

This is an appeal against the judgment of Judge JM Doogue, delivered in the Family Court at Auckland. The learned Judge refused the appellant's application under s 24(2) of the Matrimonial Property Act 1976 ("the Act") for leave to file matrimonial property proceedings out of time.

Although the judgment in the Court below was delivered on 4 December 1997, it has taken some nineteen months for the appeal to be heard. The delays stem largely from three different defended applications to this Court. The first application resulted in a decision of Laurenson J given on 17 March 1998, that the appeal was a nullity because of non-payment by the appellant of security for costs. On 6 August 1998, Williams J granted leave to the appellant, pursuant to s39(4) of the Act, to file further evidence on appeal. Thirdly, in a reserved decision issued on 18 March 1999, the late Giles J dismissed an application by the respondent to dismiss the appeal on the grounds that the decision of the Family Court was an interlocutory decision, which was not appealable as of right and which needed leave to appeal. Giles J held, in my respectful view correctly, that an application for leave to bring proceedings out of time was not an 'interlocutory application' and therefore the appellant did not need leave before filing an appeal.

The indulgence of filing further evidence on appeal given by Williams J resulted in voluminous affidavits being filed on both sides. The consequence is that I have much more information before me than was available to the learned Judge in the Family Court. Accordingly, I have greater scope to consider the correctness of her decision than if I had been faced with an appeal against the exercise of a discretionary decision reached solely on a consideration of the evidence supplied to the Family Court.

I shall now set out the facts essential for the determination of this application. Despite their divorce, it will be convenient to refer to the appellant as 'the wife' and to the respondent as 'the husband'. Much of the material filed pursuant to the leave granted by Williams J would be of greater relevance to a substantive hearing than to an application for leave to bring proceedings out of time. It is

therefore unnecessary to descend into the somewhat excruciating detail provided in some of the affidavits.

The parties were married either in 1969 in Mexico or 1973 in Uganda, where they went through a second form of marriage. The wife claimed to have separated from the husband in April 1991. He asserts that the separation occurred in September 1989. The husband applied for and was granted a dissolution of marriage in the Family Court at Kaikohe on 30 March 1993. The time for the bring a claim under the Act as of right therefore expired one year later. The wife's application for leave to bring matrimonial property proceedings was not filed until April 1997.

Both parties worked for the United Nations. The wife still works for that organisation in an administrative position. She seems to have been posted to most of the world's trouble spots where United Nations has intervened, e.g. Angola, Mozambique, Somalia, Haiti and now the Israeli/Lebanon border. The husband, until his retirement, held a high position in the United Nations, although he too has had to visit various trouble spots in the course of duty. When he retired in 1987, he capitalised part of his pension entitlement from the United Nations and received US\$250,000. He continues to receive a United Nations pension of around NZ\$10,000 a month.

At the time of their separation, the parties owned a property in the Bay of Islands. They lived together there for one period. In September 1997, after the wife filed her application under s 24(2) and before it had been heard, the husband applied to the Family Court for an order concerning the sale of this property. An order was made with the consent of the wife's solicitors. Effectively, the proceeds of a sale of the property were shared equally. It is interesting to note that the husband was here invoking the Family Court's matrimonial property jurisdiction, although he could have with an equally certain result, have applied to this Court under s 140 of the Property Law Act 1952 since the property was owned by both parties as joint tenants. The fact that he chose to invoke some provisions of the

Act must be one factor in a consideration of the wife's application to invoke other parts of the Act.

Most of the husband's half share of the property was spent by him in purchasing a property in Nelson where he now lives. Some remains undisbursed. The wife's half is held in trust pending the outcome of this application. There is a property jointly owned by the parties in Scotland known as "The Old Coach House" said to have a value of £80,000 (NZ\$240,000). The wife has a half-share in an adjoining property known as "The Neuk" which is half-owned by her present husband. The husband in these proceedings claims that the wife's share in "The Neuk" is matrimonial property also. She contests this claim. The only other possible item of importance, is a Nigerian artefact known as a "Benin Head" which the wife exported from Nigeria. The husband claims this artefact is worth at least NZ\$600,000. The wife says that she does not know where this artefact currently is and that, in any event, it was a fake. The husband produced an affidavit from a curator of an art gallery who had seen the head in question and asserted that it was not a fake.

There are a number of other chattels which would be considered as matrimonial property including two motor vehicles. The impression I have is that each party's entitlement to chattels was sorted out summarily between them. If these chattels and other minor items, such as a small shareholding, were the only matters in dispute, then there could be no justification for granting leave to bring proceedings out of time.

