18/6

IN THE HIGH COURT OF NEW ZEALAND

M. 13/77

GREYMOUTH REGISTRY

3 MPC 166.

No Special Consideration

360

BETWEEN ROSALIE PATRICIA SHEARING

APPLICANT

A N D RAYMOND ROBERT FRANCIS SHEARING

RESPONDENT

Judgment: 13 JUN 1980

Hearing: 23 April 1980

Counsel: A.D. Orchard for Applicant
T.L. Savage for Respondent

JUDGMENT OF CASEY J.

This application by Mrs Shearing involved principally a farm property containing the matrimonial home, together with stock and plant, the assets of a contracting business and other property owned by Mr Shearing. They were married in June 1960 and divorced in 1977 after separating in 1974, so I am dealing with a marriage partnership of fourteen years, during which they had six children and Mrs Shearing also had four miscarriages. In 1957, when he was in his early twenties, Mr Shearing entered into a farming partnership with his grandfather who had sold him the "home" block of some 88 hectares at Waipango, next to the "back" block which he retained, together with a one-third interest in the livestock. On the land sold was the house which subsequently became the family home, plus all the other farm buildings. The special valuation price of the land was $27,920 but Mr Shearing paid only $18,120, the rest being gifted. He assumed liability under an existing mortgage and gave back a mortgage to his grandfather for the balance at 3% interest. The figures are as follows:-

Value of land		27,920.00
Value of one-third interest in live-stock		4,467.84
Provided by		
Gift	12,925.84	
Mortgage liability assumed	5,000.00	
Mortgage to grandfather	14,462.00	
		$32,387.84

At the time of their marriage in 1960 Mr Shearing owned this farm and the interest in the stock, plus some other assets which I detail later. They lived first of all in the homestead with his grandfather, with whom his wife quarrelled, so after about a year they moved to rented accommodation, where they stayed for three years, and then returned to the farm house in 1965. Mr Shearing worked on the farm in fulfilment of his partnership obligations. He claims that because of his wife's attitude to his grandfather, the latter changed his mind about making a gift of the balance owing under his mortgage. Their partnership was dissolved in 1963 and arrears of interest were added to the mortgage which was extended to 5 July 1968 with interest at 5%; it was repaid in 1966 with a fresh loan for $16,000 from another mortgagor, and a mortgage was also given to the bank to secure seasonal finance.

The grandfather transferred the back block to Mr Shearing's brother, who sold it to him in 1969 for $23,000, and thereafter the two properties were farmed by him as one unit. To finance this he raised a mortgage over that block for $15,300 and obtained a second mortgage from the State Advances Corporation for $14,300 over both blocks, which included $5,600 for 800 extra ewes. The bank's third mortgage was also extended to them both to secure an overdraft limit of $10,000 for seasonal finance. In 1971 the first mortgage had been reduced to $12,000 and was renewed to 1976, and in 1972/73 Mr and Mrs Shearing spent some $13,000 upgrading their home, for which a further advance of $3,000 was obtained from the Corporation, and the rest paid from income. Mr Shearing also operated a contracting business. Apart from the farming assets acquired from his grandfather, he owned at the beginning of their marriage 9 cattle, a truck, a car and a hay baler. His wife said she gave him $1,300 from money she had saved before marriage to help him buy his first bulldozer, but he disputes this and says she had no savings at all, and contributed only $100 towards the bulldozer from proceeds of a life policy, which he repaid her. Mrs Shearing details other financial contributions she made to the marriage out of returns for pigs which she raised, lamb receipts and the proceeds of a paddock of grain. She received no other income apart from the family benefit, and all this money went into family and household

expenses, and towards the renovations and a new car. When she left in January 1974 she had only $917 in her bank account and says she spent this on a washing machine and other household appliances. I think these items should be treated as matrimonial property by virtue of s.9(4) and in the circumstances of this case I think it would be proper to fix their value at that figure as at the date of separation. There is no evidence of their current value. They will be brought into the calculations at $917.

