

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M.51/78

**No Special
 Consideration**

IN THE MATTER of the Matrimonial
 Property Act 1976

A N D

IN THE MATTER of an application for
 orders as to property

BETWEEN

EATON

Applicant

A N D

EATON

Respondent

Hearing : 16th November 1983

Counsel : Miss C. Bradley for Applicant
 A.J. Twaddle for Respondent

Judgment : 16th November 1983

(ORAL) JUDGMENT OF BARKER, J.

On 1981, Speight, J. delivered a reserved decision on an application brought under the Matrimonial Property Act 1976 concerning these parties. The decision is reported in (1981) 5 MPC 33. I shall refer to the parties, for the sake of convenience, as "the husband" and "the wife".

Speight, J. ordered that the parties share equally in the matrimonial property which was to include a certain block of land over which there had been a dispute as to whether it was matrimonial property or not. The Judge reserved leave to counsel to apply for any further directions. He gave the husband six months within which to conclude a sale of the

matrimonial property, the principal item of which is a farm at , about 25 miles west of in a remote area of the far north. In addition to this farm, there is of course stock and plant. No proper values are provided for stock and plant; the current Government valuation of the land is \$440,000.

According to an affidavit from a Kaitaia real estate agent, the farm property has been on the market for some 3 years; no sale has eventuated. There was one agreement for sale and purchase for \$423,750. for land and buildings. That sale did not proceed.

The wife now seeks an order for sale of the matrimonial property, notwithstanding that the farm is clearly difficult to sell because of its location. Miss Bradley submitted, on the basis of cases such as Morton v. Morton (1982), 5 MPC 100, Yakich v. Yakich (1982), 5 MPC 1981 and Page v. Page (1981), 5 MPC 114, that an alternative to an order for sale could be to grant the wife a fairly large sum on account immediately and to secure the balance by way of a table mortgage for a fairly limited period.

This alternative is not a real possibility. There is an existing first mortgage of about \$40,000 on the farm in favour of the Rural Bank; I am advised from the Bar that there is little likelihood of the husband being able to raise a sufficiently large amount to pay even part of the wife's claim now and to raise the rest in about 3 years' time. Although the exact amount of the wife's share is not fixed, counsel for the wife estimates it at no less than \$200,000. Mr Twaddle does not dissent from this view. That alternative must therefore be rejected, not because there is anything wrong with it in principle, but because it just is not practicable.

Another alternative proposed by the husband was that the wife should take over certain blocks of the land which she would then be able to sell. Apparently, it would be possible to achieve parity in this way; the wife claims that she is just not interested and lacks the ability to farm in her own right. Again, I think this suggestion lacks practicality and must also be rejected.

The law is clear; it has been developed since the Act came into force; unless there are special circumstances (the most usual of which are the interests of dependent children) matrimonial property should be sold to enable each party to make a new start.

I do not wish to have this farm sold at an under-value. That would not be to the benefit of either party. As the Court of Appeal remarked in Morton's case (at p.103) an order compelling a farmer to dispose of his lifetime interest and enterprise is not lightly to be made; equally, it would not be fair for the wife to be kept out of her funds just to enable the husband to retain ownership of the farm without giving the wife the benefit of the value which the wife already had at the date of hearing. In the present case, Miss Bradley for the wife seeks an order for sale as the only feasible remedy possible.

I must say, in support of her submissions, that the wife has not brought this application prematurely. It is now 2 years since Speight, J. gave his judgment; as I say, the property has been on the market for 3 years.

The first matter to be determined is the identity of the matrimonial property. I therefore make an order under Section 38 requiring the Registrar to enquire into the value of

the matrimonial property and to decide on the appropriate reserve price at which the farm property, including stock and chattels, should be sold. Doubtless the Registrar will have to sight valuations; both parties will be able to give evidence as to what the appropriate figure should be, bearing in mind the locality of the farm and the difficulty of selling any property in this particular district. The parties will also have to give evidence to the Registrar as to the proper value for stock and plant, bearing in mind the taxation implications which are not fully understood by me at the moment; bearing in mind, too, that it would not be in the interests of either party for the property to be sold at a "give-away" or "bargain basement" price.

I direct that the parties give urgent attention to assisting the Registrar to come to his conclusion under Section 38 as to the appropriate reserve price.

I direct a sale of the property, if necessary by public auction. However, I allow the parties a period of 6 months from the date on which the Registrar fixes the reserve price before the arrangements for the sale under conduct of the Registrar should begin. That arrangement will give a last chance to the husband to see whether he can effect a sale. It may provide an incentive to him for additional effort in effecting a sale.

Once that 6 months is completed, then orders will have to be made for a forced sale, bearing in mind the Registrar's decision as to the reserve price.

In addition, the wife is clearly entitled to some allowance by way of interest or by way of a share in the income of the farm since she has had nothing for 2 years. It would be

burdensome to require this allowance to be paid immediately; it can be paid when final accounts are settled between the parties after the farm has been sold. I think the easiest way for me is to award the wife interest at 11% on her share, commencing 6 months after the judgment of Speight, J., namely, 2nd May 1982, until date of payment.

In calculating the amount to be paid to the wife under the preceding order, there should be deducted from the interest half an appropriate management allowance to the husband. This can be fixed by the Registrar at the same time as he hears evidence on the other matters. I make an order under Section 38 to enable him to make that determination.

I reserve liberty to apply to both parties and to the Registrar. I shall be happy to see counsel in Chambers in Auckland or to receive written memoranda if counsel so desire.

The question of costs is reserved.

R. J. Barker J.

SOLICITORS:

Chapman, Tripp, Whangarei, For Applicant.

Thomson, Wilson, Fidler & Heenan, Whangarei, For Respondent.