The wife has submitted actuarial evidence to this Court (not supplied to the Family Court) that puts the value of the husband's superannuation at over 1.1MNZ\$. The husband claims that this figure is grossly excessive and that the true value of the superannuation is in the region of \$259,933. I do not have to make the difficult determination as to the value of the wife's entitlement to the husband's superannuation. That would be for the Family Court at first instance to work out, should leave to bring proceedings be granted. The husband claimed in his affidavit that he had earned the pension over his 30 years of

service for the United Nations and that he was married to the wife for only 13 of those years. However, s 8(i) of the Act is all embracing and covers any pension to which one spouse may become entitled to if the entitlement is derived wholly or in part from contributions made to the scheme after the marriage or from employment or office held since the marriage.

The husband claims that the wife may herself be entitled to some pension from the United Nations, although she says that her entitlement to a pension began only after the separation and therefore her pension entitlement should not be part of any matrimonial property claim. Another factor relating to the superannuation is the husband's bad health. The latest available medical report made some two years ago, indicated that he had serious medical problems but there is no up-to-date statement. He is now aged 73. He has always paid an allowance to his first wife, including part of his present pension. There was apparently some matrimonial property settlement when he divorced her in 1969.

In her decision, the learned District Court Judge mentioned the following "usual factors" to be taken into account when determining whether "the justice of the case" requires that the discretion under s 24(2) be exercised to extend to time. These factors are:

- 1 The delay between expiry of the time limit and the bringing of the application.
- 2 The adequacy of the explanation offered for the delay.
- 3 The merits of the case.
- 4 The prejudice to which the respondent would suffer, particularly when compared to the prejudice to the applicant if the application is refused.

The Judge referred to *May v May* [1982] 1 NZFLR 165; *Beuker v Beuker* (1977) 1 MPC 20; *Ritchie v Ritchie* [1992] NZFLR 266. In the latter case, Anderson J

pointed out that the four factors cited by the Judge (derived from McMullin J's decision in *Beuker*) were not to be taken as a comprehensive code and that the weighting to be given to each aspect is to be decided in the light of the particular case being considered. Anderson J stated he would be wary of placing undue weight on the length of time which has elapsed between the expiry of the time limit fixed by the statute and the bringing of the application.

In the present case, the delay is three years and one month. Clearly the longer the delay, the harder it should be to obtain leave. However, the reported cases show that leave has been granted even when the delay was even longer.

Of greater importance is the reason for the delay. It seems clear that part of the reason has been the problem of communications for the wife caused by her assignments in the service of the United Nations. For example, she was in Angola to October 1992, Mozambique to August 1993, Somalia to August 1994. She went to New York to January 1995. She had a term in Haiti also; at the present time she is in Israel.

The Judge found that the wife knew about the divorce proceedings by May 1992. She must have known that a divorce had been granted because she remarried in August 1993 and had written to the husband's then solicitors for a copy of the order of dissolution. It is her conduct thereafter that needs scrutiny. The Judge noted that the wife swore an affidavit on 21 August 1995 (which was not filed until May 1997) in which the wife said that she had "only quite recently learnt" that her marriage had been resolved. The word "recently" was clearly inaccurate, given her remarriage in August 1993. Her remarriage makes it unnecessary to examine whether she was properly served with the application for dissolution of marriage or not.

Although the wife says that she did not instruct a Mr Hesketh (then a barrister in Auckland) to act for her until January 1992, she wrote to him seeking advice in August 1991. It is not clear what Mr Hesketh did for her. He mentions in his affidavit communication difficulties. He did write to the husband's Christchurch

solicitors in December 1994 but did not exhibit their reply. Mr Hesketh was appointed to the District Court Bench in March 1995 and Mr Faigan was instructed in July 1995. The wife visited Mr Faigan in August 1995 and presumably then swore the affidavit in support of her application for leave to bring proceedings out of time.

Why this affidavit was not filed for another twenty months is unclear. I do not find the explanation of Mr Faigan at all satisfying, i.e. that he was attending to a difficult exercise in amalgamating a number of titles to an accessway necessary to conclude before the Bay of Island property could be sold and that he was doing this at the request of both parties. This exercise was successful as was reflected in the subsequent sale of the property in late 1997. However, the work and negotiations relating to the Bay of Islands property has absolutely nothing to do with the wife's principal claim which is to the husband's entitlement under the U.N. superannuation scheme. There is no good reason demonstrated why the application should not have been filed in August 1995 by Mr Faigan and earlier than that by Mr Hesketh.

