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RJ

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.249/81

604

BETWEEN J BESLEY
(also known as _____ of
Christchurch, Femme Sole
Plaintiff

A N D A JOHNSON of Christchurch
Retired substituted by
the District Public
Trustee for Christchurch
Defendant

Hearing: 16 April 1984
Counsel: A.A.P. Willy for Plaintiff
B.S. McLaughlin for Defendant
Judgment: JUN 1984

JUDGMENT OF ROPER J.

The Plaintiff in this action, whom I shall refer to as Mrs Besley to avoid confusion, seeks a declaration that the Defendant holds certain property, or an unspecified share therein, in trust for her. The Defendant died some time after the issue of the proceedings and the Public Trustee, as his executor, has been substituted as Defendant. Mr Johnson's death left Mr McLaughlin in something of a difficulty on the facts in issue.

Mrs Besley and Mr Johnson lived together in a de facto relationship for 25 years from _____ There were no children. Mr Johnson was _____ at his death in _____ and Mrs Besley is now about _____. Mrs Besley was married and divorced twice and it was during her second marriage that she met Mr Johnson. She has two children of the first marriage,

who are now in their forties. Mr Johnson never sought a divorce from his wife (not that Mrs Besley would have married him had he been free), and indeed he returned to her after he and Mrs Besley separated in , and by his last will, made on the 25th September 1981, left her the whole of his estate which has a nett worth of about \$23,000. There are only two assets, a C.S.B. account of \$2,606 and the unpaid purchase price of about \$22,000 for Mr Johnson's home in Avenue. Mrs Besley's caveat has prevented completion of the sale.

The couple began living together in 1956 in a rented property in in Christchurch. At that time Mr Johnson owned a glass factory where Mrs Besley worked part-time but for no set wage. According to Mrs Besley the glass factory had to be sold because of some unspecified difficulties Mrs Johnson was causing in the business, and the couple then moved to a dairy in Kaiapoi purchased by Mr Johnson. Mrs Besley, by her account, did most of the work in the shop because Mr Johnson took an interest in power boating and

His boats always bore the name ' and he worked his way up to 14, although it is not clear from Mrs Besley's evidence how he financed this hobby. They kept the shop for three years and then moved to rented premises at and later Kaiapoi and Belfast with Mr Johnson doing various labouring jobs when not unemployed. According to Mrs Besley most of Mr Johnson's money went on his power boating activities and she worked throughout and maintained the family, including her two children of the first marriage.

In about 1968 Mr Johnson asked Mrs Besley if she would give up work and look after his mother, who was then over 70. She agreed, and eventually Mrs Johnson senior's house was sold and the property purchased in Mr Johnson's name by using the proceeds from the sale of the mother's house and raising a mortgage for \$1,600. Mrs Besley looked after the

old lady for some four or five years and also obtained employment (6 p.m. to 9 p.m.) at _____ She retained that job for 14 years. After the mother's death the couple continued living at _____ but it seems that it was not a very happy relationship. Mrs Besley claimed that she was assaulted at times, and at no stage did she receive a regular housekeeping allowance. After Mr Johnson had been admitted to hospital Mrs Besley decided that enough was enough and took the opportunity to leave

Mrs Besley's son gave evidence. Neither he nor his sister got on very well with Mr Johnson. He gave evidence of Mr Johnson's irregular work pattern, his ill-treatment of Mrs Besley, and his pre-occupation with power boat racing.

Mr Johnson made the following points in his Statement of Defence:-

1. That he always gave Mrs Besley all his wages, but despite that rent remained unpaid.
2. That a substantial part of his earnings went to pay court costs and legal fees incurred by Mrs Besley's son.
3. That, contrary to Mrs Besley's allegation, he had never made nor contemplated making a will leaving her his estate.
4. That from 1970 the couple had used separate bedrooms.
5. That there was never any intention that the assets should be their joint property.

I am left with the impression that Mr Johnson wouldn't have looked too convincing had he survived to give evidence. This is the son's evidence concerning his criminal record:-

"There has been a suggestion you were involved in some sort of trouble with the police when you were younger? From what I can recall of it I was only about 14 or 15 and a cobbler and I took another cobbler's car and went for a ride in it, a bit of a joke, we knew him quite well. He came out and found the car missing and called the police and we ended up in Court in Rangiora. I got reprimanded and had to stay home and give up tennis, that sort of thing, and that was it as far as I recall. I have never been in any other trouble at all."

And there is no doubt that Mr Johnson did make a will leaving Mrs Besley the whole of his estate for a copy of that will, made in July 1968, was produced. Mr Johnson actually gave Mrs Besley a copy of it and later tried, unsuccessfully, to recover it from her. I accept Mrs Besley's evidence that the couple did not occupy separate bedrooms.

Mrs Besley's claim was advanced on the ground that there was a sufficient common intention of equal sharing to give rise to a trust, or, in the alternative, if a common intention cannot be found in fact then a constructive trust ought to be imputed to reflect the direct and indirect contributions of each to the property.

According to Mrs Besley Mr Johnson never discussed money matters with her and she knew nothing of his finances or what he did with money raised on mortgage on after the original mortgage for \$1,600 had been repaid. She agreed that she made no direct financial contribution to the assets and indeed conceded that they tended to keep their money separate and share expenses. I think it reasonable to assume that Mrs Besley did make indirect contributions to Rookwood Avenue by contributing to the household expenses so freeing Mr Johnson to get on with paying off the mortgage and otherwise maintaining the property. The most crucial evidence was the assertion by Mrs Besley that over the years Mr Johnson had always assured her that "everything was to be shared equally".

That evidence must of course be viewed with caution but my impression of Mrs Besley was that she made a genuine effort to recount the facts as she recalled them. The 1968 will gives some clue to Mr Johnson's attitude and I think it is of some importance that Mrs Besley's claim was no afterthought. Immediately she heard that Mr Johnson was contemplating selling she sought legal advice. Furthermore, having regard for the duration of the association and the fact that Mrs Besley undertook the care of Mrs Johnson senior it would be surprising if Mr Johnson had not expressed himself as Mrs Besley claimed he did.

I am satisfied that the inference can be drawn that there was a sufficient common intention of equal sharing to give rise to a trust.

I therefore declare that the Public Trustee is to hold half the proceeds of sale of _____ and half the balance in the C.S.B. account upon trust for the Plaintiff.

I am inclined to think that this is a case where the parties should be left to meet their own costs but I am still prepared to receive Memoranda on the matter if Counsel for the Plaintiff has other ideas.

A handwritten signature in dark ink, appearing to be 'J.G. Salisbury', is located in the lower right quadrant of the page.

Solicitors:

J.G. Salisbury, Christchurch, for Plaintiff
Harold Smith & Dallison, Christchurch, for Defendant