IN THE SUPREME COURT OF NEW ZEALAND

SC 73/2007
[2009] NZSC 46

	BETWEEN	JAMES ARTHUR ROSE Appellant
	AND	KAREN DIANE ROSE Respondent

Hearing: 15 October 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: C R Carruthers QC and M J Radich for Appellant
A E Hinton QC and A J Connor for Respondent

Judgment: 19 May 2009

JUDGMENT OF THE COURT

The appeals of both parties are dismissed.

REASONS

(Given by Blanchard J)

Introduction

[1] This appeal against a decision of the Court of Appeal under the Property (Relationships) Act 1976 concerns farm land and a farming business (principally the growing of wine grapes and grazing of some livestock) in Marlborough. James Rose and Karen Rose married in 1979 and separated in 2003. At the time of the marriage the husband was already the sole owner of a farm property, known as Cloverlea, and a partner with his father, Arthur, and brother, Peter, in a partnership known as A W Rose & Sons which carried on the farming business (then cropping and livestock) on

the husband's property and on two other blocks separately owned by Arthur Rose and by Peter Rose.

[2] Because the farming activities ran at substantial losses during the 1980s the two brothers sold large portions of their land holdings in 1989 to reduce debt. But they recognised the potential of the remaining land for the growing of wine grapes and later began the development of vineyards on their properties.

[3] Arthur Rose died in 1995 and his two sons inherited, equally, the larger portion of his property (known as Poplars) and all his interest in the farming partnership. Part of Poplars was sold in 1999 to reduce debt and a vineyard was developed on part of the balance. Although the partnership continued to make losses in some years thereafter, indeed until after the husband and wife had separated, the wine-growing business is now profitable and, even before that point was reached, the value of all the residual blocks of land had increased very considerably, which no doubt reflected in some measure Marlborough's international reputation as a wine growing area.

[4] The case, as it reaches this Court, involves claims by Mrs Rose in relation to the husband's land and partnership interests asserted under ss 8 and 9A of the Act. She says that Mr Rose's share of the partnership assets is relationship property (but accepting that his proportion of its very significant indebtedness, which slightly exceeds the value of the assets, is a relationship debt within the definition in s 20) and that the increases in the values of the land he owns by himself and his share of the land owned in common with Peter Rose are also relationship property. Mr Rose denies this is so, although still taking the position that his share of the partnership indebtedness is a relationship debt. He argues that the wife's only claim must be under s 17 of the Act for sustenance of his separate property. She was awarded $75,000 under that section in the High Court[1] and he would accept reinstatement of that award, which was displaced by the awards made in the Court of Appeal.

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[1] *Rose v Rose (No 2)*, (unreported, High Court, Blenheim, CIV-2005-406-155, 22 December 2005, Wild J).

[5] The values attributed by the Court of Appeal to Mr Rose's land interests at the time of the hearing in the Family Court in 2005 are:

One-half of Poplars	$1,341,000
Cloverlea	$1,505,000[2]
	$2,846,000

As a result of the Court of Appeal's orders Mrs Rose's share of those assets would be $557,517 made up in the following way.

[6] Mrs Rose's claim under ss 8(1)(ee) and 9A(1) in relation to Poplars was for $283,000, being for a one-half share of Mr Rose's proportion of the increase in the value of that property since the vineyard was planted on it, with some adjustment to allow for the value attributed to the vineyard which has been included in the partnership accounts.[3] The Court of Appeal has found Mrs Rose to be entitled to that sum. Mr Rose now challenges that award in its entirety.

[7] In respect of Cloverlea, the wife claimed half the increase in value of that property since the marriage. In this instance, the Court of Appeal ordered that under s 9A(2) she should receive $299,120, on the basis that her contribution to the increase in value should be assessed at 40 per cent, rather than the half-share she claimed. The husband again seeks to have the award entirely set aside and the wife cross-appeals against the reduction to 40 per cent and says also that the increase has not been correctly calculated because the amount deducted for the value at the date of marriage should not have included the value at that time of the portion of the land

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2 This value excludes the area on which the homestead was situated before it was destroyed by a fire in 2002. It is not in dispute that the wife is entitled to a one-half share in the homestead area and the insurance proceeds.

3 The calculation is described in paras [65] to [67] of the judgment of the Court of Appeal: *Rose v Rose* [2007] NZFLR 167 (CA) (Hammond, Robertson and Ellen France JJ).

which was sold in 1989. She further says that there was an arithmetical error made by the Court of Appeal. She says that on a correct calculation her 50 per cent share of the increase should be $597,207.

[8] The Court of Appeal also ordered that $24,603 should be deducted from the amounts due to the wife in order that she should bear one-half of the shortfall in the husband's share in the partnership. Leave was not granted for any appeal against that order.

[9] Before dealing in more detail with the facts it is convenient to set out the relevant portions of the provisions of the Act which are most directly engaged by the arguments of counsel, namely ss 8, 9 and 9A:[4]

> **8 Relationship property defined**
> (1) Relationship property shall consist of—
> …
> (e) subject to sections 9(2) to (6), 9A, and 10,[5] all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and
>
> (ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—
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> (i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or
>
> (ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began;
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> …
>
> **9 Separate property defined**
>
> (1) All property of either spouse or partner that is not relationship property is separate property.

