

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

CP.202/87

804

BETWEEN: J.K. & C.M. ANDERSON  
LIMITED a duly  
incorporated company  
having its registered  
office at Christchurch

Plaintiff

A N D: STEPHEN GORDON GLEN of  
Christchurch, and WILLIAM  
JOHN WOODS of Rangiora,  
both Company Directors

Defendants

Hearing: 16 June 1989

Counsel: D.H.P. Dawson for Plaintiff  
T. Sissons for Defendant S.G. Glen (Took no  
part in the argument)  
No appearance for Defendant W.J. Woods  
Mr Matthews for Mrs L.A. Glen

Judgment: 20<sup>th</sup> JULY 1989

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JUDGMENT OF JEFFRIES J.

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Before the court is a motion for an order varying a Mareva Injunction previously granted in this court. The background to the application is as follows.

Plaintiff in these proceedings sold a business to Stephen Gordon Glen and William John Woods on 6 August 1986. The defendants' intention was to conduct the business through a company to be formed. The company was incorporated and the

terms of sale were \$10,000 deposit and the balance of \$135,000 was secured by a debenture over the company's assets but with personal guarantees given by each of the defendants. They also became principal parties under the terms of the debenture. The plaintiff attempted to obtain a summary judgment against the defendants, but on 11 August 1987 Holland J. dismissed the application and consequently the proceedings thereafter followed in the conventional way.

In December 1987 plaintiff sought ex parte orders for a Charging Order and a Mareva Injunction. The Judge before whom the file was placed refused the Charging Order but made the following orders:

1. An Interim Injunction requiring the Defendant STEPHEN GORDON GLEN his servants, agents or otherwise to retain in New Zealand his share of the net proceeds of any sale of the above-described property situated at 48 Bellingham Street Christchurch up to the sum of \$148,370.57 pending the hearing and determination of this action.
2. An Interim Injunction requiring that the Defendant STEPHEN GORDON GLEN disclose on oath all property money and other assets held by him in New Zealand or on his behalf and in particular the terms under which he holds or has sold the house property at 48 Bellingham Street, Christchurch and the details of the disposition or intended disposition of the funds resulting therefrom.
3. Reserving unto the Plaintiff and the Defendant STEPHEN GORDON GLEN liberty to apply to stay, vary or discharge the orders so made."

The court observes the exact wording of paragraph (1) of the order requires Stephen Gordon Glen to retain "... his share of the net proceeds of any sale ..." of the house property. Plaintiff has never claimed the wife of S.G. Glen was ever personally liable for the debt in any way. The

background behind the application now follows. Stephen Gordon Glen was married to Lynne Alison Glen on 3 March 1984 and they were separated in November 1987. The matrimonial home was at 48 Bellingham Street, Christchurch. The property was sold in December 1987 after separation. The net proceeds of the sale amounted to \$73,081.58, and is held in a solicitor's trust account and is earning interest. The amount now available for distribution is in excess of that sum and of that each party is entitled to one half. The parties signed an agreement which settled that, and also of some relevance in this case the wife held the possibility that there might be some value in Glen & Woods Ltd, which was the company formed to conduct the business. The solicitor who holds the proceeds of the sale of the house has been called upon by Mrs Glen's solicitors to forward her half share. The solicitors for the plaintiff have advised those solicitors they consider Mrs Glen's share is covered by the injunction. The stakeholding solicitors do not believe this to be the legal position and for the avoidance of doubt are seeking an order varying the order made ex parte to exclude specifically from the terms thereof the interest of Lynne Alison Glen in the proceeds of the sale of 48 Bellingham Street. There were other orders sought but they were not argued, and the court is not required to rule on those applications.

The starting point of plaintiff's counsel's argument is that the debt which arose out of the guarantee given by S.G. Glen was not a personal debt of the husband which would allow s.20(2) to operate and permit the wife to receive her share as it is apparently under the present \$44,000 limit. His argument is that the debt is outside the definition of personal debt by virtue of s.27(7)(d) in that the debt was incurred for the benefit of both husband and wife in the course of managing the affairs of the household. The couple had no children. The plaintiff's argument is an attempt to make all matrimonial property available for a creditor of a spouse.

