NZLR

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

AP.21/95

LOW PRIORITY

BETWEEN HARLOW

Appellant

AND HARLOW

Respondent

Hearing: 14 June 1996

Counsel: L. J. Postlewaight for Appellant
G. J. Mathias for Respondent

Judgment: 14 June 1996

ORAL JUDGMENT OF SALMON, J.

Solicitors: Connell Rishworth & Co.,Whangarei for Appellant

Thomson Wilson, Whangarei for Respondent

This is an appeal from a decision of the Family Court dividing matrimonial property under the provisions of the Matrimonial Property Act 1976.

Mr and Mrs Harlow were married in 1965 and separated in March 1991. There is one child of their marriage who was born in 1969. At the time of their separation the parties were living on a farm which they owned and farmed at Tangiteroria, near Whangarei.

By the time of the hearing before the family Court the parties had agreed that the basic approach to the division of the matrimonial property was equal sharing in terms of the Act. The result of the Family Court decision was a valuation of the matrimonial property assets at $669,379.36 after a credit adjustment was made in the husband's favour for post-separation improvements to the farm.

The Family Court order required the parties to share certain pre-separation debts equally. Those debts totalled $42,088. Each party's half share, therefore, amounts to $313,645.68. The result of the judgment of the Family Court was that in general the husband was to be responsible for post-separation debts and was to be entitled to post-separation income.

On this appeal the issues as set out in the comprehensive and helpful submissions of Mrs Postlewaight were as follows:

(a) Whether on the evidence the appellant is entitled to be compensated by the respondent for loss caused by the restraining order made on 9 November 1992.

(b) Whether on the evidence the losses sustained by the appellant in respect of stock including future loss should be shared by the respondent.

(c) Whether on the evidence the appellant is entitled to claim a fee for managing the farm.

(d) Whether on the evidence the appellant is entitled to claim an adjustment to the respondent's share of matrimonial proceeds for groceries and expenses he has paid off the farm income.

(e) Whether the appellant is entitled to a credit in respect of the liabilities owed by the parties as at date of separation.

(f) Whether the appellant is entitled to a credit for substenance of matrimonial property by use of his separate asset the Red star tractor purchased on 20 January 1992 and used to produce farm income.

Issues (a) and (b) were dealt with together.

The principles that should guide me on this appeal have been adverted to by the Court of Appeal in various decisions. For example, in ***Aldridge v Aldridge*** [1983] NZLR 576 Cooke, P. said in relation to the discretions to be exercised under the Matrimonial Property Act,

> "The ordinary constraints on appellate review of discretionary decisions must apply with special force when the statutory criteria are so wide." (p.580)

In ***Haldane v Haldane*** [1981] NZLR 554 at 558 the Court said:

> "... this Court must not be taken as encouraging appeals in this field. If Judges address themselves broadly to the matters indicated in our judgments in this case, there will be no disposition to disturb the results on appeal."

Whist that comment was not made directly in relation to the general discretions exercised under the Matrimonial Property Act, I accept it as being apposite to my task on appeal. It is also worth noting that the Family Court is a specialist tribunal and its decisions should be regarded on that basis.

In the present case there was a three day hearing before the Family Court, including both affidavit and *viva voce* evidence and cross-examination. Having set out the principles which I consider should be followed in determining this appeal I would add that if I am satisfied that the Judge was wrong in relation to any of the findings that me made then, of course, I would not hesitate to allow the appeal in the appropriate fashion.

I have set out above the issues raised by the appellant. Effectively they fall into two categories. The first involves criticisms of the Judge's findings of fact and the application of his discretion to those facts. The second category is an allegation of failure to deal with certain matters at all. The appeal did not seek to review the Family Court Judge's findings on questions of law. The submissions, therefore, required a review of the evidence in a number of areas.

The first ground of appeal involves submissions that raised allegations of abuse of process. The principle is, that where a legal process, not itself devoid of foundation has been perverted to serve some extraneous purpose such as extortion or oppression, an action will lie at the suit of the injured person. What is alleged in this case is that a restraining order was obtained for an ulterior purpose. Mr Mathias, counsel for the respondent, raised the question as to whether it was appropriate to address such an issue in the context of a matrimonial property claim without separate

proceedings having been brought in tort. I will assume for the purposes of this judgment that the complaint is available.