Mr Shearing says that much of the income she claims to have earned from work on the farm was really the result of tax-saving arrangements to spread normal farming receipts, and although he agrees that she did look after pigs, he disputes the annual income was anything like $400-$500. There was no cross-examination to help me decide where the truth lies in these matters, as well as in the disputed question of Mrs Shearing's contribution through other farm work. She maintains that her husband's contracting business took him away an average of six days a week from early morning to late at night, and that in effect the daily running of the farm fell on her shoulders in the following ways. She helped in the shearing shed as well as looking after the gang, but her husband assisted with early lambing and did the crutching, and also maintenance and heavy work (such as fencing and ditching) on Sundays or when it was too wet for contracting. She says he continued to work as a full time contractor even after the back block was acquired in 1969, though he occasionally used to hire casual labour. She also assisted at times with tractor work. In the year or so before she left, Mr Shearing hired a land-girl to help with lambing. On two or three occasions he engaged someone to cook meals at shearing time so that his wife could help full-time in the shed. She also details other routine farm work - drenching, haymaking, dipping etc. - at which she assisted, except for the five months she was confined to bed during her pregnancy with Euan. To complete the recital she says that her husband, except for that period, and while she was in hospital, gave no help at all in the house or with the children. The youngest child needed a special diet of goat's milk and she kept and milked goats for two years to provide it. She also handled the book work for the farm.

Nearly all these allegations are disputed in Mr Shearing's affidavit. He concedes that she did the usual work expected of a farmer's wife over those years, but says that her claims are greatly exaggerated. During the early days of marriage until they went to live in the rented house he worked mainly on the farm; then his contracting work increased and he says life was "fairly tough for both of us" for the next three years with him away for long periods. However, the partnership with his grandfather was still operating and the latter did most of the farm work. The bad feelings said to exist between Mr Shearing's grandfather and his wife were also mentioned in the very late affidavit from Mr Shearing's mother, in parts highly critical of her domestic abilities - although she does concede that she loved outdoor work. In view of the lack of opportunity to reply, I cannot pay too much regard to these criticisms. Many of them are the familiar and naturally-expected comments of a mother loyally siding with her son in a distressing family situation. Underneath it all I suspect she got on well enough with her daughter-in-law, and many of the domestic shortcomings she notes, even if true, were minor and consistent with the busy life of farm, home and a growing family.

Mr Savage points to the improbability of Mrs Shearing doing all she claimed during the ten years she was having the family between 1961 and 1971, with four miscarriages as well. When only the home block was owned, the farm ran about 1,000 sheep; after the back block was added in 1969 the number increased to around 2,300. He also pointed to bulldozer hours worked and returns from contracting - about one-third of the farm revenue over the years 1971-1974 - as supporting Mr Shearing's claim that he never worked full time on this, and was always on hand for the regular farm work; and that much of the assistance his wife gave was little more than token, with ample help being engaged when it was needed. He also pointed to the holidays she had taken in later years, whereas Mr Shearing had taken little or no time off.

As in so many of these cases, I suspect the truth lies somewhere between. I have no doubt that both parties started their marriage devoted to the ambition of building up a solid farm ownership to settle some of their children on the land and carry on Mr Shearing's family tradition. I am also

satisfied that both worked very hard in their own respective spheres, and in the early years particularly they went without a lot to achieve their purpose. It is a matter for regret that those early hopes have ended like this, and there may be some force in Mr Orchard's comment that the drive to work so hard - particularly on Mr Shearing's part - may have stunted their personal and domestic relationship. Looking at the whole of the evidence in the affidavits, I am satisfied that Mrs Shearing's contribution over the fourteen years has been impressive, and I think considerably more than that encountered from a normal farmer's wife, who does not have to cope with her husband's second major business, and the absences it caused.

There was disagreement about the matrimonial property available for division. The back block acquired during the marriage presented no problems, nor did the insurance policies, and the parties are agreed on the inclusion of a Commercial Union policy omitted by mistake from Mr Shearing's list, and that they are to be assessed at the most recent surrender values on file. Family chattels and their valuation are also agreed. Mr Shearing claims the home block, owned by him before marriage, as separate property, while Mr Orchard submits it is to be treated as matrimonial property by virtue of s.9(6) of the Act, which reads:-

> "Subject to section 10 of this Act, any separate property which is or any proceeds of any disposition of, or any increase in the value of, or any income or gains derived from, separate property, which are, with the express or implied consent of the spouse owning, receiving, or entitled to them, used for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either the husband or the wife in, any property referred to in section 8 of this Act shall be matrimonial property."

