IN THE COURT OF APPEAL OF NEW ZEALAND CA 138/83

BETWEEN THOMAS REX GILES of Wellington, Company Director

Appellant

A N D GWENDOLYN VERONICA GILES of Wellington, Divorced

Respondent

Coram: Woodhouse P
Richardson J
McMullin J

Hearing: 17 July 1984

Counsel: J A L Gibson with I W G Cochrane for appellant
M P Reed with Miss Jocelyn Afford for respondent

Judgment: 27 July 1984

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

After a marriage which lasted 20 years the parties to this appeal separated by court order on 25 October 1974. There were 5 children of the marriage: one died in 1963 and the remaining 4 children were all teenagers at the time of the separation. The parties are now divorced but it is convenient to refer to them as the husband and the wife.

In 1975 the wife instituted proceedings under the Matrimonial Property Act 1963 but as the hearing in the High

Court did not commence until 7 July 1980 they fell to be determined under the Matrimonial Property Act 1976. Because of the issues involved and the nature and complexity of the husband's business affairs Ongley J dealt with the questions arising between the parties in 2 stages. In his interim judgment of 15 May 1981 he determined what property was subject to sharing as matrimonial property and fixed the respective shares of the spouses as two-thirds to the husband and one-third to the wife, except for an adjustment to be made under s 11(3) of the Act compensating for the fact that the home in which the family lived in Wellington could not be shared equally by the parties because it was the property of one of the husband's companies. Then after extensive reports had been obtained from 2 share valuers pursuant to s 38 of the 1976 Act and considerable further evidence, largely as to asset values, had been heard, the Judge delivered a further and final judgment on 22 September 1983. In the result he ordered the husband to transfer his interest in a house property in Plunket Street, Wellington, to the wife and to release the charge thereon in favour of the husband; to deliver a Goldie painting to her forthwith; and to pay her $310,070 in 2 successive payments with interest at 11 per cent per annum on so much thereof as should from time to time remain unpaid. The wife was ordered to transfer to the husband all shares held by her in any of the companies in the Consolidated Traders Group of companies, and the parties were ordered to refund to the Crown the amount of fees and expenses of

the valuers totalling $23,674.03 in the proportions of two-thirds by the husband and one-third by the wife.

The grounds for the appeal may be conveniently grouped under 5 heads. The first concerns the Judge's finding that the husband's shareholding in Consolidated Traders Limited and its associated companies is matrimonial property, not his separate property, the contention for the husband being that that shareholding should have been traced back to property which he had acquired by gift before the marriage and which was accordingly separate property in terms of s 10(1). The second is concerned with the share values. The third is the contention that no question of compensation out of matrimonial property for the absence of the matrimonial home arose for consideration. The fourth is concerned with a limited number of largely factual findings made by the Judge. And the fifth is directed to the order for payment by the parties of the valuers' fees and expenses.

The facts are comprehensively reviewed in the judgments of Ongley J and it is not necessary for the purposes of this appeal to traverse that background or to review the considerations which led him to conclude in terms of ss 15 and 18 that the matrimonial property should be divided two-thirds to the husband and one-third to the wife. It is sufficient to refer under each head to any factual matters necessary for an understanding of the points in issue.

(1) Section 10(1)

Consolidated Traders Limited was the financial base from which the husband developed a major venison exporting enterprise which at the first hearing before Ongley J in July 1980 had assets of an estimated gross value of over $6 million. That company was incorporated in 1962 with a share capital of L2,000. One thousand shares were subscribed for by the husband and 1,000 by Mr Higgins, a wealthy friend of both husband and wife. Mr Higgins paid up his shares and lent the husband the funds to pay for his shares. Both the husband and Mr Higgins guaranteed the overdraft of the company and after its early success the husband repaid the loan from Mr Higgins and purchased Mr Higgins' shares from him at par. Before the marriage the husband had acquired by gifts from his family 900 one pound shares in a family company, Hotel Windsor Limited. Those shares were used as security for advances which the bank made to Consolidated Traders Limited and capital dividends derived by the husband following the sale of the hotel building were used to purchase the shares from Mr Higgins and repay the loan from him.

