IN THE SUPREME COURT OF NEW ZEALAND SC CIV 26/2004

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **HENRY JOHN ESDAILE NATION**

Appellant

AND **NICOLA MARY NATION**

Respondent

Hearing 5 April 2005

Coram Gault J
Keith J

Counsel M J Macfarlane for Appellant
G R J Thornton for Respondent

APPLICATION FOR LEAVE TO APPEAL

10.00 am

Macfarlane May it please the Court, Counsel's name is Macfarlane, I appear for Mr Nation.

Gault J Yes Mr Macfarlane.

Thornton May it please the Court, Counsel's name is Thornton, I appear for the respondent.

Gault J Yes thank you Mr Thornton. Yes Mr Macfarlane.

Macfarlane Yes thank you Sir. Could I start by addressing the jurisdiction point. My submissions in writing in reply were to the effect that the Supreme Court Act set up a new structure for appeals and in

consequence s.67, as it came to be interpreted by the Privy Council in **De Morgan**'s case, was no longer a restraint (**De Morgan v Director-General of Social Welfare** [1997] 3 NZLR 385). And I'd like to speak to that a little more now by starting with the purpose of the Supreme Court Act, which amongst other things is said to improve access to justice and to provide for the Court's jurisdiction. Here of course we know that as s.7, and that that in turn is founded on a civil proceeding in the Court of Appeal. In consequence it includes appeals wherever they may have emanated from to that Court and therefore from the District and the Family Courts. To include them in that way but then to remove any right to appeal in the case of those Courts by virtue of s.67 makes no sense.

Gault J I think we can proceed on the assumption that it was plainly the intention that there would be rights of appeal from the Family Court under the Relationship Act.

Macfarlane Indeed.

Gault J But the question is, have they provided for it?

Macfarlane In that event I can not take you through the background material that I intended to because what you've just said Sir is plainly consistent with all the preceding Parliamentary process documents, Hansard's reports and indeed the Select Committee report back. My submission on that count then is that the Privy Council itself allowed for what it described as exceptions to the finality rule. It does so at page 387 of the New Zealand Law Report towards the bottom of the page around line 43 or 44 where this short statement appears. And in their Lordships' view the correct construction of the sections is as follows: 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. In consequence the way in which the Privy Council was there approaching the question was by virtue of consideration of exceptions. In my submission, that case having been decided in 1997, the Privy Council would today if it still existed for New Zealand's purposes be obliged to look at s.7 of the Supreme Court Act as a further exception.

Keith J That's a rather broad argument isn't it Mr Macfarlane? If this was an appeal say from the regular jurisdiction of the Magistrates' or the District Court on the civil side, would you make the same argument that a civil matter in the District Court could proceed notwithstanding s.67?

Macfarlane Yes, yes, I'd have to make the same argument because the civil proceeding definition in the Supreme Court Act comprehends both appeals from District and Family Courts.

Keith J Mm.

Macfarlane But the same argument would apply that the Supreme Court Act in s.7 nonetheless provides that further exception the Privy Council would have allowed.

Keith J Mm.

Macfarlane And with respect that approach to the matter is entirely in accord with s.5 of the Interpretation Act which guides us all now to have proper regard to the text and purpose of the legislation with which this question is concerned.

Gault J The exception to which you referred was simply an express statutory provision.

Macfarlane Yes it is.

Gault J Where is the corresponding basis for such an exception here?

Macfarlane In, well, in **De Morgan** the concentration was only on s.67 and the appeal process that was permitted to the Privy Council under the rules that then applied. Two aspects therefore. That process and s.67. What's changed is the process. We now have a different process and a jurisdictional underpinning to it.

Gault J Well you also have s.38B of the Supreme Court Act which invokes the provisions of the Judicature Act. So we have the same provisions being applied in this situation. What's the difference?

Macfarlane Again, s.7 of the Supreme Court Act. Which is the express provision which must be the starting point for a jurisdiction analysis. Whereas before there wasn't that s.7. And if you apply a purpose of approach because of s.5 of the Interpretation Act of s.7 and see that the obvious intention was that appeals from the inferior Courts should be able to be taken to the Privy Council to then apply.

Keith J And then you've got the first "unless" in s.7 haven't you?

Macfarlane Yes.

Keith J It's not a complete open slather provision. It does.

Macfarlane Indeed that is so Sir. But given that the common ground appears to be that such appeals were intended to be allowed.

Keith J Yes.

Macfarlane Then the section should be read, with respect, in that way.