However, if it is to be established then the elements referred to in the decision of ***Goldsmith v Sperrings Ltd*** [1977] All ER 566 C.A. must be present. In that decision the matter was put in this way. That what the defendants have to show in order to establish abuse of legal process was that in starting and continuing his actions, the plaintiff had an ulterior purpose in that he was seeking a collateral advantage for himself beyond what the law offered as a remedy for his grievance and that, but for that ulterior purpose, he would not have started proceedings at all.

The evidence in this case does not satisfy me that Mrs Harlow obtained the restraining order for an ulterior purpose. The principal evidence relied upon by the appellant to establish this contention is a statement by Mr Styles who is Mrs Harlow's brother. That statement was made in answer to a question from the Family Court Judge and Mr Styles acknowledged that he thought that the restraining order could assist in obtaining a settlement. Mr Styles' comment is not in my view sufficient to establish that as the purpose of obtaining the order. In fact the written record makes it clear that the purpose of obtaining the order had to do with concern over the sales of stock. That concern was made clear in correspondence preceding and leading up to the obtaining of the order. However, in my view that is not the end of the matter. Quite apart from the tort of abuse of process it seems to me that if it were established in a matrimonial property case that one party had acted improperly and had adversely affected the position of the other, that could well be a matter to be taken into account in the exercise of the Court's discretion.

The abuse of process submission was made in the Family Court and the learned Family Court Judge's finding on the matter is at page 7 of his decision. He held that for the reasons he set out, the husband suffered no loss as a result of the making of the order. I have not been persuaded that the Family Court Judge was wrong.

A major part of the loss claimed on behalf of the husband is related to cows which did not get into calf in 1992. The allegation was that the reason for this event was the nonavailability of funds for fertiliser and veterinary expenses and that that nonavailability was due to the restraining order.

After reviewing the evidence I am satisfied that the reason for this event was the failure of Mr Harlow to appreciate the condition of the stock at times prior to the restraining order being made. The appropriate times for the application of fertiliser in 1992 and for any veterinary attention to the stock was prior to the restraining order.

Apart from that, the main complaint relates to the nonavailability of funds for fertiliser in March of 1993. On my review of the evidence I am not satisfied that there was a refusal to make funds available for that purpose in March. The exchange of correspondence in that month is mainly concerned with the need to sell stock because of dry conditions. In one letter there is a statement, that if money had been available fertiliser would have been applied from January onwards. But, I am not aware of there having been any request for money for that purpose in January.

Reliance is placed on a report from a Mr Page of the Ministry of Agriculture and Fisheries, in August 1993. In that report Mr Page says that

fertiliser should be applied immediately, i.e. in August. He also says that he saw the beef cattle in March and thought they were in excellent condition, despite the dry weather of that time, but he considered that they had lost condition between that time and August. By the end of August the appellant had in fact applied fertiliser to the farm.

The Family Court Judge also noted the understandable alarm on the part of Mrs Harlow and her advisers at an intention to spend over $13,000 on fertiliser during the 1992/93 year, when in previous years the fertiliser accounts had not exceeded $4,000 to $5,000 per annum.

It should also be noted that the restraining order was made by consent.

Mr Mathias, pointed out that the restraining order was reviewed on two occasions by Judges as a result of an application by the husband for discharge of the order and that on neither occasion was there any suggestion that the wife's actions in relation to the order were improper. I am not satisfied that there was any improper action or attitude on the part of Mrs Harlow in relation to the restraining order which resulted in loss to Mr Harlow. Indeed, in large part it seems to me that what happened on the farm was due to Mr Harlow's management decisions. I am, therefore, not persuaded that the Family Court Judge was wrong.

The second issue raised on appeal was a claim by Mr Harlow for a management fee for the period between the separation and the hearing of the claim. Mrs Postlewaight's submission records that the Family Court decided that the appellant was not entitled to a management fee because -

1. the appellant had the use of the wife's equity in the farm;

2. he had not paid any interest to the wife for the use of her equity; and

3. there was uncertainty as to the benefits which the husband has received from operating the farm since separation.

This seems to be an accurate summary of the Court's findings.

