

Balance of matrimonial
property

- subject to deduction of mortgage, figure to agreed	55,650
Wife's insurance	1,181
Husband's insurance	2,062
Husband's building society shares	2,267
Current accounts in husband's name in R Okey Ltd and Isa Flats Ltd - nett credits	30,000

I turn to the three issues which I was asked to decide.

The wife's \$5000

Immediately prior to the separation the wife obtained from the husband's accountant a cheque for \$5000 drawn on one of the husband's businesses. She obtained the payment by deliberately misrepresenting the purpose for which it was required. Now she contends that it should be regarded as payment in lieu of maintenance, as that is what she says the money was used for. In my opinion the use to which it was put is irrelevant. The wife would have no defence to an action for repayment, and that simple fact should not be allowed to be complicated by an argument about whether the husband should or should not have paid her maintenance, had she applied for it sooner. The sum must, as the husband contends, be regarded as an advance against the wife's matrimonial property entitlement.

The evidence does not disclose what assets the parties had upon marriage. The husband must have had some, at any rate in relation to his business, but as that was on the point of failure two years later, this pre-marriage contribution cannot be regarded as of great significance. By 1981 there were substantial assets. In addition to the matrimonial home and family chattels, they included a second property (presently occupied by the wife), the building company R Okey Limited, and a substantial interest in Isa Flats Limited. The last mentioned company is the owner of a substantial commercial property at 680 Tremaine Avenue and of two lesser properties. The acquisition of the husband's financial stake in Isa Flats Limited I infer, has been made possible as a result of his earnings through the building company, and work performed by that company, as no other source of funds is apparent.

It is clear that apart from the wages earned in the business, the wife's contributions were all of a non-monetary kind. But as Vautier J pointed out in Field v Field 1977 MPC 75, 76 in a passage approved by Woodhouse J (as he then was) in Barton v Barton 1979 1 NZLR 130, 133, in the ordinary case of a marriage of long duration the legislative intention is that the various contributions made by the wife to the marriage partnership, even though all of a non-monetary kind, should prima facie be regarded as an equally important contribution to that provided by the efforts of the husband in other directions, whether by way of the earning of wages or skill in business management or investments.

The husband's submission that his efforts are entitled to greater recognition are really based upon the proposition that the acquisition of property by one

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party is entitled to special rewards. The Act of course proceeds on the hypothesis that a contribution of a monetary nature is of no greater value than any other. The judgment of Woodhouse J in Reid v Reid 1979 1 NZLR 572 at pp 580-583 sufficiently answers that contention.

I do not think the case calls for any extensive restatement of principle. Some of the most important considerations were summarised by Richardson J delivering the judgment of the Court in Williams v Williams 1980 1 NZLR 532, 534 as follows :

" As we emphasised in Reid v Reid /1979/ 1 NZLR 572 the just division of the matrimonial property, to which the long title of the Act refers, must reflect the proper recognition of the presumption of the equal contributions of husband and wife to the marriage partnership. In terms of s 15 the equal sharing of matrimonial property other than the matrimonial home and the family chattels is to be departed from only where it is established that the overall contribution made by one spouse to the marriage partnership over the whole span of their lives together - that overall

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global contribution being evaluated in terms of the criteria referred to in s 18 - has clearly been greater than that of the other spouse. The statutory scheme recognises that in the general run each spouse contributes in different but equally important ways to the common enterprise which constitutes the marriage partnership and the legislation presumes that in the ordinary circumstances of marriage the respective contributions of the spouses, whatever form they have taken, will be in balance at the end of the day. The longer the marriage and the less ample the financial resources, the more difficult it will often be to establish a case for unequal sharing. But in the end the answer must turn on consideration of the facts of the particular case. "