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[4] They appear as they now stand following amending legislation taking effect in 2002, which preceded the separation of the parties and applies in this case, and in 2005, which effected only changes which have no impact in this case.

[5] It is not contended that ss 9(4) – (6) or s 10 have any significance in this case.

(2) Subject to sections 8(1)(ee), 9A(3), and 10, all property acquired out of separate property, and the proceeds of any disposition of separate property, are separate property.

(3) Subject to section 9A, any increase in the value of separate property, and any income or gains derived from separate property, are separate property.

…

9A When separate property becomes relationship property

(1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of relationship property, then the increase in value or (as the case requires) the income or gains are relationship property.

(2) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part, and whether directly or indirectly) to actions of the other spouse or partner, then—

(a) the increase in value or (as the case requires) the income or gains are relationship property; but

(b) the share of each spouse or partner in that relationship property is to be determined in accordance with the contribution of each spouse or partner to the increase in value or (as the case requires) the income or gains.

…

Further facts

[10] The parties lived in the homestead on Cloverlea during their marriage until the homestead burnt down. Mrs Rose had been previously married. She brought to the marriage with Mr Rose in 1979 most of the household chattels as well as a sum of $10,000 which seems to have been obtained from a settlement following the end of her first marriage. That sum was evidently expended within the marriage relationship with Mr Rose. She also brought two children from her first marriage and she and her husband later had two more, born in 1980 and 1983. The findings below are that she carried out the normal functions of a mother and, as the Family Court Judge put it, undertook all domestic duties expected of a farming wife. Importantly for Mr Rose's arguments, she did not undertake any farm work or play any role in the farming partnership.

[11] In 1985 Mrs Rose obtained employment as a sales-person with a cosmetics company. She earned an income which seems to have averaged in the vicinity of $30,000 per year (before tax) and had the use of a company vehicle. Her success as a sales-person won her several overseas trips which she took with her husband. Later she worked for a wine company in a similar capacity. Her earnings were applied entirely for the support of the household or otherwise within the domestic relationship.

[12] For his part, her husband worked long hours in the partnership farming business and, of particular relevance, in the development of its vineyards. Upon the sale of part of Cloverlea in 1989 the money raised ($515,000) was used to reduce debt and for family purposes. Mr Rose drew an average of about $60,000 per year from the partnership but, as it was running at a loss for most of the time, this was in fact an overdrawing funded by increased partnership borrowings. The High Court Judge said that from 1989 to 2003 he contributed to the marriage $960,530, which he drew from the partnership.[6]

[13] The partnership borrowings were secured by mortgages over the properties of the husband and Peter Rose. In the husband's case, the mortgage security included the homestead on Cloverlea. He of course has argued that his share of the partnership indebtedness is a relationship debt.

[14] The Family Court Judge recorded that Cloverlea had increased in value by $911,473 during the time of the marriage. That figure excluded the value of the grapes but made no adjustment to reflect the greater area held at the date of the marriage. The Judge also recorded that since the death of Arthur Rose, the husband's inherited share in Poplars had increased by $760,000, again excluding the grapes. He found that the book value of the partnership assets, including all the grapes on the three properties, was $2,619,937 but the partnership debt was $2,712,990.[7]

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6 *Rose v Rose* (unreported, High Court, Blenheim, CIV 2005-406-155, 14 October 2005, Wild J) at para [32].

7 *KDR v JAR* (unreported, Family Court, Blenheim, FAM-2003-006-000229, 6 July 2005, Judge Grace) at para [81].

The Family Court judgment

[15] Much of the Family Court judgment is taken up with consideration of whether a prenuptial agreement between the parties should be set aside. Judge Grace decided that it should be and there was no appeal from that decision. Having put that to one side, the Judge then quite briefly considered whether the increases in value referred to in the last paragraph were attributable wholly or in part, directly or indirectly, to the actions of the wife. He concluded that the increases in value had in part occurred because of the application of partnership funds, of which he said the husband's share was relationship property. He therefore fixed the wife's share of the increases at $455,735 for Cloverlea and $380,000 for Poplars, i.e. 50 per cent of the increases he had identified.

The High Court judgment

[16] In the High Court, Wild J took the view that Judge Grace had been wrong to regard the husband's partnership interest as relationship property. He had also erred in concluding that the husband's income was not used to support the family when it was ploughed back into developing the land and funding partnership borrowing. Wild J said that was factually incorrect since the development of the land was debt funded and the debt was serviced and kept to levels acceptable to the bank by means of sales of parts of the partners' lands. Wild J therefore held that no relationship property was applied to the husband's separate properties. Any increase in value accordingly could not be relationship property.

