

26/3

(3)

X

IN THE HIGH COURT OF NEW ZEALAND

A 143/83

WELLINGTON REGISTRY

BETWEEN: PASI of Wellington,
Married Woman

Plaintiff

A N D: KAMANA of
Petone, Clerk

Defendant

153

Appeal reported
[1985] 1 NZLR

Hearing: 28 June and 23 November 1984

Counsel: J.A.L. Gibson and G.J. Cross for Plaintiff
G.J. Allan for Defendant

Judgment: 15 MARCH 1985

JUDGMENT OF JEFFRIES J.

The plaintiff in this action seeks some recompense, and I have deliberately chosen those words to describe the remedy sought, for her contributions to the defendant's accumulation of assets. I was specifically asked by plaintiff's counsel not to order resale as requested in the pleadings if I found for plaintiff, as he said she was prepared to negotiate the remedy. Such claims have come before the courts more frequently in recent years in New Zealand, and elsewhere, reflecting, perhaps, changing social patterns. Although the frequency of the cases is a more recent development they nevertheless are grounded in causes of action, mostly in equity, that have a long history. They are said to be modern applications of various theories of trust. See Pettit v Pettit [1970] A.C. 777; Gissing v Gissing [1971] AC 886; Cooke v Head [1972] 2 All E.R. 38; Hussey v Palmer [1972] 3 All E.R. 744;

Gough v Fraser [1977] 1 NZLR 279; and Hayward v Giordani [1983] NZLR 140 to name a few.

The plaintiff was at one time associated with the defendant in circumstances to be outlined, but after leaving him in October 1981 has married. Her maiden name was Walzl but throughout this judgment she will be referred to as the plaintiff, or as Mrs Pasi. The plaintiff first met the defendant in about the year 1971 when she was aged 20 years. He was then aged 34 or 35, was separated from his wife, and was the father of five young children. He was then, and still is, employed by the New Zealand Railways. Apparently shortly after meeting they commenced living together as husband and wife at various residences in the Hutt Valley and Wainuiomata. They never married. At the time Mrs Pasi was working for Feltex in the Hutt Valley. In 1972 they had settled at a flat at Petone. Mr Kamana was employed in the Road Services branch of the New Zealand Railways, and in that capacity was required in December 1972 to drive a bus to Gisborne. In the bus with others was Mrs Pasi. Not far from Wairoa the bus was involved in an accident in which Mr Kamana received serious injuries to the lower part of his right leg. He was first admitted to Wairoa Hospital and then transferred to Cook Hospital, Gisborne. Mrs Pasi decided to stay in Gisborne to be with Mr Kamana. She ceased her employment with Feltex and arranged release of their obligations in regard to the flat at Petone, and for the storing of the furniture. The degree of injury to the lower part of his right leg indicated amputation below the knee and the evidence was of reluctance on Mr Kamana's part to have this operation. Mrs Pasi said in her evidence, and this can be accepted, that he was depressed and she assisted him with advice on the proposed amputation. The operation was performed by amputation below the right knee.

It would appear that Mr Kamana was in hospital at Gisborne for a period of something over nine months, but the exact time spent there is uncertain. During this period Mrs Pasi took part-time employment as a tomato picker and lived with friends in Gisborne. She was a regular visitor at the hospital and says she was well-known there. Mr Kamana was receiving compensation and she says their respective incomes were pooled and she managed the finances over this time. After Gisborne the couple shifted to Auckland where he received further medical treatment, and they remained there for about three months. Whilst in Auckland she worked and the same financial arrangements continued.