The learned District Court Judge looked at the rather meagre evidence before her as to the identity of the property which would be under consideration in a matrimonial property application. She was given no actuarial information as to the husband's pension, nor to any valuation of the property in Scotland, or indeed of any of the other items. She considered that the pension entitlements did not form a substantial part of the estate for division between the parties. In view of the actuarial information now before this Court, this statement cannot be correct, although the District Court Judge is by no means to be criticised for making the statement because of the failure of the wife properly to put forward all available evidence in support of her case for leave to bring proceedings. The wife has only managed to do so because of Williams J's order allowing further evidence to be filed.

The District Court Judge considered that refusal to grant leave would not deprive the applicant of a substantial share of the property because the sale of the Bay

of Islands property was impressed with a trust and because the property in Scotland, "The Old Coach House", was protected by virtue of its joint ownership. The Judge considered that the value of the Scottish properties and the other items would be in excess of any likely amount which the wife would receive as her interest in the pension.

Now that the fuller facts have been disclosed, I do not think that this latter proposition can be asserted with any certainty. It may be the case after a full hearing that what was said by the Judge in this respect will prove to be correct. However, one cannot embark on that exercise. All I am required to assess is whether, in the light of the evidence that came to light as a result of William J's order, the District Court Judge's decision was correct. I do not prejudge what the result of any substantive application would be, other than to say that there appear to be assets of some substance which require investigation under the Act.

The District Court Judge considered the husband's health and the need for finality in coming to the view that to decline the application would not result in hardship amounting to an injustice. She made no order as to costs.

Weighing up all the relevant matters in the light of the information that is now before the Court, I consider that the application for leave to bring proceedings should be granted on a specific condition. That is, that the appellant wife sign a statement in terms of s 9(2) of the Act that her interests in the immovable property in Scotland, i.e. "The Old Coach House" and "The Neuk" may be considered by the Court and that the Act shall apply to her interests in those properties. The husband will have to decide whether to sign a similar statement. If he does not do so, then the Court would have to consider the application in respect of:

- (a) movables including the Benin head (covered by s 7(1)(b) because at least the husband is domiciled in New Zealand; and
- (b) New Zealand immovables.

It would be unfair for the Scottish properties to be excluded from consideration whilst attention was focussed solely on the husband's pension rights and possible in-roads made into his pension entitlement.

I consider that there is sufficient evidence that the wife may have a claim on the merits. The principal asset which could be affected – the pension entitlement – has always been in existence. Justice might still be done, despite the wife's tardiness, if this asset were to be valued as at date of hearing rather than at date of separation. As for the valuable artefact, the Family Court will have to do its best to assess whether it exists and, if so, what it is worth.

While I consider the wife's explanations for the late filing of her application unsatisfactory, there is enough material now before the Court to enable her application to be disposed of fairly. There will be some prejudice to the husband, but his pension entitlement has always been vulnerable to attack under the Act. On balance, I think that justice will be done if the wife is allowed to pursue her claim on the conditions set forth. I stress that the decision of the learned District Court Judge was quite appropriate on the meagre information which the wife chose to supply to the Family Court. However, as stressed earlier, this Court is better informed as a result of further evidence being allowed to be filed on appeal. The husband's invocation of the Act is also a makeweight factor in tilting the exercise of the discretion in favour of the wife's application for leave.

The appeal is allowed. The wife is to file her substantive proceedings in the District Court within 28 days. She is to prosecute those proceedings with considerable diligence. She cannot continue to claim her commitments to the United Nations as an excuse for delaying the litigation. This point was made to her by a Family Court Judge during one of the conferences preceding the hearing.

I urge the Family Court to give this application priority in view of the husband's poor health and the time delay. I think it unlikely that there would be a necessity

for many more affidavits to be filed but I leave that question to the discretion of the Family Court Judge at a pre-trial conference which should be held within an early date, given that most of the documents are filed. I direct that the affidavits filed as a result of William J's orders be added to the affidavits already filed in the District Court and be used at the substantive hearing.

I discourage the parties from arguing about items such as motor vehicles and chattels and urge them to concentrate on the main items which are superannuation (both husband's and wife's), the Scottish properties and the Benin Head (should it exist and should it have any value). The wife should provide promptly an affidavit from someone at the United Nations Pension Office which should settle one way or the other the question whether the wife's pension entitlements are matrimonial property.

The wife has obtained an indulgence. Her inaction in not filing proceedings after August 1995, whether that of her or her solicitor, is inexcusable and is relevant also on costs. She should pay substantial costs for this present appeal which I fix at \$3,000 together with disbursements as fixed by the Registrar. These costs are to be the husband's costs in any event. The 'no costs' order in the District Court must stand.

R. D. Barker J.