IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2008-443-000321

IN THE MATTER OF	The Property (Relationships) Act 1976
AND	
IN THE MATTER OF	An Application for Orders
BETWEEN	VAB Appellant
AND	ACRB Respondent

Hearing: 22 October 2009 (at Wellington)

Appearances: P J Radich and L P Radich for Appellant
R C Laurenson for Respondent

Judgment: 11 December 2009 at 3pm

I direct the Registrar to endorse this judgment with a delivery time of 3pm on the 11th day of December 2009.

RESERVED FINAL JUDGMENT OF MACKENZIE J

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[1] In my interim judgment delivered on 21 May 2009, I left open a number of matters for further submission. Following memoranda, a further hearing was held on 22 October 2009. Following the helpful submissions presented at that hearing, I am now in a position to give a final judgment.

[2] The first issue to be addressed is the outcome of my findings concerning the Woods dairy unit. My conclusions on the status of the relevant interests in that unit were summarised in paragraph [34] of my interim judgment. At paragraph [57], I

noted difficulties in quantifying the consequences of those findings. The further submissions have greatly assisted me in this regard.

[3] The first task is to quantify the value of the right to acquire the five sixth interest under the 2002 settlement agreement, which I have held is relationship property. The final terms on which that acquisition was made by the respondent were contained in a deed which constituted schedule 5 to the deed of distribution entered into in 2006, referred in paragraph [8] of my interim judgment. Schedule 5 is variously described as "Deed of Sale of Woods partnership" and "Deed of Transfer of Woods dairy unit". That difference in nomenclature highlights a point which it is necessary to make. In my interim judgment I referred, somewhat broadly, to the Woods dairy unit. As I noted in paragraph [6] of the interim judgment, that had been, from 1985, jointly owned by the respondent's mother and father. The property had been farmed by a partnership which initially comprised the respondent's mother and father, and, at the time of settlement in 2006, comprised the executors of his father's estate and his mother. The Woods dairy unit, as referred to in my interim judgment, includes the farming operation conducted on the Woods dairy unit land. That farming operation was conducted by the partnership, and that was the only operation conducted by the partnership. Accordingly, the assets to be taken into account include all of the assets of the partnership. Those assets are all assets of the farming operation conducted on the Woods dairy unit. They include, as a significant item, shares in Fonterra Limited, the holding of which is a right and requirement of the dairy farm operation. What is required, in quantifying the effect of my conclusion that a five sixth interest in the Woods dairy unit is relationship property, is to apply the calculations used in the deed of transfer of the Wood partnership. The figures that were used in that deed were from the accounts as at 30 June 2005. Those accounts reflected a recent market valuation of the Woods dairy unit.

[4] In my interim judgment, I indicated that the property to be valued was the right to acquire the remaining five sixth interest in the Woods dairy unit under the 2002 settlement agreement. Mr Laurenson submits that that right had no value, as the right to acquire was subject to the payment of a consideration equal to the full market value. It is of course true that the deed provided for payment of full

consideration, in the sense that the various credits and payments provided for equalled the book value of the assets. However, that approach does not correctly reflect the intent of the interim judgment. The ultimate fruit of the settlement of the litigation, for the respondent, was the acquisition of the whole of the Woods dairy unit. It is that which constitutes the relationship property. But, the value to be attributed to that fruit of the litigation must reflect the full terms of the settlement agreement. The settlement involved a complex interrelationship of claims. The tangible outcome, for the respondent, was that he received the Woods dairy unit, subject to payment of some monies from external sources (that is, not themselves a product of the settlement) as well as credits from other aspects of the settlement with other family members. I consider that the appropriate value to be placed on the right to acquire the Woods dairy unit is the difference between the value of the unit, as attributed to it by the settlement agreement, and the external funds payable by the respondent to acquire that interest.

[5] By 30 June 2005, significant imbalances in the accounts of the partners (the estate of the respondent's father, and his mother) had arisen. The total equity in the partnership (after deducting liabilities of $63,286 which were assumed by the respondent) was $2,532,097. The share of the estate was $1,893,516 and the mother's share was $638,581. The respondent's interest acquired under the will was one third of the father's interest. I described that in paragraph [34](a) of my interim judgment as a one sixth interest in the Woods dairy unit. In fact, the significant change in capital accounts between the date of death and 30 June 2005 makes that description inappropriate. It is more accurate to define the interest covered by paragraph [34](a) of my interim judgment as a one third share of the interest of the estate in the Woods partnership. That interest, as I have held, is the separate property of the respondent.

