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IN THE HIGH COURT OF NEW ZEALAND M. 700//83

AUCKLAND REGISTRY

IN THE MATTER of the Matrimonial Property Act, 1976

- a n d -

IN THE MATTER of an application

BETWEEN B BODAY

APPLICANT

A N D C BODAY

RESPONDENT

Judgment: 10 December 1984

Hearing: 10 December 1984

Counsel: G.N. Jenkins for Applicant
R.P. Towle for Respondent

ORAL JUDGMENT OF CASEY J.

I think it is appropriate to make a brief resume of the history of this litigation to date. Mrs Boday filed her application under the Matrimonial Property Act in 1983 and at that stage the parties were living together in the former matrimonial home. She deposes that she moved downstairs to stay with her mother in the flat in of that year, and left the premises in . My understanding is that Mr Boday has occupied the house ever since.

The matter came before me on 4th May this year on her application for a direction regarding the sale of the home. I ordered that it be vested in Mr Boday on payment to her of the sum of $144,464.54, taking into account as the only liability a bank mortgage of $14,445.92, which was to be

subject to minor adjustments, if any, on settlement and there have been none established. Of this amount the sum of $100,000 was to be paid by 8th May and the balance on 31st August when settlement was to take place. Mr Boday has duly paid the first mentioned sum but has not yet paid the balance.

There followed an intractable dispute over the matrimonial chattels and the contents of the house, and on 10th July I was asked to make orders in an effort to try and resolve the impasse. There had been a valuation and inventory by George Walker, obtained in the previous December. I heard evidence from the parties. There were charges and counter-charges about the ownership and removal of the property, and a dispute about chattels belonging to Mrs Boday's mother, , and to a third party. The only independent evidence I had was George Walker's valuation, and as I said at the time in my judgment, I found it quite impossible to tell where the truth lay in a straight dispute between the parties themselves, without independent evidence. However, I felt able to accept Mrs as a truthful witness, although at her age some of her recollections may not have been as.good as a younger person.

The upshot was on 16th July I ordered the appointment of a special refereee to try and determine the problems on the spot. Mr Dickie was put forward by Counsel and duly appointed, and I must pay tribute to the sterling job that he did, undoubtedly in co-operation with Counsel, whom I feel sure have done their best to resolve these difficulties with minimum resort to the Court. In two reports he dealt with everything that was physically present in the house, or accepted as belonging to one or the other party, and a large measure of agreement was reached.

Now Mr Boday moves for a number of orders designed to bring this part of their matrimonial dispute to a conclusion. Mrs Boday is presently overseas and he (as I have said) is in the house, retaining by agreement a number of

items for which I am asked to fix a cash allowance in her favour in the accounts to be finally settled between them. The parties accept that all this part of their matrimonial property is to be dealt with by equal division. However, any orders I make now will still leave for resolution other assets comprising properties, Mr Boday's interest in a company, valuable personal items such as jewellery and furs, and photographic equipment.

Mr Boday wants several matters taken into account. First, he mentioned loans made to him by the company in which he is interested between 1977 to 1979 and used by him to renovate the house property. Undoubtedly the house was subject to recent and widespread renovation. In his affidavit, Mr Boday said that there was $10,403.20 due under this loan as at June 1983, when Mrs Boday's application was filed. However, his Counsel said this was a mistake and the proper figure should be $12,903.20 because the sum of $2,500 was repaid shortly after, but wrongly taken into account at the time the affidavit was prepared. It is submitted that the existence of this advance which had been applied towards the house was overlooked at the time the net figure for her share in it was fixed by me last May.

Mr Jenkins quite fairly indicated that he would not object to this being raised as a proper deduction, but pointed out there was very little independent evidence of Mr Boday's assertions that the money had gone into the house property. I regret to say that I am simply not in the position to accept his word on the matter without some independent evidence supporting it. My reasons for saying so will be quite clear from my assessment of both these parties at the hearing last July. A further factor is that the treatment of this fund may also be affected by this Court's final resolution under the Matrimonial Property Act of Mr Boday's interest in the company and Mrs Boday's rights in respect thereof. I indicated to Counsel that I thought it better to let this part of the dispute stand over, to be taken

into account in the final resolution of the position between the parties. This will give Mr Boday the opportunity to produce more acceptable evidence that the loan was applied in this way. Mr Towle acknowledges that there would be no additional loss to him, because apparently this money is not attracting any interest. In accordance with this view, I reserve that particular matter for further consideration in due course.

Secondly, he seeks reimbursement of half the amounts paid in respect of the outgoings and payments on the mortgage over the house from the date that Mrs Boday filed these proceedings in May 1983 until the time she left the home in June 1984, a period of some twelve months. Mrs Boday objects strenuously to being charged with anything over this period, pointing out that until she moved downstairs with her mother in December 1983, she was still sharing the ordinary living accommodation with Mr Boday and providing the normal domestic services. My order last May was made in the light of the quite unequivocal offer from Mr Boday that he would pay half the equity without any such deductions or reference to outgoings, and the balance of the mortgage to be taken into account was then fixed. The evidence of the advances from the company was clearly overlooked, and in the light of Mr Jenkins' concession, it is proper that it be taken into account in the way I have suggested.

