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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 476/76

1248

BETWEEN COXHEAD of Auckland, married woman

Plaintiff

A N D COXHEAD of Orewa, Beneficiary

Defendant

Hearing: 5 and 6 September 1984

Counsel: A B Lendrum for plaintiff
P Thorpe for defendant

Judgment: September 1984

JUDGMENT OF HENRY J.

This is a matter with what is now a long history. The parties were married on 18 February 1967. There were four children of the marriage, now aged 16 years, 14 years, 13 years and 11 years. A separation agreement was entered into on 23 May 1975, and the action originating these proceedings was commenced as long ago as 30 April 1976. Lengthy affidavits have been filed and in addition the Court has had the benefit of viva voce evidence from and cross-examination of the parties. Although at earlier stages several matters were raised and were in issue, most of those have now been resolved and the only ones now requiring resolution relate to the former matrimonial home situated at , Orewa.

It is accepted by the Defendant that the Plaintiff's entitlement should be one-half, the dispute being, inter alia, as to the date at which the property is to be valued for the purposes of division, and as to how and when division is to be effected.

The brief relevant history is that on execution of the separation agreement, which provided for the Plaintiff to have custody of the children and for the matrimonial home to be sold and the net proceeds to be divided equally, the net value of the matrimonial home was approximately $36,000.00. The Plaintiff left Auckland in September 1975 to live in Wellington, but without the children, who remained with the Defendant, he having resumed occupation of the matrimonial home. Subject to some minor exceptions, the Defendant has continued to retain custody of the children, residing with them in the matrimonial home, down to the present time. The exceptions relate to the daughter , the youngest child, who resided with the Plaintiff for a period, the length of which is disputed. The Plaintiff claims it was for approximately one year from February 1976 to February 1977. The Defendant contends only from February 1976 to May 1976, for six weeks about August 1976, and again in early 1977. Although the exact period or periods is not of any real significance, on balance I would prefer the evidence of the Defendant in this respect. On 7 March 1977 the Defendant obtained an order for interim custody of the

children, and a final order on 7 June 1978 with access reserved to the Plaintiff.

At the time of separation the matrimonial home was subject to two mortgages, one to the Canterbury Building Society securing $10,249.14, and one to the Bank of New South Wales for $3,946.00. As at the date of hearing, the Building Society mortgage has been reduced to $2000.00, and the second mortgage repaid. It is also agreed between the parties that the present capital value of the home is $85,000.00. In March 1976 the Plaintiff arranged a loan from the Bank of New South Wales by way of overdraft which was secured by mortgage registered against the matrimonial home. Although he consented to the mortgage, the Defendant did so on the express basis that he was under no personal liability for that loan, and that the security was in respect only of the Plaintiff's interest in the home. The loan was for an initial overdraft limit of $4000.00, which was allowed to be increased to some $5868.00 as at November 1976. Nothing has been paid in reduction of that loan, which as at 1 September 1984, with accrued interest, stood at the startling figure of $21,836.61.

The first issue which requires resolution is whether the present indebtedness to the Bank of New South Wales (now Westpac) should be taken into account in assessing the equity in the matrimonial home.

Being incurred by the Plaintiff in her sole name after separation, it would prima facie be her responsibility and would not be taken into account in assessing the value of or determining matrimonial property. It is, however, contended on the Plaintiff's behalf that the debt it represents is not a personal debt within the meaning of s.20(7) of the Matrimonial Property Act 1976 and therefore should be taken into account. The submission is that the debt is not a personal debt because it comes within the provisions of either sub-paragraphs (a) or (d) of s.20(7) of the Act. These provisions are :

> "20. (7) For the purposes of this section, "personal debt" means a debt incurred by the husband or the wife, other than a debt incurred -
>
> (a) By the husband and his wife jointly; or
>
> ...
>
> (d) For the benefit of both the husband and the wife or of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage."

The contention is that the advance was obtained for the purpose of enabling the Plaintiff to purchase a motor vehicle, she then residing in Wellington and having physical custody of Kyran, the reason for the purchase, it is said, being to provide transport for both the Plaintiff and Kyran to visit the other three children in Auckland.

