

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M. No. 45/78

721

IN THE MATTER of the Matrimonial
Property Act 1976

BETWEEN N. WAKELY
of Gisborne, Married
Woman

Applicant

A N D J. WAKELY
of Meeanee, Farmer

Respondent

Hearing: 22 June 1984

Counsel: T.D. Caley for Applicant
M.A. Courtney for Respondent

Judgment: 13 August 1982

Supplementary Judgment: 28 June, 1984,

SUPPLEMENTARY JUDGMENT OF QUILLIAM J

On 13 August 1982 I delivered judgment in this case but it had not been possible to make a final determination of all matters. This is reflected in the summary of my findings at p 16 of the judgment which was in these terms:

- " 1. The matrimonial property is to be valued, if that has not already been done, as at the date of hearing with the exception of the bank accounts and the life policies which are to be valued at the date of separation.

2. The husband is entitled to credit for the payments made since the date of separation by way of repayment of the mortgage on Lot 1 DP 9123 and the rates on the industrial sections.
3. In the valuation of the shares in J.R. Wakely Ltd the husband's current account as at the date of separation is to be deducted as a debit owed by the company, and the buildings occupied by the company on land owned by the husband's father are to be omitted.
4. All matrimonial property is to be divided between the parties equally.
5. Leave is reserved to both parties to apply further in respect of any matter not resolved by the findings I have made and in respect of any matter necessary to implement those findings.
6. There will be no order as to costs. "

Application has now been made by the wife, pursuant to leave reserved, in order to achieve finality. She alleges that the husband has refused to assist in having the outstanding matters resolved.

Following the delivery of judgment the wife's solicitors proposed that a Mr Wilson be instructed to value the shares in J.R. Wakely Ltd and that his fee should be shared by the parties equally. This was agreed to on behalf of the husband and instructions were given to Mr Wilson in December 1982. He had some difficulties in obtaining all the information he required but finally submitted his valuation to the wife's solicitors on 17 March 1983. On 26 August 1983 the wife's solicitors wrote to the husband's solicitors enclosing a copy of the valuation and proposing a basis upon which the respective interests of the parties in

matrimonial property should be arrived at. The calculation contained in that letter produced a total value of matrimonial property of \$213,095 with the result that the half-share of each amounted to \$106,547.50. That figure was arrived at after having corrected what is an obvious error in my judgment. I have recorded the value of some vacant land as \$45,000 when it should have been \$4,500. I regret any inconvenience caused by this error. It was also the case that two sums which the husband was, in terms of the judgment, entitled to have taken into account to his credit, were not included because the amounts involved had never been notified to the wife's solicitors. This omission will have to be corrected and I was informed that this could be done at once.

There remained some matters on which counsel could not agree. The first concerned an item in Mr Wilson's valuation. In accordance with the judgment he had deducted \$10,517 as a debit owed by the company. This was the figure fixed for the husband's current account with the company. An affidavit has been filed by the husband's accountant arguing that the current account has not been correctly treated by Mr Wilson in his valuation. This was a matter on which I was not prepared to accept argument. It was acknowledged that Mr Wilson has made his valuation in this respect in accordance with the judgment. The parties had agreed to accept his valuation. In these circumstances I was not prepared to review my judgment and this was what the argument for the husband would have required me to do.

I should mention that there was a correction which needed to be made to Mr Wilson's valuation because it was agreed he had misunderstood the judgment in one respect. He had deleted the value of buildings on the land owned by the company, but the buildings which I had directed should be omitted were those on land owned by the husband's

father. It was common ground that this adjustment needed to be made.

The other principal matter in issue concerned the course which should now be followed in order to implement the decision which I had made. It was argued, on behalf of the wife, that the husband has been guilty of delays and intransigence which had prevented the wife receiving her interest in matrimonial property, with the result that the wife ought now to be allowed interest on her share or that an order should be made for sale of all matrimonial property and a division of the proceeds. An application was also made for costs. All these orders were resisted by the husband. It is necessary, first, to consider the allegations of delay and intransigence.

The chronology is of importance:

- 13.8.82 Judgment delivered.
- 2.12.82 Mr Wilson instructed by the wife's solicitors to value the shares.
- 7.12.82 The husband's solicitors wrote to Mr Wilson confirming the instructions for him to do the valuation.
- 17.5.83 Mr Wilson's valuation received by the wife's solicitors.
- 26.8.83 Letter from the wife's solicitors to the husband's solicitors enclosing copy of the valuation and proposing the basis of final division.

