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**IN THE FAMILY COURT
AT HASTINGS**

**FAM-2011-081-000021
[2016] NZFC 3269**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	ELLEN CANAVAN Applicant
AND	SEAN CULLEN Respondent

Hearing: 19 April 2016

Appearances: A Gallie for the Applicant
I Squire for the Respondent
A Souness as Lawyer for the Children

Judgment: 19 April 2016

ORAL JUDGMENT OF JUDGE A B LENDRUM

[1] This is the matter of Sean Cullen and Ellen Canavan, former husband and wife and the parents of three boys Eamon, Liam and Rory. Ms Squire represents Mr Cullen, Mr Gallie represents Canavan and Ms Souness is lawyer for the three young men as they now are.

[2] In an oral judgment of 19 February I said that this matter needed to be dealt with so that the two children who still remain in the care of their parents; one each in the care of their mother and father respectively, should have this conflict resolved because the intensity of that conflict was occasioning them very significant damage.

[3] In the course of that hearing, or the proceedings immediately prior to them, I had appointed Ms Souness to be the lawyer for the children, she having succeeded in turn Mr Kennedy and Mr Headifern, both of whom, in different circumstances, had retired from that position.

[4] Ms Souness is a most experienced and capable lawyer for children. Ms Souness has a very clear view, expressed in both her reports of 21 March 2016 and successively, and even more strongly, on 12 April 2016 where she said in the latter report at paragraph 6:

I am concerned about the impact of the increasingly bitter Court proceedings fuelled dispute on the children. Each boy is acutely aware of the proceedings before the Court and has their own view on what should happen. Each boy's respective view is aligned very closely with the parent with whom they are currently living.

[5] I have been involved in these particular issues since the beginning of 2015 although I had the carriage of the file for well over a year prior to that time. Judge Skellern had dealt with the case before me.

[6] On or about 18 April 2015 I convened a judicial settlement conference between the parties. That was, to my knowledge, the third judicial settlement conference; Judge Skellern having dealt with matters on 1 November 2013 and a later date which escapes me but which I think is April 2014. In both of those meetings the parties had inched their way along this mile long journey to settlement.

[7] I dealt with this matter also extensively in a quasi conference on 9 December 2015 where the issue of who would own the former matrimonial home and the lifestyle block that surrounded it was finally resolved. There have been a number of other significant incidents along the pathway since that time.

[8] I convened a further hearing on 19 February this year at which time I set some very clear terms about what was required to enable settlement of the wife's purchase of the family home to be completed. This followed my decision on 9 December 2015 when I made clear and very direct orders with respect to the transfer of the property. In particular I dealt with the issue of possession given the very high level of disharmony that this case has had as a key characteristic throughout the time that I have been involved in it.

[9] I set a date for settlement at 5 February 2016 and further, because of the disharmony, a time for that possession to become available to Ms Canavan, the purchaser. That time was 1.00 pm that day.

[10] I then set further terms, set out at paragraph 4 of that minute, in terms of chattels and the manner in which they would be removed from the property. A price for the sale of the property was agreed and determined and confirmed by order. I made also some further orders and directions about items as esoteric as the [item details deleted]. I then made orders concerning some further minor adjustments.

[11] Unfortunately, despite all of that, those directions, on 5 February Ms Canavan while taking possession was not able to complete settlement. It was for that reason that I set the hearing on 19 February 2016.

[12] In that hearing at 1(c) I made very clear directions as to what was to occur in respect to the removal of Mr Cullen's and Liam Cullen's (Liam is the [details deleted] son) chattels and possessions from the former matrimonial home. Regrettably those directions were not complied with.

[13] The major impediment to giving effect to those directions was the subsequent actions of Mr Cullen and Liam coming onto the property on 8 February 2016, when

Ms Canavan was present at the property, and then further actions taken successively, and indeed even after 19 February, when I made the clear directions for the uplift of the chattels. These involved the [details deleted] son Eamon, who normally lives in [location deleted], driving onto the property, taking various items and subsequently on 27 February further similar style actions allegedly occurred.

