IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.213/84

1617

BETWEEN CONQUEST
of Raglan,
Appellant

A N D CONQUEST
of Raglan,
Respondent

Counsel: A.S. Menzies for Appellant
E.A. Dawe for Respondent
R.H.K. Jerram for Children

Hearing and Judgment: 18 December 1984

ORAL JUDGMENT OF GALLEN J.

This is an appeal against a decision of Family Court Judge Cartwright which was delivered on 16 May 1984. That decision effectively ordered that the principal matrimonial asset of the parties, a section at should be sold and the proceeds divided. The appellant contends that there has been a change in circumstances since the date of that decision which would justify a re-consideration of the conclusion to which the learned Family Court Judge came.

This is a particularly sad case. It is a sad case because it is one where parties who are obviously idealists, had set out to establish what both of them would have regarded as their dream home for the future. Unfortunately, that dream has turned sour. Both the appellant and the respondent wish to retain the section; both indicated in evidence before the learned Family Court Judge that they wished to develop it for housing purposes for themselves and the children; both still express a view that they would wish to retain it although as Mr Menzies points out, the respondent did not choose to appeal against the initial decision. Because the dispute between these parties has become so bitter, I do not think it would help to go into the background again at this stage.

The learned Family Court Judge effectively gave three reasons for coming to the conclusion for which she did. The first related to the fact that the land in contention was basically a section rather than a dwellinghouse. The second arose from submissions which arose from counsel for the children and was to the effect that because of the bitterness of the dispute and the effect on the children, it was desirable that the matter should be resolved without the land being vested in one or other party because of the likelihood that such a situation would be regarded as a success by the party who succeeded and would be likely to result in an intensification of the bitterness to the detriment of the children. The third reason given for the decision to which she

came was that she did not accept that either the appellant or the respondent were likely to be able in practical terms, to acquire sufficient funds to complete a dwelling and buy out the other's interest.

Mr Menzies sought leave to adduce further evidence and was permitted to do so in relation to the availability of funds. It is clear that the appellant now has immediately available funds which would enable him to purchase the interest of the respondent as assessed by a valuation which is now something over a year old. Mr Menzies says and quite properly, that this is a changed circumstance which enables the matter to be re-considered.

It is clear tht on an appeal, it is not right to simply substitute a view which the appellate Judge may have come to had he been sitting at first instance. The discretion which has been exercised by the learned Family Court Judge should stand unless it is clear that she exercised it on a wrong principle; failed to take into account material which was relevant or took into account material which was irrelevant. In addition to that, in appeals of this nature it is possible to take into account a change in circumstance, but I think it is important to bear in mind that this is an appeal from a discretion and that it is quite undesirable to substitute some other discretion in those circumstances unless the case is a clear one.

In this case, it is true that the appellant is now able to indicate that his financial capacity is rather better than was the case before the learned Family Court Judge, but I think it is important to note that in her conclusions relating to the financial ability of the parties, she took into account the fact that she was not satisfied even with family borrowing, that there were sufficient resources to translate the dream home which both contemplated, into reality and I do not think that the obtaining of sufficient funds to purchase the interest of the other necessarily goes far enough to set aside the conclusion to which she came.

The learned Family Court Judge was particularly concerned over the effect of the decision on the children. She took into account submissions which were made by Mr Jerram which suggested that it was undesirable that the property should be vested in one or other of the parties because this would be likely to eventually reflect upon the children because of an increased bitterness. Mr Jerram has re-considered the matter and made further submissions. He now does not make the positive submission that vesting the land in one party or the other would intensify the bitterness because he takes the commonsense view as indeed do other counsel, that it is quite clear that the bitterness is going to continue regardless of the outcome. If the appellant succeeds, this will be resented by the respondent; if the respondent succeeds, this will be resented by the appellant. Mr Jerram makes the point that the

interests of the children now requires a decision, but he does not go so far as to suggest that the interests of the children require a decision in either of the directions which would be open if the land were to be vested in one or other of the parties. His view is therefore not positive support for the appellant although what he now puts forward does to some extent affect the reasoning upon which the earlier decision was based.

In the end, this seems to me to be a situation where the appellant and the respondent set out to develop a matrimonial property for matrimonial purposes. They both of them, had a view to its future; they both wished to retain the property; they have both indicated an intention to develop it if they were able to do so; they both would be dependent on family funds in order to realise that ambition. If the interests of the children are not a significant factor, then in the end the matter comes down to deciding on the principles contained in the Act, what is the appropriate way of dealing with an asset which the parties cannot share and which cannot effectively be divided, except in terms of money.

I think it is important to stress that the concept which lies behind the Matrimonial Property Act 1976 is one of equality. That is equality both in terms of the values of assets, but it also relates in my view to equality of opportunity. There is much to be said in this case in favour of the proposals which the appellant puts forward. It is

particularly unfortunate that neither the appellant nor the respondent are able to see the matter except in terms of their own disappointment. That being so, I do not think that it is right to substitute an advantage to one for the equality of opportunity which the Act contemplates.

Taking that into account as well as the material which was before the learned Family Court Judge and her decision, I do not think that this is a proper case for substituting a discretion and the appeal will accordingly be dismissed.

R B Gallen J

Solicitors for Appellant: Messrs Harkness, Henry and Company, Hamilton

Solicitors for Respondent: Ms E.A. Dawe, Hamilton

Solicitors for Children: Messrs McKinnon, Garbett and Company, Hamilto