

IN THE HIGH COURT OF NEW ZEALAND

NAPIER REGISTRY

665

IN THE MATTER

of Part 1 of the Judicature
Amendment Act 1972

BETWEEN

OTENE of
Hastings, Driver

Plaintiff

AND

PHILLIP TERENCE RICE of
Hastings, District Court
Judge

First Defendant

AND

PETER JAMES TRAPSKI of
Rotorua, Principal Family
Court Judge

Second Defendant

AND

HAPE of
Hastings, Married Woman

Third Defendant

AND

EVAN CHRISTOPHER JOHN GOULD
of Hastings, Court Registrar

Fourth Defendant

Hearing: 6 June 1984

Counsel: M Wigley for Plaintiff
G L Lang for First, Second and Fourth
Defendants (Abided and withdrew)
GJC Ferguson for Third Defendant

Judgment: 20 JUNE, 1984,

JUDGMENT OF JEFFRIES J

This is an application for review of two separate decisions by two judges of the Family Court, who are named as first and second defendants. The third defendant was the wife of the plaintiff, but their marriage was dissolved in 1968. The fourth defendant is the registrar of Hastings District Court. The protagonists are the plaintiff and the third defendant. The others abide the decision of the court. I proceed to the facts.

Plaintiff and third defendant were married in 1960. They separated pursuant to an agreement dated 19 February 1967. The agreement provided for third defendant to continue to occupy the matrimonial home which was registered in both their names. It was a condition of occupation that she paid all outgoings. In May 1968 she vacated the home and went to live with the man she ultimately married. From May 1968 plaintiff resumed occupation of the home, and apart from times when it has been let, has remained in occupation to the present day.

It is the plaintiff's case that he and his former wife reached an agreement in October 1968 that her claim under the then matrimonial property legislation in respect of the house would be settled by him repaying all moneys owing on a family benefit charge, and for payment to her of \$180 plus a sum equal to the family benefit expended to that date. It is not disputed the sum of \$564.20 was paid in discharge of the family benefit and it was registered in January 1969. Plaintiff admits he has not paid the balance of money due to his former wife but acknowledges it is still owing.

It needs to be said immediately third defendant denies the existence of any such agreement. By letter in mid 1980 third defendant wrote through her solicitors to plaintiff concerning a prospective application under the Matrimonial Property Act 1976. For the hearing in this court Mrs Hape's counsel filed a sequence of events and the most economical way of covering the events since mid 1980 down to the present time is to reproduce that document and state that it is agreed by plaintiff's counsel to record accurately the facts of which it speaks:-

- "1. 30.6.80 - Third Defendant's Solicitors write to plaintiff threatening proceedings under Matrimonial Property Act.
 2. August 1980 - Application for leave to issue out of time filed. (Substantive Matrimonial Proceedings also filed).
 3. 25.9.80 - Defendant served all proceedings.
 4. 7.10.80 - Defendant appeared on Application for leave to issue requested adjournment through Solicitor instructed.
 5. 21.10.80 - adjourned. Solicitor not available.
- 18.11.80 - adjourned. Solicitor not available.

6. 16.12.80 - Imrie D.C.J. order granting leave to issue out of time granted by consent. Plaintiff represented by two Counsel.

- Imrie D.C.J. substantive proceedings
adjourned sine die.

7. 13.7.81 - Fixture allotted, parties notified.
8. 19.8.81 - Substantive Hearing. No appearance by Defendant. Sheehan D.C.J. makes orders for sale.
9. Rehearing Application dated 4.11.81 served on Third Defendant 25.11.81.
10. 3.12.81 - Rehearing Application adjourned to 4.2.82 at request of Plaintiff.
11. 4.2.82 - Application for Rehearing granted - Rice D.C.J. and Rehearing of substantive proceedings adjourned to 18.2.82.
12. 18.2.82 - Rehearing of substantive proceedings further adjourned to 31.3.82 at request of Plaintiff.
13. 31.3.82 - Rehearing of substantive application. No appearance of Plaintiff. Orders made directing sale.