Keith J Well that's a somewhat more confined argument isn't it?

Macfarlane Yes.

Keith J That's why I asked you about District Courts generally.

Macfarlane Yes I accept that.

Keith J I mean you can say, looking at the indications in all the family statutes, guardianship and harassment and family proceedings and so on that in all cases the Supreme Court was given jurisdiction. All the finality provisions were removed.

Macfarlane Yes indeed.

Keith J But there wasn't, in terms of the drafting, there wasn't a similar provision in the Property Relationships Act. And the amendment that was made there was inept at best.

Macfarlane Yes, well whichever adjective is used it could certainly have been done better.

Keith J Mm.

Macfarlane But that doesn't necessarily prevent the Court from applying s.5 in a way which would enable the section to be made to work properly.

Keith J Mm, yes.

Macfarlane And I'm hestitating.

Keith J But that's a narrower, there are two different ways in which you can put it aren't there? One is to say that all matters in the District Court including the Family Court and so on come within the positive side of s.7. Or more narrowly that the Property Relationships Act amendments plainly did have the purpose of bringing that jurisdiction within the Supreme Court's jurisdiction.

Macfarlane Yes. Well there's a plain contemporaneous connection between the replacement of the Privy Council reference in the Property Relationships Act to s.7's enactment in the Supreme Court Act.

Keith J Mm, mm.

Macfarlane I was about to say, I was hesitating to move on to address a point I hadn't intended to, but in light of the questions I will. Of course for the purposes of interpretation, if s.5 is not the answer in the way that I have suggested and submitted but then of course it is possible for the Court to proceed upon the basis that there is a drafting error which

within the very confined and narrow limits that the Court's reserved to itself for the purpose might lead to the provision being interpreted as it had been intended by Parliament to read. And this is not in the materials because, although I have it here in case, I hadn't intended to put it before.

Keith J It looks too dangerous do you think. (Laughter)

Macfarlane Indeed.

Keith J And it's been. And that proposition's been in the books for a long while hasn't it?

Macfarlane Well, its most recent application where it didn't work for the party urging it was **Tasman Orient Line v The Alliance Group** case ([2004 1 NZLR 650). Just last year when Justice Williams applied the House of Lords in **Inco Europe Ltd and ors v First Choice Distribution (a firm) and ors** (House of Lords; 9/3/00; Lord Nichols of Birkenhead). And if I, it's not a long passage, I can quickly read it to you. Statute is expressed and language approved and enacted by the legislature so the Courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the Court must be abundantly sure of three matters. The intended purpose of the statute or provision in question. If I could interpolate, we seem to be clear about that here. Second that by inadvertence the draftsmen and Parliament failed to give effect to that purpose in the provision in question, and if I could interpolate again, that equally appears to be so here. And third, the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance, otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation." And that is a passage from 115 of the All England Reports of the House of Lords decision in **Inco** which.

Keith J What's the **Tasman Orient** reference?

Macfarlane **Tasman** is [2004] 1 NZLR page 650 and I've been referring you to passages which appear on page 671. So my point is first of all you don't need to go there because s.5 is the answer.

Keith J No.

Macfarlane But if you have to because s.5 isn't enough then there is a backup which enables what Parliament clearly intended to be the effect of the legislation by virtue of the way that the Court construes it. That's all I intended to say on the jurisdiction point, given the constraints of time in this Court.

Gault J Yes thank you.

Macfarlane If I could just move on Sir to address briefly the s.44 point. This is an important point in New Zealand when you look at the time at which the defeating of effects of a disposition are concerned there can be vast differences between the actual time of disposition and the hearing date of the particular Property Relationship Act case. And my submission there is that if the Court of Appeal is right, there must now be in New Zealand a very real risk that every disposition to a trust, whenever it was made, and that could be many many years ago, will have a defeat effect exposing the transferor spouse to a s.44C Order. In consequence there is an important point for New Zealand here which justifies grant of leave by itself quite apart from the consequences for Mr Nation.

Gault J I wasn't quite clear from reading the Court of Appeal Judgment, whether a distinction had been drawn between the time at which there is to be determined a defeating effect, as you call it.

Macfarlane Mm hm.

Gault J And the time at which the assessment of any compensation were to be made. They seem to have run the two together somewhat.

Macfarlane I think they. I'm sorry Sir?

Gault J What do you understand them to have said?