[17] Nor, Wild J said, had the wife made any indirect contribution to the increases in value. She had not worked on either property or in the partnership business. Further, in his view, there had been no increase "net of any debt incurred to achieve that increase". Mr Rose's hard work, facilitated by his wife's contributions to the home and to the family income, had been done for the partnership. But at the end of the marriage its liabilities exceeded its assets. Therefore it was not possible to conclude that her efforts contributed to an increase in value of the partnership assets because they had no net value. As to the increases in value of the land, that was

explained by a combination of inflation and the strong demand for land suitable for viticulture.

[18] Wild J overturned Judge Grace's awards under s 9A and made instead an order that Mrs Rose should receive $75,000 under s 17(2)(b).

The Court of Appeal judgment

[19] The Court of Appeal saw the matter very differently. It disagreed with Wild J concerning the status of the husband's interest in the A W Rose & Sons partnership, saying that each partner has a beneficial interest in the assets of a partnership and that accordingly, in terms of s 8(1)(e), a partner's interest in a partnership asset acquired after marriage will be relationship property.[8] Even if they were wrong about this, the Court said, they were satisfied that the "debts" (by which they seemingly meant the partnership assets which were funded by the borrowings) should be treated as relationship property in terms of s 8(1)(ee) as the property in question was, arguably, acquired for common use or common benefit. "We say that because the partnership continued to borrow in order to continue to provide for household expenses, at least in part."[9] Mrs Rose had no legal liability for the partnership debt but she suffered in the sense that partnership money going to meet the partnership debt was money not available to the household. She had to maintain her contribution to the household.[10] Therefore, the investment of the borrowed funds and partnership income and the development of the vineyard on the husband's land was the application of relationship property to his separate property. The vineyards formed part of the land in the absence of a contractual agreement to the contrary.[11]

[20] The Court examined the claim to the increase in value of Poplars, which was advanced under s 9A(1). Plainly there had been an increase in value. It said that, s 9A(1) was not to be applied only to the parts of the property which were developed. Rather, it applied to the identifiable certificate of title.[12]

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8 At para [48], citing *Maw v Maw* [1981] 1 NZLR 25 (CA).
9 At para [51].
10 At para [52].
11 At para [56].
12 At para [62].

[21] The calculation made by the Court was as follows:

(a) Land value of Poplars at date of Family Court hearing	$2,682,000
(b) Land value before planting of vineyards on Poplars (2000)	$1,080,000
Increase	$1,602,000
Therefore the husband's half share of increase	$ 801,000
Of which the wife's share was	$ 400,500

But, the Court said, it was necessary in order to avoid double-counting to debit the same proportion of the vineyard as it appeared in the partnership books, i.e. $470,000, of which the wife's share was $117,500 (25 per cent). That produced an award of $283,000 in relation to Poplars under s 9A(1).

[22] The claim to Cloverlea was pursued under s 9A(2). The argument for the wife was that her actions since marriage had freed up the husband to undertake work solely for the benefit of his separate property and that she had prevented the debt from reaching an unsustainable level. The end result was that the remaining portion of Cloverlea was able to be retained. The Court said that the critical factor was a finding made by Wild J during his consideration of the s 17 claim that the husband's separate land, or part of it, would have been in jeopardy but for the wife's financial contribution. In addition to looking after the children and managing the household she had earned over $300,000 from outside employment, all of which she had contributed to the household. Wild J had found that if the wife had not made this contribution it was likely that the husband would have needed to overdraw an equivalent amount from the partnership in order to sustain the family's lifestyle. There had been no challenge to that finding which was supported by the evidence.

[23] There had been an increase in the value of Cloverlea. At the date of the marriage it was worth $301,200 and in 2005 $1,505,000 (excluding the homestead). If all the increase was plainly related to inflation, the Court said, there could be no link as required by s 9A, but it was open to inference that at least some of the increase must relate to the development of the land.[13] The Court did not see s 9A as

[13] At para [80].

requiring evidence as to how much of the increase related to inflation and how much to other matters. Under s 9A(2) the claimant was entitled to a share determined in accordance with the parties' contributions to the increase in value. All forms of contribution are equal but in this case the husband's contributions to the increase were greater. He had brought the land to the marriage and also contributed to the household income. The increase was $1,203,800 ($1,505,000 – $301,200) but the Court deducted $456,000 to avoid double-counting the vineyard. So the relevant increase was $747,800, of which the wife's share was determined to be 40 per cent, i.e. $299,120.

Section 9A – preliminary observations

[24] The general purpose of the Act is to provide for the sharing of property which either partner brings into or acquires during the relationship. Property owned before the relationship is, prima facie, excluded from the sharing regime but can, in certain circumstances, become subject to it. Consistently with the underlying philosophy that property acquired during the relationship falls for division when the relationship ends, the Act provides for circumstances in which increases in the value of separate property, which occur during the relationship, must be shared. Such increases in value are viewed as an independent species of property which is notionally severed from the underlying property.

[25] Subsections (1) and (2) of s 9A deal with the circumstances in which increases in the value of separate property become relationship property. The basic approach is that if the non-owning partner contributes to an increase in the value of the other partner's separate property, that increase in value becomes relationship property and thus subject to the sharing rules. The words "wholly or in part", which appear in both subsections, make it clear that any contribution, other than a minimal one, will result in the whole increase becoming relationship property.

