

Anthony Fulton Reid - - - - - *Appellant*

v.

Susan Rosemary Reid - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 20TH APRIL 1982

Present at the Hearing :

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD KEITH OF KINKEL
LORD SCARMAN
LORD BRANDON OF OAKBROOK

[*Delivered by* LORD SIMON OF GLAISDALE]

This case concerns the interpretation of the New Zealand Matrimonial Property Act 1976 and various orders made thereunder. The matters originally came before Quilliam J. on an application by the Husband. The New Zealand Court of Appeal (Woodhouse, Cooke and Richardson JJ.) allowed an appeal by the Wife and dismissed a cross-appeal by the Husband [1979] 1 NZLR 572. They made an Order that current values should be fixed for all matrimonial property. The Husband now appeals to Her Majesty in Council and the Wife seeks special leave to cross-appeal.

As is usual in litigation of this sort, a great number of issues have been raised as the case has proceeded, and the status and disposal of a wide variety of assets have been in question. Most of these matters have been disposed of as the action has progressed. The issues which have been canvassed before their Lordships and which remain for decision are as follows:—

1. Are the proceeds (now nearly \$500,000) of the sale of shares in a company (Reid Containers Ltd.) built up by the Husband "matrimonial property" or the Husband's "separate property" within the meaning of the Statute?
2. In what proportions should the matrimonial property be divided between Husband and Wife? (With this issue is tied up the Wife's application for special leave to cross-appeal.)
3. Should a Vesting Order stand in favour of the Wife in respect of the family holiday home at Paihia?

4. Were the Court of Appeal justified in ordering "current values" to be fixed for all matrimonial property or should the values have been those at the date of the hearing of the Husband's application?

Their Lordships will consider each of these issues in turn. First, though, they must give some relevant facts. These were fully set out in the judgments below, and can be summarised for the purpose of the instant appeal.

The Husband and the Wife were married in 1955. They have four children, born respectively in 1956, 1958, 1961 and 1964. Two or three years after the marriage the Husband started a business named Reid Containers Ltd. with virtually nothing except some old tools and machinery (his own pre-marital property) and a gift to himself from his mother of \$1,000. Such was his mechanical and business ability that seventeen years later he sold his shares in the business for over \$500,000: it is these proceeds which are the subject matter of the first issue. (Their Lordships are in some position to appreciate the Husband's capacity, as he conducted his own appeal before them with truly remarkable skill and judgment.) The parties separated in 1976; and the proceedings instantly under review were then started.

1. *Construction of the Statute: "Matrimonial" / "Separate" property*

The following are the provisions on which this part of the appeal turns:—

" 8. **Matrimonial property defined—**

Matrimonial property shall consist of—

- (a) The matrimonial home whenever acquired; and
- (b) The family chattels whenever acquired; and
- (c) All property owned jointly or in common in equal shares by the husband and the wife; and
- (d) All property owned immediately before the marriage by either the husband or the wife if the property was acquired in contemplation of his or her marriage to the other and was intended for the common use and benefit of both the husband and the wife; and
- (e) Subject to subsections (3) to (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;

.....

" 9. **Separate property defined—**

- (1) Separate property means all property of either spouse which is not matrimonial property.
- (2) Subject to subsection (6) of this section and to sections 8(e) and 10 of this Act, all property acquired out of separate property, and the proceeds of any disposition of separate property, shall be separate property.

.....

- (6) Subject to section 10 of this Act, any separate property which is or any proceeds of any disposition of, or any increase in the value of, or any income or gains derived from, separate property, which are, with the express or implied consent of the spouse owning, receiving, or entitled to them, used for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either the husband or the wife in, any property referred to in section 8 of this Act shall be matrimonial property."

Section 10 deals with property acquired by succession or by survivorship or as a beneficiary under a trust or by gift.

Section 8(e) and 9(2) are not easy to construe together; and there has understandably been some difference of judicial opinion. ". . . all property acquired by either the husband or the wife after the marriage" in section 8(e) is on the face of it apt to include the proceeds of the shares, which would thus be matrimonial property and subject to division by the court. On the other hand, the business of Reid Containers was built up out of the Husband's pre-marital property and a personal money gift to himself, so that the words "the proceeds of any disposition of separate property" in section 9(2) are apt to include the proceeds of the shares, which would thus be separate property and not subject to division by the court. So, at its most elemental, the question of construction turns on which is paramount—section 8(e) or section 9(2)? Of that there can be no doubt. Section 8(e) is "Subject to subsections (3) to (6) of section 9 . . ."—significantly not to subsection (2). And, on the other hand, section 9(2) is "subject to . . . section[s] 8(e) . . ."; whereas, were section 9(2) to be paramount, the words would run "and notwithstanding section 8(e) . . ."—a technique the draughtsman has used elsewhere in the Act (see section 10(3) and 25(3)). So it is clear that section 9(2) is subordinate to section 8(e).

