1 20/12 NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.284/84

1569

BETWEEN A POOLEY
of Raglan, Retired
Appellant

AND I POOLEY
of Hamilton,
Married Woman
Respondent

Counsel: D.L. Bates for Appellant
A.S. Menzies for Respondent

Hearing and Judgment: 13 December 1984

ORAL JUDGMENT OF BISSON J.

The parties to this appeal are no longer married, but it will be convenient to refer to them as husband and wife, it being a matrimonial property case. Following a defended hearing on 2 July 1984, the learned District Court Judge gave an oral decision in which he extended the time for the wife to bring her application under the Act and then in a short decision, resolved the outstanding issues by awarding her a half share in a small property of 2.5 acres at Raglan and a

half share in the proceeds of the sale of a house property at Raglan, the total value of these items of matrimonial property being $45,139.83.

From that decision the husband has appealed and the first matter which Mr Bates argued on behalf of the appellant was that in all the circumstances the extension of time to apply should not have been granted. There are four matters for particular consideration which are often referred to in such cases and they originate in Beuker v. Beuker 1 M.P.C. 20. I had occasion to consider such an application in Henderson v. Johnson 4 M.P.C. 100 and at p.101, after referring to the four factors set out in Beuker, I quoted the following words of the learned Judge - "the real inquiry to be made is whether it is just to grant leave in all the circumstances."

I have no doubt that the justice of this case calls for the extension of time. The merits of the case clearly call for the dispute as to matrimonial property, to be resolved. The delay in question, that is the length of delay, is only 2 weeks 5 days and the appellant can hardly claim to be prejudiced through a delay such at that. He claims to have re-ordered his lifestyle since April 1972, but there was really no evidence to show how he might be prejudiced through the delay between 1972 and 1982 when the application was made. He does refer to re-marrying, but that was not until 1981, shortly after the dissolution of marriage which took

place on 1981, the application itself being made on 1982. All he says is that he restructured his affairs as there were no outstanding matrimonial issues after 1972, but there is really no evidence as to what structuring of his affairs took place which would amount to placing him in a prejudiced position by the consideration of this application, particularly when one has regard to the fact that from 1972 onwards, he had clear notice that a claim was pending because there was correspondence between solicitors for the wife on the one hand and the husband on the other, relating to settlement of such a claim.

The wife gave reasons for the delay in making her application during the period from 1972 to 1982, but that is really not the question as she had the right to make such an application at any time until 13 October 1982. During that time, there were delays possibly on both sides to bring the matter to a head, but it is quite clear from the correspondence that there was an issue still to be resolved and the fact that the application was under 3 weeks late is, in my view, not sufficiently grave by any means to exclude the application when the Court has a discretion to extend the time in the interests of justice being done between the parties.

This was a marriage which was entered into in 1944 and the parties did not separate until January or February 1968, so it was not a marriage of short duration and there were

a number of children born of the marriage. When the wife left the matrimonial home, the children went with her to other premises and the husband retained possession of a small farm property of about 50 acres. This included an area of 2.5 acres in a separate title and on this area of land was the matrimonial home. At the time of the separation, it was not a substantial house by any means and the husband claims to have - at the time he sold the area of approximately acres - also sold the 2.5 acres and then bought it back immediately at a figure of $1,500 for the property plus $500 for a piggery, making a total purchase price of $2,000. However, the evidence does not substantiate a sale and immediate purchase back, so that it must be considered to have remained in his name and therefore remained matrimonial property.

The rest of the land produced some $15,000 and there is no evidence as to the ultimate sale of livestock or any other assets associated with this farm. Out of the proceeds of $15,000, a car was provided for the wife at a cost of $1,500. Apart from that, she has enjoyed no part of the proceeds from that sale.

It appears that the house was improved because it became insured for $10,000 and when it was destroyed by fire in 1975, the husband received the full insurance money of $10,000 in respect of the house and a further amount of $7,000 in respect of contents. He then applied $10,500 of those

insurance moneys to purchase a house property in Frankton, on 1975. This property was sold on 1981 for $15,000, but the husband deposed to improvements which he carried out to that property to a total cost or value of $1,904.62. The small property of 2.5 acres which had been the matrimonial home, is still owned by the husband and it was valued by Mr D.B. Lugton, registered valuer, on 13 April 1984 at a total of $30,000 including $6,000 for improvements. This item for improvements would include in particular, the workshop or shed which according to the valuer, was erected around 1975 but according to the husband's evidence, had been built in 1972.

In his decision to divide the assets which were either matrimonial property at the time the parties separated or became matrimonial property by tracing proceeds of matrimonial property spent in the acquisition of other property equally between the parties, the learned District Court Judge said:-

> "The only question left therefore is whether or not the date of hearing is the appropriate date for fixing the value of Mrs Pooley's share, or whether or not recourse should be had back to the date of separation. Mr Pooley has had the full and unencumbered use of the matrimonial property for the last sixteen years and his wife was cast adrift almost when she left the matrimonial home with the children as a pauper. I think that it would be a gross injustice to Mrs Pooley to fix the value of the property at a date other than the date of hearing. That being the case, she is entitled, without question, to a half share in the total matrimonial property of $45,139.83."

Mr Bates has submitted that in reaching the decision, the learned District Court Judge did not have regard to or had insufficient regard to post-separation contributions which had been made by the husband to the two properties, that is the original matrimonial home and then the later property in Street, Frankton. However, Mr Menzies has pointed out that the husband has had the use of the proceeds from the sale of the farm property and the livestock without accounting for it to his wife, it having been matrimonial property at the time of separation, other than to provide her with the car already mentioned.

This is a case where the appellant has failed to provide evidence of the proceeds from the sale of livestock and his use of those proceeds. He has failed to supply other information as to the disposal of the moneys from the sale of the farm itself other than in respect of the car. This is information which should have been provided and is known only to him and is not available to the wife. In the absence of that information, the Court can only draw the inference that the moneys other than those expended on the car for the wife, were used by the husband either for his own purposes or for the improvement to the matrimonial home property which he retained.

This Court would not lightly interfere with the exercise of a discretion by the learned District Court Judge, but it does appear in the absence of reasons being given by the

learned District Court Judge, for the broad brush approach that he adopted, that he may have failed to take into account a relevant matter, in particular the improvements to the Rose Street property which were made by the husband between 1975 and 1981. So far as the addition of the shed to the 2.5 acre property, if that was carried out in 1972, that was prior to the sale of the farm so could not have come out of the proceeds of the sale of the farm. This seems to have been not taken into account at all and it is a substantial improvement which still remains on that property. On the other hand, the husband has claimed credit for other improvements to that property and for his care and attention to it in a variety of ways over a number of years and he has certainly preserved it in the sense that it has appreciated in value. However, in respect of those items, I take the view that one must set off against them the fact that he had the use of the property itself and the proceeds of the sale of other matrimonial property which were available to him and which he failed to account to the wife for her half share.

That being the case, the appeal will be allowed to this extent, that the husband should receive a credit in respect of the sum of $6,000 being the present value of the shed on the property and in respect of the sum of $1,900 in respect of improvements to the Rose Street property. I see no

reason to interfere with the decision of the learned District Court Judge in adopting the present values so that apart from those two items, his decision does not call for any other variation.

G E Brown J.

Solicitors for Appellant: Messrs McLeod, Bassett, Buchan and Partners, Hamilton

Solicitors for Respondent: Messrs Harkness, Henry and Company, Hamilton