

IN THE MATTER of the Matrimonial
Property Act 1976

BETWEEN

DYSON of Christchurch,
public servant

Appellant

AND

DYSON of
Christchurch, registered
nurse

Respondent

Coram: Cooke J (presiding)
McMullin J
Somers J

Hearing: 29 November 1983

Counsel: A W Robinson for Appellant
B McClelland Q C and A J Cadenhead for Respondent

Judgment: 16 December 1983

JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

The parties to this appeal were married in 1953 and separated in 1975. In 1979 the respondent, Mrs Dyson, made application to the High Court for an order under the Matrimonial Property Act 1976 determining the interest of the parties in their matrimonial property. The items of property then involved were the former matrimonial home at 21 Smartlea Street, Christchurch together with miscellaneous furniture and family chattels, a ten acre block of land at Yaldhurst, and the assets of a fund known as the Emohruo Syndicate owned by Mr Dyson. It was agreed at the hearing in the High Court that the matrimonial home and whatever

chattels were still there fell to be divided equally there being no extraordinary circumstances justifying any other division. The syndicate ceased to be a live issue when, during the course of the hearing, Casey J indicated that Mrs Dyson had not established that this fund was still in existence. In the end the only item in dispute between the parties was the Yaldhurst land. Mrs Dyson sought a half share in this block. Mr Dyson claimed that his contributions to the marriage partnership were clearly greater than Mrs Dyson's and that this should be reflected in the award of a greater share to him.

Casey J was not satisfied that the contributions made by Mr Dyson towards the marriage partnership under s 18 of the Act had clearly been greater than those of Mrs Dyson and so he made an order for the equal sharing of the property. Mr Dyson now appeals against that order and asks this Court to receive further evidence pursuant to s 39(4) of the Matrimonial Property Act 1976 on matters said to be relevant to this appeal.

In the High Court it was more or less common ground that in 1953, shortly after the marriage, Mr Dyson purchased a freehold farm of 40 acres at Momona for 8500 pounds. He contributed 6000 pounds of this and raised the balance of 2500 pounds on mortgage. At the same time he obtained the lease of a further 16 to 17 acres. On the combined area he ran dairy cows. A few years later he was able to lease a

further 60 acres. On this the parties continued to run a dairy herd and to carry on mixed farming until 1964 when the freehold area was sold for 12,000 pounds and the goodwill of the lease of the 60 acre block and the town milk quota were sold for a further 12,000 pounds. A property of 600 acres at Ashburton was then purchased for 41,000 pounds of which 20,000 pounds was raised on mortgage. The balance came from the sale of the Momona farm. Stock was purchased at the cost of a further 7000 pounds of which 5000 pounds was raised from a stock company. The Ashburton farm was sold in 1972 and with stock thereon realised \$118,080. After discharging the mortgages on the property and paying expenses a sum approximating \$49,000 was left. Of this sum \$22,500 was used to buy the matrimonial home at Smartlea Street and \$24,000 was used to buy the Yaldhurst property. Further sums were spent on effecting improvements.

In the High Court the dispute between the parties centred largely on the extent to which Mrs Dyson had helped in the farming operations. She claimed that throughout the years that they had farmed the Momona property she had taken part in all aspects of the farming operations and to a much greater extent than is ordinarily the case with the wife of a farming proprietor; that in addition she had cared for the six children who were born while they lived on this property, and that she had looked after the household. She also claimed that she was heavily involved in the actual working of the Ashburton farm and that Mr Dyson left the bulk of this

work to her. In March 1969 she took up work at the Ashburton Public Hospital on two nights a week and that from 1973 on she had worked as a charge sister at

Mr Dyson said that on the Momona farm Mrs Dyson had been fully occupied as a mother and housekeeper and that she had made no direct contribution to the farming activities. He admitted, however, that she had played a limited role in the farming operations at Ashburton but claimed that she had overstated the degree of her involvement.

Mr Dyson's claim to a greater share of the property was based on the 6000 pounds cash contribution which he made to the purchase of the Momona property, his assumption of indebtedness for the mortgage which he raised upon it, and the farming work which he did on both the Momona and Ashburton properties. Mrs Dyson's claim to an equal share in the property was based on her contribution to the farming operations on both properties and the discharge of her duties as a mother and housekeeper.

Casey J accepted that the 6000 pounds initially contributed by Mr Dyson was a significant contribution but said that Mrs Dyson's contributions were such that when one looked at the contributions of the partners at different times over the 22 years they lived together he was not satisfied that the contributions of Mr Dyson had clearly been greater than those of his wife.