But, in deference to the able arguments of the Husband and of counsel who appeared as *amicus curiae* and to the careful and closely reasoned judgment of Quilliam J., their Lordships turn to examine the issue more narrowly. Quilliam J. recognised that "all property acquired by either the husband or the wife after the marriage" in section 8(e) were plain and unambiguous; and that the primary rule of construction would demand that effect should be given to them in their natural sense (see *Maxwell on Interpretation of Statutes*, 12th ed. 1969, pp. 28 and 43, and the cases there cited). He felt justified in rejecting this primary rule of construction by two considerations. In the first place, he held, the second part of section 8(e) (*i.e.*, following the word "including") must enlarge the meaning of the first part, since it must refer

"to property already referred to (that is, property acquired after marriage) but which was acquired out of property acquired before marriage. The fact that the second part is there at all means that without it, the first part standing alone would not have achieved the result of making property acquired from assets owned before marriage into matrimonial property."

In order to obviate the described redundancy, Quilliam J. therefore construed the first part to read ". . . acquired by either the husband or the wife after the marriage *for the common use and benefit of both the husband and the wife*" (thereby adopting one of the constructions urged by the Husband). But their Lordships respectfully agree with the Court of Appeal that

". . . it is quite a common statutory device to add an inclusive clause of specific description simply to give precautionary emphasis to something which otherwise might be left open to doubt or argument." (Woodhouse J. at p.579.)

(In this respect being somewhat similar to a proviso, as to which see *Commissioner of Stamp Duties v. Atwill* [1973] A.C. 558.) This very word "including" is palpably used in the way indicated by Woodhouse J. in section 18(1)(h), quoted hereafter. Their Lordships moreover agree that, even with the addition of the words italicised above, there will still be a redundancy in the two parts of section 8(e), and also that section 9(2) itself contains a redundancy. Finally, their Lordships have in mind what was said by Lord Mersey in *Thompson v. Gould & Co.* [1910] A.C. 409, 420:

“It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.”

The second reason that impelled Quilliam J. to decline to read section 8(e) according to its plain words was that to do so would leave section 9(2) with a very limited scope. But their Lordships respectfully agree with the Court of Appeal that this is understandable in a statute dealing primarily with matrimonial property not with separate property (cf. *N.Z. Married Women's Property Act 1884* and its re-enactments: see *Haldane v. Haldane* [1977] A.C. 673, 688E-F). In any case their Lordships agree that the consideration that section 9(2) is left with an extremely limited scope is inadequate to displace the primary canon of construction according to plain words, reinforced as it is here by the other considerations to which their Lordships have referred.

The Husband put his case on construction in two ways alternative to the foregoing. The first, urged before the courts below and rejected both at first instance and on appeal, was to read “acquired” in section 8(e) as meaning “acquired *from assets which are not separate property*”. In view of the fact that this construction was accepted neither by the learned judge nor by the Court of Appeal it will suffice to say that this construction too involves reading in words which are not in the Statute.

The same objection applies to the second alternative construction put forward by the Husband, this time in his argument before their Lordships. It was that “acquired” means “acquired *by his or her own exertion*”. Furthermore, in statutory interpretation there is a presumption against a change in terminological usage;

“. . . it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an act of parliament”

(*Cleasby B. in Courtauld v. Legh* [1869] L.R. 4 Exch. 126, 130.) “Acquired” cannot possibly mean “acquired by his or her own exertion” in section 10, which deals with “property acquired by succession [etc.]”. Section 10 is actually referred to in both sections 8(e) and 9(2).

Their Lordships therefore agree with the construction put on section 8(e) by all three members of the Court of Appeal, so that the proceeds of the Reid Container shares were “matrimonial property”.

2. *Apportionment*

Quilliam J. ordered the matrimonial home and the family chattels to be equally divided in accordance with section 11 of the Act; and his decision in that regard was accepted by the parties.

The division of the balance of the matrimonial property was governed by sections 15 and 18. These read as follows, omitting sections 15(3) and 18(3) as irrelevant:—

“15. **Division of balance of matrimonial property—**

- (1) Upon the division of matrimonial property, each spouse shall share equally in it unless his or her contribution to the marriage partnership has clearly been greater than that of the other spouse.
- (2) Where, pursuant to subsection (1) of this section, the spouses do not share equally in the matrimonial property or any part of the matrimonial property, the share of each in the matrimonial property or in that part of it shall be determined in accordance with the contribution of each to the marriage partnership.

18. Contribution of spouses—

(1) For the purposes of this Act a contribution to the marriage partnership means all or any of the following—

- (a) The care of any child of the marriage or of any aged or infirm relative or dependant of the husband or the wife:
- (b) The management of the household and the performance of household duties:
- (c) The provision of money, including the earning of income, for the purposes of the marriage partnership:
- (d) The acquisition or creation of matrimonial property, including the payment of money for those purposes:
- (e) The payment of money to maintain or increase the value of—
 - (i) The matrimonial property or any part thereof; or
 - (ii) The separate property of the other spouse or any part thereof:
- (f) The performance of work or services in respect of—
 - (i) The matrimonial property or any part thereof; or
 - (ii) The separate property of the other spouse or any part thereof:
- (g) The forgoing of a higher standard of living than would otherwise have been available:
- (h) The giving of assistance or support to the other spouse (whether or not of a material kind), including the giving of assistance or support which—
 - (i) Enables the other spouse to acquire qualifications; or
 - (ii) Aids the other spouse in the carrying on of his or her occupation or business.

