IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M. 670/85

LOW PRIORITY

IN THE MATTER of the Matrimonial Property Act 1976

BETWEEN HEBBERD

Applicant

A N D HEBBERD

Respondent

Hearing: 19 March 1987

Counsel: W.V. Gazley for Applicant husband
J.A.L. Gibson QC for Respondent wife

Judgment: 2/6/87.

JUDGMENT OF ELLIS J

Although they are now divorced it is convenient to refer to the applicant as the husband and the respondent as the wife. The wife made her application under the Act in the District Court in July 1983 and it was transferred into this Court on the husband's application.

The parties were married on 12 November 1977. It was a second marriage for each. At the time of their marriage the husband was 32 and the wife 34 years old. It appears that each had two children by their former marriages. The parties separated on 11 May 1983. The parties lived together for a year prior to their marriage and then

on the husband's farm in the Marlborough. The farm had been owned by the husband for some considerable time before he met the wife and part of the farm was planted in timber trees and the balance was used to raise fat stock. As at 31 July 1978 some 129 bulls were on hand at standard value worth $2,850. The farm was a going concern with usual plant and equipment.

In her application the wife claims a share in property under the Act. The property concerned can be described as the farm and homestead, the plant and stock of the farm, the family chattels, a boat named and a mussell farming business operated from two sites, one in and the other in in the Sounds. I shall deal with each claim in turn.

THE FARM AND HOMESTEAD

The parties agree that there is a defined homestead on the farm property marked by fences and this has been occupied by the wife since separation and latterly under an order of the Family Court dated 31 October 1983. Each agrees that the wife is entitled to one half of its value and that value is to be calculated as at today's date. Two matters are not agreed. The first is how the equity in the homestead is to be calculated and the second is whether or not the wife should suffer some deduction from

her share to compensate for the wife's occupancy since separation. The balance of the farm property is agreed to be the separate property of the husband. Questions of valuation are to be reserved by agreement between the parties.

From title searches produced by consent the farm property comprised some 114 hectares at the date of the parties' marriage and was then apparently subject to a mortgage to the Rural Bank, a statutory land charge and a mortgage to the Bank of New Zealand. Subsequently a notice of claim under the Act by the husband's first wife was lodged. It has subsequently been withdrawn and need not be mentioned again. In 1982 the husband sold some forested land to Fletcher Forests Limited for $78,500. The farm was thereby reduced to 49.3328 hectares and a new Title was issued in the name of the husband on 9 June 1982. Two days later notice of claim under the Act was registered by the wife against the Title. Some two months later mortgages to the Perpetual Trustees and the Bank of New Zealand were registered with the consent of the wife. No further dealings occurred on the Title until 1985 when the Perpetual Trustees' mortgage was apparently renewed. The mortgage to the Perpetual Trustees was for $30,000.

The evidence of the husband was that the loan of $30,000 was applied towards this purchase of the boat. All evidence before me confirms this and I accept it. Mr Gibson submitted that the wife's share in the homestead

should not be reduced by a proportion of the mortgage to the Perpetual Trustees. Mr Gazley, on the other hand, submitted that it should. By reference to a valuation of the property produced to the Court dated 26 May 1982, the proportion was revealed by the value of the homestead at $44,000. and the value of the whole farm at $170,000. Accordingly the proportion of the $30,000. to be considered was calculated at $7,764.71. Mr Gazley submitted that s12 of the Act required such a calculation. Section 12(1) provides:

> "**12 Homesteads** - (1) Where the matrimonial home is a homestead which is owned by the husband or the wife or both of them, section 11(1)(a) of this Act shall not apply but each spouse shall instead share equally in a sum of money equal to the equity of the husband or the wife or both of them in the homestead; and any spouse who does not have a beneficial interest in the land on which the homestead is situated shall, until his or her share of that sum is paid or otherwise satisfied, be deemed to be beneficially interested in that land."