His argument rests on the fact that this property, acquired from his grandfather about 1957, was mortgaged to raise some of the finance needed for Mr Shearing to buy the back block from his brother after marriage, and, I might add, to increase the bank's seasonal advances for the running of the farm. Thereafter the two properties were farmed as one unit, and the farm income (undoubtedly matrimonial property) partially derived from work on this block, was used for family living

and improvements and to pay off the mortgages on the two properties. I was referred to Baddeley v. Baddeley 1 MPC 10, which was the only case Counsel have discovered where s.9(6) was applied in a similar way. There the husband's interest in a farming partnership entered into before marriage (and therefore prima facie separate property) was treated by Mahon J. as matrimonial property pursuant to s.9(6) because "income or gains therefrom had been used for the acquisition of" a farm property during the marriage and before separation. The learned Judge did not discuss the question in any detail beyond the words I have quoted. From the facts mentioned in the judgment, it appears that the only contribution by that separate property to the acquisition of the farm was the income earned from it. That income would become matrimonial property under the conditions of s.9(6), but it does not follow that the classification of the property from which it was earned must be altered, unless it can be said that the partnership interest was thereby "used" for the acquisition of the farm. Mr Savage referred to my own decision of Maw v. Maw 2 MPC 162 where separate farm property used as security to acquire matrimonial property was still treated as separate, but the point in issue here was never raised, because Counsel accepted it remained separate property.

Mr Fisher has grappled with s.9(6) in his work "The Matrimonial Property Act 1976", and decided it is largely redundant, most of its provisions being already provided for in other parts of the Act. He felt it might be interpreted as simply affording an added protection for separate property by its insistence on the express or implied consent of the owner (ibid. p. 80). In Reid v. Reid (1979) 1 NZLR 572 the Court of Appeal emphasised that the words used in s.8(e) of the Act were to be given their plain and ordinary meaning, unaffected by concepts which had previously been accepted as appropriate in determining property rights between spouses. The judgment of Woodhouse J. in particular strongly emphasises the concept of equal sharing, as a radical departure from the conventional structure of those rights. I bear this in mind in my approach to s.9(6), which was also discussed in a general way in that case. At p. 608 Richardson J. made the following observations:-

"...the legislative pattern seems to be carefully settled and the exceptions to the application of s8(e) to all property acquired after the marriage deliberately listed. Sections 8(e), 9(3), 9(6), 10(1) and 10(2) have one important feature in common. In each case there is some particular dealing with the property during the marriage which is regarded as sufficient to attract the matrimonial property sharing regime. It is the acquisition of property out of that property under s.8(e); the actions of the other spouse or the application of matrimonial property giving rise in whole or in part to the income or gains under s.9(3); the use of that property, with the consent of the spouse owning the property, for the acquisition of matrimonial property under s.9(6); the intermingling with matrimonial property of property acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person under s.10(1); and the use for the benefit of both spouses of property acquired by one spouse by gift from the other under s.10(2)."

He went on to say at 1.44 of s.9(6):-

"Any separate property - and that may include pre-nuptial property, property acquired while the spouses are living apart, property acquired from post-separation earnings and, subject to s.10, property acquired by succession or survivorship or as a beneficiary under a trust or gift - which, with the express or implied consent of the spouse owning the property, is used for the acquisition of any property referred to in s.8, becomes matrimonial property."

These words are very wide and can convey the notion of any purposeful dealing with the separate property to achieve the acquisition of s.8 property. The primary meaning given to "use" in Funk and Wagnall is "To employ for the accomplishment of a purpose" and in a broad sense that is what Mr Shearing did with the home block, when he mortgaged it to raise money to buy the other land from his brother. However, if the opening words of this section dealing with any use of separate property are to be read in this way, the references which follow to alternative methods of acquisition etc. having their source in separate property would seem largely unnecessary. If a husband decided to apply income from his separate property to improve the family home, this would in the broad sense of the word be a "use" of the property for that purpose and qualify it (and automatically the income gained

therefrom) as matrimonial. This may be the approach which commended itself to Mahon J. in Baddeley's case, but it seems to me with respect that s.9(6) makes a distinction between the use of separate property as such, and the use of proceeds of its disposition and income or gains derived from it; it follows that the latter transactions are not to be treated as "uses" of the property itself for the purposes which they have achieved. Notwithstanding the new and much broader approach to matrimonial property questions required by the Act, there seems a certain lack of logic in accepting that a spouse may retain separate property, but only for so long as he or she refrains from purposely applying any benefit derived from it to matrimonial or family advantage. And I find it hard to accept, for example, that a temporary loan of $5,000 raised on separate property worth $50,000 to buy a family car automatically renders that property matrimonial. It seems more consistent with the purpose of s.9(6) and the recognition of separate property contained in the Act to read "use" in the sense of the direct employment of the property or asset itself for the acquisition, improvement etc. of the matrimonial property. Indeed, this is normally how income, gains or proceeds of disposition would be involved. Such an approach preserves the independence of each of these alternative transactions which the section seems to recognise. I am therefore led to accept Mr Savage's proposition that what was used to acquire the back block in terms of s.9(6) was not the home block itself, but the proceeds of its disposition by way of mortgage. Only those proceeds became matrimonial property by virtue of that use, and the same reasoning applies to the additional bank accommodation from the third mortgage used to finance stock purchases and other farming needs - which, of course, are matrimonial property by virtue of s.8(e). I therefore find that the home block remains separate property.