Against that background Mr Gibson submitted that s 10(1) protects the status of the husband's shareholding in Consolidated Traders Limited (and associated companies which originated from Consolidated Traders) as separate property of the husband. That subsection as it stood at the material time read:

> " Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person shall not be matrimonial property unless, with the express or implied consent of the spouse who received it, the property or the proceeds of any disposition of it have been so intermingled with other matrimonial property that it is unreasonable or impracticable to regard that property or those proceeds as being separate property. "

The short answer to that submission for the appellant is that in its statutory context s 10 is directed to gifts and successions during the marriage, not to property acquired before the marriage. Property acquired before the marriage, and whether acquired by gift or by purchase, is and remains separate property unless specifically constituted matrimonial property under the Act. The general rule applying in this case as expressed in s 8(e) (the 1980 amendment has no application in the circumstances) is that:

> " Subject to subsections (3) and (6) of section 9 and to section 10 of this Act, all property acquired by either the husband or the wife after the marriage, including property acquired for the common use and benefit of both the husband and the wife out of property owned by either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned ... "

is matrimonial property. That reference to s 10 protects gifts made to a spouse during the marriage. It is s 9(1) and (2) which reflect the corollary to s 8(e), namely that property of either spouse which is not matrimonial property is separate property and so, whatever form it was in at the time of the

marriage, property acquired by one spouse before the marriage is separate property. But if after the marriage any such property or any gains derived from it or the proceeds of its disposition are used to acquire other property then that last mentioned property, being within the description "all property acquired by either the husband or the wife after the marriage", is itself matrimonial property within s 8(e). And because it is subject to s 8(e), s 9(2) does not preserve as separate property any property acquired out of separate property after the marriage (Reid v Reid [1979] 1 NZLR 572 (CA); [1982] 1 NZLR 147 (PC)).

It follows that in terms of the scheme of ss 8 and 9 property acquired by gift before the marriage is not matrimonial property and s 10 has no application to that property. This conclusion is reinforced by 2 further considerations. The first is that s 10(2) is directed to interspousal gifts, which can obviously occur only during marrriage, and s 10(1) which speaks in terms of a gift of property "from a third person" and to "the spouse who received it" proceeds on the same premise. The second is that if s 10(1) were to apply to property acquired by gift before marriage then that property would become matrimonial property if, with the express or implied consent of the spouse who received it, that property had been so intermingled with other matrimonial property that it was unreasonable or impracticable to regard it as separate property - a result which would not apply under s 9(1) and (6).

But even assuming that s 10(1) can apply where property has been acquired by gift before the marriage, we are satisfied that it does not avail the husband in this case. The protection afforded by s 10(1) before it was recast by the 1983 Amendment applied only to the property itself or to the proceeds of any disposition of it: not to property acquired out of the proceeds of disposition (Reid v Reid) or out of any gains derived from the property.

(2) Share values

Because of the complexity of the financial affairs of Consolidated Traders and associated companies and with a view to avoiding a lengthy hearing before the Judge in which expert valuers on each side would give evidence, the parties agreed to an appointment by the Court under s 38 of a nominee of each party to inquire into the valuation issues and report thereon to the Court. The valuers appointed, Mr P W Brooks and Mr C D Williams, did so. However, it seems that the husband or his advisers took issue with the report in a number of respects and in the end Ongley J allowed the valuers to be cross-examined. Section 38, and subs (2) in particular, does not appear to contemplate that those required to report would be cross-examined on its contents. What the section does provide is for any party to tender evidence on any matter referred to in any such report. Be that as it may the valuers did not resile from the conclusions they had reached in their report and Ongley J, having heard all the evidence,

adopted that report. In the circumstances there is no evidential basis or any other justification which would warrant this Court as an appellate tribunal in rejecting their valuations of the shares and the assumptions on which those valuations were made. Accordingly it is unnecessary to deal separately with Mr Gibson's specific submission that the allowance of 15 per cent to the notional purchaser from the net realisable value of the assets on a notional liquidation was too low. We are satisfied too that Ongley J was entitled to conclude for the reasons he gave that the shares in a company called Stag Corporation Limited, for which the husband had agreed to pay $1 per share, were worth that amount, not the 10 cents per share that the group accountant of the Consolidated Traders Group attributed to them in his evidence.

Finally on this aspect of the case, we are not persuaded that the Judge erred in not making a special (and unspecified) monetary adjustment in favour of the husband in respect of the value of the shares in the group. The companies were in receivership at the 1980 hearings before Ongley J. That was due to liquidity problems and under the management of the husband they traded out of that receivership. Mr Gibson submitted that the husband should be rewarded for that by an adjustment in his favour in respect of the value of the shares. But it was not suggested that the husband was not adequately remunerated by the company for his services to the company. It is a completely different situation from those exceptional cases in which the

post-separation contributions of one spouse in preserving, improving and increasing the value of matrimonial property such as the matrimonial home have been recognised in that way.

(3) Section 11(3) and the matrimonial home adjustment

In 1968 the matrimonial home at 100 Derwent Crescent, Wellington, was sold and the family moved into a substantial house in Hobson Street, Thorndon, purchased by one of the husband's companies. When the separation came about the company required the premises and the wife and children, some of whom wished to reside with her, had no home in Wellington. The parties owned a 900 sq ft beach house at Waikanae and it was agreed between them that it should be sold and the proceeds applied towards the purchase of a home for the wife and children. This was done and the wife has since then lived in the Plunket Street house.