In the course of cross-examination, it transpired that of the initial overdraft accommodation, some $2900.00 was paid as a deposit on a motor car, the balance being used to assist the Plaintiff in the purchase by her of furniture. It is not clear to what the balance of the funds drawn were applied. At the time the car was purchased the Plaintiff was employed by Industrial Nameplates Limited, which employment required her to travel regularly throughout the North Island. The car was used for those purposes.

There is a conflict of evidence as to the extent to which the Plaintiff did in fact visit the children between 1976 and 1978, a factor which has some relevance also to another issue to which I shall refer later. Having seen and heard the parties, I have reached the view that the number of occasions upon which the Plaintiff did exercise access was quite limited, and far less than the two to three times each month in 1975 and the monthly visits in 1976 to which she deposed. I find that the occasions were more in line with the details given by the Defendant, and that the visits to Auckland from Wellington were in the main associated with the Plaintiff's employment and not solely for the purposes of access to the children. Section 20 (7) (a) cannot, in my view, apply to the above factual situation. Neither the original debt of $4000.00, nor any part of it, was incurred by the parties jointly. The Defendant was at no time a party to it; he was under no legal obligation to

the Bank in respect of it, in the letter of consent to the charging of the Plaintiff's interest in the home he expressly disavowed any personal liability, and he received no benefit from it. The consent to the charging of the Plaintiff's interest cannot constitute the incurring of the debt. Neither on the evidence was the purchase of the car for the benefit of s travel to Auckland "in the course of bringing up a child of the marriage" within the meaning of s.20 (7) (d). The dominant and overriding purpose of the purchase, I find, was for the Plaintiff's personal benefit, particularly in relation to her employment activities. The car was an asset retained either in specie or in the form of the proceeds of sale by the Plaintiff solely. Any benefit accruing to the daughter was incidental and outside the ambit of the provisions of s.20 (7) which, in my opinion, is designed to ensure that what can properly be described as family or marriage partnership debts are taken into account.

It follows, therefore, that this indebtedness is to be disregarded in the assessment of the net value of the matrimonial home, the burden of and responsibility for it resting on the Plaintiff. Whether or not it should be taken into account in respect of any other issue I will consider later, but I cannot avoid commenting at this stage on its magnitude, presumably arising from some form of compound interest calculation applied to the overdraft facility.

Whether or not the terms involved could be said to be oppressive is of course not my concern, which is directed only to the application of the provisions of the Matrimonial Property Act 1976.

It is unnecessary therefore for me to consider the further submission of Mr Thorpe that s.20 (7) (d) applied only to debts incurred during the course of the marriage and prior to separation, but I do express the view that there would appear to be major difficulties in the way of adding such words of restriction to achieve a true construction pf the subsection.

I turn now to the question of the appropriate date of valuation. The starting point is s.2(2) of the Act, which requires valuation as at the date of hearing unless the Court in its discretion orders otherwise. For the Defendant, it is contended that there are post-separation circumstances which justify finding the value as at the date of separation or alternatively at some intermediate time, or making some monetary allowance within the principles discussed in Meikle v Meikle [1979] 1 NZLR 137. I will consider the separate sets of circumstances relied upon.

1. Defendant's responsibility for the support of the children:

The substance of this allegation is that the Plaintiff, for practical purposes, deserted the children for the greater part of the post-separation period. I do not think this allegation is proved. There was, as I have said, a limited exercise of access by the Plaintiff over the years 1975-1977, but the circumstances were that she was living for much of that time in Wellington, and I am satisfied there was a level of contact maintained with the children. She actually had custody of Kyran for some months at least, and of Todd for a lesser period. There were also custody and access applications heard in the District Court, all of which evidence an interest being displayed as a mother. The failure to assist financially in their upbringing until 1982 is, I think, marginally relevant only and cannot in my view be the subject of any strong criticism - her financial position was not strong, there was no call for contributions made on her, and nothing was conveyed to her to suggest such support was needed for any particular purpose. I am, however, satisfied that the real burden of maintaining and bringing up the children has fallen on the Defendant, and some appropriate recognition of this additional responsibility should be made. Support for such an approach can be found in Meikle and in Hedley v Hedley 3 MPC 384.

2. The Defendant's responsibility for the upkeep and maintenance of the home:

Little weight, I think, needs be given this factor other than to recognize the reduction of principal of the mortgages made by the Defendant and which total $12,195.00. The Defendant has had the use of the home since 1975, and this I think more than offsets any general and maintenance outgoings he has had to meet in the meantime.

