IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

D/P NO. 4/17

IN THE MATTER	of the Matrimonial Property Act 1976 (NZ)(as applied in the Cook Islands by the Matrimonial Property Act 1991-92)
BETWEEN	**CAROLINE ANNE DANIEL**
	Applicant
AND	**IAN ROGER ZWIES**
	Respondent

Date of Hearing:	30 May 2018
Appearances:	Mr M Scowcroft for Applicant Respondent in person
Judgment (No.1):	18 July 2018
Date of Minute (No.1):	13 September 2018
Date of Minute (No.2):	17 October 2018
Date of Minute (No.3):	15 January 2019
Judgment (No.2):	29 April 2019

JUDGMENT (NO.2) OF HUGH WILLIAMS, CJ

[WILL0545]

Judgment of 18 July 2018

[1] The first substantive judgment in this long-running dispute under the Matrimonial Property Act 1976[1] was delivered on 18 July 2018. For present purposes, apart from a discussion of the precepts to be applied, the salient findings were:

a) The parties married in Rarotonga on 25 November 2011 separated, according to the applicant, Ms Daniel, by July 2014 and the marriage was dissolved by the Federal Circuit Court in Brisbane, Australia with effect from 5 August 2017.

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[1] Applied in the Cook Islands by the Matrimonial Property Act 1991-92.

The respondent, Mr Zwies, now disputes the date of separation and it will be necessary to reconsider that finding.

b) For the reasons set out in the "Procedural" section of the judgment[2], the Court put the orders in Mr Zwies' Australian Federal Circuit Court file number (P)BRC 10496/2016 property proceedings to one side in ajudicating on the merits of this case.

c) That the parties' jointly-held lease dated 10 September 2013 of 3247m^2 of land at Te Auere Section 14B Matavera, Rarotonga, was included within the matrimonial property regime and was matrimonial property divisible between the parties with an agreed value of $127,000.[3]

d) The value of the company, The Salon Limited, through which Ms Daniel operates her hairdressing business, was commenced prior to marriage and was accepted to be matrimonial property[4] but the parties differed as to its value, Ms Daniel relying on a valuation at $6,000 and Mr Zwies arguing for a valuation of $65,000. It will be necessary to reconsider the value of The Salon Limited in this judgment in light of additional evidence.

e) Mr Zwies owns a 2005 Suzuki Swift which has always been in Ms Daniel's possession. It was agreed to be matrimonial property and to be worth $9,000 at a time proximate to the hearing. The parties were to share equally in that sum.

f) The joint account of the parties at the Bank of South Pacific Limited, account number 2000205134, was in credit in the sum of $15.84 at the date of separation. It was held to be matrimonial property divisible equally between the parties, namely $7.92 each. Similarly a joint priority cash management account at ANZ, account number 336553, was in credit at separation of $18.42. This was held to be matrimonial property divisible equally between the parties at $9.21 each[5].

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[2] at [6]-[36].

[3] at [38]-[54], especially para [54] with the valuation as at 18 September 2018 being accepted as being a hearing date valuation.

[4] at [55]-[65].

[5] at [76]-[80].

g) Mr Zwies' equity in his Australian 2012 BMW motorcycle model K1300S, registration 661JK, was held to be matrimonial property and to be worth A$8,500 translated into New Zealand dollars at 31 July 2014[6].

h) Mr Zwies' equity in his Australian 2010 ML350 Mercedes Benz motorcar, registration 653TLO, was held to be worth A$1500 and to be matrimonial property translated into New Zealand dollars at separation date.

i) Though the evidence was imprecise, it was held that Mr Zwies' superannuation fund in the name of Merlin International was held to be matrimonial property with a value tentatively fixed at A$15,400 at separation translated into New Zealand dollars at that date[7].

j) The matter was adjourned for further evidence concerning the value of The Salon Limited, and additional information as to the couple's suggested debts at separation if they wished to argue they qualified as debts under s 20 of the Act.

