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SET 3.

IN THE HIGH COURT OF NEW ZEALAND

AUCKLAND REGISTRY

M.575/85

IN THE MATTER of the Matrimonial Property Act 1976

BETWEEN ROBERT JOHN LOCKWOOD

APPLICANT

A N D LYNLEY SHIRLEY LOCKWOOD

RESPONDENT

Judgment: 21 April 1986

Hearing: 17 February 1986 (at Auckland)

Counsel: R.L.Fisher Q.C. and P.F.Gorringe for Applicant
W.Akel for Respondent

FURTHER JUDGMENT OF CASEY J

On 3 May 1984 I gave judgment at Hamilton in the property dispute between these parties affecting the farming partnership in which they have been involved with their accountant, Mr.McDonald. At the time I was told there was a contract for sale of the farm likely to yield $260,000 as their share. I found the value of the notional matrimonial home at $42,500 to be shared equally and divided the balance 55% to Mr.Lockwood and 45% to Mrs.Lockwood, reserving leave to apply for any further orders to give effect to the judgment. I expected the parties and their counsel to settle all other matters in the light of that division. The matter came before me again on a change of venue to Auckland because almost every item of property was still in contention; fortunately, to some extent, commonsense seems to have prevailed, but there remained many areas of dispute.

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Re-Opening Division

In spite of the very full argument in the original hearing from Mr.Lockwood's former counsel on the point, Dr.Fisher sought to persuade me to re-open the whole question of division of thebalance of matrimonial property. His principal ground was the unexpected liability for income tax on the sale of the farm (settled in July 1984) some 2 months after my judgment) under the"claw-back" provisions of s.129 of the Income Tax Act 1976. This makes assessable as income capital profits on sale within 10 years of acquisition to the extent of any interest previously deducted on funds borrowed to finance that purchase, as well as previously deducted capital expenditure.

Mr.Frankham (a chartered accountant) examined this position from Mr.Lockwood's point of view, and calculated that on his interest in the partnership (65%) and after taking into account his other income and writing back stock values on sale, he is liable for an additional $61,826 in tax. This is on the basis of the most advantageous spread of income allowed. He did a similar exercise for Mrs.Lockwood but on the assumption (mistaken) that she had no other assessable income, and on her interest in the partnership (5%) her tax was $1,292, making a total extra payment of $63,118. I find this is deductible from the value of the matrimonial property for division under s.20(5) of the Matrimonial Property Act. On the estimates made by counsel the tax assessable to Mrs.Lockwood could be increased by up to $2,000, depending on her exact income figures for the years, and the most favourable way of spreading it under the provisions of the relevant income tax legislation.

The "claw-back" tax would not have been imposed if the farm had been sold pursuant to a Court order made under the Matrimonial Property Act. Apart from noting that the

decision to sell was made by Mr.Lockwood, who was effectively in control of the farm at the time, I do not propose to add fuel to the mutual recriminations over this unfortunate development. There was no mention of this possibility at the May 1984 hearing and it seems to have been overlooked by the parties and their advisers. Attempts to obtain relief from the Commissioner have so far been unsuccessful.

Dr.Fisher submitted that this unexpected reduction in the value of the total assets available for distribution warranted a fresh look at my 55/45 percent division of the balance, because there is no longer adequate recognition in the share he receives of his contribution of livestock acquired by gift and $26,000 received during the marriage from the sale of his interest in his family's property. These were factors justifying the unequal division ordered. He suggested, on the basis of remarks by Somers and Richardson JJ in Illingworth v Illingworth [1981] NZLR 1 PP.9 and 15, that his client is entitled to credit for separate property contributed to the marriage partnership which is not generated by it. He put forward an updated adjusted figure demonstrating that the $26,000 was worth $68,874 in June 1985 and twice that amount with compound interest at 10%. Reliance on such figures in this way demonstrates a departure from the basic philosophy of the Act, under which such property brought in by a spouse is treated as an additional contribution to the marriage partnership and becomes absorbed into it. There is no asset which can now be attributed to this particular source, which is no more to be treated as an item of separate accountable property than are the spouses' individual contributions in other areas of their matrimonial endeavour. With the same logic each could value and apply similar inflation and interest factors to all their contributions and seek a proportionate recognition of their assets at the end. The Act does not work this way.

I am not disposed to alter my assessment of an appropriate division betwen the parties by reason of this added tax burden which both must share. For the reasons set out in my earlier judgment, I regarded the contributions brought by Mr.Lockwood into an established marriage partnership as of less significance than similar contributions made at the outset. While the reduction in disposable assets will affect the return he might expect for his efforts, it must be remembered that Mrs.Lockwood will also suffer a diminution in hers.

I turn now to specific matters raised for discussion.

Loan Account with Farm Partnership

This is tied up with total payments of $17,000 received by Mrs.Lockwood on account of matrimonial property or out of the farm account. I was mistaken in saying at p.2 of my judgment that Mr.Lockwood contributed $8,300 towards her purchase of a 5% interest in the farm, and at p.3 that he should get credit for one-half of $2,000; it should have been 55%. The $17,000 will be taken into account in the settlement as matrimonial property and Mrs.Lockwood must give credit for the fact that she has received her husband's share of $9,350 as well as her own.

Kauri Trees

(a) Mr.Lockwood received $1,260 for the Kauris removed before sale and that sum is matrimonial property. He says Mr.McDonald paid his wife her share; she cannot remember. Obviously the accountant can say "Yes" or "No", and his word should be acceptable, so I leave this to be sorted out with him by the parties.

(b) I rule the Kauri removed after sale was matrimonial property and of the $6,500 Mr.Lockwood says he received, I allow him $1,500 for felling, removal etc. The balance of $5,000 is to be divided 55/45.