Macfarlane I understand that the defeat effects are to be considered by the Court of Appeal at the date of hearing and one of the reasons I say that is they made observations you might recall about the conversion of the relevant property rights and to bear money without possibility of increase in value on that money is something that they took into account. And that can only be explained by them having the defeat effects considered at the date of hearing as opposed to the date of disposition. Because they're looking back from the date of hearing and saying, this particular spouse has had what she could have got today defeated because it isn't here to be awarded to her. That is the farm in its increased value state as opposed to the money provided upon the disposition.

Keith J That's in paragraph [146] is it? Yes. And then the consequence, the amount of the debts remain constant while the value of the farm has increased significantly.

Macfarlane Yes.

Gault J Was interest being paid on this debt?

Macfarlane It was able to be paid if demanded I think.

Gault J What does that mean?

Macfarlane I don't think it was automatically due.

Gault J It wasn't being paid?

Macfarlane I don't think it was being paid, no.

Gault J So an income earning asset was substituted with a non-income earning asset?

Macfarlane As it happened although it could have been an earner of income.

Gault J Well presumably in this field one looks at the reality, not what could have happened.

Macfarlane More often than not, yes.

Gault J I thought so.

Macfarlane Indeed. But this is not an uncommon way of estate planning and transfer of assets between generations so there's that aspect.

Gault J Does that necessarily mean that there should not be some sort of assessment of compensation?

Macfarlane No it doesn't but it's a factor.

Gault J And that hasn't yet been determined has it?

Macfarlane True, it has not.

Gault J So we don't know whether there'll be a minor assessment of compensation to offset the loss of income or whether there's going to be some massive compensation by reference to capital value.

Macfarlane True.

Gault J Well then why should we be looking at it yet?

Macfarlane Because the way that the Court of Appeal have set it up takes the defeat effects point and in my submission establishes as a matter of law that the starting point is the relevant value as at the date of hearing. Whereas my submission is that you should consider that defeat effects as at the date of the disposition itself. And that was the debate in the lower Courts to which the Court of Appeal had directed attention when it issued its Minute and sought submissions. And it went one way and left the argument the other way.

Gault J So you say that the real issue is the date at which the defeat effects are to be assessed?

Macfarlane Yes that's the first issue. And the most important one. Because if there is no defeat at the time of the disposition, it's unnecessary to go on to consider the exercise of a discretion under the section.

Gault J The section itself rather suggests it's a later date doesn't it by the use of the word "has" rather than "had"?

Macfarlane Although ironically the Court of Appeal when it wrote its Decision used the word "had" when it was addressing that point. So there is a question about the meaning of the word. But if you look in the preceding subsection Sir you'll see that the same tense is used. So contextually it may not be a pointer to the present as opposed to the past.

Gault J Well what is the other issue? If you say the principal issue is the date the defeat effects are to be assessed, what is the other issue?

Macfarlane Well then subsequently the question is, to what extent has there been a defeat if you hold that the defeat effects are to be dealt with as at the date of hearing.

Gault J So just, has there been a defeat. And one is the date at which it's to be assessed.

Macfarlane Yes.

Gault J And the second is, has there in fact been a defeat.

Macfarlane Yes and then you come on to, well how much should it be.

Gault J Well we can't get into that.

Macfarlane I'm not suggesting that this Court should address that at all. A brief second point on s.44C. The way this case started and developed, the effect for the husband is that this would be a first appeal for him on s.44C. There was no consideration of these points in effect either in the Family Court or in the High Court. Indeed.

Gault J I gather from the High Court Judgment that the point was in fact not taken. There was no appeal against the Family Court determination.

Macfarlane There was no argument in support of the way in which the Court of Appeal came out with its decision.

Gault J But neither was there any argument against the way in which the Family Court dealt with it.

Macfarlane Well that's how I've considered the matter and have submitted it to the Court of Appeal. My friend may have a different perspective on that. But certainly.

Gault J However it does seem to be live.

Macfarlane Well the Court of Appeal, in my submission with respect, were generous in concluding that the point was live because it really never arose until the Minute was issued by the Court of Appeal after hearing.

Gault J Well your grounds of appeal here don't say that there is an error of law by the Court of Appeal in allowing it.

Macfarlane No I don't take the point because I accept the Court had jurisdiction to ask us to consider it. And I did argue against it and failed.

Gault J It's rather beside the point then isn't it?

Macfarlane All I'm saying is that by the time you get to a possible appeal to the Supreme Court, you should be very very careful to be urging it where you've started out in the Family Court. My point is simply this would be the first time that the point that is significant is being appealed. Because the Court of Appeal effectively dealt with it for the first time. So the husband, if he was not able to appeal, would have been stuck with effectively what amounted to a first instance Decision.

