IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.145/84

BETWEEN BARRY WILSON WATERS
formerly of Hamilton, but now of Auckland, Real Estate Agent
Appellant

A N D MARY FRANCES WATERS
of Hamilton, Married Woman
Respondent

Hearing: 7 November 1984

Counsel: B.J. Paterson for Appellant
E.A. Dawe for Respondent

Judgment: 30.11.84

JUDGMENT OF GALLEN J.

By a reserved decision delivered on 13 April 1984, Family Court Judge Cartwright, made orders defining, fixing and determining the respective shares of the appellant and the respondent in matrimonial property. The matters in issue were complex and difficult. On the application of the original applicant, the respondent in these proceeedings, an order was obtained appointing a Chartered Accountant, a Mr Robert Dobson to conduct an enquiry pursuant to s.38 (1) of the Matrimonial Property Act and to report to the Court as to the financial

affairs of both parties. Mr Dobson made a report and an additional report which were available to the learned Family Court Judge at the hearing and Mr Dobson having heard the greater part of the evidence of the parties, produced a final summary of adjustments to his original report.

Evidence was given by both the appellant and the respondent. After setting out the history of the marriage, the learned Family Court Judge then identified the issues for determination and determined as a question of fact, that the date of separation of the parties was 14 December 1982. This had considerable significance because there had been a period of reconciliation and an earlier separation. She then in a careful and with respect, a very thorough judgment, identified the assets; then determined the net value of those assets. Having ordered an equal division, she then moved on to determine various outstanding matters, including the question of costs.

The appellant raises four questions on his appeal. The first is that a certain sloop "Cezanne" was, he says, not owned by him at the date of the separation and that his interest in it on that date was no more than a deposit of $10,000. The learned Family Court Judge had concluded that the vessel was matrimonial property and that the value for division after making a deduction in respect of the amount owing in respect of the vessel, was $29,000.

Secondly, the appellant maintained that commissions approximating $15,220.60 were separate property, not matrimonial property, on the basis that these had been earned between the original date of separation and the date of reconciliation. These items were taken into account as matrimonial property by the learned Family Court Judge. Thirdly, he contended that there should have been an allowance for tax on certain other commissions totalling $19,892 and that an allowance should have been made in respect of certain other income earned ;up to the date of separation. Fourthly, he contended that a portion of a deposit with the Westpac Banking Corporation at the date of separation, was separate property, this having been taken into account as matrimonial property by the learned Family Court Judge.

The respondent in her turn, cross-appealed. The first ground of the cross-appeal was that the learned Family Court Judge had erred in allowing a deduction in the appellant's favour of $5,814, being costs and penalties incurred on unpaid income tax. Secondly, she contended that the learned Family Court Judge was in error in allowing as a deduction, the sum of $1,604 in respect of legal fees remaining outstanding at the date of separation. Thirdly, she contended that the figure fixed by the learned Family Court Judge in respect of commissions was incorrect and should have been increased. Fourthly, she contended that the amount fixed in respect of the sum contained in the term deposit account at the Westpac Corporation of $30,000, was incorrect. For completeness, I

should say that in taking issue with the appellant in respect of some of the items included in the appeal, the respondent also contended that the assessment in respect of certain of these items was incorrect. In particular, the respondent contended that the sum of $17,000 being an amount owing in respect of the vessel "Cezanne", should not have been deducted as being a personal debt in terms of the Act.

The situation regarding the yacht "Cezanne" is complex. The appellant gave evidence that he had paid a deposit of $4,500 on the yacht before the date of separation. Mr Dobson on his investigation, fixed the amount of that deposit as $10,000. The purchase price of the "Cezanne" was $46,000 - $17,000 was borrowed, secured by way of instrument by way of security. Certain cash payments were made after the separation took place. The learned Family Court Judge considered that as the transaction was initiated and completed within a very close period around the date of separation, she had no hesitation in finding that the sloop was an item of matrimonial property which should be taken into account. Having deducted the sum of $17,000, she found that the balance of $29,000 was matrimonial property and did so on the basis that the funds for the purchase of the "Cezanne" had clearly enough been matrimonial property themselves. The learned Family Court Judge did an analysis of the payments made. In this, she included the sum of $9,070 which she identified as an amount obtained from the joint account of the parties and intended for payment to the Department of Inland Revenue. The evidence clearly establishes

that this sum was removed from the joint account, but was paid into a solicitor's account and ultimately did find its way to the Department of Inland Revenue.