Events since 18 July 2018

[2] As noted in the minute of 13 September 2018, pursuant to the directions in the judgment of 18 July 2018, Ms Daniel's filed her sixth affidavit on 18 August 2018 and Mr Zwies filed a further affidavit on 27 August 2018.

[3] The content will need consideration later in this judgment but the minute gave Ms Daniel one month to file further evidence as to Mr Zwies' assertion as to the date of separation, her asking price for The Salon Limited and whether the appearance of her name and that of her Rarotonga solicitors, Little & Matysik, on the coversheet of the Federal Circuit Court's order of 8 May 2017 in Mr Zwies' property proceedings was due to any involvement of those parties.

[4] As a result, Ms Daniel filed her seventh affidavit on 5 October 2018 and this judgment was in the course of preparation when, by email of 13 October 2018, Mr Zwies claimed he had further evidence on items listed in Ms Daniel's seventh affidavit. He sought ten further days

[6] at [86]-[90].
[7] at [99]-[102].

to submit that further evidence and, over objection by Mr Scowcroft, counsel for Ms Daniel, Mr Zwies was given ten working days from his receipt of the minute to file that evidence. That step was taken because the minute said "it is, of course, of prime importance that Court applications are ultimately determined on full and complete evidence"[8].

[5] Unfortunately, that minute was not distributed to the parties until 6 December 2018 but Mr Zwies' further affidavit was received on 19 December 2018 (NZT). Its contents led to the issuing of Minute (No.3) on 15 January 2019 seeking Mr Scowcroft's submissions on costs within ten working days of receiving the minute. Mr Zwies had already commented on costs.

Further evidence

General

[6] The first ten pages[9] of Mr Zwies' affidavit sworn on 27 August 2018 largely repeated the assertions made by him in previous affidavits concerning his contention that Australia was the only jurisdiction for the resolution of the couple's property disputes, adduced some additional emails as to their date of separation and again expressed his wish – despite Judgment No.1 saying[10] that there is no power so to do – to have his Australian orders registered in the Cook Islands. The affidavit also repeated aspects of the parties' separate Australian custody and access proceedings and gave details of Mr Zwies' view of matters relevant to that question.

Names Endorsed on Australian Property Proceedings

[7] From the material in the further affidavits of both parties it is clear that the inclusion of Ms Daniel's name and that of her Cook Islands solicitors on the coversheet of the Federal Circuit Court's 2016 documents in Mr Zwies' property proceedings did not result from any participation of those parties in those proceedings. Indeed, the contrary is the case; Ms Daniel's Rarotonga solicitors had expressly advised Mr Zwies' Australian solicitors and the Federal Circuit Court that the applicant would not be participating in the Australian litigation. It would appear that the identifying material referred to was included in the documents filed by Mr Zwies' Australian solicitiors because Ms Daniel had participated in another set of

[8] at [7].
[9] paras 1-51.
[10] at [30].

Australian proceedings, those relating to custody and access,[11] without those solicitors recalling that those proceedings had been permanently stayed on 4 June 2015.

[8] The additional material does not therefore require reconsideration of the comments in the 18 July 2018 judgment which concluded that Mr Zwies' Australian property proceedings had probably never been effectually served on Ms Daniel and that, even if they were, she had exercised the right of any civil litigant to decline to participate in the matter because of her belief that the Cook Islands was the appropriate jurisdiction to resolve the couple's matrimonial property dispute.

Date of Separation

[9] There may be a little more weight in Mr Zwies' extra evidence as to the parties' date of separation.

[10] His 27 August 2018 affidavit[12] put in evidence an email to him from Ms Daniel of 11 December 2013 which said "We're done! No more to be said! I will carry on with my children!". Mr Zwies said the parties lived separate lives from that month.