[26] The contribution made by the non-owning partner can arise either from the application of relationship property or from conduct. The only difference between the two types of contribution is that, in the case of the application of relationship property, the ordinary sharing rules apply, whereas in the case of a contribution by

the conduct of the non-owning partner the sharing is in accordance with the contributions of each partner to the increase in value. The legislative treatment of increases in value as a species of property in their own right, which must necessarily have been "acquired" during the relationship, supports the view that the effect of the word "indirectly" in subs (2) is that the parties will share increases in the value of separate property unless the actions of the non-owning party have not materially influenced the increase.

Poplars – claim under s 9A(1)

[27] A claimant under subs (1) of s 9A asserting that an increase in the value of separate property should be treated as relationship property bears the onus of proof and must establish:

(a) that the subject property (which is separate property of the other party) has increased in value;[14] and

(b) that such increase in value is attributable, wholly or in part, to the application of relationship property.[15]

[28] Mr Rose's interest in Poplars was acquired by inheritance in 1995. It was his separate property protected under s 10. Mrs Rose's s 9A(1) claim is, however, confined to the increase in value which has occurred since 2000 when vineyard planting began on that property.[16] Her claim is properly directed to the whole of Poplars, both the vineyard and the land still used for other purposes, just as it would be if it relied upon an increase resulting from the erection of a building on part of the land. The carrying out of an improvement which adds value will increase the value of the whole of an unsubdivided property.

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14 An increase in value means an increase in nominal terms: *Hight v Hight* [1997] 3 NZLR 396 at p 406 (CA).

15 In the account of the statutory provisions references to income or gains and to partners, civil unions or de facto relationships are omitted as they have no application in the present case.

16 No part of Poplars was sold during the time to which the claim relates.

[29] As the claim is for an increase said to be at least in part attributable to the application of relationship property, it is restricted to the increase which occurred from 2000 onwards, in accordance with *Hartley v Hartley*.[17]

[30] The valuation evidence establishes that there has been a significant increase in value since 2000. Some of that may well be the product of inflation or a general rise in the value of land in Marlborough suitable for viticulture, but that does not defeat a claim under subs (1) if some part of the increase (excluding anything which is merely trivial or minimal) is attributable to the application of relationship property. Once a causative link is established between the application of relationship property and some such increase in value, the whole of the increase, howsoever the balance of the increase arose, is required by subs (1) to be treated as relationship property.[18] Thus, in the present case, if any relationship property was used to fund the development of the vineyard, and there has been an increase since 2000 in the value of Poplars attributable to the presence of the vineyard on the property, after account is taken of the fact that the vineyard is owned by the partnership, the whole of the increase in the value of the property from whatever cause will be relationship property and will fall to be divided under Part 4 of the Act. It would therefore be subject to the primary rule of equal division which is stated in s 11. It has not been suggested that any of the exceptions to that rule would apply.

[31] The partnership developed and owns the vineyard on Poplars. But the Court of Appeal correctly found that the vines are part of the land[19] and it is in practical terms hardly likely that the vines will be removed from it, as that would destroy their value to the partnership. If the husband were to sell his interest in Poplars the price would certainly in some degree reflect the fact that the land has on it an operating vineyard from which any buyer could expect to receive a rental return. If the partnership had wanted to capture any increase in land value of this kind, an agreement between the parties or a long-term lease at a peppercorn rental would have been necessary. No agreement between the husband and his brother or any

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17 [1986] 2 NZLR 64 (CA).

18 *Hartley* at pp 73 and 76; *Hight v Hight* at p 406. Relationship property exists in the same way under s 9A(2) when a causative link is established between any action of the non-owner spouse and any rise in value of separate property.

19 *Bain v Brand* (1876) 1 App Cas 762 at p 767.

agreement for a lease, oral or otherwise, appears to exist. Whilst it may be implicit in their arrangements that the partnership's operation of the vineyard will not be disturbed by either of the husband or the brother in his capacity as landowner, it would be a long step to imply a term which would restrict a sale by the husband except on a basis which would effectively ascribe no value to the land reflecting the presence of the vineyard.[20]

[32] The argument that relationship property has been applied on Poplars turns on a question on which the High Court and the Court of Appeal expressed different views: whether the husband's interest in the partnership was relationship property. Again, the Court of Appeal was correct. It is well established for the purpose of property relationships law in this country that a member of a partnership has a beneficial interest in each asset of the partnership, as well as a right to receive a proportion of any surplus after dissolution and realisation. The starting point is s 23 of the Partnership Act 1908:

> **23 Partnership property**
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> (1) All property and rights and interests in property originally brought into the partnership stock, or acquired (whether by purchase or otherwise) on account of the firm or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.
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> (2) Provided that the legal estate or interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.
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> (3) Where co-owners of an estate or interest in any land not being itself partnership property are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

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[20] Valuation reports separate the value of the land planted with grapes from the values of the vineyard assets and of land which has not been planted.