[6] Under the deed of sale, the whole of the estate's interest in the Woods dairy unit was transferred to the respondent. The consideration for the transfer of the estate's interest (valued at $1,893,516) was provided for in cl 2.2(a) and (b). Under cl 2.2(a) the respondent was to offset his equitable interest under the will. That interest had a value of $632,005. As that interest was the separate property of the respondent, it is, for present purposes, to be excluded from the calculation. What is

relevant is the consideration payable for the remaining two thirds of the estate's interest, and for the mother's interest.

[7] Payment of the purchase price for the acquisition of the remaining two thirds of the estate's interest (a value of $1,261,511) was to be satisfied in accordance with cl 2.2(b). The amount was payable to the respondent's sister M. Part of that purchase price came from other benefits which the respondent obtained pursuant to the settlement. Under cl 5 of the deed of distribution which effected the settlement, the respondent was awarded a debt of $403,737 owing by the Wairoa Trust to the estate as further provision out of the estate. That was supplemented by a payment from his sister J of $96,263 (making the amount up to the $500,000 which had been provided for in the 2002 settlement agreement) less a payment by him to J under cl 4.1 of the deed of $41,660. That sum (a net $458,340) was applied in part payment of the consideration payable to M. The balance of the purchase price payable to M was paid by taking over the existing partnership debt of $63,286 to which I have referred, and by external borrowings, of about $750,000.

[8] Payment for his mother's share in the partnership, which amounted to $638,581, was provided for in cl 2.2(c). The respondent covenanted to pay that amount on demand. That obligation was in turn subject to a covenant by his mother, in cl 9 of the deed of distribution, to forgive that debt.

[9] The overall effect of that is that the net value of the Woods dairy unit ($2,532,097) less the respondent's share under the will ($632,005) constitutes $1,900,092. Of that, the sum of $1,096,921 was paid by amounts derived by the respondent from the settlement, (being the $458,340 referred to in paragraph [7] and the $638,581 referred to in paragraph [8]) and the balance by external borrowings for which the respondent is liable.

[10] The benefit obtained pursuant to the settlement represents the value of the right to acquire the remaining part of the Woods dairy unit in the manner intended by my interim judgment. Accordingly, the value of the right referred to in paragraph [34](b) of my interim judgment, valued as at 30 June 2005, was $1,096,921.

[11] It is necessary to apply those findings to determine the appellant's interest in the Woods dairy unit. Under s 2G(1) of the Property (Relationship) Act 1976, the appropriate valuation date is the date of hearing in the Family Court, namely August 2007. I consider that it is appropriate to adopt that date. At 30 June 2005, the Woods dairy unit was valued, in total, at $2,595,383. Valuations as at August 2007 were $3,070,000 for land and buildings plus $246,650 for stock, giving a total value, on a comparable basis to the 2005 valuation, of $3,366,650. That represents an increase of $771,267, or 30%. I consider that the appropriate method of updating the June 2005 value of the right to acquire the Woods dairy unit to August 2007 is to increase the value of $1,096,921 by 30% to give a value of $1,425,997. That is relationship property, which must be divided equally.

[12] The position is complicated by the fact that the homestead was included in that valuation, but was separately dealt with in the Family Court judgment. The appellant was awarded one half of the 2007 value of the homestead. I consider that, given the change in the status of the Woods dairy unit which results from the allowing of the first ground of appeal, the appropriate course is to view the Woods dairy unit as a whole, not separating out the value of the homestead. That will, to a marginal extent, favour the respondent, in that his separate interest in the Woods dairy unit will be an interest in the Woods dairy unit as a whole, not, as my interim judgment envisaged, an interest in the Woods dairy unit exclusive of the homestead.

[13] Account must also be taken of the appellant's share of the litigation cost. As I noted in paragraph [14] of my interim judgment, the Family Court Judge had held that one half of the expenditure on the legal proceedings (which totalled $111,618) should be credited to the appellant. Since the effect of this judgment is that the appellant will share in the fruits of that litigation, the appellant must bear a share of those costs. That credit must be reversed.