Woolpress & Hay

The evidence of sale proceeds could be suspect but will have to be accepted at $980 and $1,120 respectively, to be divided 55/45.

Te Puke Property

The evidence of source of funds is suspect. After what seem to be inconsistent or less than frank explanations Mr.Lockwood finally acknowledged that the funds for the post-separation purchase of the section and construction of the home came partly from proceeds of stock sold, of the Kauri tree (b) above, and of sale of bulls he acquired from the farm partnership - all matrimonial property. He also produced an IOU for $40,000 to his mother, representing money he said he borrowed from her, and claimed that his earnings also went in. A valuation obtained by Mrs.Lockwood gives a market value of $141,000 and she claims this is matrimonial property. Mr.Akel submitted that in respect of funds having their source in matrimonial property, the situation was different from the assets purchased by Mrs.Lockwood out of the $17,000 paid to her. This became her separate property so she could do what she liked with it.

I do not think Mr.Lockwood's actions in applying matrimonial assets in this way should be regarded as bringing the Te Puke property (purchased about September 1984) within the ambit of Sec.8(f) or call for the exercise of my discretion under Sec.9(4). It may well be that he hoped to conceal his use of matrimonial proceeds in this venture, but the reality is that he anticipated the division to be made in the Court application by appropriating the assessed $5,000 of matrimonial property in the proceeds from the Kauri tree (wife's share $2,250; and (assuming the figures are correct) the $76,892 received from stock sold and agreed commission of 3%, of which Mrs.Lockwood's share is $34,601. He must pay her interest on the total of these shares and on her share of the woolpress and hay proceeds, calculated from

the date the money was received until payment to her in the final settlement, at the rate it would have earned in the solicitor's hands. This can no doubt be ascertained from a comparison with the funds they hold. Offset against this will be interest at the same rate on Mr.Lockwood's share $9,359) of the $17,000 she has already received.

Post - Separation Contributions

Mr.Lockwood claimed that credit should be given for his post-separation contributions, originally by way of specific allowance but now to be taken into account under Sections 2(2) and 9(4) as part of his general responsibility for increase on the net value of the farming assets. After the separation on 26 July 1982, he remained on the farm for about 11 months, leaving it in June 1983 to move to Kaitaia. He worked there for Allied Farmers and put a manager on the property. He had the use of the farm car (a 1981 Holden Commodore) and Mrs.Lockwood suggests he might have been able to charge petrol and other expenses to the farm account. This may be so, but there is no evidence to show it happened. She says there were in fact two managers - a Mr.Bowler for 8 months and a temporary man for 3 months - and that Mr.Lockwood returned some 6 weeks prior prior to settlement on 6 July 1984.

There was a dispute about whether the farm and stock had increased in value and if so, what had caused it. Mrs.Lockwood thought the property had deteriorated. After listening to Mr.Bowler's cross-examination on his affidavit and Mr.Lockwood's evidence, I am satisfied that the farm, when sold, was not up to its full potential. Mr.Stewart (a neighbouring farmer) blamed its appearance on a recent sustained drought. Mr.Lockwood was evidently critical of Mr. Bowler's management and they parted on bad terms. Mrs.Lockwood pointed to a Government Valuation of the Lessee's

interest at $465,000 obtained in 1982 which was more than the sale price of $460,000 obtained in 1984. On the other hand, Mr.Lockwood relied on a valuation obtained early in 1983 by arrangement with his wife which suggests an increase of $57,600 by the date of sale.

I find this evidence inconclusive in determining the existence and extent of any increase, but I am satisfied that Mr.Lockwood is not entitled to any extra consideration for it. He regarded Mr.Bowler as less than competent, and he appears to have visited the property only once a month while in Kaitaia, although more frequently when he returned to Te Puke. His salary was $25,000 for the year to 30 June 1983 and $9,000 for the following year, of which $2,312 was undrawn. There is no evidence to suggest any increase in stock values was due to other than ordinary market movements. Mr.Lockwood also claimed that his decision to keep the farm going was primarily responsible for th writing-off of Livestock Incentive and Land Development loans and the reduction of the Rural Bank loan.

On all these matters I do not see his post-separation contributions as being any more than those of a competent farmer in his situation; indeed, having regard to his view of the manager's calibre, they might well have fallen short of that standard. I regard his $9,000 salary as adequate recompense for what he did; he is entitled to credit for the undrawn salary, but not to any further recognition under the Act.

Other Matters

These have been substantially covered in the statement of agreed common ground put in at the hearing. Each side submitted their calculation of an appropriate division. This is best left to counsel and their advisers to work out in the light of this decision. I should add that the parties' interest in the farm partnership is to be divided after deducting all farming partnership debts; the latter are not subject to separate division, as Mr.Akel seemed to suggest.

I am not sure whether any decision is required about the repayment of the loan of $8,300 raised by the wife on the security of her section to enable the purchase of an additional share in the farming partnership. When that section was sold, Mr.Lockwood says he repaid the loan from his post-separation salary. Mr.Fisher suggested this is a simple matter of book-keeping, not calling for decision. The interest on the funds held by the solicitors is to be shared 55-45. The sum of $65,000 is to be set aside to meet the added tax liabilities and any balance and accrued interest is to be shared 55-45. The parties have agreed to share valuation and experts' expenses. While some of the issues before me may have been incapable of settlement in any event, I am satisfied that this further hearing was substantially the result of Mr.Lockwood's attitude to efforts by his wife's solicitors to negotiate, and of his wish to re-open my previous ruling on division. He will pay costs of $1,250 to the Respondent.

M.E. Casey J.

Solicitors: Maltby Hare & Willoughby, Tauranga for Applicant
Simpson Grierson Butler White, Auckland for Respondent