

IN THE SUPREME COURT OF NEW ZEALAND

**SC 3/2017
[2017] NZSC 44**

BETWEEN

MALCOLM EDWARD RABSON
Applicant

AND

LINDA GALLAGHER
First Respondent

**MALCOLM EDWARD RABSON AS
TRUSTEE OF THE MALCOLM
RABSON FAMILY TRUST**
Second Respondent

**WAYNE SEYMOUR CHAPMAN AS
TRUSTEE OF THE GALLAGHER-
RABSON FAMILY TRUST**
Third Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: Applicant in person
N Levy for First Respondent
S A Barker for Third Respondent

Judgment: 5 April 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

**B The applicant must pay costs of \$2,500 to each of the first
and third respondents.**

REASONS

[1] Litigation between the applicant and the first respondent under the Property (Relationships) Act 1976 resulted in orders made by the Court of Appeal in 2011.¹ The Court determined that the first respondent was entitled to payment of

¹ The orders are contained in two judgments: *Rabson v Gallagher* [2011] NZCA 459; and *Rabson v Gallagher* [2011] NZCA 669 [Rabson orders judgment]. The latter is of prime concern.

\$1,239,081.² This figure represented, *inter alia*, the High Court Judge's assessment of the value of debts owed by the Malcolm Rabson Family Trust. The payments to the first respondent were to be funded from the proceeds of sale of three properties held by the Gallagher-Rabson Family Trust (GRFT). As perceived by the applicant, the effect of the orders was that he would receive less than 50 per cent of the relationship property pool if the net realisation from the three properties (after allowing for the expenses of the trustee) was less than what was then anticipated. That perception accords with the practical effect of the orders. However, for the purposes of the Court of Appeal (and the High Court as well) the relevant relationship property consisted of the debts. The valuation/division proceeded on the basis that those debts were worth their face value.

[2] The orders made by the Court of Appeal generally followed the form of those made by the High Court Judge. There is no explicit explanation in either the High Court or Court of Appeal judgments for the way in which the order was structured. We think it likely that the structure was intended to ensure that difficulties generated by Mr Rabson in relation to the GRFT and the properties it owned would not diminish the amount that Ms Gallagher would receive. That has been the practical effect of the orders.

[3] The orders of the court provided:³

Leave is reserved to the GRFT trustee to apply to the High Court for further directions if required and to any party to apply to this Court for clarification of any matter relating to these orders.

[4] The applicant's application for leave to appeal to this Court was refused.⁴ He complained that the effect of the orders was to confer on the first respondent an effective priority in respect of the proceeds of sale of the three properties. In dismissing the application, this Court observed:⁵

The payments ordered to be made to Ms Gallagher are, however, on account of her overall entitlement and leave has been granted to any party to apply to the Court of Appeal for clarification of any matter related to its orders.

² *Rabson orders judgment*, above n 1, at [10].

³ *Rabson orders judgment*, above n 1.

⁴ *Rabson v Gallagher* [2012] NZSC 26.

⁵ At [2].

Mr Rabson would therefore be able to seek from the Court of Appeal an adjustment of its orders if there were to be a change of circumstances for which he bore no responsibility and, as a consequence, the orders would lead to an overpayment of Ms Gallagher. We should add that it is not at this stage apparent that this may occur.

[5] Mr Rabson applied to the Court of Appeal for clarification of the orders pursuant to the grant of leave reserved. His specific questions were these:

- 1.0 Was it the expressed purpose of the judgment to effect an equal distribution of the relationship property between Ms Gallagher and Mr Rabson (being a 50% share for each) under s 44C of the Property (Relationships) Act 1976?
- 2.0 Was it the direction of this Court by the judgment for its Court-appointed trustee Wayne Chapman who was granted control of the relationship assets to effect a 50/50 equal distribution of the relationship assets he controlled between Ms Gallagher and Mr Rabson, and/or their designated recipient?
- 3.0 Did the judgment base its directions as to the exact quantum the Court's trustee was to pay Ms Gallagher first and in full and only then Mr Rabson on the Court's approximate \$2,570,000 valuation of the relationship property estate held by its trustee?
- 4.0 If it can be shown this Court's orders in the judgment have resulted in Ms Gallagher receiving \$1,300,026.91 and Mr Rabson no distribution (\$0) under this Court trustee's interpretation and approach, does it fall to this Court to amend its orders to effect a 50/50 distribution as found to be the legal imperative of such orders?

