separated.

It is not necessary to record the matrimonial history of these parties other than to note that they were

married in                      and separated in                      The husband has lived in the matrimonial home ever since the separation. The wife, who was a Dutch national, has now returned to Holland where she now permanently resides.

The matter has come before me on a number of occasions and has been adjourned on four occasions for various reasons. As I recall it, at one stage the husband was not happy about the property being sold as one unit since there is a possibility of a section being subdivided off and time was sought in order for that possibility to be explored. On another occasion the wife's counsel sought an adjournment because of the difficulties of receiving instructions from her in Holland. The husband changed solicitors on several occasions and Mr. Walker was instructed only last month.

On the 26th July 1983, I did make an order restricting the affidavits and the time within which the husband should file further affidavits. Accordingly, because of that order, I do not accept the affidavit filed by the husband as late as yesterday which was served on the wife's solicitors only last night with no sensible possibility of their considering it let alone answering it. However, I think I have sufficient information in the affidavit of Mr. Ozich, a registered valuer at Henderson, and of the husband himself. The husband has now recognised that it is inevitable that an order for sale must be made and counsel have agreed as to the appropriate formula which will permit a private sale and if that is not possible then an auction. The only point of dispute between the parties is the allowance, if any, that should be made to

the husband out of the sale proceeds in respect of the improvements which he has made to the property. It seems to be undisputed that he has added a detached garage and a car port and has since put in a metal driveway and concrete paving and fencing. The valuer estimates \$4,200 as the value of these items added. Both counsel agree that I have jurisdiction to order an allowance in favour of the husband but Mr. Gapes for the wife submits that in all the circumstances I should not do so. His principal submission was that the husband has had the use of the property which rightly belongs to both of them for an exceptionally long period, namely, almost 13 years.

I think that one must balance the fact that the property has increased in value because of inflation and that the husband's efforts have contributed to the increase in value and have made the property more readily saleable. As against that I note that he had the use of the house for all this period of time and that the house must inevitably be a less attractive sale proposition because of its age; it is now almost 23 years of age. The valuer reports that the present saleability and market value of the dwelling are adversely affected by overdue exterior repairs and maintenance and his assessment for market purposes of \$48,500 takes that factor into account.

In my view the wife could have brought this matter on for hearing somewhat earlier than has occurred. It would be unrealistic to deny the husband any recognition

for improvements but I do not think that he would be entitled to recognition for the full amount claimed. I think that justice would be done if I were to allow him \$3,000 for the improvements, which means that out of the net proceeds of sale he is to receive \$3,000 and thereafter the net proceeds are to be divided equally. Counsel are now agreed now that this ruling has been made as to the machinery terms of the order and I look forward to a draft in due course. I make no order as to costs.

*X. J. Barker J.*

Solicitors: Raymond S. Walker, Auckland, for Plaintiff  
Butler, White & Hanna, Auckland, for Defendant