It would be an exaggeration to say there is no evidence to support the factual base of the submission made, but it is slight. The business of Glen & Woods Ltd was a bakery. Mrs Glen is a bank officer. She said in her affidavit she had no commercial interest in Glen & Woods Ltd and that it was but one business venture her husband had during the marriage. There certainly was no evidence she was in any way directly involved in that business. However, she did say in her affidavit after her husband and his partner set up the business she and a friend bought and operated a retail outlet for bakery products. At first they purchased goods from her husband's business, but when it ceased to operate she bought elsewhere. She said it was a normal commercial arrangement. Before separation she sold her half which was always operated apart from her husband's business. She further said her husband had nothing to do with her business venture. There is little or no evidence to contradict the foregoing. Mrs Glen said she contributed a substantial sum from her assets to purchase the house and if she receives her share of matrimonial assets she will have lost about \$15,000. I do not regard it as determinative one way or another that at the time of separation Mrs Glen took the precaution of reserving her position in regard to Glen & Woods Ltd. There is no affidavit evidence from S.G. Glen on the point at issue.

The finishing point, so to speak, of counsel's argument for the plaintiff is that the business, out of which the debt to plaintiff's arose, was for the benefit of both husband and wife and, therefore, not a personal debt. The liability arising out of that business was part of the total matrimonial property issue and could not be defeated by the matrimonial agreement executed in December 1988. It was submitted that agreement came within the terms of s.47 in that it had the effect of defeating creditors. The justification for that submission was that she was prepared to take by the agreement

any value in the business, but not share in any deficit. Mrs Glen said in an affidavit she knew so little of the business that she did not know her husband had incurred the personal liability by the guarantee until after it was executed. On its face the agreement dividing the chief asset, being proceeds of the sale of the matrimonial home, by each taking half is entirely usual. Mrs Glen claims she was advised by her solicitor she had a justified claim to more than half, but she did not wish to pursue it.

It seems to the court whether s.27(7)(d) applies or not is a matter of fact to be decided upon the evidence before the court, which is certainly not extensive. I also join the criticism about this particular subsection. See "Fisher Matrimonial Property", 2nd Edn, para 15.5. It appears both parties worked throughout the marriage which was itself short in that it lasted a little over three years. There is no evidence how much the husband contributed to the household running. The wife certainly seems to have made the greater capital contribution to the purchase of the house which was the substantial matrimonial asset. However, the point seems to be on the evidence there is no direct nexus between the bakery business of the husband and the managing of the affairs of the household. Looking at the subsection (a) and (b) do not apply, but they are some indication of what the subsection is designed to take out of personal debts of one spouse alone. Section 27(7)(c) and (d) have a definite theme which locates the debt very much in the home/household environment or, to put it another way, locates the debt as domestic. This case on its facts is far stronger for the rejection of the s.27(7)(d) argument than Castle v Castle [1980] 1 NZLR 14 C.A. For myself I think Cooke J. put the issue in dispute correctly in Park v Park [1980] 2 NZLR 278 at 281, lines 15-20. I therefore hold the liability of the husband is a personal debt and that s.20(2) would apply, and the wife gets the full benefit of the protected interest.

The court, therefore, makes a declaration that the half share in the matrimonial home proceeds of Lynne Alison Glen is specifically excluded from the term set out above of the Mareva Injunction.

The plaintiff is ordered to pay \$350 costs to Mrs Glen.

A handwritten signature in cursive script, appearing to read "L. A. Glen".

Solicitors for Plaintiff:

Joynt Andrews, Christchurch

Solicitors for Defendant  
S.G. Glen:

Alpers & Co., Christchurch

Solicitors for  
Mrs L.A. Glen:

Hill Lee & Scott, Christchurch