IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 26/2004
[2005] NZSC 14

BETWEEN	HENRY JOHN ESDAILE NATION Appellant
AND	NICOLA MARY NATION Respondent

Court:	Gault J and Keith J
Counsel:	M J Macfarlane for Appellant G R J Thornton for Respondent
Hearing:	5 April 2005
Judgment:	5 April 2005
Reasons:	8 April 2005

JUDGMENT OF THE COURT

As announced at the hearing,

A The Court rules that it has jurisdiction over this proposed appeal.

B Leave is granted to appeal on the issue whether the Court of Appeal correctly interpreted and applied s 44 C of the Property (Relationships) Act 1976 to the disposition to the trust of the relationship property half interest in the farm at Punawaitai in the circumstances of this case.

C The appellant is entitled to costs of $5,000 plus reasonable disbursements including the cost of travel and accommodation (if any) to be fixed by the Registrar in the absence of agreement.

REASONS

[1] This application for leave to appeal relates to a proceeding under the Property (Relationships) Act 1976 which began in a Family Court with appeals being decided in the High Court and the Court of Appeal.

[2] The first question to be answered in dealing with the application for leave is whether the decision of the Court of Appeal is final with the consequence that this Court does not have jurisdiction. Section 7 of the Supreme Court Act 2003 gives the Court jurisdiction to hear and determine an appeal by a party against any decision of the Court of Appeal made in a civil proceeding, which this is, unless, to quote the relevant exception, an enactment "makes provision to the effect that there is no right of appeal against the decision".

[3] Mr Thornton, for the respondent, contended that s 67 of the Judicature Act 1908 is such an enactment. It provides:

> **67 No appeal on appeals from inferior Courts without leave**
>
> The determination of the High Court on appeals from inferior Courts shall be final unless leave to appeal from the same to the Court of Appeal is given by the High Court or, where such leave is refused by that Court, then by the Court of Appeal.

[4] He called in aid the decision of the Privy Council in *De Morgan v Director-General of Social Welfare*[1] holding that s 67 prevented it granting special leave to appeal from a judgment of the Court of Appeal in proceedings which had begun in a District Court. Lord Browne-Wilkinson said this:

> Under s 67 the decision of the High Court is "final". To this finality there is one limited exception ie an appeal with leave to the Court of Appeal. There is no further exception to the finality of the decision of the High Court which permits a further appeal to the Privy Council. If the Court of Appeal dismisses the appeal from the High Court, the decision of the High Court remains final. If the Court of Appeal allows the appeal from the High Court it substitutes the decision which the High Court should have given and that decision is final.[2]

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[1] [1997] 3 NZLR 385.
[2] At 387.

[5] Mr Thornton accepted that the overall purpose of Parliament in 2003 undoubtedly was to provide for appeals to this Court in relationship property appeals, as it had for all other family law matters, but it had not used the words necessary to achieve that purpose. In particular it had removed from s 39B of the Property (Relationships) Act subs (2) which had expressly provided for appeals to the Privy Council and it had not replaced that provision with one allowing appeals to this Court. The clear wording of the legislation made it impossible to give effect to the purpose.

[6] Mr Macfarlane, for the appellant, by contrast emphasised that purpose which in a general way Parliament has made explicit in its statement of purpose in s 5 of the Supreme Court Act:

> (1) The purpose of this Act is—
>
> (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges—
>
> …
>
> (iii) to improve access to justice;
>
> …

[7] Under s 5(1) of the Interpretation Act 1999, he reminded us, we are to weigh that purpose. The access to justice purpose is also specifically and clearly manifested in the concrete context of the family law statutes by the repeal by the Supreme Court Act of particular finality clauses which had previously prevented appeals beyond the Court of Appeal to the Privy Council in statutes regulating child support, children young persons and their families, family proceedings, guardianship and harassment. It would not have been within the purpose of the legislation to widen access to a further level of appeal in that comprehensive way over the full range of family matters, including dissolution of marriage, guardianship and custody, and maintenance, while excluding appeals in respect of relationship property. Moreover, Parliament made amendments to the Property (Relationships) Act itself which indicated that it specifically contemplated appeals to this Court. In addition to repealing s 39B(2), it replaced references in two other provisions to the Privy Council with references to the Supreme Court.[3] While it is true that those provisions

[3] Sections 29 and 73(3)(c).

could be explained by the power under s 22 to remove proceedings from a Family Court to the High Court with the proceedings continuing as if they had been properly commenced there, these provisions do support the overall purpose of providing for appeals in relationship property cases. We find those general and specific purposive and contextual arguments compelling subject to one remaining issue.

[8] It is this. What are we to make of the direction in s 39B(1) that

> The provisions of the Judicature Act 1908 relating to appeals to the Court of Appeal against a decision of the High Court apply to an order or decision of the High Court under this Act.

[9] Does not that require the limit stated in s 67 of the Judicature Act as interpreted in *De Morgan*, to apply? We do not think so. A number of relevant provisions of the Judicature Act, such as those about the composition of the Court of Appeal and enforcement of judgments, do continue to apply as directed by s 39B(1). Further, for the reasons already given, we see any finality effect of s 67 and, to the extent that it may be relevant, of s 68 as being superseded by the 2003 legislation so far as the Property (Relationships) Act is concerned.

[10] We would observe that the purpose of the Supreme Court Act might be thought to have not yet been fully and clearly carried through in amendments to particular provisions. Consider for instance s 65 of the Judicature Act and its curious proviso.

[11] We accordingly rule that we have jurisdiction.

[12] We grant leave in respect of the issue relating to s 44C of the 1976 Act.

[13] The applicant has sought leave to appeal also in respect of the decision of the Court of Appeal upholding the determination of the High Court classifying the 247 cattle beasts provided to a farming joint-venture under a "put to use" arrangement as relationship property.

[14] Counsel very properly accepted that, standing alone, this point could not qualify for leave under the s 13 criteria, but submitted that, if the appeal is to

proceed, it would be useful to have a definitive ruling on the correct position of such arrangements under the Property (Relationships) Act.

[15] Both the precise nature of the arrangement and (if material) the question of intermingling are essentially factual issues on which, as the Court of Appeal found, the evidence is less than complete. Therefore, this is not an appropriate case for a determination having precedent value. Any decision on the facts available would necessarily be limited to the interests of the particular parties and without such general or public importance as justifies leave to appeal. On this point leave is refused.

Solicitors:
Sainsbury Logan & Williams, Napier for Appellant
Carlile Dowling, Napier for Respondent