[14] The next matter left open in my interim judgment was that referred to in paragraph [49], namely a claim for occupational rent. That claim was the subject of the fifth ground of appeal. (I note an error in paragraph [59] of my interim judgment, which should refer to the fifth ground of appeal, not the fourth ground.) Counsels' further submissions did not address this aspect in detail. Counsel for the

appellant adopted an essentially pragmatic approach on issues of interest and occupational rent. Counsel noted that those are discretionary and would give rise to difficulties in terms of apportionment and quantification. Counsel therefore indicated that the appellant would accept an outcome whereby the Family Court's interest award stood but interest was awarded at the current prescribed rate on her entitlements and terms of the Court's judgment from 19 January 2005. Counsel for the respondent submits that there should be an award of $209,233 in favour of the respondent, to reflect the imbalance in the respective current accounts owing to the partnership at the date of hearing at the Family Court.

[15] So far as occupational rent for the Lucena/Mangaehu block is concerned, I do not consider that it is appropriate to disturb the exercise of the Family Court Judge's discretion not to award occupational rent. As to the respondent's contention, that is a new matter on which it would not be appropriate to venture at this late stage. The determination of matters relating to the partnership accounts are not in issue on this appeal. For these reasons, I now conclude that the appropriate course is to dismiss the fifth ground of appeal.

[16] I had, at paragraphs [38] and [39] of my interim judgment, addressed tentatively the possible relevance of the application of the resources of the farming partnership to the farming of the Woods dairy unit, with reference to ss 9A and 17. These could relate only to that part of the Woods dairy unit which is separate property. The evidence does not enable me to make any finding on this aspect. I hold that neither s 9A nor s 17 applies to the respondent's separate property interest in the Woods dairy unit. I therefore now dismiss the second ground of appeal.

[17] As to interest, I have already dealt with the claim for interest in dismissing the fourth ground of appeal. I do however need to address the question of interest on the payment which is now to be made in respect of the Woods dairy unit. In all the circumstances, I consider that interest should run, at the prescribed rate, from the date of settlement of the acquisition by the respondent of the Woods dairy unit. As I understand it, that was 1 July 2006.

[18] A further matter left open in the interim judgment was the quantification of the family debt, dealt with at paragraphs [40] to [45] of my interim judgment. At paragraph 58, I suggested that that should be simply a matter of arithmetic. The parties' submissions are still at odds on the point. Counsel for the appellant quantifies it at $464,143. Counsel for the respondent says it is $415,017. The difference is $49,126, which apparently remains in the 2007 balance sheet of the partnership. Mr Laurenson says that the reason this was not discharged is unknown to counsel. There is no evidence that it remains a real liability. I find the relevant amount of the debt is $464,143.

[19] I consider that the appropriate course is to reverse the decision of Judge O'Donovan by directing that no deduction is to be made on account of the family indebtedness appearing in the partnership accounts at the date of separation as referred to in paragraphs [21] to [27] of his judgment of 19 March 2008.

[20] The overall result of this appeal (combining the outcomes in the interim judgment and this judgment) is accordingly as follows:

a) The appeal is allowed as to the first ground of appeal in the following respects:

   i) The finding in paragraph [61] of the Family Court judgment of 19 November 2007 is reversed, and there are substituted declarations that an interest in the Woods dairy unit, to the value of $1,425,997 as at August 2007, is relationship property; and that the appellant is entitled to received one-half of that interest, together with interest from 1 July 2006 at the rate prescribed under the Judicature Act 1908.

   ii) The finding in paragraph [65] of that judgment is reversed;

b) The appeal is dismissed as to the second ground of appeal.

c) The appeal is allowed as to the third ground of appeal, to the extent that the finding in paragraph [27] of the Family Court judgment dated 19 March 2008 is reversed and there is substituted a declaration that, in calculating the value of the farming partnership between the appellant and the respondent, the interfamily indebtedness of $464,143 subsequently forgiven is not to be taken into account as a liability of the partnership.

d) The appeal is dismissed as to the fourth, fifth and sixth grounds of appeal.

[21] The final matter to address is costs. The appellant has been substantially successful, to an extent which in my preliminary view justifies an award of costs in her favour. Counsel for the appellant has sought award of costs in an amount of $50,000, for reasons set out in the submissions following the interim judgment. Counsel for the respondent submits that costs should be reserved. I consider that there is merit in a pragmatic approach such as that suggested by counsel for the appellant, in the interests of achieving finality in this matter. However, in the light of the request by counsel for the respondent, I consider that the preferable course is to reserve costs so that the position may be considered now that the final outcome is known. Costs are accordingly reserved. Counsel may file memoranda.

[22] I also reserve leave to apply in respect of any other matters which may arise as to the implementation of this judgment.

"A D MacKenzie J"

Solicitors: Radich Law, Blenheim for Appellant
Billings, New Plymouth for Respondent