His offer was received and acted upon as settling the parties' interests in the matrimonial home as at last May, and I am not prepared to reopen the order I then made to take these additional matters into account now. I would point out in any event that this is a very different situation from that usually encountered in these cases, where one spouse departs completely from the home and the other is left to make payments for its preservation as an asset. Here Mrs Boday said that she stayed on and was actually providing matrimonial services until she went to live with her mother in December - a period of some six months. Mr Boday has had the use of the

$44,000, which he should have paid last August, down to the present time, and an elementary calculation demonstrates that the interest on that sum would be about $1,000. One can credit this and accept that for the first six months there should be no deduction, with both of them living in the same part of the house. So the claim he is now making would have been reduced considerably in any event. But for the reasons I have already given, I am not prepared to reopen the matter. This particular claim has all the appearances of an after-thought. I see no reason to depart from the usual practice of valuing Mrs Boday's interest at the date of hearing in May for that part of the application settling the question of their interest in the matrimonial home.

Mr Boday further seeks the costs of replacing locks and having the phone reinstated in the flat, ammounting to $261.80 and $25 respectively. I can well concede that these comparatively small items must have rankled with him as a nuisance for which he blames her, but she certainly denied the allegation of having anything to do about the locks in her earlier affidavits. I am simply not prepared to deal with these matters now. It is crystal.clear in my view (and I have no doubt in the view of Counsel) that the time has come to rule a line across this area of their dispute. The Court cannot hope to do full and detailed justice in the light of the continuing bitterness between these parties and its inability to resolve the total contradictions in their evidence.

The next matter Mr Boday wants is an allowance of rent for Mrs   accommodation over this period of twelve months. I am firmly against this. It was a family arrangement and, as Mrs Boday points out, when one is considering the overall rights and wrongs it is more than balanced by the treatment his own parents received at an earlier stage. There was no suggestion at the time she was living there that she should pay or make any allowance. The Matrimonial Property Act was not designed to allow claims to

be brought to recover payments which would never have been sought except to satisfy a sense of grievance attributed to the other party's conduct. I think this is clearly the reason for this suggestion of an allowance for Mrs Martens' accommodation.

I accordingly confirm the order that I made last May, vesting the house in Mr Boday on payment of the balance specified, which was due on 31st August last. I now add the stipulation that if it is not paid within fourteen days, it will bear interest at 11% from 24th December 1984. Even if he had been entitled to the matters which he now raises, there is no excuse for withholding all of this balance.

I now turn to the claims in respect of missing chattels. This tends to ressurect problems similar to those encountered in the July hearing. Mr Boday referred to items which he thinks should have been there but were not, and I agree that on some of them he raises grounds for grave suspicion on Mrs Boday. But she has filed an affidavit totally denying any responsibility and makes counter-charges of her own. I do not think it will come as any surprise to Counsel or the parties, when I say it is simply impossible for the Court to reach any conclusion on this kind of evidence, or to make any orders about these missing items, and I decline to do so. Again I can only repeat that the sensible thing for the parties to do now is to draw a line across the past with the house and contents, and accept what has been resolved, on the understanding that the Court can only attempt in such circumstances to achieve broad justice between them, and to do as much as the evidence and the circumstances will allow for each.

That accordingly leaves the division of the chattels in accordance with Mr Dickie's reports. Mr Boday, in para. 15 of his affidavit, has listed the items taken by each with a corresponding adjustment value, and after hearing Counsel I am prepared to add a further $375 to his total in

respect of Mrs Boday's interest in his half share of the chattels which I found to have been owned jointly by him and Mrs Martens. Accordingly I make an order that subject to a payment or allowance by him to her of $4,007.50, to be effected within fourteen days, all chattels listed by Mr Dickie in his reports, as affected by para. 15 of Mr Boday's affidavit, are to be vested in each party as indicated in those documents, as their own separate property. The above sum of $4,007.50 will also bear interest at 11% from 24th December 1984 until payment or settlement

I further direct that Mr Dickie's fees and the valuations of the matrimonial home and chattels obtained to date be shared equally between the parties. It is probably preferable for them to be paid by Mr Boday, if this has not already been done, and taken into account against Mrs Boday's half when settling the balance payable to her for the home and chattels.

I have also discussed with Counsel the future conduct of these proceedings. It is obviously desirable that some form of timetable be proposed. Mr Towle says he will be away for some two months. Mr Boday has really filed nothing in reply to the affidavits from his wife about the other property. She is overseas and there will, of course, be difficulties in obtaining instructions and affidavits from her in response. To compound matters, I will be away between the end of February and the beginning of June next year - although, of course, it is not necessary that I be available to deal with the further matters in this dispute requiring resolution in Court. I think the best thing at the moment is to direct that Mr Boday's affidavits be filed by 15th March 1985. I fix that date rather than the 31st in order to give Mrs Boday sufficient time to file replies. She will have until 15th April to respond, if she wishes to do so, and I

would hope that the case would then be ready to set down for final disposal immediately afterwards.

M.E. Casey J

Solicitors:

Turner Hopkins, Auckland, for Applicant
Towle & Cooper, Auckland, for Respondent