The matrimonial home on this block is a "homestead" so that an equal allowance in a sum of money equal to the equity therein must be made to Mrs Shearing. The Valuer General has determined its value under s.12(2) as $40,000. Although Mr Savage queries this figure, in

the absence of any appeal or other evidence establishing it was wrong, I accept it. The debt to be deducted to arrive at the equity for division is the balance of $2,167 owing to the Rural Bank on the loan of $3,000 for improvements. Mr Savage suggested that some part of the secured debts over the whole block be apportioned to the homestead land, but in view of the division I have made and the very small amount that would be involved, I do not think such an exercise is called for.

The balance of matrimonial property to be divided under s.15 comprises the back block; live and dead stock and plant, some investments, the assets of Mr Shearing's contracting business and life insurance policies. Each party contended for unequal division on the grounds that their respective contributions had clearly been greater than the other. As Counsel conceded, Reid v. Reid and other recently reported decisions of the Court of Appeal have strongly affirmed the Act's recognition of equal contributions to the marriage partnership, which lasted some fourteen years in this case. I have outlined their history of hard work and early deprivation in order to achieve the major gaol of their partnership - the chance for some of their children to follow them onto the land. Even taking into account his work and assets brought into the marriage, in my view Mrs Shearing's contributions have been the equal of her husbands over that period and an equal division is called for.

The next question is the date and method of valuation. I see no reason to depart from the date of hearing for the land and buildings. Mr Savage told me that the valuer had placed $97,700 on the back block, although his affidavit does not deal with them separately. I accept this as appropriate, and he concedes that the secured debt of $7,500 for farming improvements to the home block and $1,000 suspensory loan can be ignored. The balance of the loan for house improvements is chargeable only to that "homestead" value. In the absence of any submissions, I think the balance of the secured term

liabilities shown in the last accounts should be broadly apportioned to each block according to their respective values; Mr Halstead assessed the total (excluding homestead) at $249,500. A reasonable division of the appropriate secured term liabilities on this basis would be 3/10ths to the back block.

Mr Orchard submitted that the numbers and value of livestock should be assessed as at the date of hearing, and current debts and outstanding credits should be ascertained and assessed at that date also. Mr Smith has made a valuation of stock, chattels and plant as at 26 June 1978 which he reassessed as at 24 August 1979. The number of sheep has been about the same (around 2,300) over the period since the separation in 1974, but there has been an increase in value - now $57,330 as against $30,300. I think Mr Orchard has a point when he says the stock should be treated as capital stock-in-trade as in any ongoing business, and while it is true that its maintenance - and perhaps some increase in value - is due to Mr Shearing's work and judgment, he has been paid for it from the income produced. Much of the rise can be attributed to market increases and inflation. On the other hand, Mr Savage said it would be unjust for Mrs Shearing to receive the benefit of his work and care for the stock over these years. McMullin J. recognised this in Tickle v. Tickle 2 MPC 195 when he fixed the date of separation as the time for valuing the stock and directed the husband (who remained on the farm) should have the increase in numbers and value. Here there has been no increase in number, and in the absence of evidence that Mr Shearing has done anything more than the normal work of a good farmer, I see no reason to depart from the usual rule of a hearing-date valuation, so that she gets the benefit of the market increase on her share in the stock, of which Mr Shearing has had the free use. The numbers and value can be accepted at Mr Smith's amended figure for 24 August 1979. While Mr Orchard was no doubt theoretically correct in much of what he said about the way the debts and credits should be calculated, I think the most convenient and just method here is to adopt their values at the end of the last financial year

(30 June 1979) - appearing in the annual accounts. This is near enough to the date of the amended stock and plant valuations to be still relevant. By virtue of s.9(6) the value of the improvements made to the matrimonial property by Mr Shearing after separation becomes matrimonial property and I have taken this into account in fixing contributions. Similarly the life policy premiums he has paid during that period are matrimonial property. So far as the childrens' policies are concerned, the parties are agreed that these remain in force for their benefit, so there is no practical problem about division, and as requested I make an order vesting them as tenants in common in equal shares. I do not have full details of the premiums Mr Shearing has paid since separation on other policies, except to note from the Company's letter annexed to his affidavit that there are arrears on one. In any calculation of the amount due to Mrs Shearing, the approach taken by Ongley J. to post-separation premiums in Allum v. Allum 2 MPC 2 appeals to me.