Mr Gazley referred me to the unreported decision of Greig J in Lett v Lett, Masterton M 7/86: 6 January 1987. In that case a farm property was in issue too. In dealing with the wife's share in the homestead, the question arose as to what was the equity in terms of s 12(1). There were three mortgages over the whole farm to the Rural Bank, Public Trustee and the husband's father. There was no discussion as to what use the mortgage funds had been put to, and Greig J held that the equity in the homestead was its value less a rational proportion of the mortgage debts.

He made reference to Fisher on Matrimonial Property (2nd ed) para 12.17, s20(5) of the Act and a previous decision of his own, Reid v Reid 4 MPC 170 and said:

> " I have decided that the proper approach is to assess the equity by deducting from the value of the homestead a proportion of the sum of the secured debts over the whole farm property in the proportion the value of the whole bears to the value of the homestead. That, I believe, is what the equity means. As a result I think that s 20 (5) does not apply.
>
> My reasoning starts from the words of s 12, which uses specifically the word 'equity' which in ordinary use in New Zealand means the difference between the value or the price and the sum of the debts secured on the property. That is a special provision applying to a particular species of matrimonial home. It does so apply by, first of all, declaring that s 11 shall not apply so that the spouses do not share in the matrimonial home. What they do is to share equally in the sum of money calculated by reference to the equity. That then deals with the debts secured in respect of the land in a way which corresponds to what happens with a matrimonial home which is not a homestead.
>
> Section 20 (5) on the other hand is a general provision which provides, as it says, for ascertaining the value of the matrimonial property, compared to the provision of s 12 which calculates a sum to be shared. If s 20 (5) is to apply in this case then, because the secured debts here must be personal debts, not falling within any of the provisions of s 20 (7), there will be no deduction and the equity becomes the full value, not the equity at all. That cannot be right or just between the parties. There is the further difficulty that if s 20 (5) applies fully then unsecured debts and the excess of unsecured personal debts owed by the spouse who owns the farm will be deducted from the homestead value. That is not contemplated in the ordinary idea of equity and would be unfair if it only affected the homestead equity, the equivalent of the matrimonial home, because other property was separate property and not therefore to be divided for the benefit of the other spouse. Though relief may be given by means of s 20 (6).

I believe there is some support for my view in the observations of Richardson J and McMullin J (especially) in Park v Park [1980] 2 NZLR 278, at 282, and 285 where McMullin J states:

> "The only section which itself takes account of debts in effecting a division of the matrimonial property is s 12 of a homestead for the equal sharing of a sum equivalent to the equity of the husband or the wife or both of them in the homestead. Sections 11 and 15, to which reference has already been made, are concerned only with shares in the matrimonial home or matrimonial property. They make no reference to equities or values. Hence the need, in the case of the matrimonial property other than a homestead, to consider what debts can be deducted in ascertaining the value of the property available for division between husband and wife. Subsections (5) to (7) of s 20 provide a formula for that purpose.""

In Shearing v Shearing (1980) 3 MPC 166 Casey J was considering a homestead, where mortgages had been raised on the security of the farm including the homestead, to purchase other farm land, for general farming purposes, and to improve the homestead. He calculated the equity under s 12 by deducting from the value of the homestead the outstanding amount of its loan monies applied to improve the homestead only. At page 168 he said:

> "The matrimonial home on this block is a 'homestead' so that an equal allowance in a sum of money equal to the equity therein must be made to Mrs Shearing. The Valuer General has determined its value under s 12(2) as $40,000. Although Mr Savage queries this figure, in the absence of any appeal or other evidence establishing it was wrong, I accept it. The debt to be deducted to arrive at the equity for division is the balance of $2,167 owing to the Rural Bank on the loan of $3,000 for improvements. Mr Savage suggested that some part of the secured debts over the whole block be apportioned to the homestead land, but in view of the division I have made and the very small amount that would be involved, I do not think such an exercise is called for."

