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child of Mr Thomas's first marriage. She was in the custody of his first wife. He paid maintenance for her. There was a child of Mrs Thomas's first marriage and she was brought up as a child of the second marriage. There was also a child born of the second marriage. The deceased left his estate equally between these three children.

The matrimonial home was a property at Street, Christchurch. During the marriage the deceased in successive purchases acquired several adjoining blocks of farm land at Rolleston. He would work there at weekends. In 1972 the parties separated and on 1973 they entered into a separation agreement which provided for custody and maintenance but not for the division of matrimonial property, that matter being the subject of continuing negotiation between the parties' solicitors and continuing discussion between the parties themselves, for they seem to have remained on amicable terms. Before any settlement had been achieved, in December 1974 Mrs Thomas purchased an ownership flat, paying a nominal deposit, obtaining a Housing Corporation loan and with her husband's co-operation obtaining from the vendor a second mortgage of \$8,600 primarily secured over the Street property. In July 1975 Mr Thomas sold the Street property for \$15,500 and out of the proceeds paid off Mrs Thomas's second mortgage. The amount required was \$9,495.28. On 21 July 1975 Mr Thomas's solicitor Mr Marshall made an offer to settle Mrs Thomas's matrimonial property claim. The terms of the offer are not before the Court, but the terms of acceptance are. They are set out in a letter from Mrs Thomas's solicitor Mr Maciaszek dated 30 July 1975.

The letter reads as follows:

" Further to your letter of the 21st of July 1975 we had further discussions with our client and are instructed to inform you that our client would be prepared to settle her claim for the sum of \$19,500 less the mortgage repaid to Mr Wilkie.

However we take it that settlement would be dependant upon sale of the properties and we would have no objections to that course provided it does not cause an undue delay. Perhaps your client would be able to arrange a suitable mortgage in the meantime. Our acceptance of your offer is made without any prejudice to our clients rights to a claim should this matter not be settled within two months from the date hereof.

Please advise us of your intention in due course."

It appears from Mrs Thomas's affidavit that the deceased was selling off some of his land and was proposing to pay her out of the proceeds. The time constraints imposed by the letter are not clearly expressed, but it is clear that unless the outstanding balance, which was \$10,004.72, was paid by 30 September 1975, Mrs Thomas's rights under the Act were reserved. Payment was not made by that date. It seems that the parties were having discussions amongst themselves and it is clear that Mrs Thomas acquiesced in the delay that ensued. In October 1975 Mr Thomas sold part of the farm, and from the proceeds he paid his wife \$5,000 on 30 October 1975. That was accepted without comment. In December 1975 he sold a further portion of the land for \$12,000 but nothing was paid to Mrs Thomas. The land involved in these two sales amounted to half the total area.

In 1976 Mrs Thomas needed some money to pay off some furniture she had ordered and Mr Thomas agreed to provide her

with \$700 for this purpose. Nothing more seems to have happened, certainly between the solicitors, until 28 November 1979 when Mr Maciaszek reminded Mr Marshall that Mr Thomas owed a further \$5,000 to complete the settlement. It was subsequently acknowledged by Mr Maciaszek that the \$700 was a payment on account of his client's matrimonial property entitlement and there was then a discussion between the solicitors as to the manner in which the outstanding balance of \$4,300 might be secured. (Mrs Thomas had registered caveats against the farmland but these had been withdrawn in exchange for the earlier payments.) Nothing was done. Then in a letter of 3 March 1980 Mr Maciaszek confirmed that \$4,300 was still owing in respect of matrimonial property. There was no further communication between the solicitors and it appears that the matter rested thus until these proceedings were instituted, some seven months after Mr Thomas's death.

The first question for decision is whether in these circumstances s 6(2) of the Act applies, so as to prevent the Court from awarding Mrs Thomas more than the outstanding balance of \$4,300 together with interest thereon: for Mr O'Donnell agreed that interest ought to be paid.

The meaning of s 6(2) was considered by the Court of Appeal in Stevens v Stevens [1974] 2 NZLR 129. It was held that common intention may be expressed by conduct that is "sufficiently unmistakable in import": McCarthy P at p 133. And further that the subsection applies only if the order proposed will run counter to what the parties intended, whenever that intention may have been formed. So, "if the parties have not formed an intention relative to the particular

circumstances which have developed, then quite obviously there is nothing which could be defeated by the proposed order" : McCarthy P at p 134.

In the present case, it is clear that the husband's offer of \$19,500 was an offer of a lump sum and not of any particular proportion of the value of the whole; and that the wife's willingness to accept the offer as the proper and final quantification of her entitlement was conditional on payment within two months. There is no evidence that this condition was accepted by the husband. Indeed he clearly ignored it. For her part, Mrs Thomas did not insist upon it. But her attitude remained consistent with that expressed in the letter of 30 July 1975. Although she acquiesced in her husband's continuing failure to pay, and did not assert her right to claim consequent upon his failure to pay within the time stipulated until after his death, nothing was said to indicate that the reservation of her right had been abandoned. Thus assuming that the letter is to be treated as an expression of common intention, I am unable to find any departure from that intention. For s 6(2) to prevent the wife from obtaining more than the balance of the sum agreed in 1975, I would have to find a common intention that the initial reservation of her rights had been abandoned, and that the intention was that she could claim no more, no matter when that balance was paid, even if only now, almost ten years later. No such intention was expressed in words, and I do not consider that it is to be found in the parties' conduct, which at best was equivocal.