With reference to factors mentioned towards the end of that passage I note that here the financial resources are ample while the length of the marriage may be described as in the medium band. A further consideration

is that the enquiry is not concerned with contributions to individual assets, or even with contributions to the matrimonial property as a whole, but to the marriage partnership seen in its entirety. I particularly mention that because clearly in the present case the husband recognises the contribution that his wife has made to the marriage in a general way but perhaps has difficulty in seeing how that entitles her to a substantial share in those assets which I think he would be inclined to regard as attributable to his efforts alone. In Reid v Reid 1982 5 MPC 124 Hardie Boys J, after stating the legal proposition mentioned in the penultimate sentence, continued :

" To that partnership
 [sc. the marriage
 partnership] the
 spouses contribute
 their individual talents
 and efforts, and there
 is a specific direction
 in s 18(2) to avoid the
 traditional assumption
 that it is the material
 and tangible that is the
 more significant. It takes
 little reflect[ion] to
 appreciate that often the
 most important and the most
 exacting contribution to the
 partnership produces little
 that is visible or capable
 of assessment at all. The

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difficulty of making a relative assessment of the tangible as compared with the non-tangible is beside the point : but of course it is considerably reduced by the presumption of equality that applies unless the circumstances demonstrate clear inequality. "

In weighing the contributions I have had regard to the separate requirements of s 18. In the circumstances of this case it would be a sterile exercise to comment on each of them, since I would only be repeating, under separate headings, the few facts that are available to me, to which I have already referred. At the first stage of the enquiry, the onus is on the party asserting that his contribution has been clearly greater than that of the other. That onus has not been discharged. Accordingly the parties will share equally in the division of matrimonial property.

Husband's interests in companies

(a) R Okey Limited

Under this subheading all I am asked to do is to record the limited agreement reached between the parties. In exhibit A to Mr Eglinton's affidavit of 29

June 1983 the total shareholders' funds were shown as \$75,209. I was informed that it was agreed that this figure should read \$80,111. Further it had been agreed that the deductions then shown in exhibit A were to be disregarded with the result that the figure of \$80,111 represents Mr Okey's interest in the company.

(b) Isa Flats Limited

The following values were agreed :

\$48,800

\$62,350

I am asked to decide the value of a third property situate at 680 Tremaine Avenue. It is a regularly shaped site, approximately 40 x 100 metres, situate in the heart of the city's principal light industrial area. It contains a substantial five year old light industrial building, two storied in part, erected on concrete foundation and floor slabs with walls of Vibrapac concrete blocks and concrete panels, and a corrugated iron roof supported by steel portal frames. The upstairs portion and an area downstairs are fitted out as offices. In addition there are some older workshops and sheds at the rear of the site, occupied by R Okey Limited which also has use of certain of the yard space. About half the site is vacant leaving space for a further substantial building project. The value of the property has three components. The first and main aspect is the portion leased to B D H Chemicals (NZ) Limited which comprises the building already described plus approximately half of the total site excluding the portion occupied by R Okey

Limited. The second is the portion occupied by that company and the third is the remaining vacant area.

On behalf of the wife a valuation was made by Mr M A Ongley showing a total capital value of \$379,600. On the face of it this valuation proceeded on the basis of valuing the land and adding to it the bricks and mortar value of the improvements. For the husband a valuation was obtained from another valuer, Mr B E White. On a similar basis his total came to \$352,000. As I shall state this was subject to significant qualifications but for the moment it may be helpful if I set out for purposes of comparison the separate components making up the two valuations on this basis :

	<u>Mr Ongley</u>	<u>Mr White</u>
	\$	\$
Main buildings	292,800	270,000
Old buildings at rear	2,500	2,000
Fencing, concrete, yard etc	700	-
Land	<u>83,600</u>	<u>80,000</u>
	<u>379,600</u> =====	<u>352,000</u> =====

Mr White in his report then went on to set out an alternative method, namely the rental yield of the land on the hypothesis that the tenant paid rates, insurance and internal maintenance. He used a rate of \$26 per square metre for the warehouse space and \$33 for the office area. After making allowance for some maintenance by owners he arrived at the following annual rental figures :

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	\$
Main building	28,500
Old buildings occupied by R Okey Limited	1,200
Vacant land	<u>2,000</u>
	\$ 31,700
	<u>=====</u>

Capitalising this at 11% gave Mr White a capital value of \$288,000. He went on to point out that compared with this assessment the current rental of the main building of \$22,000 obviously was artificially low, this being attributable to the rent freeze legislation. He concluded that because of the current low rental the building was unsaleable at its intrinsic value, which he thought was in the vicinity of \$285,000, and that the maximum selling price on today's market would be about \$225,000. Effectively that figure represents the current net rental capitalised at about 9%.

