IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.116/84

IN THE MATTER of the Matrimonial Property Act 1976

BETWEEN J CALLUM

Appellant

A N D M CALLUM

Respondent

Hearing: 12 November 1984

Counsel: T.W. Fournier for Appellant
P.J. Egden for Respondent

Judgment: 16 NOV 1984

JUDGMENT OF HARDIE BOYS J

The unusual facts of this case demonstrate the difficulties of applying a code such as the Matrimonial Property Act 1976 to the infinitely diverse range of circumstances that can arise. The parties were married on 5 March 1966 and there were two children, one born on 1966 and the other on 1969, both of whom are in the custody of the mother. After their marriage the parties lived in Gore where the husband set up business on his own account as a plumber, and where a matrimonial home was purchased in Ardwick Street. The purchase price was $6,600,

financed by a first flat mortgage of $4,000, a second mortgage of $1,500, and the balance in cash from savings and an overdraft. They lived in this house until 13 December 1973 when a separation agreement was signed and the wife and the children moved out to rented accommodation in Gore. The agreement recorded the arrangement the parties had made between themselves and although it was prepared by a solicitor whom the wife had consulted it seems that neither received any independent advice as to his or her property rights. The agreement provided for the furniture and other chattels to be divided in such manner as the parties might agree and for the husband to pay maintenance for the children at the rate of $7.00 a week each and for the wife at the rate of $26 a week, the wife's maintenance to be payable during the joint lives of the parties: but the agreement was to come to an end should they resume cohabitation or should a decree absolute of divorce be pronounced. It made no mention of the matrimonial home, the wife's explanation being that as the husband was running his business from the home, she did not think to make any claim to it. The husband stated that he invited the wife to take from the home whatever chattels she wished, but she said that she took only half and that the chattels were in fact shared equally. The husband retained the business, the van that went with it and a motor car, and he bought the wife a motor car. None of these vehicles was of great value but their division was clearly much to the husband's advantage.

The husband remained in the house until September 1975, paying the outgoings and effecting some improvements. His business was apparently not very prosperous and he found it

difficult to maintain the property and meet his maintenance obligations. Accordingly he sold the house receiving $12,000 after repaying the first mortgage. (The second mortgage had been repaid before the separation, out of moneys gifted by the husband's mother). He then bought a property at Nelson Street, Gore, for which he paid $10,000 of which $6,000 effectively was applied from the sale proceeds of the Ardwick Street house, the remainder of those proceeds being used to pay the debts of the plumbing business. He lived in the Nelson Street house for three years and he then sold both that house and the business, receiving $15,000 in all of which only $6,000 was left after he had paid further business debts which had accumulated. He decided to travel overseas and after putting $2,400 into a bank account to cover his maintenance obligations while he was away, he used everything that was left from the disposal of his assets in Gore for that trip.

In the meantime the wife in 1977 moved to Christchurch and in the following year she purchased an ownership flat in Vivian Street. This cost $23,500 and was financed entirely by mortgages and family benefit capitalisation. She obtained a position with The Press newspaper, and committed herself to the purchase of staff shares and to participation in the staff superannuation scheme. During 1978 there had been some discussion about a reconciliation but it appeared that it had come to nothing. However, on his way through Christchurch at the start of his trip overseas the husband called on the wife and they agreed upon a reconciliation. They cohabited for a week and then with the wife's blessing the husband went off on his trip, returning in March 1979. By then he had spent all

his money and for the first six months after his return he was unemployed. But he did not obtain a benefit; instead the family lived on the wife's earnings and what remained of the Bank deposit. They lived in the Vivian Street flat until late in 1980 and the husband effected various improvements to it. It was then sold and a house at 44 Castletown Place purchased in its stead. This was placed in the parties' joint names. It cost $24,500 and was financed by a first mortgage of $16,500, a second of $4,300, moneys borrowed or cashed in on the husband's life insurance policies totalling $1,200, whilst the balance was provided in cash mainly from the proceeds of sale of the flat but in part too from savings which they had been able to make. They lived together in this house until 16 May 1982. Again the husband effected some improvements and outgoings were met from joint resources as the wife was continuing to work. It is agreed that the present equity in the property is $26,264. It is now worth $47,500. In 1981 a Hillman Avenger motor vehicle was purchased in the names of them both. It cost $4,500, $2,000 of which was borrowed from a finance company for which the husband accepted responsibility, whilst from one source or another the wife paid the balance. It is now worth about $2,400. On 16 May 1982 the parties separated again and have remained apart.