In the course of his judgment he said:

" For the short time that these parties were in the witness box undergoing cross-examination I can say that I formed a favourable impression of Mrs Dyson as a truthful and reliable witness, although I hasten to add that neither party was cross-examined extensively about the disputed assertions in their respective affidavits, so that I can really make no concluded findings one way or the other on these matters. The background of a town milk supply, and later a mid-Canterbury farm where money was very short at times, tends to support Mrs Dyson's assertion that she worked harder than one would normally expect a farm wife in her position. From March 1969 she worked at the Ashburton Hospital two nights a week, that money going to the support of the family, and after the shift to Christchurch she was employed full-time as a nursing sister."

The primary submission of Mr Robinson who appeared for Mr Dyson in this Court was that there was a disparity between the contributions of the parties of such a kind that the Judge ought to have made an order that Mr Dyson was entitled to a 60 per cent share in the Yaldhurst property. He relied on Mr Dyson's contribution of the 6000 pounds which was almost four-fifths of the purchase price of the Momona freehold and his continued contribution of the farming skills

which he had acquired as a single man. He said that the 6000 pounds was a contribution which gave the parties their start in life and that the momentum which they obtained from this injection of capital was never lost. It was acknowledged by Mr Robinson that Casey J had properly addressed himself to the relevant principles but it was said that he had failed to give proper weight to Mr Dyson's greater contributions. Had he done so, Mr Robinson said, the Judge would have made an order for unequal sharing in favour of Mr Dyson.

On the evidence before the High Court given both by affidavit and viva voce, we do not think that Casey J has been shown to be wrong. There is much to be said for Mr Robinson's claim that the initial contribution of 6000 pounds was the means by which the parties were launched into farming operations in which they continued until they sold the Ashburton property. The Judge himself thought that this contribution was significant. But he was entitled, in the terms of s 18(2), to hold that Mr Dyson's monetary contributions were not to be rated as having a greater value than Mrs Dyson's contributions as a mother, housekeeper and farm worker. Therefore, on the evidence which was available to the Judge in the High Court, we would not be prepared to say that he was wrong in concluding that this was a case for equal division. Maw v Maw [1981] 1 NZLR 25 is distinguishable as much greater sums were involved and there was the continuing influence of the husband's separate property.

Reid v Reid [1982] 1 NZLR 147, on which Mr Robinson also sought to place some reliance, is remote on the facts.

In his second submission Mr Robinson asked this Court to admit further evidence in support of his primary submission that the order for equal sharing made by the Judge was wrong. He did so in reliance on s 39(4) of the Act. The background to this submission can best be explained in the following paragraphs:

(1) In his affidavit in the High Court Mr Dyson claimed that Mrs Dyson had been fully rewarded for any farm work which she did by the payment to her for her personal use and enjoyment of the profit from the sale of 200 to 300 lambs each year. Mrs Dyson in her affidavit in reply denied this. She said that Mr Dyson recorded the sale of these lambs in her name for taxation purposes but that in reality she received no payments at all. She was cross-examined as to what bank account she had at the time of separation and said that she did not have a bank account at all. But since the hearing it has been found that, at the time of the separation in September 1975, Mrs Dyson had a Post Office Savings Bank account at Riccarton and that for some years she had had this account or an account in a Post Office branch in other towns where she has lived. Although at the date of the separation the credit balance in the Riccarton account was only \$57.34, at least one substantial deposit was made in it prior to the separation. In particular on 17 December

1971 the sum of \$1750 was deposited in the account. On 24 December 1971 \$970.20 was withdrawn. In November 1973 three deposits totalling over \$1435 were made in the Post Office Savings Bank account of their daughter Lois, then aged 17. And in February 1973 a deposit of \$284 was made in the account of their son Brian, then aged 17. Mr Robinson contended that these deposits were consistent with Mr Dyson's claim, repeated and amplified in his cross-examination, that his wife and children had been credited with payments for the sale of farm produce.

(2) Mrs Dyson, in an affidavit in reply, sought to explain her denial of ownership of the bank accounts by saying that she had understood the questions as to her ownership of bank accounts as relating to a trading bank account. She had no such account at the time of separation. She said that she regarded the Post Office Savings Bank account not as a bank account but simply as a repository for payments of family benefit made to her for children; that the Post Office account was used almost entirely for this purpose and that the funds built up in it were drawn on from time to time for living expenses.

(3) Although Casey J was informed in the High Court that Mr Dyson did not contend for other than an equal division of furniture and chattels in the matrimonial home Mr Dyson appears nonetheless to have been concerned to ascertain what had happened to some of his personal possessions and tools

which he left at the house at the time of the separation. After the hearing in the High Court arrangements were made between counsel for Mr Dyson to uplift his personal effects from the matrimonial home and on 23 March 1981 he attended at the house with Detective Sergeant Meikle for that purpose. In particular he seems to have been at pains to locate a shotgun and some chain-saws.

