

20/12

NZLR

X

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.183/76

IN THE MATTER OF The Matrimonial Property Act 1963

1570

AND

IN THE MATTER OF An Application in respect of
property

Appeal to CA filed
CA 16/85

BETWEEN J O'ROURKE
of Hamilton, Farmer
Applicant

A N D M O'ROURKE
of Hamilton, Married
Woman
Respondent

Hearing: 29 November 1984

Counsel: D.G. Holloway for Applicant
H. Fulton for Respondent
H.B. Rennie for Official Assignee

Judgment: 14 DEC 1984

JUDGMENT OF BISSON J.

On 9 August 1976 the applicant applied under the
Matrimonial Property Act 1963 for an order that the matrimonial

home, which was registered as a joint family home, be sold and the proceeds divided between him and the respondent on such terms and conditions as the Court thought fit. He filed an affidavit in support and the respondent filed an affidavit in reply.

Discussions took place between the parties themselves and eventually their respective solicitors recorded in correspondence an agreement between the parties for the sale of the property provided that the respondent received \$35,000 clear from the proceeds of the sale. It was intended that an order of the Court be obtained if such agreement were approved. No such order was obtained and on 13 July 1978, the applicant was adjudicated bankrupt in the Supreme Court at Wellington. The Official Assignee in bankruptcy filed an application on 9 November 1979 seeking orders:-

"(a) Such order pursuant to Section 21 of the Matrimonial Property Act 1976 as shall determine whether there is any agreement in existence between the applicant and respondent in this application and if there is any such agreement whether such agreement shall have effect in whole or in part or for any particular purpose;

(b) If any such agreement shall be found to exist and the Court in its discretion shall decide to give effect to such agreement in whole or in part then such orders pursuant to the Matrimonial Property Act 1976 including in particular such orders pursuant to Section 33 (3) (a) (b), (e) and (h), as this Honourable Court may think fit."

In my judgment, I held that no agreement under s.21 of the Matrimonial Property Act 1976 existed and therefore the provisions of s.21 (9) could not be invoked. The judgment concluded:-

"If the parties are unable to resolve the dispute in the light of this judgment then it will be necessary to arrange a fixture for the hearing of the substantive application and the making of an order, whether in terms of the draft submitted or otherwise."

That judgment was delivered on 5 August 1980. It was not until 21 September 1984 that the proceedings were brought before the Court again. The applicant sought an order determining the status (if any) of the Official Assignee in the original proceedings which had been commenced by the applicant in 1976. The Official Assignee in turn, sought the disposal of the proceedings by an order of the Court approving a settlement which he had reached with the respondent to the effect that she pay to him as Assignee of the applicant's estate in bankruptcy, the sum of \$22,500, such sum to be applied by the Official Assignee as to \$15,000 in settlement and discharge of the Official Assignee's claim upon the applicant's estate and interest in the matrimonial home and as to the sum of \$7,500 to the applicant personally; and for a consequent order vesting that property subject to a mortgage to the Northern Co-operative Terminating Building Society, in the sole name of the respondent, at the same time cancelling the registration of the property as a joint family home.

The applicant has sworn and filed an affidavit dated 10 September 1984 in which he states that on 13 July 1981 he was unconditionally discharged from his bankruptcy under s.107 (1) of the Insolvency Act 1967. As a result, he contends that the Official Assignee has no further status and that he is entitled on his original application back in 1976, to an equal share in the matrimonial home which is the only outstanding asset of matrimonial property. Three days before his unconditional discharge, a caveat was registered against the title to the matrimonial home in favour of the Official Assignee.

The applicant and the respondent separated on 18 March 1976 and were divorced on 11 April 1979. The respondent obtained in the Magistrate's Court at Hamilton, orders for separation, custody in respect of the four children of the marriage and exclusive possession of the matrimonial home where she still resides.

Mr Holloway for the applicant, correctly stated that except in certain circumstances, which do not apply in this case, the discharge in bankruptcy released the applicant "from all his debts provable in the bankruptcy" (see s.114 of the Insolvency Act 1967) and that being the case, Mr Holloway

argued - "if there are no debts remaining of the bankrupt, how can the Official Assignee have any further interest in the property as it is only vested in him to pay debts?" He referred to the case of Perrott v. Newton King Limited 1933 N.Z.L.R. 1131 (C.A.) and cited the following passage from the judgment of Kennedy J. at p.1160:-

"The release not only bars the remedy against the bankrupt, but extinguishes the debt."

I do not read that sentence as meaning that the debt is extinguished for all purposes. I draw attention to a further passage of that judgment on p.1161 which reads:-

"The original debt measures the creditor's right as against the Official Assignee, but the release discharges the bankrupt from the debt so that as between the creditor and the debtor nothing is owing after the discharge."

I must find against Mr Holloway's submission because while the bankrupt is released from all debts proved or provable in the bankruptcy (subject to those exceptions stated in s.114), the creditors can still look to the Official Assignee for payment in respect of those debts to the extent that funds available in the bankrupt estate permit.