The present proceedings were issued by the wife who sought the Court's determination under the 1976 Act of the respective interests of the parties in the home, the car, her shares (worth $900) and superannuation (worth $571) and the furniture and effects. Prior to the hearing they reached agreement about these chattels in that the wife was to pay the

husband $300, but the Court had to determine their rights to the remainder of the matrimonial property. It was the wife's case that because the husband had received all the capital from the former matrimonial assets in Gore it was only right that she should receive all the assets that had been accumulated in Christchurch. She claimed that the marriage should be treated as one of short duration or alternatively that s 14 of the Act should be applied in her favour, and that as her contributions to the marriage partnership were very much greater than his she should in either case have by far the greater share in the matrimonial property. As a further alternative it was argued that she should receive credit under s 20(6) in respect of the moneys applied to the business debts and the overseas trip. The husband on the other hand contended that the separation agreement in 1973 was in full and final settlement of property rights at that time so that the assets he retained were his separate property; that s 20(6) did not apply; and that there was no basis for departing from the equal sharing provisions of the Act in respect of all the present matrimonial property.

The Family Court Judge held that there had been a final settlement in 1973 so that the disposal of the assets held in that earlier period of the marriage no longer had any relevance. He held that s 20(6) did not apply. He did not deal expressly with s 14 but obviously thought it did not apply either. He considered it appropriate to regard the marriage as comprising three stages and that the final stage, which he saw as beginning in March 1979 and ending in May 1982, a period of 3 years and 2 months, was of such a quality as to justify

the marriage being regarded as one of short duration. In this respect he relied upon what Woodhouse J said in Martin v Martin [1979] 1 NZLR 97, 101. Then, again directing his attention largely, if not solely, to that third stage of the marriage he held that the wife's contributions to the partnership had been clearly greater than those of the husband and so justified disparity of division of property. He fixed the proportions at 60% to the wife and 40% to the husband. He also gave the wife credit for post-separation contributions which he ordered the husband to pay to her.

The wife has appealed against this judgment and on her behalf Mr Egden argued in support of the conclusion that this was a marriage of short duration, accepted the apportionment of 60%-40% as a minimum, but contended that s 14 ought to apply and that the proportions in fact should be 80% and 20%. As an alternative he has argued (and although this was for the first time Mr Fournier did not make any objection), accepting the Family Court Judge's finding that it was part of the agreement entered into in 1973 that it was a final settlement, that that was a harsh and unconscionable bargain which ought in equity to be set aside, and that s 20(6) ought then to be resorted to to enable the wife to be compensated for the way in which the husband had dissipated the proceeds of sale of the Gore assets; but he felt it necessary to concede that if that argument were adopted there ought to be an equal division of the existing matrimonial property. As well as resisting these arguments, the husband has cross-appealed against the finding that this was a marriage of short duration, again contending that there ought to be an equal division of the present assets.

I accept Mr Fournier's submission that this cannot be treated as a marriage of short duration. It was a marriage of 16 years' duration. Its effectiveness as a marriage partnership was certainly nullified for the five years the parties were living apart, so that in terms of quality (to employ the expression used by Woodhouse J in Martin v Martin) it should no doubt be regarded as of 11 years' duration: but no less. Although the period of separation enables the marriage to be conveniently considered in three, or perhaps rather two, distinct stages, it did not bring the marriage to an end either legally or so as to entitle the Court to disregard the first seven years, and pretend that the partnership began only in 1978 or 1979. With respect, therefore, I think the Judge was in error in dealing with the case under s 13.

