IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M.158/82

BETWEEN CHARMAN

Appellant

AND CHARMAN

Respondent

Hearing: 10th April, 1984

Counsel: Olphert for Respondent in Support
O'Brien for Appellant to Oppose

Judgment: 10 MAY 1984

JUDGMENT OF SINCLAIR, J.

This is an application for leave to appeal to the Court of Appeal in respect of matrimonial property proceedings between the parties.

Originally in the District Court so far as the matrimonial home was concerned the Appellant, who I will refer to as the Husband, received an interest of 15%, while the Respondent naturally was confirmed as having an interest in the balance, namely 85%. On appeal Barker, J. held that the District Court had acted erroneously and ordered an equal sharing of the matrimonial home, but directed that the date at which the Appellant's interest in the home should be assessed should be the date of separation and not the date of hearing. To save further argument he then quantified that half interest at $8,500 and I am informed by counsel that on this basis the husband's interest, if the District Court Judge's judgment is to stand, would be approximately $2,500. Thus, by any standards the amount involved in

actual money is not great and I observe now that as both have at one stage or another been legally aided there will be various charges in favour of the Crown in respect of those costs which fall within the ambit of legal aid.

The brief facts are that this was a second marriage for both parties and that they lived together for some time prior to their marriage on 15th November, 1973 and then appeared to have lived quite happily together until March of 1977. The marriage was one of just over three years and in the District Court a decision was made not to regard the marriage as one of short duration; from the judgments which I have read there was no justification for it being treated in such a fashion. However, the District Court Judge was obviously very unimpressed with the husband's claim, pointing out that the house property was at the time of marriage registered in the wife's name and that he, the District Court Judge, was very unsatisfied as to the husband's contention that he had done much work on the house at all.

The matter was further complicated, and it seems to have played an important part in the District Court's decision, by the fact that the solicitors who acted for the husband immediately after the separation appear to have entirely neglected the advent of the Matrimonial Property Act 1976 and wrote a letter which suggested that at that time the husband would confirm ownership of the matrimonial home in the wife. Some time later, when other advice was taken, the husband chose to assert his rights which had been conferred by the 1976 statute and the earlier proposed settlement never eventuated. Some four years after

the separation the proceedings were commenced and that was in truth a considerable delay. Nevertheless the delay was not a bar to the bringing by the husband of a claim to the matrimonial home.

In the High Court Barker, J. reviewed the facts and referred to the proposed earlier settlement and the fact that the husband, despite that, was still entitled to pursue his rights which were specifically given to him by the 1976 statute. He also referred to the fact that the wife gave no evidence of any circumstances which showed that the marriage was limited in terms of quality and he referred to the husband having contributed his National Superannuation to the household when he ceased working in September, 1973.

After referring to the decision in Martin v. Martin (1979)1 N.Z.L.R. 97, Barker, J. went on to hold that in his view the District Court Judge had erred in departing from the fundamental premise of equal sharing in relation to the matrimonial home and accordingly held that there should be an equal sharing, but that to overcome any apparent injustice by reason of the late filing of the claim, the date at which the interest should be assessed was the actual date of separation.

Naturally Mr Olphert on behalf of the wife contended that Barker, J. had erred in coming to the decision that the wife had not discharged the heavy onus cast upon her to demonstrate that this was a case which required there to be an unequal sharing of the matrimonial home. He accepted that before he could succeed in the present

application for leave to appeal to the Court of Appeal he must bring this appeal within the ambit of the decisions in Rutherfurd v. Waite (1923) G.L.R. 34 and Adam Bruce Limited v. Frozen Products Ltd (No. 2) (1953) N.Z.L.R. 310. In essence, before an application such as this can succeed, the Court must be satisfied that there will be raised some question of law or fact which is capable of bona fide and serious argument and it must be shown that there is involved some interest, public or private, of sufficient importance to outweigh the cost and delay of proceedings in the Court of Appeal.