It follows that I must approach the case afresh, and determine the extent of the wife's entitlement, giving credit

of course for what she has already received, for it was clearly intended that those payments be on account. Her entitlement depends on her having made contributions, whether in the form of money payments or in some other less direct form such as by way of services or prudent management, to the matrimonial property but it is not to be assessed in mathematical proportion to the degree of those contributions. In considering the matrimonial home, the Court is required to have regard to the respective contributions of both spouses to the home. In considering the other matrimonial property, the parties' contributions to that property are a matter to which the Court may have regard. Once contributions are established, the Court has an unfettered discretion to make such order as it deems just. For the authoritative pronouncement on these matters, dealt with by ss 5 and 6 of the Act, see Haldane v Haldane [1976] 2 NZLR 715.

Over the 17 years for which this marriage effectively subsisted, Mrs Thomas's contributions were considerable, and they extended beyond the matrimonial home to other assets that were acquired, particularly the farm land. Mrs Thomas's evidence on these matters was not, for it could not be, gainsaid. Nonetheless, she gave some oral evidence, and she impressed me as a straightforward honest woman. She stated that she attended to the normal duties of a wife and mother, her husband giving her no assistance. She was in full-time employment for all but the five years in which she bore the child of the marriage and cared for her until she went to school. Even in those five years she did not cease to earn, for she developed a large vegetable garden where she grew

plants for sale through retail shops. To her earnings, the deceased added a weekly housekeeping allowance, and from this fund Mrs Thomas paid all the expenses of the household and the family, apart from the mortgage instalments. She also paid the maintenance due for her husband's daughter by his first marriage. The housekeeping allowance Mr Thomas provided was barely sufficient for the purposes for which it was intended, a problem compounded by Mr Thomas's insistence on eating well. Mrs Thomas had to buy almost all the family's clothing from the City Mission and similar shops. Nothing was left over for anything other than the basic necessities of life.

She said that when they were married they had virtually no assets. . The home was purchased in 1958 for 1,300 Pounds, made up of a mortgage advance of 1,027 Pounds and cash from their joint savings, accumulated from their earnings after they were married. It was an old house, sparsely and poorly furnished, and their life in it was spartan and uncomfortable. At first there was no proper bathroom, only an outhouse. There were no carpets at all for the first five years they were there, and after that only in the front rooms. Mrs Thomas was largely responsible for maintaining the property. She painted and decorated it three times during the marriage, with some help from others but apparently little from her husband. She had to endure her husband's passion for animals: he kept a virtual menagerie, which at times spread into the house itself. She not only had to endure the noise and odour, but also the complaints of the neighbours about them.

By dint of Mrs Thomas's willingness and ability to manage the household on the money available to her, her husband

was able to set aside the funds needed to purchase the farm land, stock it, and develop it. The land was cheap, and I have no information as to the total amount expended on it. The physical work was done by Mr Thomas, with some help from the daughter, and a little from Mrs Thomas, particularly after the separation. It was a good investment, for in August 1973 Mr Thomas gave a developer an option to purchase the major part for \$25,000 and as mentioned he sold half of it in 1975 for \$26,000 and the balance, which he retained until his death, had a 1982 Government valuation of \$75,000.

I must guard against the temptation to gauge a claim under the 1963 Act by the same measure as applies under the Act of 1976. Nonetheless, Mrs Thomas's contributions to the assets that were acquired during the marriage were substantial. But for her efforts, and her willingness to go without and make do, it is unlikely that her husband would have been able to acquire the farm land at all. He obviously recognised this in the offer of settlement he made. Her main contribution of course was in the home, and it is there that the greatest recognition should be accorded to her. Had the home still been in existence, I would have awarded her a half share. As it is not, I would allow her one half of its value when it was sold, \$7,750. However that is not of itself sufficient recognition. In addition, I consider she should have a one third interest in the farm land, both that which has been sold and that which has been retained. By fixing this share, I obviate any need to deal with other matrimonial property, or what may represent the proceeds of its disposition. Her share of the land that was sold is say

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\$8,650, so that her total cash entitlement is \$16,400. Of this she has had \$15,195, leaving a further \$1,205 which I order be paid to her out of the cash assets of the estate. I also order that there be vested in her a one third interest in the remainder of the land, as held by the deceased at the date of his death.

The applicant is entitled to her costs, which I set at \$750 together with disbursements as fixed by the Registrar.

A handwritten signature in cursive script, likely of the Registrar, is written in the right-hand margin of the document.

Solicitors:

Geddes & Maciaszek, CHRISTCHURCH, for Applicant
Bell, Taylor & Co, CHRISTCHURCH, for Respondent.