In *Maw v Maw* Cooke J pointed out that "property" is defined widely enough in the (now) Property (Relationships) Act so as to include a share in a partnership. He drew attention to the final words of subs (2). He said that those words recognise that partners are correctly to be described as beneficially interested in the partnership assets, although they are undivided interests and regulated by the Partnership Act.[21] Richardson J cited[22] a passage from the judgment of the High Court of Australia in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* in which the following appears:[23]

> The partner's share in the partnership is not a title to specific property but a right to his proportion of the surplus after the realization of assets and the payment of debts and liabilities. However, it has always been accepted that a partner has an interest in every asset of the partnership and this interest has been universally described as a "beneficial interest", notwithstanding its peculiar character.

The passage cited by Richardson J in *Maw* also adopted a description given by Luxmoore J in *In re Fuller's Contract*[24] in which that Judge said that:

> as between the partners, the partnership property must be dealt with in a particular way, but so far as all the rest of the world is concerned, there is no limitation on the interests of the partners; the partners have the beneficial interest in the partnership assets, which are held together as an undivided whole, but they respectively have undivided interests in them.

The third member of the Bench in *Maw*, Somers J,[25] said simply that it could not be doubted that a share or interest in a partnership is "property" within the defined meaning in s 2 of the Property (Relationships) Act.[26]

[33] It followed in the *Maw* case that, since the partnership of which the husband was a member, though in existence before the marriage, had acquired the assets against which the wife was claiming after the marriage, the husband's beneficial interest in them was to be treated as matrimonial (now, relationship) property. But at

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21 At p 26.
22 At p 30.
23 (1974) 131 CLR 321 at pp 327 – 328.
24 [1933] Ch 652 at p 656.
25 At p 32.
26 The approach taken in *Maw v Maw* was confirmed in *Hadlee v Commissioner of Inland Revenue* [1991] 3 NZLR 517 (CA) and *Z v Z (No 2)* [1997] 2 NZLR 258 (CA).

the time the husband and wife separated in *Maw* (in 1977) the Act was in its original form and, as Mr Carruthers QC noted in argument, s 8(e), providing for all property acquired by either the husband or the wife after the marriage to be matrimonial property, was not expressed, as it now is, to be subject to s 9(2), which says that all property acquired out of separate property is separate property. That qualification, which the Court of Appeal seems to have overlooked at para [51] of its judgment, was introduced for the first time by the Matrimonial Property Amendment Act 1980 in response to *Reid v Reid*.[27] The husband's interest in the partnership assets at the date of the marriage was his separate property, which is protected under s 10. Under s 9(2), as long as it retained that status, his interest in further assets acquired by the partnership using only partnership resources, would also prima facie have been separate property.

[34] However, s 9(2) is in turn subject to its own qualifiers, of which s 8(1)(ee) is relevant in the present case.[28] Section 8(1)(ee) stipulates that all property acquired after the marriage began for the common use or common benefit of both spouses is relationship property if the property was acquired out of property owned by either spouse (or both of them) before the marriage began or out of the proceeds of the disposition of property which had been so owned. This provision is concerned with the original purpose of the acquisition, not with how the acquired property was actually used or how it actually benefited the parties.[29] In the present case, the important question under s 8(1)(ee) is the husband's purpose when the vineyard assets on Poplars were being acquired by the partnership, i.e. his purpose during the development of the vineyard.

[35] In considering this question, it is to be observed that the partnership business was effectively the husband's job. It was the means by which he earned his living so as to be able to provide support for his family. It was not merely an investment from which he derived some income. The household expenses of both the husband and

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27 [1979] 1 NZLR 572 (CA), affirmed [1982] 1 NZLR 147 (PC).
28 Unlike s 8(1)(e), s 8(1)(ee) is not subject to s 9(2).
29 *Sloss v Sloss* [1989] 3 NZLR 31 at pp 35 and 41 (CA).

his brother were paid from the partnership account and the partnership's funding for the development was secured, inter alia, over the homestead on Cloverlea, which was always relationship property. Furthermore, there is evidence demonstrating an acceptance by the husband that his participation in the partnership, at least by the time vineyards were being developed, was intended for common benefit.

[36] In her admirably focussed submissions, Mrs Hinton QC drew our attention to material contained in the cross-examination of Mr Rose. Trial counsel for Mrs Rose, Ms Moran, asked him about Mrs Rose's repeated requests that he separate his interests from those of his brother by dissolving the partnership. Mrs Rose had been especially concerned that the partnership was planting grapes on Peter Rose's land. Mr Rose accepted under cross-examination that he had told her not to worry about this because "we own half of them", meaning, he conceded, his wife and himself. If that was his attitude to the vineyard on Peter Rose's land, he would certainly have had the same attitude in relation to Cloverlea. It is not surprising that he would have regarded all the vineyards in this way especially when the family home on Cloverlea was being used as security for the indebtedness incurred in their development. On his own evidence, therefore, it is a reasonable inference the vineyard assets were being acquired for the common benefit of both. That position is confirmed by the fact that, as between the wife and himself, the husband has asserted that the partnership's debt is a shared responsibility or, to put it technically, a relationship debt under s 20(1)(c) and (d).