Mr O'Brien on behalf of the husband contends that there is no question of law involved in this particular matter as the law has already been settled by such decisions as Martin v. Martin (supra) and Castle v. Castle (1980)1 N.Z.L.R. 14. He went on to submit that there was no interest either public or private involved in the proposed appeal and that really the wife was advancing a pecuniary interest which was not sufficient to justify the grant of leave as sought. He relied heavily on the fact that S.14 of the statute and the decision in Martin v. Martin were referred to in Barker, J.'s judgment. Indeed, throughout the whole of the argument I was not able to discern any question of law as being involved in the present appeal; what was really involved was an application of the law as has already been interpreted by cases such as Martin v. Martin and Rutherfurd v. Waite to the facts presently in issue.

It is true that Barker, J. in his judgment referred to the heavy onus which rested on a party to a proceeding

such as this before it could be said that S.14 of the statute could be brought into play, but in so saying, he was merely mirroring what has already been said in the earlier cases. In Castle v. Castle (supra), at page 24, Richardson, J. referred to a portion of the judgment of Quilliam, J. in the Court of first instance which is reported in (1977)2 N.Z.L.R. 97. He quoted the following passage from page 102:

> "The general purport and intent of the Act is, I think, clear. Except for marriages of short duration (which is not the case here) it is to ensure that in the majority of cases there will be an equal division between the spouses of all matrimonial property. This is, I think, the primary and governing intention of the legislature and s 14 is to be interpreted in the light of that. The expression 'extraordinary circumstances that, in the opinion of the Court, render repugnant to justice the equal sharing between the spouses' must accordingly relate to the exceptional situation and not to the commonly recurring one. The extraordinary circumstances will, I think, require to be those which force the Court to say that, notwithstanding the primary direction to make an equal division, the particular case is so out of the ordinary that an equal division is something the Court feels it simply cannot countenance."

Richardson, J. commented that that approach had been expressly approved by the Court of Appeal in Martin v. Martin (supra).

With the greatest of respect to the argument put forward by Mr Olphert I am unable to discern any question of law or some public or private interest of sufficient importance to warrant this matter proceeding further. With the greatest of respect to the Judge in the District Court I am of the view that the present situation has been brought about by the fact that he commenced his considerations from the wrong end of the spectrum. The marriage being not one of short

duration, the presumption of equal sharing applied. From there the matter should have progressed to ascertain whether there was anything established on the facts and within the law which would justify a departure from the equal sharing. From the judgment in the District Court it appears to me that the commencing point was that the husband was in fact not entitled to any interest at all and that grudgingly, because of the terms of the statute, the Court found itself forced to make some award and considerations were then given to how that could be restricted to as little as possible.

During the course of argument Mr Olphert referred to a decision which was reported in "Capital Letter" but which was not available to him at that particular time. I have obtained a copy of that decision which is Ballantyne v. Ballantyne, M.155/83, Wellington Registry, judgment of Quilliam, J., 7 March 1984. In that case the husband was confirmed as having an interest of 80% in the matrimonial home and the wife 20%, but that was a case where there were some rather peculiar features. The marriage was one of over five years duration, but there had been a break in it for some period which is not set forth in the judgment. In consequence of the parties getting married, it being a second marriage for both, the husband sold his original home to comply with the wife's desires and built another one without any assistance from the wife, paying for the new house from the proceeds of the original one, plus a small loan from his bank, while the balance came from the sale of his car. The husband's sole income was National Superannuation while all the expenses in respect of the house were met by the husband. On page 4 of the decision

Quilliam, J. said:

> "It is true that the principle of equal sharing is not to be put aside by the fact alone that the matrimonial home has been brought to the marriage by one spouse only. In this case, however, that is only one of the factors."

He later went on to point out that the dominating factor was that the wife had brought nothing into the marriage which she had not retained and that her contribution was small, made over a brief period. He then upheld the finding of the District Court.

The present matter is not on all fours, notwithstanding that the wife brought to the marriage the matrimonial home. Here there was, at least until one precipitating episode, a marriage which was happy and to which the husband made at least what could be termed an average contribution.

In all the circumstances the present motion in my view must be dismissed but, in the circumstances, without costs.

P. R. Quilliam J.

SOLICITORS:

Dennett Olphert Sandford & Dowthwaite, Rotorua for Respondent

Bennetts Morrison & O'Brien, Te Awamutu for Appellant