I think therefore, the learned Family Court Judge was in error in finding that this sum was included as part of the source of funds for the purchase of the vessel. Mr Paterson also placed some reliance on the fact that a receipt for the sum of $5,600, being one of the payments made in respect of the sloop, was made out in the name of H.E. Brown. That is the name of the lady with whom Mr Waters was then living and Mr Paterson suggested that this indicated that those funds came from H.E. Brown and not from the appellant. Having regard to the circumstances, I think the onus of proof was on the appellant to establish that funds used for the purchase of this vessel were not matrimonial property. H.E. Brown was not called, nor was any evidence tendered in respect of this, except the receipt. I think that the appellant failed to establish the onus which was on him. I do not consider that the reference to the receipt is sufficient to displace the conclusion of the learned Family Court Judge.

Counsel for the respondent, while accepting that the sum of $9,070 referred to by the learned Family Court Judge was not in fact that obtained from the joint account and intended for the payment of tax but misapplied, said that whether that sum was correctly identified as part of the purchase price or

not, the sloop was purchased by the provision of funds which were in the circumstances, matrimonial property in any event whatever the source unless it could be established that they were not; that there being an onus on the appellant to this effect, he had failed to discharge the onus even if the learned Family Court Judge had misidentified the particular sum. The appellant said in evidence that he thought he had in fact paid something like $24,000 and it may well be that the difference was the amount in the name of H.E. Brown.

Mr Paterson argued that there was evidence that the appellant had been in receipt of sums by way of commission subsequent to the separation and that he had had available to him, sums which might have provided the basis of the purchase of the sloop without reference to matrimonial property. The learned Family Court Judge clearly considered that the circumstances brought this particular asset within the ambit of matrimonial property. Her decision in this regard involves both findings of fact and the application of the discretion which was vested in her. In my view, there was evidence on which she was entitled to come to this conclusion and I do not think that the appellant discharged the onus of proof on him of establishing - bearing in mind the background circumstances - that the purchase was financed in some way which did not involve the application of matrimonial property. I do not consider that he is entitled to succeed in respect of this aspect of the appeal.

The appellant also contended that the learned Family Court Judge wrongly included certain commissions received by the appellant as matrimonial property. The evidence establishes that the parties separated on 18 October 1981, came together for the purposes of reconciliation in June 1982 and finally separated on 14 December 1982. The commissions in issue were earned by the appellant when he travelled to the South Island during the period of separation. They totalled $15,220.60. The evidence establishes that these commissions were earned during the period of the separation; were owing during the period of the reconciliation, but were in fact paid after the final separation. The learned Family Court Judge has found that the matrimonial property included commissions due from Eastside Real Estate as at the date of separation. It is necessary therefore, to determine precisely what Mr Waters was entitled to at the relevant periods.

Effectively, he was possessed during the period of the resumption of the cohabitation, of a chose in action. In my view, the appellant brought with him an entitlement to the commission at the time of resumption of cohabitation and had a right, according to the evidence, (see Mr Dobson's report) in respect of which he could have brought proceedings during that time. I do not think that the actual payment is significant and while it is perhaps important that the sums were earned during the period of separation, the learned Family Court Judge has found as a fact that the assets of the parties were co-mingled during the period of resumption of cohabitation. I

think there is evidence which would justify the learned Family Court Judge in having come to the conclusion she did, that the commissions were matrimonial property.

The learned Family Court Judge does not give reasons for her conclusion, but I think it follows from the evidence that she was entitled to find that the asset was an asset acquired during the period of the reconciliation. It is perhaps significant that the appellant did and was required to do, nothing after the date of separation to earn the assets concerned. Quite apart from these factual aspects however, the learned Family Court Judge would have been entitled to rely upon the discretion contained in s.9 (4) or s.25 (3). In either case, there would be evidence to justify the exercise of the discretion. The appellant is not, in my view, entitled to succeed in respect of this ground of appeal.

The next question for consideration is whether or not there should have been an allowance for taxation on income which was held to be matrimonial property. Mr Dobson in his written report and in his evidence, drew attention to the liability for income tax, but it was not possible to quantify that at the date of hearing. Reference was made to a number of authorities and the appellant maintained that the liability for income tax was a non-personal debt, having regard to the provisions of s.20 (7) of the Matrimonial Property Act 1976. He submitted that it was clearly inequitable that income tax should not have been taken into account. On the other hand,

counsel for the respondent submitted that the liability was purely personal and could not be taken into account. In fact the learned Family Court Judge did conclude that certain other taxation liabilities should be taken into account, even although it had been strenuously argued on behalf of the respondent that in so far as these liabilities consisted of penalties resulting from the appellant's failure to properly order his affairs or meet his taxation responsibilities, she should not have her entitlement reduced. The learned Family Court Judge came to the view that in the circumstances, the respondent was required to take the rough with the smooth. She has effectively concluded in the particular circumstances of this case that it is appropriate that income tax should be taken into account, but I think has inadvertently omitted to do so in respect of the unascertained liability arising in respect of commissions.