Gault J Are you saying that's a reason for granting leave?

Macfarlane It's a discretion factor. Because I'm bound to accept, and it is plainly right, that appeals from the District and the Family Courts should rarely reach the Supreme Court. Two appeals really ought to be enough and you would have expected most matters to have been thrashed out pretty well by then.

Gault J Yes.

Macfarlane So this aspect of the s.44C matter sets this case apart in that context. Last, and very briefly, because I know I'm over the time I'm allowed. Were this application being made only on the stock point, I probably wouldn't have made the application. It's really only able to be suggested as a matter that could go to the Supreme Court because it would accompany the s.44C argument. And I'm not going to try and persuade you that it could otherwise have justified leave.

Gault J There seems to be a point which is barely appropriate given that the Court of Appeal basically said we don't know enough about this arrangement to take a different view from that formed by the Judge.

Macfarlane Mm.

Gault J That seems to be infertile ground for a further appeal. Particularly since it's really fact.

Macfarlane Yeah, I'm not going to go back from the merits in the point. I'm making a proper concession about its stand-alone value as a leave subject. The Family Court made sufficient findings as Court of first instance to underpin the argument that I ran in the High Court and the Court of Appeal. The Court of Appeal effectively overturned the Family Court's findings of fact to do what it did. And I'm not sure with respect that that was an appropriate way of dealing with the point, that they changed the facts of the case effectively from yes, the necessary underpinning is made out to, oh well, we don't think that the facts were really quite enough. Yet the Family Court heard Mr Nation and the accountant Mr Reaney. The Court of Appeal didn't. So it's not lacking in merit in that respect.

Gault J But the Family Court was against you also wasn't it?

Macfarlane No, no, the Family Court found in favour of (a) that the stock wasn't indeed a gift, (b) that there was a bailment or put to use arrangement for the stock and (c) in consequence there was no intermingling.

Gault J But, I'm sorry, I'm trying to get this clear in my mind. What was the point on which the Court of Appeal said they didn't have enough material to take a different view from the.

Macfarlane High Court.

Gault J High Court.

Macfarlane Because they considered that the evidence did not sufficiently describe the nature of the legal relationship between Mr Nation, the stock and the entities that used that stock so as to give it the appellation chose in action which was the necessary pre-requisite to my argument which was that if you value that right, the chose an action, then there can have been no intermingling because that right or chose in action didn't mingle with anything. It lasted from the very beginning to the time of the hearing.

Gault J Did the Family Court Judge determine it on the basis that this was a chose in action?

Macfarlane No, he called it a bailment or put to use arrangement essentially.

Gault J Yes and it was the stock that were bailed?

Macfarlane Yes indeed. And to be fair, the focus and the argument, the contest there was over whether or not there was a gift. Not over whether or not there was a chose in action.

Gault J Was it argued that it was a chose in action?

Macfarlane Not specifically. It was argued that it was a bailment or put to use.

Gault J The trouble with these matrimonial property cases is that they tend to change a bit as life goes on. And it's understandable. You win one point, you're not so concerned about another.

Macfarlane Yes, they tend to zig zag as this one has a little unfortunately. I'm well past time. I'm happy to help you on anything else.

Gault J Thank you. Yes Mr Thornton.

10.25 am

Thornton Thank you Sir. Just dealing with the, in the same order as my friend has, dealing firstly with the question of jurisdiction. In my submission the literal reading of the appeal provisions of the Property Relationship Act means there is no right of appeal to this Court. It's clear on its face in my submission that the appeal provisions are subject to s.67 of the Judicature Act and, as interpreted by the Privy Council in **De Morgan**, that position so far as appeals from inferior Courts was well understood. Prior to **De Morgan** there had been no definitive ruling although there had been some comment to the effect that it was unlikely there were appeals from inferior Courts to the Privy Council of a civil nature. But the Decision of **De Morgan** made it abundantly clear that there was no right of appeal. And that Decision has been applied on a number of times by the Court of Appeal subsequently. So when the matter came before the consideration of Parliament, in my submission the position so far as appeals from the Family Court and District Court it was clear, and the specific retention of s.67 makes it clear, that appeals such as this cannot be heard in this Court notwithstanding the apparent intention that there should be such appeals.

Gault J You accept that it was plainly the intention that there should have been?

Thornton I don't think I could argue against that Sir. All the material tends to suggest that's the case. But.