The Judge held that Mr Harlow should be allowed to keep any profits earned from the farm, excluding therefrom, cash held on behalf of the parties from the sale of stock, but that he should not receive any management fee. The Judge said that he was satisfied that any management fee to which the husband might be entitled was more than compensated by the benefit he had received from the use of the wife's capital invested in the farm and the money he had received from the farm.

The appellant challenges these findings and in particular, challenges the finding that the husband received undisclosed benefits. I have concluded that there is certainly some evidence to support the Judge's finding on this point, and it is clear that the husband had the benefit of the wife's equity. He has had drawings, he has claimed expenses in the farm accounts which are usual and proper, but which are of benefit to him personally. I conclude that the finding was one properly within the discretion of the Judge who had the advantage of assessing the evidence as a result of cross-examination.

Matrimonial Debts

The appellant claimed that as at the date of separation there were certain liabilities which were not taken into account in the Family Court. It became clear when this submission was examined that, in fact, there was

only one debt which fell into that category. That was an amount of $5,500 being a loan from M. J. Harlow. That loan appears to have been overlooked. Counsel for the respondent agrees that it should be included.

The approach of the learned Family Court Judge was that the pre-separation debts should be shared and that post-separation debts incurred by Mr Harlow should be met by him. In her submissions to me Mrs Postlewaight took the matter further than the proposition set out above. Her submission concentrated primarily on an amount of $50,000 borrowed by the appellant from his mother after separation. At least $30,000 of that was used to pay off loans which have been included in the pre-separation list of debts. Indeed, one of those loans seems to have been over stated by about $5,000, but this is not challenged by the respondent. The balance of the $50,000, i.e. some $20,000, went into the farm accounts.

Mrs Postlewaight submits that an allowance should have been made for this in the exercise of the Court's discretion. It seems that at least in part this money in the farm accounts was spent on capital improvements.

The appellant has been given credit for capital improvements. The appellant submits that the Family Court Judge did not take this $50,000 loan into account. In my view this conclusion cannot be drawn from the judgment.

The evidence was before the Family Court Judge. He turned his mind to both pre-separation and post-separation debts. Just because he did not make any specific reference to this debt, does not mean that he did not consider it. In any case, it is consistent with the general approach to the exercise of the Family Court Judge's discretion, that responsibility for this

post-judgment debt should remain with Mr Harlow. I have not been persuaded that I should vary the judgment in relation to the pre-judgment debt of $5,500.

Mrs Postlewaight's next submission was that the Family Court failed to consider the sustenance of the matrimonial property by a separate asset being the Red Star tractor. Counsel for the appellant was unable to place a figure on the value of this sustenance. I am inclined to agree with counsel for the respondent that in so far as the tractor sustained the farm, the appellant has benefited from the income. I am not persuaded that an adjustment should be made to the Family Court's findings in relation to this issue.

The final issue raised on behalf of the appellant was that the Family Court failed to consider the question of payment of the respondent's expenses after separation, and that there should be an adjustment to the order to take account of this issue. The amount involved is $5,908. It was an amount paid from the farm account for groceries and the like, for Mrs Harlow. From my brief perusal of the farm accounts it seems to me that the benefits that each party has obtained are much too complex to enable an assessment of the party's respective benefits. Counsel for the respondent has pointed to benefits which the appellant received, which would also have to be taken into account, if the amount paid for Mrs Harlow's benefit were to be allowed. In any case it appears that the Family Court Judge did take these payments into account. When he was considering the claim for the management fee he noted that money had been paid to the wife until August of 1993. That seems to be a clear reference to the amounts that are the subject of this submission. I am not persuaded that the judgment should be varied.

The Family Court was faced with a very complex claim comprising a variety of assets. The Judge had to review a very large quantity of affidavit evidence, the transcript of cross-examination ran to 89 pages. He made an order which, subject to the one matter to which I have referred, I am satisfied dealt fairly with all the issues raised before him. His orders are varied by requiring that the $5,500 pre-separation loan from M. J. Harlow be included in the debts to be shares, otherwise the appeal is dismissed.

Although I initially reserved the question of costs, I am now able to deal with it. In accordance with the usual practice no costs were awarded in the Family Court. Counsel acknowledge that costs should follow the event. However, because of the nature of these proceedings I intend to award costs at a lower level than would be the case for civil proceedings.

The appellant is to pay the respondent costs of $1,000.