In my view, on the basis of the decision and indeed having in mind considerations of equity, it would be unreasonable that the appellant should have to pay out sums which will inevitably be reduced by a liability which is definite even if not immediately quantifiable. I think that if the learned Family Court Judge had adverted to this aspect in view of her earlier decision, she would clearly have taken them into account and I therefore accept the contention of the appellant and allow the appeal in this regard to the extent that an assessment is to be made of the income tax on income up to the date of separation and whatever sum is so assessed,

should be deducted from the amount payable by the appellant to the respondent. Such an assessment could properly be made by Mr Dobson. If there are any difficulties in this regard, then leave is reserved to either party to apply.

This conclusion is in accord with authority, see para.15.7 of Fisher on Matrimonial Property 2nd ed. and the cases there cited. Miss Dawe submitted there was a distinction between assessed and unassessed tax liabilities, but this distinction does not appear from the decisions on this matter, except in relation to potential liability in respect of stock shown in farming accounts with standard values. That is not this case.

The next item in dispute relates to alleged separate property. The submission related to a term deposit at Westpac. After making certain adjustments, this was fixed for the purposes of the proceedings by the learned Family Court Judge, at $30,000. She held that it was matrimonial property and fell to be divided. The appellant now contends that it was derived from the sale of a property in Tainui Street. This in turn he contends, was financed by the sale of a property in Meadow Lane. This property was subject to the separation agreement entered into by the parties in November 1981. It is therefore contended that it then became separate property and remains so and that the ultimate deposit at Westpac should properly be regarded as property derived from separate property.

The learned Family Court Judge in dealing with this asset, simply states that it is matrimonial property, without giving her reasons for so doing, but in dealing with the question of the date for separation, she concluded as a matter of fact that on the reconciliation the appellant and the respondent had pooled their assets, these having been only partially divided in respect of the earlier agreement. She found that there was an intermingling of property; that a claim which the respondent had was not pursued and that no final division had taken place following the agreement of November 1981. The reconciliation does not necessarily put an end to the property settlement provisions of an agreement completed in terms of the legislation, see Bishop v. Bishop (1980) 1 N.Z.L.R. 9 and Castle v. Castle (1980) 1 N.Z.L.R. 14. Nor does the fact that the agreement has not been completely implemented prevent it continuing to operate see per Cooke J. Castle v. Castle (supra) at p.13. While there is a discretion under the provisions of s.21 of the Act to declare an agreement void, the way in which this discretion should normally be exercised makes it clear that it must be specially considered in relation to the terms of the agreement and the special circumstances of the parties. The learned Family Court Judge has not specifically adverted to the particular jurisdiction and I think it is sufficiently special in nature to require an actual determination. I do not think that a reference here to the surrounding circumstances would be sufficient. Under those circumstances, while I have a good deal of sympathy with the conclusion at which she arrived, I do not think that I could

properly assume that her decision was based on the exercise of a jurisdiction to which she does not refer.

Miss Dawe however for the respondent, submits that the evidence does not establish that the term deposit was separate property in that there is no evidence which sufficiently establishes that the funds were derived from the original asset which became separate property under the agreement. In his affidavit, Mr Waters merely refers to the property having been sold and the proceeds divided in accordance with the legal ownership of the property. In fact of course, it would also have been divided in accordance with the agreement.

Mr Paterson referred to the notes of evidence at p.7, l.5-25 and p.35, l.1-11. On p.7, Mrs Waters is recorded as having said that at the time of the sale of the Meadow Lane property, her husband entered into a contract to buy a property in Tainui Street. The balance of the evidence refers to a request for a loan from her proceeds of the Meadow Lane property. P.35 refers only to proceeds from the sale at Tainui Street. The evidence on p.7 does not specifically indicate that the property at Tainui Street was purchased from the proceeds of the Meadow Lane property. However likely this may have been bearing in mind the surrounding circumstances, it is at least possible that it was financed in some other way altogether. It may be, for example, that Mr Waters required assistance from his wife in the purchase of the property because he was not in fact investing his own interest.

Where a contention is put forward that property is separate or derived from separate property, the onus of proof is clearly on the person making that assertion, to establish it. The appellant has not in my view, discharged this onus and the learned Family Court Judge was entitled to come to the conclusion to which she came.

