

No. 27 of 1981

IN THE PRIVY COUNCIL

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O N A P P E A L  
 FROM THE COURT OF APPEAL OF NEW ZEALAND

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B E T W E E N :

ANTHONY FULTON REID Appellant

- and -

SUSAN ROSEMARY REID Respondent

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CASE FOR THE AMICUS CURIAE

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- 10 1. This appeal relates to the interpretation and application of the Matrimonial Property Act 1976 which instituted a fundamentally new regime of matrimonial property in New Zealand law. The previous law was based, principally, upon the Matrimonial Property Act 1963, which received authoritative interpretation in Haldane v. Haldane [1976] 2 N.Z.L.R. 715, P.C. The nature of the intended reform has been described in Martin v. Martin [1979] 20 1 N.Z.L.R. 97, C.A., where Woodhouse J.

characterised the primary purpose of the Act as being

to substitute for abstract and individual notions of justice a settled statutory concept which must be taken from the Act itself

Nevertheless the statute does not introduce a formal regime of community of property, because it prefers 'the dictates of justice in the individual case ... to theory or philosophy': Cooke J. in Reid v. Reid [1979] 1 N.Z.L.R. 572, 594.

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2. The issues that arise for consideration on this appeal relate to:

(a) The property owned by the husband and the wife at the time of the separation. The various items are catalogued in the judgment of Quilliam J. in the Supreme Court:

Matrimonial Property

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1. The matrimonial home 14 Colin Grove, Lower Hutt.
2. Holiday home, Paihia.
3. Family chattels at Colin Grove.
4. Family chattels at Witako Street.

5. Austin Maxi and trailer.
6. Wife's B.N.Z. current account at  
17 December 1976.
7. Wife's B.N.Z. Nationwide account at  
17 December 1976.
8. Husband's shares in N.Z.T.S. and  
A.B. Con., and Wellington Harbour  
Board stock and Marlborough Harbour  
Board stock.
9. Husband's two A.M.P. policies.
10. Wife's A.M.P. policy.
11. Wife's Northern Building Society  
shares.
12. Wife's money invested in New Zealand.
13. Wife's proceeds of Northern Building  
Society draws.

Disputed Property

14. Other chattels at Colin Grove.
15. Land cruiser, Toyota car and boat.
16. Property at Aglionby Street.
17. Husband's B.N.Z. current account at  
17 December 1976.
18. Husband's B.N.Z. Nationwide account  
at 17 December 1976.

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19. Husband's B.N.Z. term deposit at  
17 December 1976.
20. Husband's share in D.R.G. (N.Z.)  
Ltd.
21. Husband's shares in Fletchers.
22. Husband's unsecured loan to  
Sutherland.
23. Amount invested with Chapman,  
Tripp & Co.

Wife's Property

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24. Wife's bank account in the United  
Kingdom.
  25. Wife's real estate in the United  
Kingdom.
- (b) The division of the former matrimonial  
home:
- (i) The relevant sections are s.11 and  
s.14 of the Act;
  - (ii) Those sections have been interpreted  
by the Court of Appeal in several  
decisions which show how difficult  
it is for one spouse to persuade  
the Court to award him or her a  
greater interest in the matrimonial  
home than a one half share;

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(iii) In the Supreme Court Quilliam J. held that there were no extraordinary circumstances as defined in s.14 of the Act to displace the basic equality of sharing. Although the point was not pursued in the Court of Appeal, Woodhouse J. expressed his agreement with Quilliam J.'s conclusion.

10 (c) The division of other matrimonial property (apart from the matrimonial home and family chattels):

(i) What items of property fall within the category of matrimonial property?

(ii) In particular, what is the status of assets acquired out of the proceeds of the sale of shares in Reid Containers Ltd?

20 3. The pivotal sections upon which the determination of the status of various assets depends are s.8 and s.9. In this case all members of the Court of Appeal preferred to give s.8, and especially paragraph (e) of that section, a literal and liberal interpretation, as against what seemed to be the more restrictive

view adopted by Quilliam J. in the Supreme Court, namely the simple test of ascertaining the purpose of acquisition.