[6] In his affidavit in response, Mr Chapman (the court-appointed trustee of the GRFT) said he has:

- (a) realised all available property;
- (b) paid the first respondent, Linda Gallagher, just in excess of \$1.3m;
- (c) deducted his costs as trustee and associated legal costs from proceeds;
- (d) responded to a number of complaints and claims against him by Mr Rabson in various fora;
- (e) distributed the balance of available funds to the liquidators of Vision Ltd (in liquidation) and Double Zero Holdings Ltd (in liquidation);
- (f) now completed his trusteeship and is ready to retire.

[7] Mr Chapman notes that the trust funds have been depleted by significant and ongoing litigation with Mr Rabson. Mr Chapman further notes that the trust has paid out \$120,000 to liquidators of Vision Ltd and Double Zero Ltd, who have a judgment for much more than that sum against Mr Rabson. Once the liquidators were paid, approximately \$18,000 was left in the trust account as at October 2015.

[8] In the judgment which is now challenged the Court of Appeal concluded that the “clarification” sought by the applicant was in the nature of a challenge to the scheme of the orders.⁶ Referring then to the remarks made by this Court on the leave application, the Court went on:

[18] We do not consider when it referred to “adjustment” the Supreme Court had in mind any substantive change to this Court’s orders under the leave this Court reserved. However, on the basis of the submissions received from Ms Levy and Mr Barker, there are a variety of factors that, individually or in combination, account for differences in amounts received by Ms Gallagher and Mr Rabson, including:

- (i) Ms Gallagher’s priority right to payment in respect of which leave to appeal to the Supreme Court was declined;
- (ii) the relationship property was fixed by reference to the amounts of the acknowledgement of debts, not the value of the properties, ...;
- (iii) the GRFT’s ability to meet its debt obligation depended upon the quantum of the proceeds of sale of the three residential properties;
- (iv) the expenditure of GRFT trust funds necessitated in addressing a series of legal challenges by Mr Rabson, as explained in Mr Barker’s submissions and in the affidavit of the trustee, Mr W S Chapman; and
- (v) the implications of certain other litigation referred to in Mr Barker’s submissions, namely, first, the judgments obtained by the liquidators of Vision Ltd and Double Zero Holdings Ltd, companies of which Mr Rabson was a director, against the GRFT and, second, the declaration of the High Court in *Shephard v Rabson*⁷ that the plaintiffs in that case are entitled to payment from funds held by Mr Chapman as trustee towards settling their judgment debt.

[9] The proposed appeal does not raise any question of public or general importance. So the application for leave to appeal must rest on the miscarriage

⁶ *Rabson v Gallagher* [2016] NZCA 584 (Randerson, Asher and Brown JJ).

⁷ *Shephard v Rabson* [2015] NZHC 3137.

ground. If Mr Rabson could credibly argue that his reduced share of the relationship property pool resulted from “a change in circumstances for which he bore no responsibility” (to use the language of the earlier leave judgment), he would be well on the way to obtaining leave.⁸ In fact, however, he cannot credibly maintain such an argument; this for the reasons explained by the Court of Appeal in the passage we have set out. We can see no good reason why the first respondent’s share of the relationship property should be diminished by expenses associated with the applicant’s litigiousness.

[10] The application for leave to appeal is therefore dismissed. The first and third respondents are each awarded \$2,500 in costs.

Solicitors:

Mary Jeffcoat, Wellington for First Respondent
Buddle Finlay, Wellington for Third Respondent

⁸ Either to appeal against the most recent Court of Appeal judgment or, alternatively, if it were to be concluded that the reservation of leave was not as extensive as this Court thought in the earlier leave judgment, against the earlier judgment.