There can be no doubt that the usual meaning of the word equity denotes the net value of mortgaged property after deduction of charges. In a usual case for example where the mortgage was raised to purchase the whole property there is little difficulty in apportioning the charge to different parts of the property according to proportionate value as in Lett v Lett (supra). Such an apportionment itself however involves a discretionary tinkering with the equity of redemption which may well be contested by the mortgagee if its consent was asked for. This approach has a degree of artificiality about it, but will in most cases be entirely fair and appropriate. On the other hand if the mortgages are collateral security only should an apportionment be made, and if so on what basis? In the present case I have held that the mortgage funds were applied by the husband towards the boat and indeed the husband deposes in his first affidavit as follows:

> "Now the applicant next lists a 38 foot launch as an asset. It is separate property, paid for out of the farm accounts. There is $30,000. charged upon it"

I was not given any further information about the charge, nor was argument addressed to me on its significance in terms of the applications of s12(1) to the mortgage on the farm property. If the husband had given

a charge over the boat with the mortgage over the farm as collateral security, would the equity in the farm take any account of the boat? The problem posed in these questions indicates to me that the husband's equity in the homestead has to be calculated on a consideration of the totality of the financial transactions of the husband and wife, and this consideration should be guided by the general thrust of the Act. In particular the provisions of s 20(5) and (7) are a strong indication that the personal debts of a spouse are not to diminish the other spouse's share in matrimonial property. In my view this is particularly so when considering the emphasis on equal sharing of the matrimonial home. I accept that s 12 is a code to be applied on its terms to the special situation it addresses but in my view "the equity of the husband ... in the homestead" is a flexible expression which envisages not only a simple apportionment of the equity of redemption, but also enables the Court to take into account more complex situations, such as that considered in Shearing v Shearing (supra), and the present case.

I have considered the possible alternative approach which would involve a consideration of s 17(1) and the proposition that the homestead was "applied" to "sustain" the boat by being used as security for the loan used to purchase and fit it along the lines suggested by such a case as Holland v Holland (1982) 5 MPC 57 and thus

consider whether or not the wife could trace the mortgage funds into the boat and thus claim a sum of money or share in the boat. I do not favour this approach, as I am satisfied that the facts of this case both financial and real are that the boat is the separate property of the husband, and the equity in the homestead is to be calculated by ignoring the first mortgage debt. It offends common sense to allow the husband a double benefit from a consideration of the mortgage funds.

I therefore hold that the wife is entitled in respect of the homestead to a sum equal to one half the value thereof.

I must now consider the husband's claim to reduce that sum by some amount to recognise the occupation from the date of separation down to the present time. The wife deposed to the time and effort she has put into the running of the farm since separation, and the husband has been at pains in his evidence to minimise that. He was prepared to describe his wife's efforts in the most slighting and hurtful language. He also denied in oral evidence before me that his wife had given a personal guarantee to the bank. This denial has since been shown to be untrue and the guarantee has now been produced. Bearing in mind that most of the evidence is in affidavits I prefer the account of the wife and consider that her time and effort put into the farm since separation must offset any deduction that might otherwise have been made

in respect of her continued occupation of the homestead. She has agreed to vacate on settlement of this dispute. To protect the husband's interests I expressly reserved leave to apply in respect of the occupation of the homestead.

THE STOCK AND PLANT OF THE FARM, AND FAMILY CHATTELS

The wife claims a share in the increase in the stock and plant over the years of the marriage. The accounts produced show that as at 31 July 1978, eight months after marriage, the stock and plant comprised 129 bulls at standard value, $2,850. Plant and equipment, $1,475. Some seven vehicles including a Zephyr motorcar and a 1973 Cortina car, $6,873.

The accounts show the stock and plant as at 31 July 1983 as 130 bulls at standard value, $2,600; plant $3,299 and vehicles, including the same Zephyr and Cortina and a Holden truck $11,604. Some time prior to the hearing the parties agreed that the husband should have the Holden truck and the wife the Cortina car valued at 31 July 1983 at $4,026 and $816 respectively. Mr Gazley submitted that the Cortina car and the Holden truck were the separate property of the husband and that the wife should be required to account for the Cortina car. Mr Gibson submitted that both the Cortina and the Holden were family chattels and that the division agreed by the parties is part of a division of family chattels and should stand

undisturbed.