Precise dates were not given in the evidence but it would appear that the couple returned to the Hutt Valley in late 1973 or early 1974. Mr Kamana was re-employed on the clerical staff at the Railways and Mrs Pasi resumed work in the Valley. They occupied a flat at Moera and towards the end of 1974 two of Mr Kamana's daughters, namely Vicki aged then about 6 or 7, and Ella aged then about 8 or 9, came to live with them. Mrs Pasi said she accepted cheerfully this arrangement and her evidence was that she offered maternal assistance to the young girls. Some time in this period the family shifted to a house in Epuni where they remained for about two years. Over this period no doubt negotiations were continuing in regard to the settlement of Mr Kamana's common law claim arising out of the accident. That claim was being conducted on his behalf by a partner in the firm of Messrs Bell Gully & Co., namely Mr G.M. McKay. Apparently in about March 1977 the claim was settled on Mr Kamana's behalf by Mr McKay from which he received a net sum of approximately \$24,000. On receipt of that amount he determined to buy for himself and his family a permanent home rather than continue in rental accommodation.

He began looking for such a house to purchase and his conveyancing work was performed by another partner, namely Mr O.R. Gilbert, of the same firm of solicitors. Mr McKay was called and he said in his evidence he would not perform any conveyancing work as his area was court work. A contract was signed on 26 July 1977 for the purchase of a dwelling at 8 Bouverie Street, Petone, which had the advantages of nearness to transport and to shops. Mrs Pasi in her evidence indicated that she had a part in the choice of the dwelling. The contract was signed by Mr Kamana alone. The purchase price of the house was \$24,000. Settlement of the purchase took place in August 1977 and Mr Kamana maintains he attended to this exclusively himself. The evidence of the conveyancing solicitor, Mr Gilbert, was that he had never met the plaintiff and he had no recollection of her ever attending with Mr Kamana. The evidence of the plaintiff was that she did attend at the firm of solicitors at the time of the purchase, and her description of the solicitor clearly indicated Mr McKay whom she named, and not Mr Gilbert. Her evidence was that Mr Kamana and she intended that the property be purchased in their joint names but Mrs Pasi said the solicitor said it could not be done because they were not married. She said he advised in her presence that if Mr Kamana wished to make provision for her he would have to do it by way of will. Mr Kamana in his evidence denies that there was ever any intention on his part to purchase the property jointly with Mrs Pasi. There certainly is no external evidence by way of documentation that this was intended. It was necessary to complete settlement for a mortgage to be raised through the Public Service Investment Society, and this was accomplished. Repayments of the mortgage were by way of deduction from Mr Kamana's wages. Mr Kamana is the transferee of title to the property and it was him who executed the mortgage to the Public Service Investment Society. That mortgage was in the sum of \$5,000 with a further

advance in May 1981 of \$2,000. At about the time of purchase, according to Mr Kamana at the request of Mrs Pasi, a further mortgage to Buddle Anderson Nominees Ltd was given for the sum of \$2,000. This amount probably was used for living expenses. I accept it was not required for the actual purchase of 8 Bouverie Street.

It is appropriate here to say something of the lives lead by the couple between returning to the Hutt Valley in about 1973/1974 and to the end of 1977 with the purchase of the property at Bouverie Street. The advent of the two young girls at the end of 1974 no doubt changed their lives somewhat. As far as one can judge from the evidence, there continued through this period of about four years, some pooling of finances and a sharing of the household chores. Mr Kamana maintained his wages were paid into his banking account. After the move to Bouverie Street plaintiff concedes he did not give to her his wages. Mrs Pasi said in her evidence that she spent money on clothes for the children and household things, but there is little support for this statement. That observation does not exclude an occasional purchase by Mrs Pasi, but such provision for the girls could not have been substantial. Mrs Pasi was herself working during this period as was Mr Kamana. Even Mrs Pasi concedes that the girls right from the start were fairly independent of her and perhaps to a degree more than usual, able, or required, to look after themselves. I am satisfied in this period that the defendant undertook more than the share usually carried out by a male in the day to day running of the house, in the provision of food, organisation of meals, and household chores. It is to be remembered that for the greater part of this four year period they were living in rental accommodation.