[11] In response, Ms Daniel's seventh affidavit sworn on 5 October 2018 said that, although she admitted sending the email, 11 December 2013 was not the end of the marriage. Their relationship had been characterised by lengthy periods when they lived apart – principally for education and employment purposes – and the statement in the email was simply symptomatic of the frustration she felt at the situation. She said Mr Zwies returned to Rarotonga in April 2014 to discuss construction of their family home but that attempt at reconciliation proved fruitless and she adhered to the view the parties finally separated in July 2014.

[12] Mr Zwies' affidavit of 18 December 2018 did not comment on this issue.

[13] Clearly the parties' marriage was unharmonious in December 2013. That may, as Ms Daniel said – and the parties' respective chronologies largely confirm – have stemmed from the fact that, over the period of their relationship between 2008-July 2014, they lived apart for

[11] FCC(P) BRC 9177/2014.
[12] at 11 and 12.

periods totalling over two years. In light of Ms Daniel's uncontradicted statement that the couple were together contemplating construction of a matrimonial home in April 2014 and also discussing the possibility of her shifting to Australia with the children, the conclusion is that there is no basis to revisit the finding in the 18 July 2018 judgment that the marriage of these parties, though unhappy matrimonially earlier, did not finally end until late July 2014.

[14] While it is acknowledged that Courts must decide cases on correct views of the facts, a subsidiary reason for taking that view is that adopting Mr Zwies' very late contention as to a different date of separation would effectively result in this lengthy litigation over property of relatively modest proportions having to be re-run.

Further Evidence

[15] Mr Zwies' final affidavit, sworn 18 December 2018, raises two other issues requiring consideration.

[16] The first is that in that affidavit – and others – Mr Zwies makes a number of statements such as that Ms Daniel's Australian solicitors in her custody case "are still available to clarify their position in the Australian property settlement, should the Court in the Cook Islands pursue this avenue" and other assertions that evidence is available on other topics should the Court require it to be produced.

[17] Comments such as that led to the 13 September 2018 minute saying:

> [4] In view of the contents of Mr Zwies' affidavit, it appears that the following comments may be apposite.
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> [5] Courts decide issues the parties apply to them to decide and, in order to preserve their independence, unless orders to that effect are formally sought, Courts do not require parties to provide information or issue subpoenas as Mr Zwies seeks in paras 9, 20, 22, 24 – 67 of his affidavit.
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> [6] Courts also decide the issues the parties present to them for decision on the evidence the parties choose to place before them and the logical inferences to be drawn from that evidence. It follows that parties can have no complaint at the outcome if they choose not to put particular evidence before them.

[18] That remains the position. The role of this Court, and other courts in the Common Law tradition, is not, fundamentally, inquisitorial. The system is adversarial and, apart from

deciding applications by parties for particular evidence to be provided, Courts' decision are, as the minute said, reached on the evidence the parties choose to put before them.

[19] Secondly, not only is that generally correct, but it is of particular importance in this case as a number of judicial comments have been made highlighting Mr Zwies' repeated failures to put relevant evidence on various topics – such as the pleadings and the reasons for judgment in FCC file (P)BRC 10496/2016 – in evidence in this matter. And, as the procedural section of the 18 July 2018 judgment detailed, he has been ordered on a number of occasions to provide evidence on various aspects of this dispute but has wholly or largely failed to comply.

[20] As will be seen, Mr Zwies' widespread and repeated failures in that regard are matters that authority shows the Court can take into account in its final distribution of the parties' assets.

Valuation of The Salon Limited

[21] Ms Daniel's sixth affidavit sworn on 17 August 2018 exhibited a further valuation of The Salon Limited in which a Mr Heays of Cook Islands Real Estate said that having studied the 2017 accounts of the company he could "see no reason to amend my previous sales valuation of approximately NZ$6,000 plus VAT if any".

[22] Mr Zwies' affidavit of 27 August 2018[13] took issue with Mr Heays' valuation saying a "more qualified business forensic accountant would be of more value for property settlements" for reasons the affidavit detailed.