Against that background Ongley J concluded that the parties did not themselves own a matrimonial home at the time they ceased to live together and that the absence of an interest in the family home in Thorndon should be compensated for by equal sharing of an amount of matrimonial property equal to the value of that home. Mr Gibson challenged those findings and put some emphasis on the fact that the beach house had been registered as a joint family home some years before the parties moved from Derwent Crescent to Hobson Street.

There can be only one matrimonial home for the purposes of the matrimonial property legislation. That is clear from the manner in which the expression "the matrimonial home" is employed throughout the Act (for example in s 8(a), s 9(5), s 10(3), s 11(1), (2) and (3), s 12, s 16, s 20(2) and (3), and s 27(1) and (2)). In terms of s 2(1) "matrimonial home":

> " (a) Means the dwellinghouse that is used habitually or from time to time by the husband and the wife or either of them as the only or principal family residence, together with any land, buildings, or improvements appurtenant to any such dwellinghouse and used wholly or principally for the purposes of the household; and
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> (b) Includes a joint family home. "

In the statutory context (a) is the dominant provision and (b), which necessarily refers to the same property for there cannot be 2 matrimonial homes for the purposes of the Act, may well have been included to make it clear that the sharing provisions of the matrimonial property legislation apply to the principal home notwithstanding that it is registered as a joint family home. And where the classification of any property as a particular type of matrimonial property depends on the use to which it has been put, that is determined by the use to which it was being put before the parties to the marriage ceased to live together as husband and wife (s 2(4)). It follows that the matrimonial home of the parties is the dwelling house that is used at the date the parties separated as the only or principal family residence.

Whatever the status of the beach house in that regard at the time it was registered as a joint family home, it is clear from the evidence that the Hobson Street property was the principal family residence at the time the parties ceased to live together. That being so, and since that property was not owned by the parties or either of them, Ongley J was obliged pursuant to s 11(3) to award each spouse an equal share in such part of the matrimonial property as he considered just in order to compensate for the absence of an interest in the matrimonial home. The practical effect of his order was to allow the wife an equal share to that extent instead of the one-third share she was to receive in matrimonial property generally and the Judge measured the compensation under s 11(3) by the value of the Hobson Street property. That was a proper and realistic exercise of his jurisdiction under the subsection.

(4) Miscellaneous

A number of short unrelated matters were raised by Mr Gibson for the husband. One concerned paintings: a Goldie, which Ongley J found was the separate property of the wife, and 5 paintings, which on the eve of the hearing in the High Court were the subject of a deed of gift by the husband in favour of the group accountant of Consolidated Traders, and which the Judge found to be matrimonial property, the value of which was to be brought into account on a final division of property between the spouses.

The Goldie painting was purchased by the husband in the name of Consolidated Traders Limited and paid for with company funds. It was in the matrimonial home in Thorndon. The wife's evidence, which Ongley J accepted, was that the husband had given it to her in October 1968. She said that shortly afterwards he had announced to business guests in the house that he had bought the painting as a gift for her and she went on to say that she knew it had been paid for with company money but that that was a normal occurrence with much of their personal expenditure. Mr Gibson submitted that the painting was an asset of the company; it was not the husband's to give; what was done was not effective as a gift; but if a gift, then it was a family chattel and as such its value ought to have been divided between the parties.

At common law the delivery of a chattel by way of gift to the recipient is a recognised method of transferring ownership of the chattel (Williams v Williams [1956] NZLR 970). The husband was in complete control of the company and in purporting to gift the property to the wife as Ongley J found, he must be taken to have assumed the ownership or power of disposition, whatever entries or adjustments might have needed to be made in the records of the company; and the Judge was entitled to conclude that the painting, a gift from the husband to the wife, was the separate property of the wife pursuant to s 10(2).

The other 5 paintings were family chattels of the parties at the time they separated. But shortly before the

first hearing before Ongley J the husband executed a deed of gift in favour of the group accountant. Section 45 of the 1976 Act prohibits a party who knows that proceedings are pending (and without appropriate consents) from disposing of any of the family chattels and s 44 empowers the Court to set aside dispositions made in order to defeat the claim or the rights of any person under the Act. More broadly this Court has held that the general powers under s 25 and s 33 enable the Court to make proper compensation to one spouse for post-separation acts of the other which, if not compensated for, would in effect alter the sharing intended by Parliament (Walker v Walker [1983] NZLR 560). Ongley J was accordingly entitled to find that the paintings should be brought into account on a final division between the spouses.