From the evidence it would appear that after the shift to Bouverie Street the relationship between plaintiff and

defendant started to undergo fundamental change. Mr Kamana alleges that plaintiff began drinking excessively whilst he was in hospital in Gisborne in 1973, and he fairly took some blame for that understanding her position. After occupation of Bouverie Street defendant alleges Mrs Pasi did not undertake her fair share of the household duties, stating she was a poor housekeeper and that she was a regular attender at hotels. In his evidence he says their relationship started to fall apart about 2-3 years prior to the actual parting which took place in October 1981. During this period a boarder was introduced into the house at the request, Mr Kamana says, of the plaintiff. Later another boarder came to live there at the instigation of Mr Kamana. The boarders made financial contributions to the running of the house. Mrs Pasi in her evidence admits that for about a year and a half prior to her departure she was not contributing money to the household. Mr Kamana denies that there was any formal pooling of their respective incomes, he pointing to the fact his wages were paid direct to his bank. Probably from early 1978 to the end of perhaps 1979, there continued a sharing of expenses but at the latest this seemed to cease about 1980. These dates are by no means certain. Mrs Pasi paid for the telephone at the premises because it was in her name, but Mr Kamana conceded it was useful to him. He continued to pay the mortgage and the majority of the rates, and probably insurance. That really left the principal items of food, power and clothing to be shared. I am satisfied from the evidence no pooling arrangement extended to clothing, and for the provision of food and power in the house that would have only been until about the beginning of 1980. Mr Kamana said that their lives became separated and that he would go away for weekends to the country without her, and she would do the same around the Wellington area. The court is uncertain what that implies. It seems that they ceased to live together as man and wife for an appreciable period before the separation in October 1981. As a matter of record, it was Mr Kamana that

vacated the premises and refused to return whilst she remained in occupation. After she left he resumed living there, of course.

Common Intention

Mrs Pasi's evidence is that the common intention was to purchase in the names of them both which was not done due to the advice of the lawyer, whichever one that was. This evidence really asserts an agreement between them which is more definite and precise than a common intention that usually has no identifiable beginning. Both lawyers who acted for Mr Kamana, mentioned earlier in this judgment, were called to give evidence, and both denied giving such advice. The advice itself is wrong in law and it is inherently unlikely to have come from any lawyer. There is no documentation at all to support Mrs Pasi's version, or any other evidence. Mr Kamana bluntly denies it. At the time of purchase he still had obligations to his five children, of which two were living with him, and had been, by then, for some years. The proceeds for the purchase came from the damages he received arising out of his very serious permanent injury, and the mortgage necessary to complete the gap between cash available and purchase price was contracted by him. He undertook full responsibility for that mortgage. He paid most of the rates and probably the insurance. Mrs Pasi herself does not allege that she made any financial contribution whatsoever to the purchase of the property, and at best says that some of her money was applied for general household purposes including maintenance of Mr Kamana's daughters. Mrs Pasi lays no claim whatsoever to have had performed any work at all on the property whilst she lived there. Mr Kamana in his evidence candidly admitted nothing had been done to the property inside or outside since its purchase.

I have already dealt with the P.S.I.S. mortgage, which was the sole responsibility of the defendant, and such obligations under it were discharged by him alone. The mortgage of \$2,000 to the solicitors' nominee company, is less obvious and probably was connected with a shortage of cash for ordinary day to day living. The evidence is clear that Mr Kamana received the net principal sum, and quarterly payments of \$65.00 were deducted from his P.S.I.S. account. It was a two year mortgage falling due on 17 October 1979. It seems from the evidence it was necessary urgently to refinance that mortgage and both plaintiff and defendant borrowed \$1,000 each from the Post Office, and no doubt each was personally responsible for the discharging of that debt. On the foregoing facts I can find nothing in those mortgage arrangements which supports Mrs Pasi's claim to have contributed financially over and above what would have been required from her generally for living expenses. The finding of the court is that there was no common intention, or agreement, express or implied, to purchase 8 Bouverie Street in their joint names or that she should share equally in it.