[23] He suggested the company's accounts omitted income and relied on an email Ms Daniel sent on 13 March 2013 to a potential buyer saying "asking price for The Salon $65,000", a sum on which Mr Zwies earlier relied, as mentioned, in the 18 July 2018 judgment. He suggested that "in order for the correct valuation it would require the courts to order the respondent[14] to disclose all the books", something which would "allow for a more realistic and precise valuation with a reputable firm, not a firm that already has social and business associations" with Ms Daniel.

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[13] at 64-67.

[14] Sic: "applicant"?

[24] His 18 December 2018 affidavit restated that position, but went further concerning Mr Heays, saying that he was Mr Scowcroft's father-in-law, so his valuation evidence should be disregarded.

[25] Ms Daniel's seventh affidavit admitted sending the 13 March 2013 email, but said it followed a casual approach from a possible purchaser and that "I had no idea how to value a business and asked Ian [Zwies] what I should say. I believe he came up with a figure of $65,000 and I do not know how he calculated the figure", going on to point out that no sale eventuated.

[26] Dealing first with Mr Zwies' assertions about Mr Heays' valuation, it needs to be remembered it relates to assets in Rarotonga where valuers are not numerous and where a real estate agent is likely to have a good idea as to the sale price of an asset such as a hairdressing salon. While, in larger jurisdictions, a social or other relationship between parties, their solicitors and valuers might result in valuations being able to be performed by someone without such relationships, there is no basis, in Cook Islands terms, to conclude that such a relationship must necessarily result in abandonment of a valuer's professional expertise. Mr Zwies' criticisms of Mr Heays' valuation are therefore not accepted.

[27] As to the value of the business, while Ms Daniels, perhaps at Mr Zwies' urging, asked $65,000 for the business in March 2013, the asking price may well have been beyond the market price since no sale occurred.

[28] Further, though including this comment as a check, not as substituting the Court's views for Mr Heays' valuation, the 2017 accounts for The Salon Limited show a total income of $77,197.92 which, after charging wages ($39,254.21) and other expenses produced a loss for the year of $16,387.86. Even if Mr Zwies' criticisms of items omitted from the accounts may have some foundation, those figures do not suggest an asking price[15] of $65,000 was realistic.

[29] In default of any hard evidence as to value from Mr Zwies, the Court confirms that The Salon Limited was worth $6,000 at separation and further confirms that sum as matrimonial property equally divisible between the parties.

[15] though four years previously.

Debts

[30] The 18 May 2018 judgment gave the parties an opportunity to adduce further evidence concerning their indebtedness because it appeared they may owe significant sums and that it might have been the case that the parties contended that those debts qualified for deduction under s 20.

[31] In light of that, it needs to be recorded that Ms Daniel's sixth affidavit said she had no significant personal liabilities at separation, but owed significant sums by the date of the hearing with The Salon Limited having tax liabilities at both dates.

[32] She did not claim any of her indebtedness was for matrimonial debts which might qualify for deduction under s 20.

[33] Mr Zwies' latest affidavits were equivocal on the issue of debt.

[34] That of 27 August 2018 dealt with debts of unspecified amounts he may have incurred during the period of the parties' cohabitation including debts he incurred in acquiring qualifications. However, as noted in the 18 July 2018 judgment[16], the Matrimonial Property Act 1976 applies only to spouses so the issues raised by Mr Zwies are irrelevant.

[35] This matter will therefore be concluded on the basis that neither party has debts – quantified or not – which they claim should be taken into account and deducted under s 20 in the final distribution of their matrimonial property assets[17].

Mr Zwies' Australian Assets

[36] The 11 July 2018 judgment made certain findings concerning Mr Zwies' moveable property in Australia but said:

> [82] The next section of this judgment deals with Mr Zwies' other movable assets in Australia mentioned in evidence. Because he has failed to comply fully with the various directions earlier outlined, the section is necessarily based on such evidence

[16] at [4].

[17] There was some evidence that Mr Zwies may owe the Cook Islands authorities money, possibly for arrears of tax (see the email chain of 6-19 June 2018 between him and one Mataina Ngatae) but, if so,that is a matter between those parties.