28.10.83 The husband's solicitors wrote "without prejudice" to the wife's solicitors with an offer of settlement. There was no reply to that letter.

14.6.84 The wife's present application filed.

What has given rise to the allegation of intransigence by the husband is apparently the terms of the letter of 28 October 1983. I have not seen that letter because of its "without prejudice" status, but it may well have been that it was expressed in somewhat defiant terms. This would be consistent with the fact that the husband has so far refused to pay one-half of Mr Wilson's fee, notwithstanding his solicitor's letter to Mr Wilson of 7 December 1982 undertaking to do so. The explanation offered for this is that the husband considers the wife should pay half the valuation fees incurred for the purposes of the original hearing. This is a matter which ought to have been raised at that hearing so that, if appropriate, an order could have been made. In the absence of any such order, or of agreement between the parties, the husband may not refuse payment of Mr Wilson's fee on that ground.

Matters have dragged out to an inordinate extent since judgment was delivered but I can see no basis for attributing this solely to the husband. It may well be that he should have realised his offer of settlement was not going to be accepted, but this could have been put beyond doubt by the wife's solicitors simply replying to the letter. They have never done so. I was informed that there was never any intention of accepting the offer. In view of that it is inexplicable that there should have been a delay of 7-1/2 months before the present application was filed. I can see no basis for holding that there has been delay or intransigence on the part of the husband such as to require me to direct payment of interest on the wife's share as has

been suggested. There will, however, be an order for payment by the husband of one-half of Mr Wilson's fee.

The real question now concerns the manner in which the orders already made should be implemented. The amount of the wife's share will be in the vicinity of \$106,000. It would be unfortunate if it should be necessary to fall back on an order for sale of all property and I consider that course should be followed only as a last resort. Nor do I think that any peremptory order for payment by the husband within a brief period is reasonable. That could be tantamount to an order for sale.

It has been proposed on behalf of the husband that two properties, together valued at \$57,500, should be transferred to the wife in part satisfaction of her share and that the balance of \$48,500 should be secured to the wife and directed to be paid over a period. This does not seem to me to be a practical solution. The use of the two properties appears an obvious source of funds but the question of who should undertake the sale of them is less obvious. One of those properties contains an earlier matrimonial home and is situated in the vicinity of the husband's farming activities. The other property comprises two industrial sections in Taradale. The wife now resides in Gisborne. It seems clear that it would be difficult for the wife to have to undertake the sale of these properties and that this could more readily be done by the husband. Whether he does so or not will be for him to decide, but it is necessary to resolve this matter on the assumption that he will do so.

If the wife is able to receive approximately one-half of her entitlement in the reasonably near future then I think she must accept that payment of the balance will need to be deferred. I do not think that an order

should be made which would have the result of forcing the husband to sell all his assets.

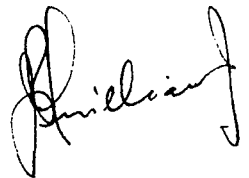
Although I recognise that any solution of this problem will be unsatisfactory to a certain extent, I have come to the conclusion that the following orders should be made:

1. The sum payable to the wife is to be quantified upon the basis of the calculations made at p 2 of the letter from the wife's solicitors to the husband's solicitors of 26 August 1983 after taking into account the deductions for mortgage and rates so long as those deductions are notified to the wife's solicitors within seven days after delivery of this judgment.
2. The amount of the wife's share is to be paid to her -
 - (a) As to \$50,000 in cash within six months from the date of delivery of this judgment;
 - (b) As to the balance, within ten years from the date of this judgment and interest is to be paid on that balance at 10% per annum until payment. That interest is to be paid half-yearly. In the event of the husband's death within the period of ten years then the balance of the wife's share and any accrued interest shall then be payable.
3. In the event of the husband failing to make the payments referred to in para 2, leave is reserved to the wife to apply further for an order for sale.

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4. The husband is to pay forthwith to the wife's solicitors the sum of \$201.66 being one-half of the fee for valuation of the shares.
5. There will be no order as to costs.

Solicitors: Crisp, Caley & Co., GISBORNE, for Applicant
Langley, Twigg & Co., NAPIER, for Respondent

A handwritten signature in cursive script, appearing to read "Phillips", is written in the lower right quadrant of the page.