[14] As a consequence on 29 February 2016 I made a without notice protection order in favour of Ms Canavan and Rory, the [details deleted] boy who resides with her.

[15] I acknowledge immediately that Mr Cullen does not accept that protection order was an appropriate order and he filed the necessary notice of intention to appear and other documentation in respect of that. However at the present time the temporary protection order enures.

[16] My intention now is not to discuss that issue which has been dealt with in a sensible way by counsel but simply to record that Mr Cullen could not have come onto the property, as I had previously directed for the auction of items not required by either party, because to do so would be in breach of the protection order as counsel agreed sensibly today.

[17] I am now requested by counsel and the parties to bring this matter to an end. To do so I have to ascribe values for various items that need to be paid by the parties to enable final settlement to occur.

[18] Both parties have told me from the witness box in response to clear questions from Ms Souness that they agree the property issues must be brought to an end today for the good of the boys. That is a comforting change of direction from the Care of Children Act 2004 proceedings that have also involved me for the same period of time as these property proceedings.

[19] I will endeavour in this judgment to bring an end to the property relationship proceedings save only that at the conclusion I am going to have to ask counsel for both parents for a direction in respect of one outstanding issue that cannot be

resolved today at this point on the submissions of Mr Gallie. That is the issue of costs.

[20] Accordingly I now determine the outstanding issues. Some of those I will comment on briefly in passing and others I will not. First I find that the wife must pay to the husband for her purchase of the home the remaining funds due and owing at \$11,147.39.

[21] I am unable to make an uplift on the chattels division as sought by the wife in the sum of \$1800 for the reason I set out later in this judgment. I can only make the adjustments that I am now able to make in respect of the following items. That will be in no set order.

Camping gear

[22] The camping gear was resolved by agreement with Judge Skellern on 1 November 2013. I find in favour of the wife's claim and she shall be reimbursed \$420, being the totality of the costs in the Maidens and Foster valuation, on the basis that both parents agreed there was another tent system available at the home. I find that the wife's evidence is the stronger on this matter. The \$420 includes \$120 which is the figure for the camping equipment as opposed to the three-bedroom tent.

[Item deleted]

[23] As regards the [item deleted] I find in favour of the wife in the sum of \$125; [details deleted]. That allegation together with the photographic evidence is sufficient for me to agree to the wife's position.

Satellite dish

[24] Two satellite dishes, which were both fixtures to the property, were removed by Mr Cullen. Ms Canavan has appropriately, and generously, agreed that one dish can remain with Father and Liam and any other boys at his new property. She is to be recompensed for the cost of a new dish and installation in the sum of \$227.

Gates

[25] Ms Canavan is owed recompense for one of four gates in the sum of \$130.

Venetian blinds

[26] Next, and a very contentious item, is that of the venetian blinds. It is the wife's position that the blinds were in a very poor state in terms of their cleanliness at the time she took possession of the property. Such was their uncleanliness that she had to remove them and place them outside where professional cleaners had been engaged to come and collect them. She alleges that on 8 February 2016, so just two days after she had taken possession, the husband and Liam drove onto the property, drove around the front lawn and in the course of that action drove over, and effectively destroyed, the blinds.

[27] Mr Cullen also gave evidence on this issue. He disputed the wife's claim and said he did not run over the blinds. I find on this matter I consider that the wife position's is the more likely. I do not say that Mr Cullen drove over the blinds deliberately but it is noteworthy that in the course of his evidence he referred to the fact that half way through his circuit of the lawn where the blinds were placed, as Ms Canavan tells me, he had to remonstrate with Liam who was videoing their progress over the front lawn. I draw an inference that in the course of those actions the blinds were destroyed. There is no counter-claim that Ms Canavan destroyed them or otherwise damaged them.

[28] Therefore on the balance of probabilities I find for the wife in terms of the venetian blinds. However I make a deduction for the fact that these will be new blinds and not old blinds and so I set the figure at \$2250. From that figure I give an uplift of \$300 because the driving should never have occurred. It was an extremely

provocative gesture, as Ms Souness put to Mr Cullen in cross-examination, “to drive around the property knowing that Ms Canavan was there.”

