MEDIUM PRIORITY

NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP No. 57/96

BETWEEN EACOCK

Appellant

A N D ENOKA

Respondent

Hearing: 6 June 1997

Counsel: G B Clarke for Appellant
M L Wright for Respondent

Judgment: 6 June 1997

ORAL JUDGMENT OF HAMMOND J

Solicitors:
Pegg Ayton Gordon, DARGAVILLE, for Appellant
Tompkins Wake, HAMILTON, for Respondent

In this proceeding Ms Enoka sought proprietary interests in property acquired or used by the parties during their four year de facto relationship.

The broad facts are straightforward. The parties met in the late 1980s. Ms Enoka was then 30, Mr Eacock was 27. Ms Enoka had children from a previous marriage. Mr Eacock was share-milking near Otorohanga. By March 1988 the couple had formed a relationship; and by September 1988 they were living together.

Mr Eacock subsequently moved his share-milking operation to a different farm property on a contract which initially ran from 1 June 1989 to 31 May 1992. This required an increase in his herd size. He borrowed money to enable this exercise to be completed. Mr Eacock in fact remained as a share-milker on this property until May 1993.

Mr Eacock was interested in purchasing his own farm. In October 1992 he entered into a contract to purchase land in Northland, with possession to be on 1 June 1993. But by April 1993 the parties had separated. Hence Ms Enoka did not in fact accompany the appellant to Dargaville.

The Judge accepted that in March 1988 that Mr Eacock's farm accounts were as follows:

100 mixed age cows	$19,180.00
10 x 1 year heifers	$ 1,351.00
1 breeding bull	$491.75
Fixed assets	$ 5,205.00
Debtors	$ 4,419.83

These accounts record him as owing the ANZ bank $38,724.89 (term loan $30,907.24, and current account $7,816.95) and owing creditors $1,824.09. He received drawings of $9,216.10 and overall made a loss of $9,901.40.

The Judge found that as at 31 March 1993 Mr Eacock's financial position was as follows:

Assets:	Stock (184 mixed age cows and 34 rising one year heifers)	$166,950.00	
	Shares	$2,543.93	
	Plant and equipment	$14,964.00	
		$169,493.94	(sic)
Liabilities:		$63,475.83	

He received drawings of $27,886.15 and overall made a profit of $120,982.10.

Ms Enoka's claim was with respect to her direct or indirect contributions to the share-milking business over the four years or so I have indicated. It was her claim that she had a reasonable expectation that she would share in the value of Mr Eacock's herd, plant and equipment, and even the farm when it was purchased. She asked the Family Court to declare that Mr Eacock held the Northland property in trust for her to the extent of 40% and to award her the equivalent sum of money. There were certain other claims with respect to personal property.

Mr Eacock denied that there was a relationship of a character which would sustain a claim at all; and, predictably, if such was found, he sought to minimise Ms Enoka's involvement with his farming operation.

Having addressed the facts, the Judge reminded himself of the legal principles set out in the leading decisions in ***Gillies v Keogh*** [1989] 2 NZLR 327 and ***Lankow v Rose*** [1995] 1 NZLR 277. In particular he noted the observations of the then President in ***Gillies*** at p 333 that -

> The practical position now reached in de facto union cases by all the various routes appears to me to be that the Courts have regard to the reasonable expectations of persons in the shoes of the respective parties.... .

The Judge then traversed Ms Enoka's contributions. He found, in her favour, that they had been significant and included such things as feeding out hay, milking, feeding calves, making silage and hay feeding animals, together with working at weed control. The Judge accepted she was a willing worker in the share-milking business, "[and] that she [even] took added responsibility for very short periods when Mr Eacock was away from the farm".

The Judge then addressed whether Ms Enoka's contributions had in fact contributed to the share-milking venture. He found that her contribution had been real, and that it was a distinct springboard to Mr Eacock's financial advancement. He found that the value of the livestock increased by $139,600.73 between 1988 and 1993. And, that it was as a result of that improvement in his financial position which enabled Mr Eacock to gain sufficient

equity to secure the substantial borrowings necessary to purchase the Northland Farm. The Judge also found that whilst there was not a direct contribution by Ms Enoka to plant and equipment, her contributions to the herd produced income which enabled Mr Eacock to acquire plant and equipment.

The Judge correctly also canvassed whether Ms Enoka had herself received benefits from the relationship. He was satisfied that the value of the contributions made by Ms Enoka to the property owned by Mr Eacock significantly exceeded the value of the benefits received by her from the relationship.