> as there is, and the conclusions are necessarily tentative. If Mr Zwies wishes to challenge those conclusions, he is to have one month from delivery of this judgment to provide evidence supporting that challenge, and Ms Daniel is to have two weeks from receipt of Mr Zwies' additional evidence to file any evidence she wishes to adduce in opposition.

[37] The only additional evidence on those topics came from Mr Zwies in his 27 August 2018 affidavit.

[38] As to the BMW motorcycle Mr Zwies said he purchased the vehicle, new, in February 2013 for A$28,000. It was on hire purchase with no deposit and with a final payment – undated – of A$11,256. He had also purchased personal items. He said all the details are in file (P)BRC10496/2016.

[39] Mr Zwies' additional evidence carries the matter of the matrimonial property value of the BMW motorcycle no further. It is therefore confirmed that the equity in the machine for matrimonial purposes was A$8,500 translated into New Zealand dollars at 31 July 2014.

[40] As to the Mercedes Benz motorcar, Mr Zwies' only additional evidence was that he used the same type of hire purchase agreement to buy it as utilized with the motorcycle.

[41] Again, that additional evidence is unhelpful, so the Court sees no basis to revisit its earlier conclusion. The equity in the Mercedes Benz was fixed at A$1,500 at the date of separation translated into New Zealand dollars as at that date.

[42] The 18 July 2018 judgment commented[18] on the unsatisfactory nature of the evidence concerning Mr Zwies' superannuation and the paucity of information concerning that asset.

[43] Mr Zwies' 27 August 2018 affidavit restates his contention that he sent considerable sums of money to Ms Daniel during the marriage for business, house and child maintenance purposes. Some emails dealing with that topic were exhibited. He suggested the Court should direct Ms Daniel to produce further evidence as to her receipt of those remittances.

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[18] at [101].

[44] Dealing more directly with his superannuation, Mr Zwies said:

> **56. Trust fund in Australia:** It is concerning that the Court in the Cook Islands has made a judgment and not properly investigated that when withdrawing money from a Trust fund which facilitates the Superannuation account of Mr Zwies, it must be transferred into a nominated account which provides for the purposes of transparency and the payment of income tax on the amount being withdrawn. Superannuation accounts cannot be used like a normal withdrawal and deposit account, there are conditions associated with transferring funds. I have withdrawn from the Trust Account and deposited into an accepted account attached to the Trust Account/Superfund, which is accepted and the tax is applied to the amount withdrawn.

[45] A debit of $6,500 on 24 July 2014 was mentioned in the 18 July 2018 judgment. Mr Zwies' 27 August 2018 affidavit said it comprised payments given to Ms Daniel being "$1400 for travel expenses for [their child] to travel to Australia in August 2014 and $5000 for salon expenses, $800 cash [and] $2000 for rental bond and rent for July 2014". Those suggested payments total $9,200 which, even if the claimed cash payment were deducted, provide no adequate explanation for the 24 July 2014 debit of $6,500.

[46] Despite the comments in the 18 July 2018 judgment about deficiencies in the evidence concerning Mr Zwies' superannuation, he has done nothing beyond the above explanation to provide any further relevant evidence, such as providing any Trust Deed, any quantifiable financial calculations. or any other evidence, such as a present value assessment, which might have enabled the making of a more precise calculation as to his superannuation's worth at separation, or any other relevant, date.

[47] There is therefore no basis for the Court to reconsider its earlier findings that Mr Zwies' interest in his superannuation fund as at separation was worth at least A$15,400, and may have been more. It is clear that, at a minimum, that sum was matrimonial property divisible between the parties but the calucation of that division is affected by factors discussed later in this judgment.