The lease provides for three yearly rent reviews. A review is due in August of this year, subject to the continuing legislative restrictions.

Mr Ongley was called to give additional evidence and for purposes of cross-examination. He stated that contrary to what one might think from the face of his valuation, it had not been carried out on a bricks and mortar basis but on an assessment of the value of the property as an investment. He had proceeded on the basis of a rental of \$34 per square metre. In the concluding stages of the hearing I pointed out that it was not clear what allowance if any this figure made for the difference between the office and the warehouse space. Leave was reserved to file a memorandum to clarify this. A letter from the witness was subsequently placed before

me indicating that he had taken \$31 per square metre for the warehouse area, \$43 for the office area and made an allowance for car parking. The \$34 per square metre figure given in evidence was the average. I have ignored the additional matters raised in the letter and covering memorandum. In Mr Ongley's opinion that average figure represents the current market value, that is to say the figure to which the rental should be increased in the August 1984 review if the legislation permitted. In fact it will not : the position as the witness put it, which was not controverted, was that as at August 1984 an increase of approximately 23% on the current rental would be obtainable which would then remain in force for a year. At that stage the full market rental could be obtained. In his opinion a prudent buyer would take into account the increases obtainable in August 1984 and August 1985 subject only to a reduction for the fact that the full rental could not be achieved during that year. The amount of that reduction he estimated as in the vicinity of \$10,000 to \$15,000.

Thus comparing the base figures used by the respective valuers Mr Ongley has taken \$31 per square metre for the warehouse area as compared with \$26 in Mr White's case and \$43 for the office area as compared with \$33. These are substantial differences. Mr Ongley was not cross-examined specifically on the rental figures and Mr White was not cross-examined at all. I really have no material on which to decide the correct figure.

In the circumstances I have concluded that I should proceed on the view that the evidence has not established rental levels any greater than those submitted by Mr White. However, I propose to use those figures to arrive at a capital value in accordance with

the principle of Mr Ongley's calculation, as I am satisfied that at this stage a buyer would take into account the depressed rent being obtained from the property and the certainty of substantial capital gains as, within 15 months of now, the rentals were brought up to a proper market value. Further, I propose to accept Mr Ongley's method of bringing into account the vacant land. He has done so on a basis that appears to be approximately proportionate to the value of the land as a whole.

Mr Gibson argued that in light of s 2(2) of the Matrimonial Property Act 1976 the Court could not take into account the incentive given to a buyer by reason of the fact that the rentals were certain to increase substantially in the near future. I am unable to accept that submission. It is a factor that affects the present value of the property, and if authority is required I refer to N v N 1981, 5 MPC 106.

My calculation is as follows :

Annual rental of main building - Mr White's sq. m. figures	\$28,500
Rental for area and sheds at rear occupied by R Okey Limited - say	\$ 3,000
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	\$31,500
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Capitalised at 10.5%	\$300,000
Allowance for vacant land	30,000
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	\$330,000
Less allowance for reduced rent until August 1985	7,500
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	\$322,500
	=====

Accordingly I fix the value of the property at \$322,500.

Although, now that I have determined this remaining issue, the values of all the assets in the two companies have been either agreed or fixed, there remains the question of how in each case those figures are to be translated into a figure per share. Reference was made to Seiringer v Seiringer 1980, 4 MPC 185. The parties however wished to have the opportunity to settle this question by agreement. In the circumstances this must be an interim judgment and I reserve all matters not specifically recorded or dealt with, for further consideration.

Robertson

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