[37] For these reasons, we are of the opinion that the Court of Appeal was right to treat the increase in value of Poplars since 2000 as attributable in part to the application of relationship property and accordingly as itself property having that status. The husband's appeal in relation to the increase in value of Poplars must fail.

Cloverlea – claim under s 9A(2)

[38] Subsection (2) of s 9A differs from subs (1) in several respects. First, rather than showing, as under subs (1), that an increase in the value of separate property of the other party is attributable in whole or in part to the application of relationship

property, the claimant under subs (2) must show that it was attributable to the claimant's actions. Secondly, the nexus between those actions and the increase in value can be either direct or indirect. Thirdly, although the result of establishing these elements, i.e. that any part of the increase (other than the merely trivial or minimal) was caused directly or indirectly by the claimant's actions, is that the whole of the increase is relationship property, subs (2) directs that the share in that increase of each of the parties is to be determined in accordance with their respective contributions *to the increase in value*.

[39] There is no need in relation to the s 9A(2) claim to repeat the analysis leading to a finding that the husband's share in the partnership was relationship property and that the development of the vineyards increased the value of the land on which they were created. A further issue is whether, indirectly, the wife's actions were causative of that development and therefore of that increase in value.

[40] Mr Rose owned Cloverlea before the marriage. Mrs Rose asserts that the undoubted increase in value since 1979 was in part attributable to her actions in caring for the children and the household and in earning a significant portion of the household income. She says that because of her domestic contributions the husband, who admits he played a much lesser role with respect to the children and the household, was freed up to work long hours in the farming business including, significantly, the development of the vineyard on Cloverlea. Importantly also, she says that if it had not been for her financial contribution produced by working off the farm, it is probable that the husband would have been forced by the level of indebtedness at the end of the 1980s to sell Cloverlea, and so the spectacular increase in value in more recent years would have been lost to him. She says that in these indirect ways she contributed to the increase in the value of that property.

[41] In response, the husband submits that, although he recognises what his wife did by way of domestic activities and through taking up employment, her actions, like those of the wife in *Hight v Hight*,[30] did not translate into an increase in value of Cloverlea. The argument is, in effect, to paraphrase something said by the majority

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[30] [1997] 3 NZLR 396 (CA).

in *Hight*,[31] that she cannot point to any particular matter in which she had a hand which can be seen to have added value to the farm.

[42] Although Mr Carruthers was well aware of the change in the legislation which took effect in 2002 when s 9(3), as considered in *Hight*, was replaced by s 9A(2) which envisages a merely indirect nexus between actions of the non-owner and an increase in value of the separate property, counsel dismissed the suggestion that the new subsection can assist the wife in this case. But, in endeavouring to downplay the effect of the amendment, he did not identify any situation in which there could be said, legitimately, to be an indirect connection between the actions of a spouse and an increase in value. He appeared to be saying that on the facts of *Hight* there would not have been such a connection, so that Mrs Hight would not have succeeded in a claim under s 9A(2).

[43] That stance flies in the face of widespread criticism of the result in *Hight* and preference for the views in that case of the High Court (Elias J) and the dissenting Judge in the Court of Appeal (Thomas J).[32] It is also contrary to the opinion of the Full Court in *Nation v Nation*[33] which met with the approval of the Court of Appeal in that case,[34] notwithstanding that the appeal was allowed on a different ground. Both Courts were of the view that the new subsection was intended to overcome the problem that actions of a spouse might be considered too remote from any increase in value in the separate property where there was no direct physical connection between the spouse's activity and the increase in value.

[44] We entirely agree. It seems to us that the inclusion of the words "directly or indirectly" in subs (2) of s 9A was indeed intended to do away with any need for a person in the position of Mrs Hight to show a direct physical connection, such as work on the separate property, or a direct financial contribution, such as a payment for an improvement to it, thereby in either instance causing it to increase in value. On the contrary, it is, since 2002, enough under subs (2) for the claimant to establish

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31 At p 408.

32 *Fisher on Matrimonial and Relationship Property* (looseleaf), at footnote 1 of para [11.47], expresses the opinion that s 9A(2) "puts in statutory form the construction of the former s 9(3)(a) adopted in the dissenting judgment of Thomas J in *Hight v Hight*."

33 [2003] NZFLR 740 at para [50] (HC).