Keith J It would be very odd wouldn't it if just this one aspect of the family jurisdiction was not subject to appeal?

Thornton Yes it seems, in particular with regard to the Property Relationship Act where you've got no such restrictions under the Guardianship Act or other such legislation.

Keith J Mm.

Thornton But in my submission, given the clarity of the legislation and the interpretation by the Privy Council, its not a matter that can be avoided and the only way that this might be remedied is for the matter to be the subject of amending legislation.

Gault J Well let's just think about that for a minute. We've got a very clear provision haven't we that says when dealing with divisions of relationship property the Court of Appeal or the Supreme Court shall have certain discretions about the date at which values for example. Now you say, well that is just to cover the possibility that a proceeding might have been transferred to the High Court. Might it not be seen as perhaps alternatively a clear indication that it was expected that such matters would find their way to the Supreme Court and that therefore s.67 is a provision of the Judicature Act that is impliedly overruled or distinguished?

Thornton Clearly that is an interpretation. But it has the difficulty in my submission that it's a general statement but that the specific provisions of s.39B with the introduction of s.67 tends to mitigate against such a broad approach. Especially where there is an explanation as to the retention or the substitution of the words to the Supreme Court as I suggest where a matter that's started in the Family Court is of such significance that it can then be referred to the High Court and the matter proceed as if it was commenced in the High Court, thereby giving rights of appeal to the Supreme Court.

Gault J It's a rather hard argument in the face of the general acceptance that it was the intention the jurisdiction should exist.

Thornton Sir I can't offer an explanation as to why the Bill or the Act was passed.

Gault J Just a mistake?

Thornton Yes, and there appears to be in some of the papers an assumption that prior to the Act there was an appeal to the Privy Council notwithstanding **De Morgan**. So I think that the mistake started at the very first consideration of the Act or the Bill.

Keith J There's also the oddity isn't there Mr Thornton not just that there would be this gap but it would be a reversal? Because I think the other family law statutes excluded appeals didn't they to the Privy Council? They specifically said the decision under the Guardianship Act and so on was final. All of those finality provisions were taken out so a further level of appeal became available. And then what you're arguing is that in this one area where the appeal did exist it was removed. So that the structure of the previous legislation would actually be reversed were you right on this point.

Thornton Yes, I think there were restricting provisions in some of the legislation.

Keith J Mm, mm.

Thornton But in my submission there was restricting provisions in the property law as well. And that it hasn't been removed under the Matrimonial Property or the Property Relationships Act but it has under other legislation which was specifically, there was no ability to appeal to the Privy Council.

Keith J I see, you're saying the old 39B(2) did not confer jurisdiction in a matter that began in the Family Court because of **De Morgan**?

Thornton Yes I'm saying that Sir.

Keith J My understanding it's express reference to the …

Thornton Well I think that might be explained inasmuch as it was the 1976 Act and at that time both the High Court and the Family Court had concurrent jurisdiction with regard to matrimonial property cases. That changed in I think, well it changed, and the legislation didn't alter when that position changed, I think it's referred to in section.

Keith J 39B is actually a 2001 amendment I see. I haven't actually checked to see what the previous 1976 provision said.

Thornton Under the '76 Act Sir the provisions of the Judicature Act relating to appeals to the Court of Appeal against the decision of the High Court shall apply with respect to any order or decision of the High Court of New Zealand under this Act.

Keith J Right.

Thornton So that was the '76.

Keith J And there was no express provision like 39B(2) then originally.

Thornton Subsection 39(3), subject to the rules governing appeals to her Majesty in Council against a Decision of the Court of Appeal of New Zealand or of the High Court of New Zealand, such appeal may be made in proceedings under this Act to her Majesty in Council.

Keith J Right, right.

Thornton Again it was subject as I read it there to s.67.

Keith J Well I don't know, the rules governing these appeals sound like the old Judicial Committee rules don't they? So that, anyway, that subsection (3) is the same, essentially the same as 39B(2).