[Item deleted]

[29] [Details deleted].

[Item deleted]

[30] On this issue it is agreed that [item details deleted] are Mr Cullen’s separate property. [Details deleted].

Damage to the home

[31] I was much aided on this issue by Ms Squire’s and Ms Souness’ careful cross-examination. It is clear in my view, having listened to the two independent real estate agents, and to a lesser extent Ms Souness as an officer of the Court, that what damage occurred to the property, and that itself is not completely certain, occurred after those three persons visited the property. An exception can be made for the indentations in the wall (presumably holes and dents to the gib lining) which Mr Cullen quite properly accepted were there from such items as a couch and other matters. They were then “fair wear and tear” as he saw it.

[32] In this area it is difficult given that there have been three boys living in the home at various times. Equally also that there has been some damage which appears to have been done after the time it was determined that Ms Canavan would purchase the property and before Ms Canavan moved into the property. I can take that matter no further and so fix a figure of \$600 compensation to the wife for this item.

Cleaning fees

[33] The next item is cleaning fees. I do have some evidence of cleaning fees and a figure of \$638 but Mr Cullen does not accept that as having been necessary. I fix a figure of \$350 for cleaning fees.

Deregistration of GSTpartnership

[34] I made it clear at the last hearing, and earlier, that I consider that unilateral actions in this case were not actions that I would condone. Mr Cullen acted in that manner and de-registered the partnership GST. I am told the fee or the amount required to re-register the property is \$961 and I fix an award to Ms Canavan in that figure.

Swimming pool

[35] The swimming pool was a gift by the boys' maternal grandfather to the parties primarily for the good of the children. This evidence was not challenged. I am told by Ms Canavan that the liner to the pool required replacement only some five years after it was gifted to them, so now many years ago. I am told by Mr Cullen in his evidence, which I found convincing, that the present liner is in a very poor state of repair, he said "it was patches on patches."

[36] What is clear from Mr Petro's evidence, he being the real estate agent commissioned by Mr Cullen with respect to sale of the property, is that the swimming pool was full at the time he visited. He said that was in September 2015. He added though that it had not been cleaned. That was understandable as it was not being used through the winter period.

[37] No one else has been able to tell me other than Mr Cullen what the state of the pool was at the time it was decided that Ms Canavan would purchase the property. He said that as at 9 December 2015 the pool was half-full.

[38] I find that Mr Cullen knew at that time that the pool would be transferred with the home because it is a fixture. He told me in evidence that the pool had emptied itself and that it had not been refilled and that is why the detritus and debris was in it that can be seen from certain photographs. I think that the pool should have been kept full with water so that it could be handed over without difficulty. However it is difficult to ascribe complete liability for that to Mr Cullen.

[39] I fix a figure in respect of the swimming pool adjustment at \$400.

Items left at property

[40] The next item and one that has been contentious during the course of the afternoon, has been the items that Mr Cullen left at the property which are annexed as B at 357 of the bundle.

[41] Both parents agreed, subject to a qualification that I have yet to ascertain from Mr Cullen, that the property belonging to the boys must of course be removed from those items which Mr Cullen claims as property that he purchased or constructed since the final separation in November 2010. Mr Cullen takes the view that these items are his separate property.

[42] Ms Canavan says she does not know some of them but some of them she does know. They were in a locked shed she did not have access to but as Ms Souness put it she has had access available to her after taking possession of the property.

[43] When pressed Ms Canavan indicated she would expect to receive \$1500 from those items. I do not agree with that figure. [Details deleted].

[44] I have no doubt that some of these items were items he had had with him for many years. Equally I have no doubt that a number of those items he picked up himself during the period of time after separation. I have no means of ascertaining which property is separate is which and which is relationship. I fix a figure for these items of \$500 to be paid to Ms Canavan for those items.