(4) Mrs Dyson was cross-examined at the hearing about Mr Dyson's personal belongings including the shotgun, chain-saws and a Parker pen. She said that she did not know where the shotgun was, that Mr Dyson had sold his last chain-saw before the separation and that he probably still had the pen. As a result of enquiries made since the hearing it has been established that in fact Mrs Dyson sold the shotgun to a secondhand dealer in 1976 and it seems that one of the sons took the chain-saw, or at least part of it, to the dump after it had been damaged by flood water entering the garage. The Parker pen was handed over by Mrs Dyson to Mr Dyson's solicitors some time after the hearing.

It was said by Mr Robinson that the material now available in respect of the bank accounts and the chattels mentioned is such that the Judge's assessment of Mrs Dyson as a truthful and reliable witness can no longer stand, with the consequence that the order for equal sharing of the Yaldhurst property based upon it ought to be vacated.

Although Mr McClelland, who appeared in this Court for Mrs Dyson, opposed the receipt of the further evidence we think it proper in terms of s 39(4) of the Act and in the interests of justice to receive the further evidence consisting of two affidavits of Mr Dyson, an affidavit of Detective Sergeant Meikle, copies of the Post Office Savings Bank accounts and Mrs Dyson's affidavit in reply.

But when all the material now before this Court is considered we think that while it is true to say that the Judge did express himself as having formed a favourable impression of Mrs Dyson, it is at least doubtful whether he acted upon that impression in making an order for equal sharing of the Yaldhurst property. Having commented, as he did, on Mrs Dyson's credibility the Judge hastened to add that neither party had been extensively cross-examined about the disputed assertions in their affidavits and for that reason he could really make no concluded findings one way or the other on these issues. It seems that he was influenced in the making of an order for equal division by the other factors he then mentioned - the background of the town milk supply, the mid-Canterbury farm and Mrs Dyson's work from March 1969 onwards as a nurse or a nursing sister. The Judge made no findings as to whether or not Mrs Dyson had been paid in any way for her services in either of the farming enterprises and we are doubtful whether, if he had the information now contained in the further affidavits before us, he would have been influenced one way or the

other by it. Apart from the specific deposits referred to, the Post Office Savings Bank accounts contain a record of deposits and withdrawals as consistent with the receipt of family benefit payments and their disbursement for living expenses as anything else. Even if, however, the credits which they record were treated as payments made by Mr Dyson to Mrs Dyson for work done on the farm it is unlikely that any difference in the contributions of the parties which they might reflect would influence the division to such an extent as to warrant a departure from equal sharing. Therefore, we think that giving proper weight to the fresh material admitted in pursuance of s 39(4), no order materially different from the order for equal sharing would have been justified.

The fresh evidence does, however, leave us troubled in another respect. In his initial affidavit Mr Dyson claimed that when he left the matrimonial home he had sought to recover a large number of tools and personal items from it. A list of these, including the shotgun, a chain-saw with two spare chains and spares for it in a tool box, and the Parker pen were exhibited to his affidavit. His counsel in the High Court cross-examined Mrs Dyson about these tools. She said that, as a result of flood or floods entering the garage of the house after the separation some of the tools had become rusty and were taken away and dumped by her sons.

We have been left with the strong impression that Mrs Dyson and the sons did not treat Mr Dyson's property with

proper care. Detective Sergeant Meikle did not notice any signs of a flood having occurred in the garage when he visited the house although he was aware that a nearby river had reached some very high levels not long before his visit. But, assuming that a flood or floods in fact occurred, no effort seems to have been made to salvage items of value such as the chain-saw, spare chains and the tool box, and these items along with others were allowed to rust. Then, without communicating with Mr Dyson or giving him any chance to make a claim under an insurance policy, the items were dumped. Moreover, Mrs Dyson admits that she gave other items in the house or the garage to the children and some she sold herself. As Mrs Dyson, in whose custody these goods remained, has either traded in Mr Dyson's goods or has treated them indifferently, we think that she should now make some recompense to him. This can be achieved by ~~leaving undisturbed the order for equal sharing of the~~ Yaldhurst property but providing that Mrs Dyson must give credit to Mr Dyson for \$1000 which is the value which, in the absence of other information, we place upon the tools and personal belongings. No order for sale has been made in respect of the Yaldhurst property. It may be that Mrs Dyson will be paid a cash sum representing her half share of this property. If that is the case the \$1000 can be deducted from it. However, we give no final direction in this regard as we are not asked to make any order implementing that already made in the High Court. Subject to the allowance

now made in favour of Mr Dyson in the sum of \$1000 in respect of the tools and personal belongings which he has lost the order made in the High Court for equal sharing will stand and the appeal will be dismissed.

In the circumstances of the case there will be no order for costs.

Solicitors:

Cunningham, Taylor & Thomson, Christchurch, for Appellant

De Goldi & Cadenhead, Solicitors, Christchurch for Respondent