Mr Rennie for the Official Assignee and Mr Fulton for the respondent, both submitted that under s.42 of the Insolvency Act, the bankrupt's interest in the matrimonial

home, subject to the protection provided by law and his interest in the proceedings which the applicant had commenced under the Matrimonial Property Act 1963, vested in the Official Assignee and that while there were creditors with debts proved in the bankruptcy not yet met in full, those interests of the bankrupt which vested in the Official Assignee did not re-vest in the bankrupt on his discharge.

I agree with those submissions and hold that although the bankrupt on his unconditional discharge is released from debts proved in the bankruptcy, the Official Assignee is still responsible to administer the estate of the bankrupt, including the conduct of these proceedings, for the benefit of creditors who have proved in the bankruptcy. Mr Rennie however, very properly accepted that the applicant was entitled to be heard as there remained his protected interest in the property and he said that at least hypothetically the applicant would have a further interest in the property if the value of such interest exceeded the debts payable in the bankruptcy because by s.104 of the Insolvency Act, any surplus reverted to the bankrupt.

Mr Fulton confirmed the agreement which he had reached on behalf of the respondent with the Official Assignee in respect of which Court orders are now sought and said that the \$7,500 to be paid to the applicant represented his half

share of the protected sum, namely \$15,000 as at the date of the bankruptcy. Mr Fulton submitted that if this proposal to which the Court's approval was sought, did not commend itself to the Court, then he asked that the original application of the applicant be adjourned so that it can be dealt with in the usual way with up-to-date affidavits establishing values and post-separation contributions.

Mr Rennie submitted that the prospect of a surplus from a sale of the applicant's interest in the matrimonial home after creditors and the costs of the administration had been paid in full did not arise, but the Court has not before it in evidence any figures in support of that submission either as to the extent of outstanding debts yet to be paid by the Official Assignee if the funds permit, nor an up-to-date valuation of the property which may have increased substantially in value since the last valuation in 1978, nor does the Court have any information as to the state in which the property has been maintained by the respondent or as to any improvements which she may have made to the property.

It is accepted that this application under the Matrimonial Property Act 1963 falls for determination under the Matrimonial Property Act 1976. As to the value of the matrimonial home, the applicant deposes in his original affidavit sworn on 14 June 1976, that it had been purchased in

1973 for \$34,000 and that he estimated its current market value in excess of \$70,000. In the respondent's affidavit in reply sworn on 21 September 1976, she said that she had recently obtained a valuation from Mr D.B. Lugton of Hamilton, registered urban valuer, who assessed the present value of the property at \$56,000. She attributed the appreciation in value since the purchase of the property to inflation, saying that the only improvements carried out in the three years since the property was purchased, were re-sealing the tennis court and odd little bits of painting together with the installation of a gate which cost \$24.00.

In an affidavit sworn by the Deputy Official Assignee on 1 November 1979, there are exhibited two valuations of the property - one by Mr Don E. Fraser, registered valuer dated 13 July 1976 at \$61,000 and another by Mr D.B. Lugton, registered valuer dated 5 December 1978 at \$55,000. In his recent affidavit of 10 September 1984, the applicant makes no reference to the present value of the property. As there is no up-to-date valuation of the property before the Court, it is impossible to consider whether the proposal to which the Court's approval is sought, is just.

Under the Matrimonial Property Act 1976, the Court has a discretion as to the date at which the property is to be valued for the purposes of a division of matrimonial property

between the spouses. The exercise of such a discretion depends on the evidence tendered in support of a substantive application. Mr Rennie submitted that there was no evidence to indicate that there might be any surplus for the bankrupt beyond his share of the protected sum and that even if the present value were such as to produce a surplus, the Court would still need to consider whether there were circumstances which justified present values being adopted as opposed to the value at any earlier time. The present value and the Court's discretion as to the adoption of such a value are the very matters which the applicant seeks to have the Court consider in deciding whether the orders sought are just. The Court would not feel easy in making assumptions which may deprive the applicant of some further equity in the property beyond the protected sum.

The order of the Court is that the Official Assignee has the status to continue the substantive proceedings commenced by the applicant, but the Court is unable to approve the settlement between the respondent and the Official Assignee without further evidence to resolve the question whether the applicant has any further interest beyond his half share of the protected sum.

If the applicant is prepared to concede in a memorandum signed by his counsel, now that the question of the Official Assignee's status has been determined, that he has no

further interest in the matrimonial home beyond the protected sum, the Court will make the orders sought by the Official Assignee without any further appearance being necessary.

Ch. B. B. B.

Solicitor for Applicant: D.G. Holloway Esq., Wellington

Solicitors for Respondent: Messrs Wilson, Henry, Martin and Company, Auckland

Solicitors for Official Assignee:

Messrs Macalister, Mazengarb, Parkin and Rose, Wellington