As to whether there was a de facto relationship, the Judge found that having regard to all the relevant factors there was such; and that Ms Enoka did have the expectation of an interest in the herd and farm.

On the issue of quantum, the Judge noted that the matter necessarily had to be approached in a broad way, and that the interest to be awarded to Ms Enoka must reflect her contributions, the amount of unjust enrichment accruing to Mr Eacock, and the amount of Ms Enoka's sacrifice over 4½ years which, as the Judge said, "is a moderate period of time". He held that Ms Enoka was entitled to an interest in the herd sale proceeds and share-milking profits which could be traced into the farm property. He awarded her $55,000.00. That amount was to be paid within three months from the date of judgment with interest at the rate of 11% from the date of judgment until the date of payment. Certain orders were made with respect to chattels. In a subsequent judgment

delivered on 23 July 1996 the Judge awarded the respondent costs of $6,400.00, and disbursements of $2,494.00.

Against those judgments Mr Eacock now appeals. The first ground of appeal is that the Judge failed to give appropriate credit for the appellant's asset position at the commencement of the relationship, or at the point in time when it was found an expectation to share was reasonable.

The second is that the Judge should not have given the respondent credit for an increase in the value of assets following separation. Effectively the argument is that the respondent's claim should crystallise at separation.

Thirdly, it is contended that the assessed contribution of $55,00.00 was flawed.

Fourthly, it is said that insufficient weight was given to various circumstances.

Fifthly, there is an appeal against the costs awarded in the lower Court.

Before turning to these particular arguments, there are some general observations I should make. Although particular points on appeal are advanced, realistically Mr Eacock has invited this Court to review the whole case. The nature of the challenge in reality was no less than an attempt to have this Court, on appeal, re-open the whole assessment. Any argument along those lines

obviously faces major difficulties. The parties are patently now at each others throats; Ms Enoka seeks to extract what she regards as her proper due from Mr Eacock. Mr Eacock has blatantly attempted to write down the relationship and whatever Ms Enoka may be due for. Whilst it is true that on review this Court will undertake the responsibility of reviewing factual findings where error is patently demonstrated, in a general way the appellant faces the stiff hurdle that the Judge had the advantages of hearing the parties and seeing them. And he made findings of fact, not all of which redounded to the benefit of the respondent. But before this Court could interfere it must be shown that the Judge was wrong. It is not a matter of this Court substituting its own judgment for that of the Family Court Judge.

Against that background I turn to the particular points on appeal.

The first and second points overlap to some extent. The appellant does not contend on this appeal that there was no de facto relationship. But Mr Clark says that the Judge did not find there to be a reasonable expectation of contribution or sharing at the outset of the relationship. And that the Judge gave the respondent the benefit of the increase in value in the relevant property after separation. Thus, it is really being said the overall periods of relationship and possible contribution have been wrongly assessed.

The Judge's finding of fact, which must be respected, is that there was no expectation at the outset of the relationship. He appears to have thought that it came into being later, and was very distinctly in place by 1995. But there is no

finding as to exactly when the expectation arose. But I think I can fairly say on the Judge's own review of the evidence, that it cannot have been all that long after the parties met that the expectation arose; certainly by late 1988. In my view there is nothing in that point. But just as clearly Mr Clark is right to say that post separation increases in value should be excluded. I think a fair period for calculation purposes is just over four years, from the end of 1988. And it is artificial in this case to say the relationship and the period of expectancy did not more or less match.

There is also some overlap between points three and four on appeal, which go to quantum. The Judge did not indicate precisely how he arrived at the figure of $55,000. But that is not necessarily fatal. As Gault J observed in ***Nash v Nash*** [1994] 12 FRNZ 446 at 449:

> It is not possible to determine from the judgment and the valuation evidence precisely how the award figure of $50,000 was arrived at. It is not to be undermined simply for that reason, however. This is a jurisdiction in which the Judge is required to exercise a broad discretion having regard to the whole of the evidence of the relationship.

The Judge appears to have reached the figure of $55,000 in this case on the totality of the evidence before him. In particular, he noted that the 1988 stock figures were at purchase price; and a 1994 valuation was at market value. The figures in that valuation are quite close to the appellant's own 1995 accounts. The Judge found that the increase in value of stock in the relevant period was, rounded off, $140,000. But plant had also increased in value and the Judge found that there had been a contribution by the respondent in the sense given by the Judge to the accretions of plant. Implicity, the manner in

which the Judge was approaching the problem was that of a "before and after" assessment: the position with respect to the relevant property at the commencement of the expectancy at the end of 1988 as compared with the situation when the relationship ended in 1995. Such an approach gives a broad approximation of the proprietary gains made during the relevant period. In my view it was an entirely appropriate way to approach the issue, at least in the context of this particular case.