Thornton As I read it Sir yes. If I could just perhaps pass on to s.44C. My submission essentially is that although this is new legislation, the Court or the Courts in applying it have not yet considered the full range of situations and scenarios that may present difficulties if there are any and it is too early for the Court to consider a definitive ruling on s.44C at this time. I think that's apparent in my submission from comments made by my friend and to the Court where there is a distinction between the time of defeat and time of compensation. If my friend's correct, and I don't want to get into the merits of the case, the potential appeal, but his starting point of the date of the transaction wouldn't enable any consideration by the Court of compensation. Whereas there are significant discretionary provisions in s.44C which will enable the Court to take cognisance of such things as the amount of payment made at the time of the transaction. The legislation as I say is new. The parameters have not yet been fully considered and in my submission if the Court were to embark on a consideration at this point it would be largely in a vacuum, particularly in this case where the issue of compensation hasn't yet been considered. So that the Court of Appeal has given a determination as to the time issue, time of defeat but the consequences of that so far as this case and others really hasn't yet been determined.

Gault J Well one of my concerns is that the Judgment of the Court of Appeal in this case is constructed in such a way as to invite the assessment of compensation by reference to the increase in the value of the farm. And I'm not sure that would not lead to some extraordinary circumstances if it were to be left as a guiding principle.

Thornton If the matter were allowed to stand, in my submission the Family Court would have the ability to assess varying factors that may militate.

Gault J That's so but my concern is, having worded the Judgment as it has, the Court of Appeal has in effect said that the defeat here is the loss of opportunity to participate in the capital appreciation of the farm which at the date of hearing is X dollars. Thereby inviting compensation to be considered by reference to that loss. And I'm not sure that the full implications of post-value developments up or down were considered in constructing the Judgment in that way. And while I accept that it appears that the discretion under subsection 4 as to quantum is very wide, my concern is that the steer from the Court of Appeal is perhaps a little rigid.

Thornton Yes, I can see that there wasn't a large amount of time spent by the Court on that and it was really giving the Family Court guidance if you like in my submission on the basis of this case, it was entirely an inappropriate way of dealing with the application of s.44C.

Gault J That's the issue I suppose.

Thornton Mm.

Gault J Yes well I understand thanks. You say it's premature in two ways.

Thornton Mm.

Gault J One is compensation hasn't been assessed in this case and in any event it's very early in the life of the legislation for a final Court to be setting out principles.

Thornton That's exactly the position Sir.

Gault J Yes.

Thornton And then dealing lastly with the issue of the stock. In my submission the concession by my friend is entirely appropriate. It is a stand-alone issue. And it doesn't in my submission meet the requirements to enable this Court to consider an appeal. Particularly as the evidential foundation is found wanting for the legal argument my friend seeks to advance.

Gault J Now one point I suppose I'd be interested in your comment on is the way in which this litigation has developed has been, it was described as staccato or something, if we succeed on this we're not really so worried about that. If we fail on that, then we raise this alternative and there is perhaps still a bit of that in here. These things tend to be part of the way in which the overall outcome is viewed by the participants. And why, if they're having a whack at one, should they be denied the opportunity of the other? That's the point.

Thornton Oh very much so. And I can see that that's the case and perhaps I could suggest that's a reason for finality.

Gault J Yes.

Thornton Unless I can assist the Court any further, I'd intend those to be my submissions.

Gault J Thank you Mr Thornton. Is there anything arising from that you want to comment on Mr Macfarlane?

10.42 am

Macfarlane Just the one thing Sir. If my friend is right and we should go back and deal with the quantum point in the Family Court then of course that drives Mr Nation into the arms of a Family Court Judge informed by precisely the way of reading the Judgment of the Court of Appeal which you've just discussed with my friend. So I would have thought with respect it was a better use of resource to get that right first rather than send Mr Nation back to the Family Court and if he gets a bad run there, what does he do? Does he come back to the High Court and then

the Court of Appeal and finally to the Supreme Court? It seems with respect a better way of getting the law right at the beginning than to put it aside and say that that's because the legislation is new. That's not a compelling reason to dispose of Mr Nation's interests with respect. That was the only matter I had in response.

Gault J And there's no prospect of the parties finally coming to some arrangement about this?

Macfarlane One would hope that they will eventually.

Gault J It's a very expensive piece of litigation.

Macfarlane It is.

Gault J Shall we just retire now? Counsel should remain for a time.

Court adjourns 10.43 am
Court resumes 10.47 am

Gault J Yes well we will issue a brief Judgment on the application shortly. But for the advice of Counsel, we are of the view that there is jurisdiction to entertain an appeal. That leave to appeal is granted but only in respect of the application of s.44C to the circumstances of this case. We do not consider that an appeal in respect of the stock meets the requirements for leave under s.13 of our Act. And we will deal with costs on the basis that they follow the event unless there are any submissions to the contrary.

Counsel (Away from microphone)

Gault J Thank you. We'll retire.

Court adjourns 10.48 am