[45] In respect of this property, being the items that Mr Cullen claimed as being his separate property from the workshop, there are listed within that schedule items at 17, 18, 19, 20, 21, 34 and 60. These are items that belong primarily to Liam, who remains in the care of his father, and also the [details deleted] son Eamon. These are the boys items referred to above. Eamon's items are to remain at his mother's home until he calls on his mother to collect them.

[46] With respect to Liam his items will be transferred from the mother's property to the [location and event details deleted]. At that point the [item details deleted] can be transferred to Liam as his own property.

[47] There has been an agreement from the very beginning that an item of property known as [item deleted] would be transferred to the wife. No money is sought for that because that has been allocated in a division recorded earlier by either Judge Skellern or myself. The transfer document in respect of this item has not been completed as yet because settlement has not been completed until today.

[48] Accordingly Mr Cullen is to sign the transfer document, presented to him either by Mr Gallie, or on Mr Gallie's behalf by Ms Souness who has offered to do so, and it is to be signed and returned to Ms Souness no later than seven days from today; time being of the essence.

[49] Now for the avoidance of any doubt on what I have set out earlier in this judgment Mr Gallie has on behalf of the wife sought an uplift on the chattels division in the sum of \$1800. Ms Squire, for Mr Cullen, has contested that claim stating that issue was resolved in the orders that were made following the first judicial settlement conference that I convened in April 2015. She contends that is the item referred at "9" of that settlement agreement as valuation uplift of \$2285.

[50] I find Ms Squire's position to be the correct one and there should be no further global chattels uplift because that was issue was agreed to at that time.

[51] The adjustments that I have determined today are in addition to those set out in schedule B at 387 and 388 of the bundle of documents less the duplications that are contained in this judgment such as the [item deleted] of \$125 which I have dealt with earlier.

[52] Another duplication is in the camping gear which is fixed in that schedule as \$210 but which I have fixed it at \$420.

[53] In the event that there are any other duplications in my orders of today they expressly override the schedule but in all other respects the schedule remains.

Costs

[54] Turning now to the matter of costs. I determine that the parties have a joint liability to the law firm Gifford Devine of Hastings whom they jointly instructed to act on the conveyancing sale of the [details deleted] property, the matrimonial home. Accordingly I find that Ms Canavan must pay to Mr Cullen to settle that account one half of the account tendered by that firm in the sum which is set out in the documentation at page 97 of the bundle.

[55] I have just been requested by counsel to confirm the exact quantum to be paid in respect of the items of property I have outlined above so I will revert to that issue now. On the determinations I have made the figure that I allocated for camping gear is a figure to be paid in full to the wife. The figure to be paid for the [item deleted] is half the agreed value and is therefore \$125. She is to receive also, \$227 for the satellite dish. This is a full payment as the husband has the other dish and has removed both. The gate is one of four; three are with Mr Cullen. So he has 75 percent of this relationship property and he needs to pay the wife \$130 to balance it.

[56] With respect to the venetian blinds the full sum of \$2750 is to be paid. The [item deleted] figure is to be divided in half. The adjusted net figure is to be paid in full to the wife. The damage to the house amount is also to be paid in full as is the cleaning fees payment. Likewise the GST is a full payment as is that of the swimming pool of \$400. Finally the items on the husband's list that have now been included is a full figure of I think \$500. That is not to be halved. The isolator switch is \$25 and paid in full. The [details deleted] figure allocated has already been halved and is therefore also to be paid in full.

[57] With respect to the removal of the items that belonged to Mr Cullen, and were to be removed from the [details deleted] property I directed on 19 February that an independent moving company was to move the chattels. Mr Cullen claimed that he could not find anybody who could remove those items for him. Ms Souness however made enquiries and ascertained that a Mr Stephenson, as I understand it, of Stephenson Trucking, would be able to move the items.

[58] The items belonging to Mr Cullen as a consequence of this judgment and which remain at Ms Canavan's property shall be removed from that property and to

an address designated by Mr Cullen as soon after these orders are sealed as is possible. The operation shall be conducted by Mr Stephenson who shall liaise with the husband and the wife for a suitable date and time for that to occur.