(2) There shall be no presumption that a contribution of a monetary nature (whether under subsection (1)(c) of this section or otherwise) is of greater value than a contribution of a non-monetary nature.”

Quilliam J. held that the contribution of the Husband to the marriage partnership had clearly been greater than that of the Wife. The Court of Appeal agreed, particularly in the light of their finding that the proceeds of sale of the shares were matrimonial property (see section 18(1)(d)). This is essentially the sort of issue where the courts of the society to which the spouses belong are in a position far superior to that of their Lordships in forming a judgment. Here there were concurrent findings by the trial judge and a Court of Appeal unanimous on this point. Their Lordships hold clearly that this finding must be respected. That disposes of the petition by the Wife for special leave to cross-appeal, since its object was to argue for an equal division. Their Lordships will therefore humbly advise Her Majesty that the Wife’s petition should be dismissed.

Having found that the Husband’s contribution to the marriage partnership had clearly been greater than that of the Wife, Quilliam J. held that the matrimonial property (other than the matrimonial home and the family chattels) should be divided in the proportion of two-thirds to the Husband and one-third to the Wife.

With their finding that the proceeds of the shares were to be included in the matrimonial property falling for division, the Court of Appeal faced an entirely different picture from that which presented itself to Quilliam J. and had perforce to exercise their own discretion in the new situation. Woodhouse and Richardson JJ. favoured division of 60 per cent to the

Husband and 40 per cent to the Wife; Cooke J. (dissenting on this point alone) would have preferred 75 per cent to the Husband, 25 per cent to the Wife.

What their Lordships have said about the superior advantage of the local court is equally cogent when it comes to an apportionment of this sort.

It was urged upon their Lordships that there was a minority judgment. This would perhaps justify a closer scrutiny to ensure that no relevant consideration had been omitted by the majority nor any irrelevant consideration taken into account. Their Lordships find none such. In the end it is a question of how the various factors are held to weigh up. Their Lordships are of opinion that there is no ground for interfering with the assessment of the majority.

It was also argued that the starting point of the Court of Appeal should have been Quilliam J.'s apportionment; and that the Court of Appeal, having found the proceeds of the shares were matrimonial property, should have increased the Husband's share in view of section 18(1)(d). Quilliam J.'s judgment did not go uncriticised in the Court of Appeal in this regard; but their Lordships do not find it necessary to go into that matter, since in their view it would have been a wrong approach to take the apportionment of the learned trial judge as a starting point. As their Lordships have pointed out, the Court of Appeal had, in the new situation, no alternative to the exercise of their own discretion—a discretion which it would be wrong to fetter in any way.

3. *The holiday home*

The relevant part of section 33(3) reads:—

“The Court may make any one or more of the following orders:

.

(c) An order vesting the matrimonial property or any part thereof in the husband or in the wife:”

Quilliam J. made an order vesting the matrimonial home in the Husband, who was residing there. In view of the fact that the Husband had the matrimonial home, he made an order vesting the holiday home at Paihia in the Wife. His judgment in this respect was unanimously upheld by the Court of Appeal. The Husband challenged this before their Lordships.

The use of the word “may” shows that the jurisdiction is discretionary. Their Lordships are again of opinion that it would be wrong to interfere with a matter of discretion in which the learned trial judge had been unanimously upheld by the Court of Appeal.

The Wife will of course have to give credit for 60 per cent of the value of the holiday home (there is also an advance of \$50,000 to be repaid).

4. *Valuation date*

The relevant part of section 2(2) reads:—

“For the purposes of this Act the value of any property to which an application under this Act relates shall . . . be its value as at the date of the hearing, unless the Court in its discretion otherwise decides.”

The Court of Appeal ordered that current values should be fixed for all matrimonial property unless the parties could otherwise agree, remitting the case to the Supreme Court for this purpose. The Husband has included in his challenge that part of their judgment which ordered current values to be put on the matrimonial property.

It is unnecessary to determine whether the "hearing" of "an application under this Act" refers to the hearing of the original application invoking the jurisdiction of the court or the hearing of the application for valuation (though their Lordships incline to the former construction); because the Court of Appeal exercised its discretion under the last limb of this subsection—"unless the Court in its discretion otherwise decides".

This once again is a matter of discretion in which the court appealed from is much more favourably placed than their Lordships to consider the relevant local considerations (for example, inflationary pressures or other fluctuations in value). Their Lordships therefore decline to interfere with the exercise of the discretion.

Conclusion

In the result their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.

In the Privy Council

ANTHONY FULTON REID

v.

SUSAN ROSEMARY REID

DELIVERED BY
LORD SIMON OF GLAISDALE