3. The Plaintiff's loan from the Bank:

It was submitted that the Plaintiff has, in effect, had the use of her share in the home by having obtained this loan on the security of her share. I do not think that is a proper analysis of the position. The existence of her share as a joint tenant enabled her to obtain funds of some $5000.00, but this is far different from having the use of an appreciating asset comprising realty, a one-half value of which was well in excess of that amount. Nevertheless, the factor is worthy of some weight, as it has meant that the Plaintiff has not been entirely deprived of the asset and has been able to utilize her interest to this limited extent.

4. Delay:

That there has been undue delay is clear. The proceedings were commenced by way of ordinary action, and in June 1978 affidavits were directed to be filed to enable the matter to be dealt with under the Matrimonial Property Act 1976. The Plaintiff's first affidavit was not filed until

August 1981. On the other hand, the Defendant did not file his first affidavit in reply until August 1984, although there was some communication between the parties in the interim including an application for a Registrar's enquiry, which was resolved by consent. Taken overall, I have reached the view that some consideration should be given to this factor, as it has resulted in the continued liability by the Defendant to meet the financial outgoings of the home and to an extent he could be prejudiced by the inflationary increase in its value.

Looking at all the above factors and their surrounding circumstances in their totality, I am not persuaded that this would be an appropriate case to value the house other than at the date of hearing. The substantial increase in its value is due very largely to the effects of inflation, which are prima facie the entitlement of both parties. Except to the extent I have referred to, this increase is not attributable to the Defendant alone. However, these factors do in my view require some adjustment to be made in favour of the Defendant as was done in Meikle. Weighing all the circumstances, I consider an allowance for all post-separation contributions of $22,195.00, being mortgage repayments of $12,195.00 plus a further $10,000.00 for the other matters referred to, should be made to the husband in any final determination.

The value of the property is agreed at $85,000.00 with a present mortgage of $2000.00, thus giving a net equity of $83,000.00. The present value of the Plaintiff's share is accordingly assessed as follows :

Net value of home...		$83,000.00
LESS Defendant's contributions..		22,195.00
		$60,805.00
50%	=	$30,402.00

This leaves the question as to when payment of the share is to be made. For the Defendant, it is submitted that it should be postponed until the youngest child attains 16 years of age. Reliance was placed on s.26(1) of the Act, and on the need to maintain the home for the family. As in many cases of this nature which come before the Courts, it is a matter of balancing that desirability against the general intent of the statute that, following separation, the matrimonial property should be effectively divided between the parties as soon as reasonably possible.

Looking at the overall situation, I do not think there should be any further lengthy postponement of the Plaintiff's entitlement. Over nine years have now elapsed since separation. She has a substantial debt which must be met, and I do not think the interests of justice would be met other than by enabling her to obtain payment at a reasonably

early date. I do not think the supplementary agreement between the parties whereunder in 1975 the Defendant was given the right of occupation should he have custody of the children, on what was then envisaged as a temporary basis, can now operate to defeat the Plaintiff's present entitlement. The matter must be judged in the light of all the circumstances which now exist, and it is those which have influenced my decision. In my view, it is time this matter was finally resolved, and the parties should each re-establish themselves and have the use of their proper share of the matrimonial property.

I propose therefore to make orders in terms of the written submissions made by Mr Lendrum, but subject to the following amendments :

1. The time within which the Defendant may exercise the option to purchase the share of the Plaintiff, as valued above, is to be six months from the date hereof.

2. The time within which the property is to be sold by public auction should there be no exercise of the option and no sale by private treaty is to be nine months from the date hereof.

3. The Plaintiff will until sale be totally responsible for the Westpac mortgage charged against her interest in the property.

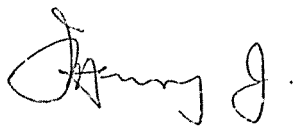
4. On any sale there will be paid to the Defendant from the net proceeds :

(a) The sums of $12,195.00 and $10,000.00 earlier referred to.

(b) Any sum by which the principal of the first mortgage to the Canterbury Building Society may have been reduced by the Defendant from the date hereof.

The balance will be divided equally between the parties.

The full terms of the Orders necessary to give effect to the above will need to be considered by counsel, and leave is reserved to apply to determine these if necessary. The question of valuation fees is also reserved, but otherwise there will be no order as to costs.



Solicitors:

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