Constructive Trust

During the course of the hearing an alternative ground was added in the following terms:

"The purchase of 8 Bouverie Street, Petone, by the defendant in the circumstances of his relationship with and intentions expressed of and contributions by the plaintiff in their de facto relationship, the defendant holds the said 8 Bouverie Street constructively in trust for the plaintiff in an equal share."

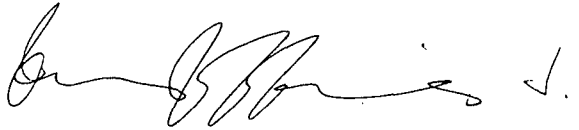
That was an amendment made very late and no doubt followed from the Court of Appeal case in Hayward v Giordani [1983] NZLR 140. The amendment was made by consent because defendant's counsel did not allege surprise. I do not think I need prolong this judgment with examination of the case law for, rightly or wrongly, the court decides on any view of the development of constructive trust as a remedy for a supposed injustice in this case it is simply not established by the evidence. I entertain little doubt that in appropriate circumstances a court would not hesitate to impose a trust.

I do not wish to re-plough the facts at length but something more by way of further evaluation must be said. Although not specifically expressed in the evidence, it was inferred when the couple met in 1971 neither had assets. The defendant was a married man with five young dependent children. The plaintiff was a young woman with no, or little, material worth. What changed the lives of these two was the very serious accident to defendant which left him with a substantial permanent partial disability. He received damages by way of compensation under the heads available when such common law claims existed. The defendant had taken physical custody of his two daughters by late 1974. From the whole evidence I am satisfied Mrs Pasi's claim to have given even moderate support to the children is not justified. I think Mrs Pasi did provide necessary and valuable support to defendant at the time of his accident and for some years thereafter. Without detracting from it nevertheless, that was part of the sequence of rising and falling which characterises lives of individuals conducted separately and jointly. Even within those two or three years close to the accident I do not believe the giving and taking was unilateral.

Broadly I think the relationship between the two parties was satisfactory until the shift to Bouverie Street towards the end of 1977. From then on it went downhill ending in everything but name probably by beginning of 1980. In all the relationship lasted something like 8-9 years. There can be no hard date lines drawn. I have already found as a fact there was no common intention, agreement or understanding express or implied the house would be purchased in their joint names. There was no common working and saving towards a goal over an appreciable time. The funds for the house came in a lump sum as damages for the severe injury suffered by defendant. He had a family of five dependent children: she had no such responsibility. She did not assert, and neither did she make, any financial contribution to the purchase itself. In all those circumstances it is extremely unlikely that he would agree to a half share going to her. Finally, the evidence of lawyer's advice is not credible and expressly denied by the solicitors.

I turn then to examine the fact situation to see if on any objective evaluation it contains elements of sacrifice, or contribution in excess of strictly personal effort required for living on the part of plaintiff. Nowhere in the evidence is there acceptable proof she gave, or contributed, without receiving or that she suffered any deprivation. To put it another way, there is no evidence the defendant benefitted, or unjustly enriched himself, at her expense. To my mind the evidence does not even faintly support suggestions of unfairness or exploitation to, or of, the plaintiff. As far as a court can judge in the relationship, the benefits were mutual and evenly divided. If there is to be inferred any lean from the vertical in benefits arising from the relationship it would be in the plaintiff's direction. The arrangement under which these two adults shared their lives until they parted, left no legal or equitable sequel.

The plaintiff's claim fails and judgment is entered for the defendant. Costs and disbursements follow the event and if counsel cannot agree they may submit a memorandum, or see me in chambers.

A handwritten signature in black ink, appearing to read "J.A.L. Gibson", with a small "d." or similar mark at the end.

Solicitor for Plaintiff:

J.A.L. Gibson, Wellington

Solicitors for Defendant:

Clapham Gaskin & Allan, Lower Hutt