IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 38/2021
[2021] NZSC 70

BETWEEN	PETER FRANCIS JOSEPH LITTLE Applicant
AND	DEBRAH LEANNE LITTLE First Respondent
	PETER FRANCIS JOSEPH LITTLE AND LOCKHART LEGAL TRUSTEE SERVICES NO 32 LIMITED AS TRUSTEES OF THE MARBLE ARCH FAMILY TRUST Second Respondents

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: R C Knight for Applicant
M K Headifen for First Respondent

Judgment: 24 June 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

[1] This application for leave to appeal concerns s 182 of the Family Proceedings Act 1982. It is an application for leave to appeal to this Court directly from a High Court decision.[1]

Background

[2] Mr and Mrs Little lived in a de facto relationship from mid-1988 until mid-1992. They separated for a year and reconciled in mid-1993. They married on 31 October 1993. Their son was born in April 1994 and daughter in September 1996.

[3] The Little family funeral business had been acquired in June 1988 by a company incorporated by Mr Little. In early October 1993, in anticipation of their marriage, all but one of the company's shares were sold to the Marble Arch Trust (the Trust). This had been done because the parties had not been able to agree on a pre-nuptial agreement. Subsequent to settlement of the Trust, the family homes of the couple had been settled on the Trust.

[4] The Trust was the family's exclusive source of income and accommodation and, from around 2000, Mrs Little had increasing involvement in the funeral business. In 2003, the Trust deed was amended to add Mr and Mrs Little's children as beneficiaries.[2]

[5] Mr and Mrs Little separated in mid-2009 and their marriage was dissolved on 5 November 2012.

Decisions in the Courts below

[6] The Family Court considered the settlements on the Trust to be nuptial settlements in terms of s 182, placing weight on the variation of the Trust deed to

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1 *Little v Little* [2020] NZHC 2612, (2020) 5 NZTR ¶30-022 (Jagose J) [HC judgment].

2 The original deed had the settlor's children as residuary beneficiaries, a mistake it appears, as the settlor was Mr Little's solicitor: at [16]. This mistake was rectified in 2009.

include the couple's children as beneficiaries in 2003.[3] The Judge ordered an equal division of the Trust's assets and liabilities by the mechanism of two parallel trusts.[4]

[7] On appeal to the High Court, Mr Little argued that the Trust was a not a nuptial settlement and that, in any event, Mrs Little had received valuable benefits from the Trust during the marriage and thus could have no expectation of future benefits.[5]

[8] The argument that the various settlements were not nuptial settlements was rejected by the High Court.[6] The division of the assets of the Trust was, however, sent back to the Family Court on the basis that there should be a sum of money paid to Mrs Little from the Trust based on the increase in net value of the Trust's assets between settlement and dissolution.[7]

[9] The Court of Appeal declined Mr Little's application for leave to appeal.[8] It said that both the Family Court and the High Court had independently examined the facts with regard to both the original settlements and subsequent settlements and, applying *Clayton v Clayton*,[9] had come to the conclusion the settlements were nuptial settlements. It said nothing raised would suggest a need to revisit the concurrent findings of fact and no issue of law capable of bona fide argument had been raised.[10]

[10] The Court of Appeal was also concerned that the Family Court had still to determine how the Trust's assets and liabilities are to be allocated for the benefit of Mr and Mrs Little. It said that it was not appropriate to engage in a second appeal in the absence of a determination of that application before the Family Court.[11]

Submissions

[11] The applicant, Mr Little, applies for leave to appeal against the High Court judgment directly to this Court. He wishes to renew his argument that the Trust was

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3 *Little v Little* [2020] NZFC 3532 (Judge Burns) [FC judgment] at [69].
4 At [81].
5 HC judgment, above n 1, at [8].
6 At [18].
7 At [30].
8 *Little v Little* [2021] NZCA 65 (Courtney and Collins JJ) [CA judgment].
9 *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590.
10 CA judgment, above n 8, at [15] and [18].
11 At [19].

not a nuptial settlement, although recognising that different considerations may apply to the settlements that occurred during the marriage. He notes as background that Te Aka Matua o te Ture/Law Commission (the Law Commission) has recommended the repeal of s 182, describing it as a "relic from the past".[12] It is submitted that further guidance is needed with regard to the test set out by this Court in *Clayton* as to what might constitute "connection or proximity" between the settlement and the marriage.[13] He submits that the courts, contrary to *Clayton*,[14] have continued to conflate Property (Relationships) Act principles with s 182.

[12] The respondent argues that this is not a rare and exceptional case justifying a leapfrog appeal in a case where the Court of Appeal has declined leave.[15] Further, it is submitted that, while the Law Commission may have made recommendations as to the future of s 182, this section has not yet been repealed and it must continue to have application. The respondent submits that this Court in *Clayton* has provided detailed guidance on the implementation and resolution of litigation involving s 182 and that the principles are well-known and settled. What is a connection or proximity to the marriage will inevitably be determined by a factual analysis of the circumstances of each case, and in this case, both the High Court and the Family Court have clearly accepted that there was a connection.

Our assessment

[13] We do not consider this to be one of those exceptional cases justifying a leapfrog appeal, particularly given that the Court of Appeal declined to grant leave to appeal to that Court.[16] Both the High Court and Family Court have applied the test set out in *Clayton* and made the same findings. Nothing raised by Mr Little suggests that the factual findings in the Courts below may have been in error.[17]

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12 Te Aka Matua o te Ture/Law Commission *Review of the Property (Relationships) Act 1976/ Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.108(a)].

13 *Clayton v Clayton*, above n 9, at [34].

14 At [63] and [65].

15 Citing *Sena v New Zealand Police* [2018] NZSC 92; *Burke v Western Bay of Plenty District Council* [2005] NZSC 46, (2005) 18 PRNZ 560; and *Clarke v R* [2005] NZSC 60.

16 *Sena*, above n 15, at [4].

17 Applying the standard required for a miscarriage of justice in a civil appeal, see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

Result

[14] The application for leave to appeal is dismissed.

[15] The applicant must pay the respondent costs of $2,500.

Solicitors:
Chapman Tripp, Auckland for Applicant
Craig Griffin & Lord, Auckland for First Respondent