4. A determination of the true construction of s.8(e) of the Act involves:
  - (a) A consideration of the principles of statutory interpretation formulated in s.5(j) of the Acts Interpretation Act 1924 with special reference not only to the paragraph as a whole (in its context) but also to the component words and phrases appearing in that paragraph:
    - (i) 'Subject to ...'
    - (ii) 'all property'
    - (iii) 'acquired'
    - (iv) 'including'
    - (v) 'common use and benefit'.
  - (b) A consideration of the relationship between s.8(e) and s.9(2) of the Act.
  - (c) An assessment as to whether there is any ambiguity in the meaning of s.8(e) and, in particular, whether the word 'acquired' is capable in the context of the statutory provision of bearing the meaning for which the appellant contends; and, if

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so, whether it is permissible to have regard to the provisions of s.8(ee) (as inserted by the Matrimonial Property Amendment Act 1980) as an aid to the interpretation of s.8(e).

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5. If the construction adopted by the Court of Appeal is not correct, it does not follow that the property in question is separate property. It is still necessary to consider whether the husband's shares were themselves acquired with separate property. That, in its turn, raises the question whether the tools employed by the husband in his business were in fact all bought before the marriage or after the marriage with separate property. Is income earned during marriage matrimonial property or separate property?
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6. The husband submits that there was a prior agreement between him and the wife concerning the ownership of the shares in Reid Containers Ltd and of the proceeds of sale. This is an argument that does not appear to have been raised in the lower Courts: it is not referred to in any of the judgments. The submission rests upon s.57(5) of the Act, which has been

considered by the Court of Appeal in Bishop v. Bishop [1980] 1 N.Z.L.R. 9; in Castle v. Castle [1980] 1 N.Z.L.R. 14; and in Illingworth v. Illingworth [1981] 1 N.Z.L.R. 1. The submission involves a consideration of the following questions:

- (a) What is the meaning of 'agreement' in s.57(5)?
- (b) What is meant by the phrase 'by way of settlement of [a] question that has arisen'?
- (c) On the evidence before the Court is there an agreement of the kind protected by s.57(5)?

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7. On the assumption that the disputed assets are held to be matrimonial property it is necessary to determine, both in relation to those assets and in relation to the admitted matrimonial property, in what shares they are to be divided between the parties. The relevant provisions are s.15 and s.18 of the Act, the key issue being whether the husband has established that his contribution to the 'marriage partnership' has clearly been greater than that of the wife. All of the

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Judges who have considered the facts of the case have concluded that the husband has succeeded in that respect, although they have not been unanimous in assessing the precise shares to be allocated to the husband and to the wife. The task calls for an evaluation separately and collectively of the matters listed in s.18 of the Act in order to reach an assessment of the contribution made by each party to the marriage partnership.

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8. The jurisdiction to make the orders in this case is based upon ss. 23, 25, 33 and 34 of the Act. The Court of Appeal ordered:

(1) That current values be fixed for all matrimonial property unless the parties can otherwise agree. In the case of the matrimonial home suitable allowance is to be made for the burden upon the title given in favour of the mother of the respondent husband. For the purpose the case is remitted to the Supreme Court.

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(2) That the matrimonial home and the family chattels are to be divided equally.

(3) That all other matrimonial property in the hands of either party and as defined in this judgment is to be shared in the proportions 60 percent to the husband and 40 percent to the wife.

(4) That the vesting orders made in the Supreme Court are to stand.

A question arises as to whether matrimonial property is to be valued by assessing 'current values', as indicated in the order of the Court of Appeal, rather than by adhering to the terms of s.2(2) of the Act. That subsection requires the value to be fixed as at the date of the hearing, unless the Court in its discretion otherwise decides.

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9. Consequential issues call for consideration with respect to the specific orders to be made:

(a) How is a 'current value' to be fixed for assets that have been made the subject of vesting orders?

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(b) How is a 'current value' to be fixed for assets which since the date of the hearing have ceased to exist in their original form?

(c) What deductions or adjustments (if any) may be made:

(i) in fixing the value of the matrimonial home having regard to  
. post-separation improvements  
. restrictions on title to property;

(ii) in respect of taxation on interest received?

10 (d) Whether interest should be charged on the amount ordered to be paid?

(e) What is the effect of vesting orders made in the Supreme Court and whether those orders should be modified and, if so, in what respect?

10. Subject to the ruling of Their Lordships counsel respectfully proposes to present submissions on the foregoing issues.

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