Distributable assets

[48] In the light of all of that – and subject to later comments – the assets and their value to be distributed between the parties are as follows:

a)	Joint lease of Te Auere Section 14B Matavera, Rarotonga	$127,000.00
b)	Shares in The Salon Limited	$6,000.00
c)	2005 Suzuki Swift	$9,000.00
d)	Joint bank account 2000205134	$15.85
e)	Joint priority cash management account 336553	$18.42
f)	Mr Zwies' BMW motorcycle	$9,444.00[19]
g)	Mr Zwies' Mercedes Benz	$6,660.00
h)	Mr Zwies' superannuation	$17,111.00
	Total:	$175,249.27

Or, presumptively, $87,624.64 each

Of that total, the parties' matrimonial assets with the Matavera lease excluded, total $48,249.27[20] or $24,124.27 each, and their entitlement with the lease included and equally shared, is $87,624.63[21] each. There are already assets totalling $42,215[22] in Mr Zwies' name, $6,000 in Ms Daniel's name, with the balance being held jointly. That comment and those entitlements are, however, subject to adjustment for the factors discussed later.

[49] As mentioned, there are no debts which the parties claim should be taken into account under s 20.

Matavera Lease

[50] The figures in [48] demonstrate graphically that the distribution of the value of the Matavera lease – at $127,000 approximately 75% of the couple's distributable assets – is critical to the calculation of the entitlement of each of them.

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[19] The $AUS/$NZ crossover rate has remained relatively constant since 2014 at between about .8-.9. The actual rate at 31 July 2014 was .926468. As the actual date of separation and the amounts under discussion are estimates, .9 has been taken as a reaonable conversion rate (historical $NZ/$AUS exchange rates and OFX.com).

[20] $175,249.27-$127,000 = $48,249.27, which, divided by 2 = $24,124.63 each.

[21] $127,000 divided by 2 = $87,624.63.

[22] $9,444+$6,660+$17,111+$9,000 = $42,215.

[51] To recapitulate,[23] the parties acquired the Matavera lease after their marriage. They paid nothing for it, nor did they have to raise a mortgage to acquire it. The land was vacant and remains so. Importantly, in an uncontested passage, Ms Daniel said the land:

> "is on a section that was the subject of a land exchange with another family and the portion that the lease is on is allocated to my father and his siblings as their share. The area of the lease represents all of my father's allocation so I would not be able to obtain another lease if the current one was sold or transferred to someone else"[24].

Ms Daniel put Mr Zwies' name on the lease because he was her husband and they were then jointly committed to the marriage partnership, though it is noted the parties separated only some ten months later.

[52] Mr Zwies' only contribution to the lease is that he says he sent significant sums of money back to Ms Daniels, some of which was intended to go towards the house construction cost and paid the, unquantified, legal costs of acquiring the lease. He does not attempt to quantify the amount sent towards the house, but Ms Daniel accepts some part of Mr Zwies' remittances were for that purpose. However, the house never eventuated and the state of the parties' bank accounts at separation suggests little, if any, of that money could have been spent on the acquisition of assets.

[53] Against Mr Zwies' unquantified, but probably relatively minor, contributions towards acquisition of the lease and towards a house which did not materialise (and brought about no other assets), Ms Daniel brought to the marriage partnership, cost free to the parties, an asset which improved the parties' capital position from, using the figures in [48], about $48,000 to around $170,000, in circumstances where, given the strong restrictions on non-Cook Islanders acquiring land in the Cook Islands and Ms Daniel's family circumstances, Mr Zwies would never have been able to acquire the lease in his sole name.

[54] In terms of the 1976 and 1991-92 Acts, does that contribution by Ms Daniel to the marriage partnership require recognition in terms of the percentage of distribution of the distributable assets – predominantly the lease – between the parties?

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[23] at [38].

[24] Daniel 4, at 10.