Mr Shearing bought a lot of plant and equipment after the separation, which has been listed in an appendix to Mr Smith's joint affidavit. The total figure for plant which I accept as at the date of hearing is $24,285, of which $17,850 represented the value of items purchased after separation. This includes a crawler tractor costing $22,000 in 1975, used in his contracting business. This would leave $6,435 as the value of plant which seems undoubtedly matrimonial property. Mr Orchard submitted that I should use my discretion under s.9(4) and treat all the post-separation acquisitions as matrimonial property. He points to the fact that some of the old plant has been sold or traded in to acquire it and there is no evidence of what it realised. However, Mr Smith did submit an inventory and valuation of plant on hand at the date of separation, which came to $5,035. Much of it was well used and of little value. The amount is near enough to present values and I cannot see that Mrs Shearing is suffering any injustice by accepting the latter figure of $6,435. Mr Shearing borrowed $8,000 from his mother to

help buy the tractor, and the balance of this should be regarded as solely his liability in respect of that separate property.

When I turn to the situation with current assets and liabilities, I see a substantial increase in net indebtedness since the separation. Again taking the figures from the respective accounts exhibited to Mr Shearing's affidavit in 1974 the bank overdraft plus unpresented cheques came to some $9,500, representing almost the whole indebtedness. Against this was a No. 2 account credit of $5,800 (I am using round figures) and other small items leaving a net indebtedness at 30 June 1974 of some $3,500. There were no entries corresponding to accounts receivable and accounts payable, which appear in the 1979 balance sheet. In that, the bank overdraft had increased to nearly $15,000 (including a new item marked "bulldozing a/c") and other small amounts took the figures (including accounts payable) to over $16,000. Current assets consisted virtually of accounts receivable ($10,000). So the current bank indebtedness had increased by some $12,500 during the separation. Mr Orchard submitted that it would be fair to balance this indebtedness against all current assets in respect of which it could be charged so that only the net overall debt would be taken into account in dividing the property. I have gone some way towards meeting his criticism by leaving accounts receivable and accounts payable out of my calculations: the former at $10,000 seems only an estimate and they must both relate to items which would prima facie be separate property. I also think the bank overdraft in the "bulldozer account" should be left out of the calculations. There is nothing in the 1974 balance sheet corresponding with this, and I see no reason to associate it with any plant in which Mrs Shearing might have an interest. However I think the balance of the current indebtedness amounting to $12,500 can fairly be deducted from the total value of the farm plant and stock before division, as having been incurred for farm maintenance and running expenses. Mrs Shearing is getting the benefit of price rises for the stock and must expect to meet a corresponding

rise in the finance normally required to operate the business. In addition there are investments itemised in the 1974 balance sheet totalling $1,625. A similar entry in the 1979 account shows the same items valued at $1,897. In the absence of any submissions to the contrary I assume they are still matrimonial property.

I summarise my conclusions in the following way:-

I. Balance Matrimonial Property			Value
(a) Back block			97,700
(b) Livestock			57,330
(c) Plant			6,435
(d) Investments			1,897
			163,362
Less Liabilities:			
Mortgages and term liabilities ($37,371 less suspensory loan and balance due to Mrs Shearing Senior $7,545) - $29,826			
Three tenths	8,948		
Current liabilities	12,500	21,448	
			141,914
(e) Mr Shearing's Life Policies			
Surrender Value $5,563.55			
Plus Policy 180302			to be ascertained
Less Premiums paid by Mr Shearing since separation			to be ascertained
(f) Mrs Shearing's property			937
II. Homestead Allowance			
Government Valuation $40,000 less balance mortgage raised for improvements $2,167			37,883
III. Family Chattels			785

All these are to be divided equally.

After calculating the balance due to Mrs Shearing there must be deducted from her share what I presume will be 50% of the sum of $397.74, being the

proceeds of a policy paid to her, and which I take to have been matrimonial property. I may be mistaken on this however, as I was not sure of the circumstances of this payment. Counsel are agreed that the further sum of $2,000 has been paid on account of her share and must also be deducted. As suggested, I will not make any formal orders at this stage, leaving it to the parties to settle the details and method of payment. They may submit a draft order for approval, and leave is reserved for either to apply for such further orders or directions as may be necessary to give effect to this judgment, or to correct any omissions or errors in the assessment of the property. I make no order as to costs as I think it appropriate that each party should bear their own.

MB Casey J.

Solicitors:

A.D. Orchard, Westport, for Applicant
Watson & Savage, Invercargill, for Respondent