IN THE HIGH COURT OF NEW ZEALAND M. 664/82

CHRISTCHURCH REGISTRY

375

No Special Consideration

IN THE MATTER of the Matrimonial Property Act 1976

BETWEEN JILLIAN ADELENE FELTON COLES

PLAINTIFF

A N D ALBERT DUNCAN COLES

RESPONDENT

Judgment: 30 APR 1984

Hearing: 5 April 1984

Counsel: J.L. Cameron and D. Riley for Plaintiff
G.K. Panckhurst for Respondent
P.F. Whiteside for Lakeridge Farm Ltd.

JUDGMENT OF CASEY J.

After a marriage of 22 years during which they had six children (including two sets of twins) Mr and Mrs Coles eventually separated permanently on 31st December 1981 and she brings this application under the Matrimonial Property Act, 1976 seeking an order under s.44 to set aside a disposition of a farm property in favour of Lakeridge Farm Limited, and for orders as to the ownership and division of their matrimonial property. A few months before their marriage in 1959 Mr Coles had bought a 100 acre farm property at Irwell for $16,000, of which he contributed $6,000 from his own savings and raised the rest on loan from a Trust Company and his parents. There was a fairly primitive house on the land, which they occupied as their first home, and I accept conditions were hard for the first years of their marriage, all their children having been born in just over ten years. Mr Coles' parents lived on an adjoining property of 242 acres which he helped his father to farm, and derived assistance in running his own 100 acre block with the latter's plant and equipment. When he died in 1960 his Will provided a life interest to his widow (who survived him) with remainder to his three children in equal shares. Mr Coles

took over the running of the farm along with his own property and in 1970 leased a further 237 acres from a neighbour and at the same time took a lease of the farm from the estate.

In 1972 his mother moved out of the house on that property to Christchurch and the Coles family moved in and let the old house to University students. It burnt down in May 1976 and Mr Coles received the insurance proceeds of about $2,000. However, they had a worse disaster in the previous year when the homestead they occupied on the estate land was almost completely destroyed by fire in November 1975. They moved to rented accommodation at Brookside about eight miles from the farms and the inconvenience of travelling there and back daily persuaded them to consider building their permanent home on the property, and Mr Coles says this influenced him towards buying it from the estate. Under the Will he had a right of pre-emption should the Trustees (of whom he was one) decide to sell.

There was an affidavit from Mr Samuels who had acted as Mr Coles' accountant since 1969 and he pointed out that over the years until 1970 he was underpaid for his services with a corresponding benefit to the estate. He used to see Mr and Mrs Coles about three or four times a year and sometimes she phoned him on matters relevant to her husband's accounting affairs. The latter purchased the stock and plant from the estate for $11,528 when he commenced leasing its land, but Mr Samuels told him then that this arrangement was unsatisfactory because he would lose the benefit of any improvements if he later exercised his right to buy it. He recommended that he should acquire it during his mother's lifetime and said that he discussed it several times with both Mr and Mrs Coles, strongly recommending that the land be owned by a company in order to avoid estate duty and to keep the farm in the family. He said they made no firm commitment to a purchase until late 1975 or early 1976, and he then explained to both how a company could be established with preference voting shares held by Mr Coles and ordinary non-voting shares held by or on behalf of the children. I accept that he went to some pains to ensure

they understood the implications of this arrangement. He recalled that on one visit to the office he asked each of them separately whom they would wish to inherit the estate property should it be purchased, and both indicated they wanted their children to benefit. He was satisfied they understood the concepts involved in a family company and recommended them to see their solicitor, his understanding being that Mr Coles would retain ownership of the 100 acre block and the stock and plant. He was not involved in the purchase of the land or the formation of the company which ultimately took it over.

The right of pre-emption under the Will was not invoked. Instead, Mr Coles discussed the matter with his mother and sisters and they agreed to the estate selling him the property for $100,000, secured by a mortgage back, although its proper value was later assessed at $135,000. Having settled the price, he then had to arrange finance to build a home, and he entered into an agreement on 13th December 1976 with the estate for the purchase of the property at this figure subject to land sales consent (which was duly obtained) and to his being able to raise satisfactory finance to enable him to build a house. He applied to the Rural Banking and Finance Corporation and he was also able to arrange for further loans from private sources. He says that by about March 1977 it became evident that the overall plan to acquire the block and build the home could proceed and he and his solicitor gave consideration to the details, as he fully appreciated the advice they had been given by Mr Samuels - particularly since he had been so recently involved with death duty on his father's estate. They rejected the idea of forming a simple trust, and decided that the land purchase should be completed in the name of a family company and application was made in June 1977 for approval of the name. It was not until December of that year that "Lakeridge Farm Limited" was approved. The approval of the Rural Banking Corporation was also sought to the change of plan and this was forthcoming. In October 1977 he and his wife entered into a contract to build a house on the estate land for $43,700 and this was commenced before Christmas. The papers necessary for the formation of the company and for

its purchase of the land from the estate were prepared in late 1977 and signed early in the new year, and clearly superseded the earlier agreement with Mr Coles. It had a capital of $2,000 of which Mr Coles held 1,500 one-dollar shares and 500 were held equally by the solicitor and the accountant, who entered into a deed of trust to hold their shares for the children.