It is quite correct to say, as Mr Clark did, that other factors would have to be allowed for; such as that certain numbers of cows were milked off property at some times, and such like factors. But those sorts of things have to be viewed in the round in assessing the overall gains made to the relevant property over the relevant period.

As at the date of separation in 1995 the respondent had stock worth, again rounded off, $170,000, and plant of $15,000. That compared to stock of $21,000 in 1988 and smaller figures for plant. Mr Clark said the 1988 figure was unrealistic. But, with respect, it is clear that the figures in the 1988 accounts were purchase price figures. If the appellant had wanted to establish some other higher figure, evidence should have been led. The Judge was quite justified in acting on the available evidence. In my view there was evidence to sustain the Judge's finding of an increase of $140,000 in stock values in the relevant period. Taken in the round, that is including plant, the gains could well have exceeded $150,000.

The next issue under the broad head of quantum is as to the respondent's contribution to the gains. The Judge chose to proceed, not on a percentage basis, but on the footing of finding a broad lump sum. He found, and these findings must be respected for there was evidence on which he could have reached them, that :

> Ms Enoka's work did contribute to the increase in value of the herd. Her work in milking, moving stock, calving cows, rearing calves, and in vetting the animals contributed directly to their phsyical welfare. Her work in fencing, making hay and silage and in general farm maintenance would have contributed indirectly to their welfare. I am satisfied that Ms Enoka's work freed Mr Eacock to do other work and because no wages were paid to Ms Enoka for her efforts more money was available to Mr Eacock to purchase cows to increase the herd numbers, and that Ms Enoka's efforts assisted in the breeding of sound replacement heifers, again to increase herd numbers. These efforts I find increased the capital value of Mr Eacock's herd, as well as assisted him in producing income from them. On the evidence I am not able to find that Ms Enoka made a direct contribution to the acquisition or the increase in value of the plant and equipment but I find that Ms Enoka's contributions to the herd produced income which enabled Mr Eacock to acquire plant and equipment. Accordingly the increase in value of the plant and equipment is to be taken into account.

Mr Clark's principal concern is that $55,000 for four or so years, when domestic contributions had already been said to have been balanced out by other benefits, was excessive. On the face of it the award was close to one-third of the found gains in the value of stock and plant. And, I suppose, another yardstick is to divide $55,000 by, say, 4.5 years to yield $12,222 per annum as a capital sum for each year of the respondent's work. By comparison the appellant received drawings of $9,216 in 1988, and $27,886 in 1995.

But the question for this Court is: can it be said that the particular assessment is so wrong that this Court ought to interfere? The figure is undoubtedly high. However, I am not disposed to interfere with it, for two

reasons. First, the Judge had to assess the qualitative impact of the respondent's work in these ventures. He clearly considered such to have been of distinctive value. That finding was open to him on the evidence and it should be respected. Second, for some reason the respondent did not claim interest on her assessed share from the date of separation. But she has been held out of her funds. And, in my view, she would have been clearly entitled to interest from separation. I refer to ***Leary v Patterson***, (CA 221/95, 30 October 1996 per Gault J at p.13). Thus, even if I were to interfere in the Judge's assessment I would have awarded interest from separation in early 1993. The resultant interest would have brought an award of, say, $40,000 roughly into line with the figure actually assessed by the Judge at $55,000.

In my view, the award of $55,000 should stand.

Then it was said that costs should not have been awarded in the Family Court, on the analogy of matrimonial property claims. I do not agree. In the first place, I would not wish to be taken as agreeing that costs cannot be awarded in a matrimonial property claim. They can be, and increasingly are, awarded. In my view, the argument that matrimonial property claims are for the benefit of both parties is, as a very general proposition, fallacious. But even leaving that to one side, this is not a matrimonial property claim. The respondent had to resort to the general law. The usual rule that costs should follow the event should obtain; the appellant should therefore be required to make a reasonable contribution to the respondent's costs. Given that approach, I am not disposed to interfere with the assessment of costs in the Court below.

The appeal will therefore be dismissed. The judgment in the Court below will stand save that the sum of $55,000, together with interest thereon at 11% from 11 June 1996, is to be paid within 28 days from today's date.

That leaves the question of costs on this appeal. The respondent will have costs of $3,000 together with disbursements, if necessary as fixed by the Registrar. Those disbursements will of course include the setting down fee.