Mr Gibson next submitted that the Judge had erred in concluding in the interim judgment that the assets of the unincorporated firm, Giles Trading Company, were matrimonial property. It is not necessary to pursue that matter for in the final judgment Ongley J felt unable to place any value on that business and accordingly did not bring anything into account under that head in deciding on the value of the matrimonial property in which the wife was entitled to share.

Mr Gibson also submitted that a financial adjustment made by the Judge in respect of the Waikanae and Plunket Street properties erred in favour of the wife, while Mr Reed for the

wife submitted that the husband had been credited with two-thirds rather than one-half of the value of the 5 paintings. These matters are so minor in the overall assessment (as are certain other small items referred to by Mr Gibson) that we would not be justified in reopening the final settlement arrived at by Ongley J.

(5) Section 38

Ongley J directed the parties to refund to the Crown the amount of the fees and expenses of the valuers, totalling $23,674.03, in the proportions of two-thirds by the husband and one-third by the wife. The exercise of the jurisdiction to make such an order under s 38 was not the subject of argument before the Judge who did not give reasons for his decision, but it seems that he may well have proceeded on the premise that the parties having agreed in the appointment of Mr Brooks and Mr Williams, they should meet the expenses of that appointment in full. Section 38 (1), (2) and (4) read:

> " (1) The Court may, on any application under this Act, appoint the Registrar of the Court, or such other person as the Court thinks fit, to make an inquiry into the matters of fact in issue between the parties, and to report thereon to the Court.
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> (2) A copy of every such report shall be given to the solicitor or counsel appearing for each party to the proceedings or, if any party is not represented by solicitor or counsel, to that party. Any party may tender evidence on any matter referred to in any such report.

> (4) The fees and expenses of any person other than the Registrar appointed under subsection (1) or subsection (3) of this section shall be paid out of the Consolidated Revenue Account from money from time to time appropriated for that purpose by Parliament:
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> Provided that, if the Court thinks proper, it may order any party to refund to the Crown such amount as the Court specifies in respect of those fees and expenses, and that amount shall be recoverable in any Court of competent jurisdiction as a debt due to the Crown. "

The power to delegate the task of inquiry into factual issues is a specific application in the matrimonial property field of the general jurisdiction which both the High Court and the District Courts have to refer issues for inquiry and report (see Code Rules 438 - 443 and District Courts Act 1947 ss 62 and 62A). In such a case the Registrar or other person to whom the inquiry is entrusted is appointed by the Court in order that the Court by means of the information obtained through him may exercise its judicial functions (Aitchison v Kaitangata Railway and Coal Company (1900) 21 NZLR 149, 150). The reference is part of the trial process. It is designed to facilitate the efficient and expeditious determination of factual issues. Viewed in that way it is understandable why subs (4) deals in 2 separate steps with the fees and expenses of any person other than the Registrar who receives such an appointment. Since he is appointed by the Court to assist it in the discharge of its functions the referee must be paid from the public purse. The subsection then goes on to provide that the Court may order any

party to refund to the Crown such amount as the Court specifies. It does so only if it thinks it proper to do so and in such a case it may order recovery of part only or all of the sum expended by the Crown. There is no presumption that the parties will meet the expenses of the referees. On the contrary, in as much as the inquiry is part of the judicial process and the power to order a refund is exercisable only if the Court thinks proper, there must be a positive reason advanced for calling on the particular parties to pay or contribute to the costs involved.

In making this appointment the High Court would have expected to benefit from the delegation to the referees of the investigation into the share values. The parties also benefited through not having to engage experts who would then function as witnesses in the proceedings. That must have represented a substantial saving to each of the parties and they have the means to contribute to the costs involved. We should add that we were advised from the Bar that the referees initially estimated that their fees would be of the order of $5,000 and Mr Gibson submitted that in the event much of their early work proved to be of limited value and that that factor increased the fees eventually charged.

In all the circumstances it is appropriate for this Court to review the matter afresh in terms of the approach to s 38(4) which we have indicated and we propose to substitute for the order of Ongley J an order that the husband and the wife refund

(in the proportion of two-thirds by the husband and one-third by the wife) $12,000 to the Crown in respect of the fees and expenses.

Subject to that modification of the orders made by Ongley J the appeal is dismissed. As requested by Mr Reed we record that interest at 11 per cent per annum continues to run on the balance outstanding to the wife notwithstanding the partial stay granted by this Court. The wife is entitled to costs in respect of the appeal and the interlocutory hearings in this Court. The least amount that can be awarded taking into account the number of issues involved and their significance, the amount at stake and the earlier interlocutory arguments is $2,500 together with reasonable disbursements as fixed by the Registrar.

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