Mrs Coles claims that this transaction between the estate and Lakeridge Farm was made in order to defeat her claim or rights under the Act, but this is firmly denied by Mr Coles, who was cross-examined, but not on this aspect. He deposed that the decision to form the company was not related to any matrimonial difficulty. The marriage had its problems, with charges and counter-charges, and even an affidavit from their daughter, now 21, and who was left with the task of looking after the house and family after Mrs Coles left in 1981. I do not propose going into these matters in detail, except to note the obvious difficulties that must have existed for some years previously. There was a separation for two weeks in May 1977 after which they reconciled. A second one took place on 24th August 1978 to 27th March 1979 and this was the subject of an agreement made on 21st December 1978. However, the parties again reconciled and lived together until the 23rd May 1981 and that separation lasted until 31st August, and the final separation occurred on 31st December 1981. Throughout this period the children remained at home with Mr Coles and most of them are still there.

Mrs Coles says that she knew little about the dealings with the property and points to the fact that initially her husband had agreed to buy the property himself, and the change of plan involving the sale to the trust occurred after their first brief separation in May of 1977. This leads her to conclude that his motive in doing so - or at least one of his motives - was to defeat any claim she might have on a future separation. He says the decision was prompted entirely by the considerations raised by Mr Samuels and by his recommendation coupled with the specific advice he

received from his solicitor. The impression I formed of him in cross-examination confirms that I received from his affidavit, of a straight-forward and hard-working farmer who did his best under difficulties to keep his family together, and was genuinely concerned to pass the property on to them. He pointed out that Mrs Coles was a party to many of the discussions with the professional advisors and fully understood and approved of what was being done, and there was no thought in his mind of putting the property out of her power. The sale was effected by his giving a mortgage back to the estate for the full purchase price on which he pays interest and I have already recorded that when he first leased it he purchased all the stock and plant. If he was intent on putting assets out of her way, I might have expected some evidence from his professional advisors that his mind was running along these lines, but both of them refer only to the estate property in a context of a farming trust of a type normally adopted in these circumstances to save duties and benefit children.

Mr Samuels' affidavit demonstrates that Mrs Coles knew and approved of the concept well before any separation. Mr Sissons (their solicitor) also swore two affidavits and was cross-examined; he confirmed the facts set out in Mr Coles' affidavit about his dealings with the estate and the trust, from which I infer that the decision to proceed along the lines recommended by Mr Samuels was taken before the first separation in May. While Mr Sissons did not recall in detail what he told Mr and Mrs Coles, he said she frequently accompanied him in the visits to his office and he considered both of them understood the implications of the transactions. He did not see the formation of Lakeridge Farm Limited as disadvantaging Mrs Coles any more than her husband because the only land being acquired by the company was from the estate, and they were effectively passing on to their children the advantage of buying it at less than its market value.

On a consideration of these affidavits from Messrs Sissons and Samuel, in conjunction with the account given by Mr Coles in his affidavits of his wife's participation in

and understanding of these matters, I am quite satisfied that she had an adequate appreciation of what was going on and fully approved of it. I accept that Mr Coles was motivated by no more than the desire of many farmers in his situation to save duty and benefit his children. The onus is on her to show that the disposition was made by the estate to the company in order to defeat her claim or rights under the Act, and it has not been discharged. Her application to have the disposition set aside is dismissed. Moreover, I share Mr Whiteside's difficulty in understanding just what claims or rights of hers were defeated by this transaction. Section 10 operates to exclude from matrimonial property Mr Coles' interest in his father's estate. Although he used it in conjunction with his own farming operations, the land continued to be owned by the Trustees, and he was entitled only as a remainderman. Even if he had obtained an interest in his own right, it is impossible to hold that it has been "so intermingled with other matrimonial property that it is unreasonable or impracticable to regard it" as separate property. The agreement for sale and purchase was abandoned in favour of the sale to the company, and I believe it was never intended as more than a holding arrangement, pending completion of enquiries for finance and settlement of the Trust scheme.

Having reached this conclusion, it is unnecessary for me to consider many of the other aspects which were discussed at length in the affidavits and by Counsel. There is now no matrimonial home for division because it was built on the land acquired by the company. They have submitted a list of other assets which are agreed to be matrimonial property, and I rule that Mr Coles' interest in the estate is separate property. There are adjustments to be made to valuations and credits from Mrs Coles for payments already made to her. After a marriage of this duration, notwithstanding any faults or shortcomings in particular areas, the matrimonial property should be equally divided; accordingly, it is unnecessary to make any provision in lieu of the matrimonial home. Leave is reserved to either party to apply for such further orders or directions as may be necessary

if they cannot agree, and I also reserve the question of costs. I see no reason to depart from the normal rule in these cases that each party should bear their own, but Mr Whiteside appeared for the company and an order could be appropriate for him.

M.E. Casey J.

Solicitors:

MacFarlane Son & Partners, Christchurch, for Plaintiff
Raymond Donnelly & Co., Christchurch, for Respondent
Wynn Williams & Co., Christchurch, for Lakeridge Farm Ltd.