[55] No Cook Islands authority was cited on the topic but in New Zealand there is a long line of pre-2001[25] cases dealing with a situation comparable to that between these parties. The authoritative text on the matter[26] describes the "unilateral introduction of capital to the marriage … from a source external to the operations of the marriage" as "by far the most common ground for unequal sharing". Property derived by inheritance or as third party gifts – which the acquisition of the Matavera lease essentially was – is the most common source of that external capital and the text analyses the principles underlying such orders for unequal sharing in the following way:

> Because the asset in these cases has commonly emanated from a separate property source, the principle of recognising an extra contribution under this head has sometimes been expressed in terms of a contribution to the marriage or de facto relationship of previously separate property.[6] It would seem, however, that the principle is not restricted to separate property in the technical sense found in ss 9 and 10, but that it embraces any introduction of capital to the marriage or de facto relationship from a source external to the operations of the marriage or de facto relationship.[7] ... Other examples, ... nevertheless qualify on the broader principle that there is an introduction of capital to the partnership not generated by any of the operations of the marriage or de facto relationship.[8] A loan from a third party upon favourable terms also qualifies,[9] although difficult to analyse in terms of separate property.
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> Fundamentally, the case for recognition appears to be the fact that the benefit to the partnership has not accrued from any of the operations of the partnership envisaged in s 18(1). The measure of the extra contribution to the marriage or de facto relationship is therefore the benefit derived by the partnership from this external source.

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6 See the Court of Appeal dicta of Richardson and Somers JJ in *Reid v Reid* [1979] 1 NZLR 572 (CA) and *Illingworth v Illingworth* [1981] 1 NZLR 1 (CA), discussed para 12.61 above.

7 Although in the foregoing Court of Appeal dicta reference was made to "separate property", the principal concern appears to have been the fact that "contributions to the partnership however include property not generated by it", per Somers J in *Illingworth v Illingworth* [1981] 1 NZLR 1 (CA) at 15 and the fact that the separate property "did not itself *result from the operations of the marriage partnership*", per Richardson J in *Illingworth v Illingworth* [1981] 1 NZLR 1 (CA) at 9 (italics inserted).

8 For example, *Walker v Walker* (1979) 3 MPC 189, White J (husband invested in matrimonial (now relationship) property $7000 acquired by him in general damages for personal injury sustained during marriage, in division under the former s 15 husband awarded the $7000 before equal division of remainder of balance matrimonial (now relationship) property, *Wiseman v Wiseman* (1981) 4 MPC 218, Cook J (due to accident during marriage, husband left paraplegic and received compensation from ACC and special improvements to home with ACC funds. Due to this and other factors, husband awarded two-thirds under the former s 14), *Hamblyn v Hamblyn* (1980) 3 MPC 75, Bisson J (utilisation of spouse's damages or compensation for permanent injury recognised as capable of satisfying the former s 14 although not in this case because both spouses had contributed damages from same

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25 when the New Zealand regime substantially changed.

26 *Fisher on Matrimonial and Relationship Property*, para 12.63. The footnotes are reproduced to explain the principle under discussion and to avoid lengthy citation of the cases from which the principle is drawn. The frequent references to de facto relationships stem from the 2001 NZ amendments.

accident and not sufficiently disproportionate). Interestingly, in California the community of property expressly excepts personal injury damages as the separate property of the injured spouse.

9 For example, *Lynch v Lynch* (1980) 3 MPC 101, 103 (CA) dictum of Richardson J, and see the parental finance extended in most of the cases involving purchases of farms from parents on favourable terms discussed in 4 above. See also the further dictum of Richardson J in *Haslam v Haslam* (1985) 3 NZFLR 545, 552 (CA) quoted in 5 above.

[56] Those passages are directly apposite to this case.

[57] As remarked in the first judgment[27], Ms Daniel might well have taken the lease in her sole name and retained it as her separate property, but she put it in their joint names for matrimonial purposes. The lease must therefore be regarded as being a benefit wholly derived, without charge, by the marriage partnership from the external source of her family. Additionally, the lease was the entirety of Ms Daniel's father's – and therefore part of her – inheritance, and was an asset Mr Zwies could never have obtained in his sole name.