When one takes, as I consider one must, an overall view of the marriage partnership, the case in my view falls clearly within s 14. Whether by impregnable agreement or not, the fact is that after seven years of marriage, the husband received the home, as well as the business and the better share of the vehicles, and the money has all gone, some of it of course in debts incurred prior to the separation, but much of it in subsequent debts and in travel. I agree with Mr Fournier that it is not possible to calculate the actual benefit the husband received at the wife's expense. At the time, the 1963 Act applied. The wife's claim to an interest in the business would have been difficult to sustain. In any event it may have been more a liability than an asset. The parties' equity in the home at the date of separation is not known and the sale proceeds of both properties represented as

well as the initial matrimonial investment in the first the improvements effected by the husband and the increments of inflation after the separation. Regard must also be had to the husband's covenant to maintain the wife, for that must be treated as consideration for the property arrangements to the extent that it provided a greater periodical payment than that to which the wife would otherwise have been entitled: and I have no means of assessing that, except for the likelihood that once the wife commenced work in 1977 the maintenance obligation may well have been less than the agreed figure. But mathematical precision is not needed in order to demonstrate the injustice of equal sharing in this case. The husband having taken the principal asset, returned to his wife in 1979 with nothing left. He remained with her for a little over three years - unsettled years they were, in the view of the Family Court Judge - living first in a home she had acquired of her own initiative, and then in a home which could not have been purchased but for the first, content to allow her to continue working and to increase the assets she had begun to accumulate in his absence. And now, he claims half - half of what now represents her initial investment for her future, to which indeed he has made some contribution, but none of which he has himself created - without being able or willing to bring to account anything from the first seven years of the marriage, apart from such maintenance as he may have paid in excess of his strict legal obligation. His claim savours of opportunism, and in my view it would be repugnant to justice to allow it. Section 14 imposes stringent tests, but I am satisfied that they are met in this case.

The matrimonial property is therefore to be divided in accordance with the parties' contributions to the marriage partnership: to the partnership, not the assets; to the whole of it, not merely its final three years. Although the Judge's assessment of 60:40 appears to have been based on the latter period, I think it is a fair assessment over the whole of the relevant period, for it allows for their joint and separate efforts in the first seven years, for the fact that the wife carried the responsibility for the children, of whom the younger presents particularly difficult problems, over the next five, and for the wife's greater material contribution in the final three. A division of 80:20 would mean that the wife had contributed four times as much as the husband to the marriage partnership, and there is no justification in this case for such a drastic disparity.

An assessment of 60:40 does not pay regard to the fate of the proceeds of sale of the Gore assets, but I do not think I can take them into account in assessing contributions. I do not accept Mr Egden's submission that they might fall for consideration under paragraph (g) or paragraph (h) of s 18(1). It is I imagine for the very reason that assets disposed of or money spent by one spouse during the marriage cannot be brought into account under s 18 that we have s 20(6) and s 9(4): although they do not cover all eventualities. The latter clearly cannot apply here and the appeal was not argued on the basis that the latter could be availed of in this context.

In view of this conclusion it is unnecessary to consider the alternative contention that the 1973 agreement ought to be

set aside. While it subsists, of course, its effect is that the house and the business became the husband's separate property, so that payments from the proceeds of their sale were not payments out of matrimonial property for the purposes of s 20(6).

The result is that both appeals succeed, but the orders made in the Family Court require no amendment, save in one respect upon which counsel were agreed, and that is that the wife's post (1982) separation contributions are not to be repaid to her by the husband but, as it is agreed she is to pay him out, are to be credited against the amount she is to pay him in this regard. I make no order as to costs, and I reserve leave to the parties to apply should further particularisation be required.

Solicitors:

Marshall Cordner & Co, CHRISTCHURCH, for Appellant
Loughnan, Jarman & Co, CHRISTCHURCH, for Respondent.