The accounts show that the Holden was purchased in 1982 for $6,290 and from the figures I will later refer to it appears to me to have been a capital purchase from funds identifiable as the husband's separate property. I do not consider therefore that there has been any increase in the plant and stock of the farm over the period of the marriage, and while I am more inclined to accept the wife's account of her efforts on the farm over the years, I consider she has not made out a claim to a share in the stock and plant. On the other hand I consider that on balance the Cortina motorcar to have been a family chattel notwithstanding its inclusion in the vehicles in the farm accounts. At the time of the marriage breaking up there were a 1975 Zephyr, 1973 Cortina, 1977 Holden truck, and two tractors, and I consider that the Cortina was more likely than not to have been used principally for family purposes, that is personal transport for husband or wife. That is reflected by the husband's agreement that the wife should use the car after separation and I accept the wife's evidence that in any event division of the cars has been the subject of agreement, and that alone is an end of the matter. I consider that the wife should be entitled to keep the Cortina car as part of her share in the family chattels. As to the other outstanding claims to matrimonial chattels, I record that the husband's requests made in his oral evidence before me can apparently be resolved

by agreement. No further order will be made, but leave to apply is reserved.

THE BOAT AND MUSSEL FARMS

Mr Miller presented a summary of the husband's capital and income movements over the marriage years thus:

"

STATEMENT OF SOURCE & DISPOSAL OF FUNDS

FOR PERIOD 1.8.76 - 31.7 84

SOURCE OF FUNDS			
FROM PROFITS			
Net Farm Profits (Before Depreciation)		68068	
Less Net Mussel Loss (Before Depreciation)		(10529)	
			57539
Loans As per Schedule			79081
Sale of Assets As per Schedule			105343
Total Funds Available			241963
FUNDS APPLIED TO			
Purchase Assets As per Schedule		120899	
Repay Loans As per Schedule		55417	
Personal Expenses			
Sundry Drawings	64807		
Income Tax	5341		
Life Insurance	2432		
Personal Car Expenses	4191		
		76771	
			253087
FUNDS DEFICIT			11124

THIS DEFICIT IS REFLECTED IN A REDUCTION IN LIQUIDITY AS FOLLOWS:	
Increased Bank OD	12958
Increased Creditors	2813
	15771
Less Increased Stock & Debtors	4645
Reduced Liquidity	11126

====="

This summary is supported by the detailed accounts and by the other evidence before me. It will be seen that "personal expenses" exceed "net farm profits" and that assets purchased $120,899 and loans repaid $55,417 were funded from assets sold $105,343 and monies borrowed $79,081. All the assets sold were the separate property of the husband. The assets purchased included the boat shares $6,000, and the mussel farms $17,600 and the Holden truck $6,290. I consider the evidence clearly establishes that these assets are property acquired out of separate property and the proceeds of disposition of separate property in terms of s 9(2) of the Act. The mussel farms are in the joint names of husband and wife. The evidence before me was that this was an income splitting device and was not intended to affect the true matrimonial property position one way or the other. It does not in my opinion alter the plain fact that the purchase price for the mussel farms came entirely from the separate property of the husband. It cannot be said that the wife's actions or efforts helped to provide any of the funds used to purchase the assets, nor in any real way to create or

maintain them. Nor can it be said that matrimonial property was applied to sustain them in terms of s 17, bearing in mind the way in which I have approached the husband's equity in the homestead.

In conclusion I refer to extensive evidence of both husband and wife as to their joint efforts over the relatively short duration of their marriage. I assess the evidence as best I can by concluding that each worked hard for comparatively little return by way of income. The wife however is in effect unable to establish that her efforts increased the capital assets of the husband and all assets owned at the date of separation can be directly traced to capital transactions involving the separate property of the husband.

The result is that the wife is to have one half the value of the homestead without deduction, and the Cortina car. Leave to apply further is reserved. I have considered the submissions as to costs, and order that each party shall bear his and her own.

Solicitors for Applicant: Hunter Ralfe (Nelson)

Solicitors for Defendant: Smythe Le Gros Barnett (Nelson)