34 *Nation v Nation* [2005] 3 NZLR 46 at paras [60] – [62] and [68] (CA).

that she or he has indirectly contributed to an increase in value. It follows that an increase in value is divisible between the parties unless it can truly be said that it has not derived from the conduct of the non-owning spouse in any material way. That may be the situation in the case of a purely passive investment but, with an asset like a farm or other business in which the owning spouse works, it will often be likely that some conduct of the non-owning spouse will have had some direct or indirect influence on any increase in value. That will be so when the claimant's actions have enabled the other spouse to devote labour or expenditure to his or her separate property with consequent increase in its value. It will also be so when the claimant has provided financial support by paying for household expenditure and thereby enabling the owner of the separate property to pay for work on it which increases its value. The present case is in fact a very good example of a situation in which we believe that the legislature intended that a claim under subs (2) should be possible. By her attentions to the household and the children and by defraying a significant proportion of the family's domestic expenses by means of her earnings from employment, Mrs Rose enabled her husband to spend very long hours on the affairs of the partnership and allowed him to moderate his drawings so that more labour and more money (or in reality more borrowing capacity) was available to the partners for the development of the vineyards, including the vineyard on Cloverlea. At an earlier time when the partnership was in financial difficulties in the 1980s and eventually some land had to be sold, her monetary contribution appears to have been vital, as Wild J and the Court of Appeal have found. If it had not been for her financial contribution produced by working off the farm, it is very likely all of Cloverlea would have been sold and the opportunity of later developing the vineyard would not have existed.

[45] There was therefore the necessary indirect connection between the actions of Mrs Rose and the increase in value of Cloverlea. The next question is whether the Court of Appeal was justified in determining that the parties should share in proportions of 40 per cent (the wife) and 60 per cent (the husband) in the increase in value since their marriage. Each seeks to disturb that division.

[46] Although an increase to be divided under s 9A(2) is classified as relationship property, it must be remembered that the Court under para (b) is engaged upon the

task of evaluating contributions to the increase in value rather than, as under subs (1) and generally under Part 2, dividing relationship property in the manner directed by Part 4 of the Act. Section 9A (2) gives no guidance about how this task is to be performed but a significantly different approach from that under subs (1) is plainly required. The principles found in s 1N (equality of men and women, equality of contributions to the marriage partnership and just division of relationship property having regard to economic advantages or disadvantages arising from the marriage) have little or no application under s 9A(2)(b). Nor does s 18 which deals with contributions *to the marriage*, rather than contributions to an increase in value of a particular piece of separate property. The circumstances in which that increase occurred require careful assessment but arithmetical exactitude cannot be achieved and in the end the evaluation of the relative contributions is likely to be a matter of general impression.

[47] A level of complication is provided by a seemingly unsatisfactory consideration.[35] It is that in many cases a major portion of the increase in value will have been the product of inflation or of a general rise in the value of a certain kind of property (here it is the increase in value of property with a suitability for viticulture). In reality, neither of these factors results from the actions of either party during the marriage, yet the subsection nonetheless requires them to be weighed as contributions to the increase in value. One possible approach would be to put such factors to one side, determine the relativity of the other contributions of each spouse and then divide the inflationary or general increase in the same ratio as the other contributions. In many, perhaps most, instances that would not, however, give adequate recognition to the fact that the property was, and remains, separate property (only the increase being relationship property) and that, if it had not been brought to the marriage or acquired during the marriage as separate property, there would have been no asset to produce the inflationary or general gain. Normally the fairer approach is therefore that the ownership of the separate property from which these increases in value sprang should be treated under s 9A(2)(b) as a contribution made by the owner spouse. The Court should then evaluate that contribution together with other contributions to the increase in value which it identifies as having being made

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[35] Several anomalies are to be found in s 9A: see *Fisher on Matrimonial and Relationship Property* (looseleaf), para [11.40].

by the owner spouse, and should weigh the aggregate of those contributions against the identified contributions of the non-owner spouse to that increase.[36]

[48] The inflationary and general increases in the value of Cloverlea have been very considerable, as can readily be seen from the before and after comparison of values, bearing in mind also that the vineyard assets belong to the partnership. Furthermore, the husband not only brought Cloverlea to the marriage as separate property, but has also worked hard on it since that time. In more recent years he has with his brother developed a vineyard which by the time of separation had begun to produce profits for the partnership and has increased the value of Cloverlea in the same way as their work increased the value of Poplars. In addition, on the sale of part of Cloverlea in 1989 the husband utilised much of the proceeds in reduction of the debt secured over the property. The debt reduction effected by the brothers did not per se effect any increase in the value of the land,[37] but in this case its significance is that it, along with the wife's earnings, enabled the continuance of the partnership business and, eventually, the planting of grapes occurred. It was indirectly a means of preserving the balance of Cloverlea so that future increases in value could be obtained. We are not overlooking the fact that the husband provided financially for the household at a level well above the wife's earnings but the fact that he was able to do this clearly had no direct or indirect impact on the increase in value of Cloverlea, and there was a downside to which we will shortly refer.

[49] Mrs Rose's role in the family has already been mentioned when we explained how her actions must be taken in part to have caused the increase in value of Cloverlea. Her non-financial contributions included care of children, management of the household, performance of household duties and, of particular relevance, the giving of assistance or support to Mr Rose which aided him in carrying on the partnership business. To the extent that her household exertions and childcare very

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[36] There was no evidence directed to the level of debt secured against Cloverlea at the time of the marriage. In some circumstances that factor might need to be considered when assessing an owner spouse's contribution.