14. 21.10.82 - Service of application for Occupation Orders and for appointment of Registrar to sell and divide proceeds.
15. 27.10.82 - Adjournment of proceedings to 1.12.82 to allow Plaintiff to obtain legal advice.
16. 1.12.82 - Occupation Orders and Registrar appointed - Trapski J. Orders served 10.12.82.
17. 17.1.83 - Application for Warrant to Enforce Occupation Orders.
18. Execution of Eviction Order 4.3.83.
19. Contract for Sale to Simmonds signed 30.3.83 for settlement 29.4.83.
20. High Court Proceedings filed 23.5.83.
21. Proceedings for Specific Performance filed by Purchaser and served 19.9.83."

Some comment is now called for on the above calendar of events. In December 1980 District Court Judge Imrie granted by consent leave to issue out of time. At this hearing plaintiff was represented by counsel. In August 1981 there being no appearance of plaintiff Judge Sheehan made orders for the sale of the house property and for the balance of the proceeds to be divided equally

between the parties after deduction of \$3,092.50 to be paid to Mrs Hape. This appears probably to be the correct figure, but in the judgment of Judge Rice on 31 March 1982 he refers to a figure of \$3,300. On February 4 1982 Judge Rice granted a rehearing of the substantive application. On March 31 1982 there was no appearance of plaintiff and again orders were made directing sale. In December 1982 Principal Family Court Judge Trapski made occupation orders and appointed the registrar to complete sale. A contract of sale was executed in March 1983. These proceedings were filed in May 1983 and in September 1983 the purchaser issued proceedings for specific performance. It should also be mentioned that an injunction was granted ex parte in May 1983 restraining the sale of the property and that injunction is still in force.

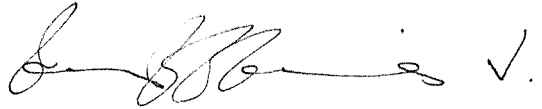
By these proceedings for review plaintiff seeks orders quashing the decision of 31 March 1982 and 1 December 1982 made by Judges Rice and Trapski, respectively, and it would appear permanent restraint upon the fourth defendant to prevent sale of the home. The grounds for seeking this relief are contained in the existence of an alleged agreement, set out earlier in this judgment, and breach of natural justice. The application for review is supported by an affidavit of the plaintiff. By way of partial explanation of his extraordinary dilatoriness and indifference to hearings of applications in the court he acknowledges he has for many years now been an alcoholic. It is clear from his past conduct and behaviour he is stirred to act only at or after execution of a court order.

The argument proceeded in this court that there was no jurisdiction to make the orders because there was in existence an agreement between the parties. The natural justice ground was abandoned. The agreement argument begs the question. At all stages there has been a denial by Mrs Hape of any agreement and at the original hearing, and at the rehearing plaintiff simply did not appear to maintain his assertion which underpins his whole case. The so-called agreement has never arisen above an assertion by him which has always been denied. What evidence is available to this court, which is correspondence attached to an affidavit filed in the District Court, strongly suggests there was never a concluded agreement between the parties as he maintains. At the highest there were negotiations which were apparently brought to an end by his disappearance.

This court is not unaware of the results to plaintiff's life of the decisions of the District Court but he has treated the system with a form of contempt and the court's duty is to do justice to all parties. A very important aspect of justice is to bring finality to disputes, and as far as possible to prevent obstruction and vexatious manipulation of court orders.

The application for review is dismissed and the injunction is dissolved. Counsel for Mrs Hape asked that I make an order that plaintiff pays the damages claimed by the prospective purchaser which is \$4,956 with a daily rate of \$12.32. I do not think I have jurisdiction to make such an order, and therefore decline to do so.

I order plaintiff to pay \$250 costs to third defendant.



Solicitors for Plaintiff:

Hingston & Chadwich,
Rotorua

Solicitors for First,
Second and Fourth
Defendants:

Crown Law Office,
Wellington

Solicitors for Third
Defendant:

Gifford Devine & Partners,
Hastings