

7/11

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M. No.516/89

1637

UNDER the Matrimonial Property Act 1976.

IN THE MATTER of

BETWEEN HALL of Christchurch, Farmer

Plaintiff

**NOT
RECOMMENDED**

AND HALL of Christchurch, Retailer

Defendant

In Chambers

Hearing: 1st November, 1989.

Counsel: Mr. D.H. Hicks for the Plaintiff Applicant
Mr Gunn for the Defendant Respondent

ORAL JUDGMENT OF MASTER TOWLE

This is an application under Section 22(3) of the Matrimonial Property Act 1976, for an order for the transfer of proceedings from the Christchurch Family Court to this Court.

Affidavit evidence has been filed on behalf of the husband and by the wife's solicitors in reply, and the major question that has to be determined is whether or not I can be satisfied that the proceedings would be more appropriately dealt with in the Family Court.

The position is generally summed up in Fisher's text book on Matrimonial Property, 2nd Ed. pages 624 and 625, and both counsel accept that the onus of satisfying the requirement

that the proceedings should be more appropriately dealt with in the Family Court lies firmly upon the Defendant wife in this instance.

The parties entered a Matrimonial Property Agreement in July, 1987, but in April this year the wife commenced proceedings in the Family Court seeking to have that agreement set aside. Those proceedings were served on the husband's solicitors in April, accompanied by a lengthy affidavit by the wife, but so far she has still not filed any affidavit as to her assets and liabilities in compliance with Rule 11 of the Matrimonial Property Rules. The husband has not filed an affidavit in opposition, and there has undoubtedly been some delay by him in doing so. After service his solicitors advised the wife's solicitors on the 20th June that an affidavit was in the course of preparation, but when this was not forthcoming, the wife's solicitors applied for a case conference in the Family Court which was arranged for the 5th October. The day before this was due to be heard, the husband's solicitors applied to this Court for an order for transfer under Section 22(3).

In his affidavit in support of the present application the husband now says that approximately a further month would be required to compile the appropriate affidavits on his behalf to traverse the material already filed by the wife in the Family Court.

I believe in a situation of this sort it is important that each party should put before the Court a full statement of their present assets and liabilities, which would be relevant in the Court's determination of whether or not the Matrimonial Property Agreement should be reopened. If the case conference had taken place in early October, it would not have been possible in my view to have allotted a fixture straight away, but some requirement doubtless would have been made for filing of both a further affidavit by the wife and the major one by the husband in opposition.

The effect of a transfer, if ordered, would be to impose some additional delay, but I do not believe in this instance it would be excessive, as it would be doubtful whether the wife could have obtained a fixture in the Family Court before Christmas, and I believe there is a reasonable prospect that a fixture could be obtained in either Court within the first two or three months of 1990.

Both counsel have referred to two decisions cited in Fisher - the case of Hodd [1979] 2 MPC 95, and Campbell [1979] 2 MPC 30. Each of those cases resulted in an order being made refusing a transfer to the High Court, but there were special circumstances in each case. In the Hodd decision the person seeking the change had made application in circumstances where there was a fixture made for a hearing the day after it was heard and had left it for seven months to apply. Ongley J., in giving his decision, observed that it was this factor that had finally tipped the scale in his deciding to refuse the transfer in that instance. In the Campbell case, where transfer also was refused, the wife had issued proceedings, and by consent the parties had obtained a fixture in the Family Court before the wife later applied for a transfer to this Court.

It seems to me the facts in this case do not go so far as those in the two cases cited where transfer was refused, and my assessment is that it would at most be only border line, and I do not believe that the wife's solicitors can satisfy the onus which is on her to show that the proceedings would be more appropriately dealt with in the District Court.

After conferring with counsel, they have indicated a willingness by their clients to comply with some orders to ensure that the outstanding affidavits are lodged without further delay. Accordingly, by consent, I direct that the wife should file the further affidavit in compliance with Rule

11 by the 15th November, 1989, and that the husband should file his affidavit or affidavits in response to the substantive application by the 7th December, 1989. It will be up to the parties to apply thereafter for a fixture.

Accordingly, there will be a formal order that the proceedings be transferred from the Christchurch Family Court to this Court pursuant to Rule 22(3).

In accordance with normal procedure in matrimonial property matters costs are reserved.



Solicitors for the Plaintiff Applicant: Quigleys,
Christchurch
Solicitors for the Defendant Respondent: Anderson Lloyd,
Dunedin by their Agents Wynn Williams, Christchurch.