[37] In *Walsh v Walsh* (1984) 1 FRNZ 262 at p 265 (CA) Hardie Boys J pointed out that debt reduction increases the value of the owner's equity in the separate property, but that the statute is concerned with the value of the property itself which is unaffected by the reduction.

considerably exceeded those of the husband she enabled him to work very long hours on the farm development. She provided a substantial sum of money in 1979 dollars ($10,000) at the beginning of the marriage but there is no evidence of what was done with it and linking it with the increase in value of Cloverlea, most of which occurred many years later. The wife did however commence employment in 1985 (little or no part of the increase occurring before that time or indeed before the 1990s) and worked continuously, earning a salary which was used to meet household expenses which the husband would otherwise have had to fund out of the already strained finances of the partnership. In that way, as we have observed, she subsidised his participation in the partnership, including the development of the vineyard on Cloverlea.

[50] To this point, taking account of the factors we have mentioned, the balance would appear to be substantially in favour of the husband. But there is an unusual and very important feature which we have not mentioned and which was emphasised by Mrs Hinton. The property was heavily mortgaged throughout the marriage, particularly in the latter stages when most of the increase in value occurred. The husband's development work was funded by increasing the partnership's indebtedness, and so far as the wife was concerned, by increasing the relationship debt. Certainly his considerable efforts within the partnership impacted directly and favourably on the value of Cloverlea but at the expense of the creation of a debt of which the wife must bear her share in the property division. Moreover, there is the very significant finding referred to in para [44] above that if it had not been for the wife's financial contribution it was likely that Cloverlea would not have been retained and so all or part of the increase in value may have been lost.

[51] When these features are brought into account the wife's case for a share of the increase in value is greatly strengthened. They provide justification for the 40/60 allocation of the increase which the Court of Appeal made in respect of Cloverlea. We are not, however, persuaded that the Court erred in declining to treat the parties equally. It seems to us, on a reading of all the evidence, that the husband's contributions to the increase in value, giving him credit for the inflation and the

general increase in the value of viticultural land, were, overall, greater than those of the wife.

[52] A second ground of the wife's cross-appeal is that in calculating the increase in value of Cloverlea the Court of Appeal erred in failing to take into account the fact that the land area had greatly reduced since the date of the marriage. It took the value of the present 13.7 hectares as at 2005 (date of Family Court hearing) and deducted the value of the 50 hectares owned by the husband in 1979.

[53] We are not persuaded that the Court of Appeal's approach was in error in the circumstances of this case. The approach to be taken will depend upon what has been done with the proceeds of a sale which occurs after there has been an increase in value and therefore after s 9A(2) has come into play. On some such occasions the proceeds will have been used to acquire other property in the name of the owner spouse and, if necessary, the increase in value will be traceable into that other property and the subsection will apply to it as well as to the residue. There will then be no need to take account of the area which was disposed of when considering the application of the subsection to the residue. On the other hand, when the non-owner has received no benefit from the sale of part of the property it may be fair to make the comparison without regard to the difference in area. In a case like the present, where the proceeds were applied to reduce the relationship debt within the partnership, enabling further expenditure on the owner spouse's property, and for other purposes from which the wife received benefit, it would be quite unfair to treat the area which was sold as if it were a separate asset for the purpose of making the comparison in values.

[54] The last point taken for Mrs Rose on her cross-appeal is that the deduction made by the Court of Appeal to avoid double-counting of the value of the vineyard on Cloverlea should have been of half the amount shown in the partnership books rather than the full amount. We do not agree. In order to arrive at the increase in value the Court of Appeal included the full value of the vineyard. Avoidance of double-counting therefore requires deduction of its full value in the partnership

accounts. Mrs Rose receives an accounting for her 25 per cent share of the vineyard through her claim against Mr Rose's partnership interest as relationship property.[38]

[55] The husband also sought in written submissions in response to the cross-appeal to raise an argument concerning the level of the negative balance in the partnership accounts at the date of separation. This argument had not been previously signalled and leave was not sought for it to be advanced. It also involves a relatively small sum.

[56] A final matter is whether, as the husband asserts, there has been an inappropriate inconsistency in the use by the Courts below of valuations of the land as at the date of hearing in the Family Court, yet the debts and liabilities have been taken as at the date of separation. This argument misstates what has been done. Certainly the land value was taken at the date of hearing in 2005 but the husband's share of the partnership debt was offset against his share of the partnership assets and both of those figures were from 2003. No debt was then required to be offset against the increases in the values of the land. In circumstances where the husband has been in possession of the land, with the partnership benefiting from the operation of the vineyards, this approach is not open to criticism.

Result

[57] We dismiss the appeals of both the husband and the wife and leave costs to lie where they fall.

Solicitors:
Radich Law, Blenheim, for Appellant
Oakley Moran, Wellington for Respondent

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[38] In submissions on the cross-appeal for Mr Rose it is said that on the basis of one valuation the land value of Cloverlea should be taken to be $985,000 rather than $1,049,000 but we see no reason to depart from the figure used by the Court of Appeal. To adopt the smaller figure would, for consistency, require an adjustment of the value attributed to viticulture assets in the partnership accounts to the figure used by the valuer and the overall result would then be only slightly affected.