[59] In respect of the cost of that operation I fix those on a two thirds: one third basis with the husband paying the first amount. While I accept that Mr Cullen has not been able to comply with the directions for the reasons I set out earlier in my judgment it was his own actions that prevented him being able to do so. Additionally I find, that with the events that have occurred since February 1 this year, the idea of an auction on the property to finalise the disposal of these items and with both parties present is simply not feasible.

[60] I want to add, for the avoidance of any doubt, that there was a significant point raised by Ms Souness about a pre-purchase inspection by Ms Canavan of this property. That point was made also by Ms Squire and was well made but for one thing. Having convened now at least four meetings with Ms Canavan and Mr Cullen I find that Ms Canavan could not have gone onto the property after the agreement was reached that she would purchase Mr Cullen's share of the matrimonial home to conduct such a pre-purchase inspection.

[61] The reasons for that view are not all directed at Mr Cullen and his actions. They are directed primarily, unfortunately, at a [age deleted] boy who has been out of control as a result of the intensity of the conflict. I consider, and with great regret, that if Ms Canavan had gone to that property, and Liam was present with his father, and his mother's arrival being the sign to Liam of his losing and leaving his home I think the situation would have reached a very high temperature degree very, very quickly. Frankly I do not think that Ms Canavan would have been safe at the property. This is an exceptional case for the intensity of its dispute. Counsel's point about the pre-inspection is a very valid one I'm sure, in 9,999 out of 10,000. However this is the ten thousandth case in my view.

[62] For you Mr Gallie, in terms of the costs of removing these items and Ms Canavan paying her share of them I say "sooner paid sooner mended." As soon

as these items are gone the house is actually hers. The cost for that is a one third contribution.

[63] I find also Mr Gallie, that \$390 is due to be paid by your client to Mr Cullen. That is the fourth item of Ms Squire's request and that is because I am convinced that at the last hearing, when I made the direction that wife was to pay the husband the \$233,000 I made it very clear that she had to meet that supplementary interest cause by her late settlement.

[64] In respect of the items that Mr Cullen does not uplift, or rather does not cause to have uplifted by Stephenson's, there is agreement between the parties that Ms Canavan will sell them on TradeMe for the best price possible as close to the Maidens & Foster valuation for the item as possible but allowing for depreciation over the four years that has elapsed.

[65] In respect of all other matters and in respect particularly of party and party costs I am going to make these orders today to resolve this issue.

[66] Ms Squire has sought from Ms Canavan costs in the sum of approximately \$5000 – being \$2500, \$2151 and \$390. I have indicated previously that I find that Ms Canavan is liable for the \$390.

[67] As to the remaining two other costs Ms Squire has informed me that her client will accept the sum of \$1250 in full and final settlement of her costs claim. In large part that relates to the claim for Mr Cullen's legal costs.

[68] In respect of a settlement figure for the property purchased by Ms Canavan, and where Mr Gallie was unable to understand the figures submitted by the conveyancing department of Gifford Devine, I note he subsequently accepted their figure as being correct.

[69] In the circumstances I think that the position taken by Mr Cullen is an appropriate one and I fix a further figure that Ms Canavan is to pay Mr Cullen the

sum of \$1250 together with the \$390 aforesaid and those cost figures are to be factored into schedule B.

[70] That I think concludes all matters. I do not have jurisdiction under this Act to halt any further proceedings. However as I will be the Judge who handles any further litigation I advise the parties to think carefully before they do so. Given lawyer for the children's views there would be a very keen scrutiny of any further applications in this area.

[71] If I have not got the jurisdiction for such an indication then you can appeal but I consider this case has got to come to an end. In respect of property it is now concluded. Everybody in this case is exhausted, counsel included, and I can assure you, so is the Judge.

[72] Finally at the request of Mr Gallie, and appropriately, I have been asked to give a final date for payment by, as I am informed by Ms Souness of the sum that the husband is to pay to the wife. That date will be 18 May 2016. If payment is not made on that date interest will run at the Family Court rate of five percent from that date until final date of payment.

A B Lendrum
Family Court Judge