In the cross-appeal, the respondent submits first, that the learned Family Court Judge should not have allowed a deduction in the appellant's favour of $5,814 being costs and penalties incurred on unpaid income tax liabilities. The appellant seems to have conducted his affairs in such a muddled fashion, that he incurred substantial penalties in respect of unpaid income tax and obligations in connection with a failure to furnish returns. The respondent says that whatever the position may be with regard to tax as normally assessed, she should not be penalised with regard to matrimonial property because the appellant incurred unnecessary obligations. She says that these obligations must be regarded as personal debts in terms of s.20 (5) of the Act and that they should not accordingly be deducted.

The learned Family Court Judge held that the sums in dispute were incurred before the date of separation. She held that the respondent was obliged to bear the rough with the smooth, having the benefit of the income and assets acquired from the income. I have already referred to various decisions where it has been consistently held that tax liability is a

proper deduction. In Anderson v. Anderson (1980) 3 M.P.C. 1, Prichard J. accepted this principle and did so on the basis that income tax attached to income used for the support of the family, so it was therefore to be regarded as a debt incurred for the benefit of both parties in the course of managing the affairs of the household. In none of the reported decisions does the question of penalties appear to have been considered. In my view, every case will depend upon its own circumstances. A deliberate attempt to deprive a spouse of matrimonial property by incurring penalties contemplated by the Act, might in an appropriate case, be a relevant matter. There is no suggestion of that in this case. I think the learned Family Court Judge was entitled to regard the matter as one where the penalties should properly be taken into account.

The respondent also contended that the learned Family Court Judge should not have allowed as a deduction, the sum of $1,604 owing in respect of legal fees outstanding at the date of separation. She maintains that they are to be regarded as a personal debt, not property to be deducted.

The learned Family Court Judge found as a fact, that the legal fees incurred were for the joint purposes of the parties in recovering debts due to the appellant which ultimately formed part of the joint assets of the couple. Although it appears that part may have been attributable to an action brought by the Reserve Bank as a result of which the appellant was fined, she concluded that on the material before

her she was unable to separate these out. In my view, the same principle would apply as that which has been taken into account in respect of income tax liability. The learned Family Court Judge having found that the legal fees were incurred in the manner indicated, I think she was entitled to conclude that they were a proper deduction on the basis set out. The same observation would in fact apply to the Reserve Bank action, in that that arose out of transactions apparently in which the appellant was involved which were designed to increase his assets. However that may be, in my view the learned Family Court Judge was entitled to find as she did.

The respondent then contends that the assessment of the learned Family Court Judge of the amount of commissions to be taken into account, was incorrect. This submission was based generally on the fact that the solicitor's trust account records did not coincide with the figures ascertained by the investigating accountant. I do not think that this can be regarded as decisive. Mr Paterson submitted there are many reasons why there might have been consequential adjustments.

In my view, the learned Family Court Judge was entitled to come to the conclusion which she did and there is insufficient material contained in the evidence to indicate that that decision was wrong.

The respondent also contended that the figure taken by the learned Family Court Judge in respect of the Westpac deposit was incorrect. This contention is based on the fact that the learned Family Court Judge deducted, by agreement, the sum for the payment of income tax. The sum of $9,070 has already been referred to in connection with the sloop "Cezanne". It appears to have come from the joint account, to have been paid into a solicitor's account and ultimately been paid to the Department of Inland Revenue. If it came from the joint account, then it could not have come from the term deposit. However, the sum of $9,070 which the learned Family Court Judge found had been paid towards the purchase of the sloop "Cezanne" from the solicitor's trust account, did not come from that source. It must have come from somewhere and have been taken into account in that item. There must, in my view, be some risk that it would be taken into account twice if I were now to add it back to the term deposit. Under those circumstances, I do not find that the respondent is entitled to any increased sum in respect of that item.

Finally, the respondent contended that the appellant was not entitled to a deduction of $17,000, being the amount owing in respect of the sloop "Cezanne". She contended that this had to be considered as being a personal debt within the meaning of that term as used in the Act and was therefore not deductible. I think the answer to that contention is to be

found in the way in which the particular item was considered as being matrimonial property. It was purchased subsequent to the separation, from property which the learned Family Court Judge held to be matrimonial property. It is not matrimonial property which existed as such and has been reduced in value by the action of the appellant in borrowing money against it. Having regard to the circumstances, it would in my view, be grossly unjust to value the item without reference to the liability. Neither the appellant nor the respondent ever had the sum represented by that liability and in my view the learned Family Court Judge was fully entitled to find as she did in respect of it.

On the basis of the above therefore, both appeal and cross-appeal will be dismissed except to the extent that the taxation liability of the appellant in respect of income included as matrimonial property is to be taken into account in reducing the same. In the circumstances, there will be no order for costs.

R.S. Gallen

Solicitor for Appellant: A.R. Thomas, Esq., Hamilton

Solicitor for Respondent: Miss E.A. Dawe, Hamilton