[58] *Fisher* summarizes the way in which the contribution of capital from an external source sounds in the distribution of matrimonial assets in the following passage[28]:

> **12.64 Length of marriage or de facto relationship.** The relative importance of a contribution of capital from an external source depends upon a comparison between the value of that external capital on the one hand, and the various forms of "effort contribution" by the spouses or de facto partners during the marriage or de facto relationship on the other. In a short marriage or de facto relationship, there will be relatively little time for contribution through effort to have great impact upon the marriage or de facto relationship compared with the external capital. Substantial inequality is likely to result.
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> **12.65 Form in which external capital recognised.** ... As to form, the capital introduced to the marriage or de facto relationship from an external source is sometimes directly reflected in an equivalent sum of money which, pursuant to ss 14(3)(a) or 14A(3) for example, is returned to the spouse responsible before division of the remainder of the relationship property in equal shares.[1] A similar result is achieved by ensuring that the external capital from one spouse or de facto partner is mathematically reflected in that spouse's or de facto partner's increased percentage or fraction of the relationship property.

1 For example, *O'Connor v O'Connor* (1977) 1 MPC 149, Vautier J (husband's pre-marriage assets $8000 and wife's $400 returned to the two spouses pursuant to the former s 15 before equal division of remaining balance matrimonial (now relationship) property following marriage of 22 years), *Walker v Walker* (1979) 3 MPC 189, White J ($7000 personal injury damages contributed to

[27] at [44]-[49].

[28] Op cit 12.64 and 12.65.

matrimonial (now relationship) property returned to husband pursuant to the former s 15 before equal division of remainder following marriage of ten years).

[59] Quantifying those observations, the cases to which the text refers[29] show a range of results varying between,at the lowest, 66.6%-33.3%, through 70%-30% to 75%-25% and even up to 90%-100%[30].

[60] Applying those authorities to the Matavera lease, the circumstances of its acquisition previously recounted, combined with this being a relatively brief marriage to which both parties made monetary and non-monetary contributions and the fact that the lease was only held for the last 10 months of the marriage, means the s 18 presumption applies. The authorities discussed in *Fisher* are indicative, but need to be considered against the fact that land and leases are freely transferable in New Zealand but restrictions are in place in the Cook Islands and the family circumstances which lead to the parties acquiring by far their most valuable asset at no cost to themselves. All of that leads to the conclusion that the value of the Matavera lease should be allocated between the parties in the proportions of 75% ($95,250) to Ms Daniel and 25% ($31,750) to Mr Zwies, a proportionate sharing which, coincidentally, echoes the augmentation of the couple's distributable.assets by its acquisition.

[61] Applying the authorities in *Fisher*[31], and recalculating the parties' entitlement in light of that determination, Ms Daniel's final entitlement to the parties' matrimonial property is $119,374.27[32]and Mr Zwies' is $55,874.27[33]

[62] The next stage in calculating whether those sums are the value of the assets each should receive is to consider whether Mr Zwies' actions or inactions for the period this case has been on foot is something which affects the amount each party is to receive.

[63] The correct approach in circumstances where one party has failed to provide all the information necessary to enable a Court to correctly evaluate spouses' proper entitlement[34] is

[29] Apart from a few outliers based on unusual facts or decided before the 1976 Act bedded in.
[30] *Smith v Heappey* (1980) 3MPC 171.
[31] at para 12.65.
[32] $95,250+$24,124.27 = $119,374.27
[33] $31,750+$24,124.27 = $55,874.27
[34] Including custody and maintenance.

to be found in the decision of the UK Supreme Court in *Prest v Petrodel Resources Limited*[35] where Lord Sumption observed[36]:

> 44. "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."
>
> 45. The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is.

[64] Those observations were adopted by the New Zealand Court of Appeal in *Clayton v Clayton*[37] where the Court held:

> [186] In our view, when the public interest considerations lying behind the purpose and principles of the P[roperty] R[elationships] A[ct] are taken into account, there is merit in an approach that recognizes that:
>
> (a) parties to relationship property proceedings are under an obligation to make full and frank disclosure of all relevant information in order to ensure that the court is in a position to make appropriate orders for the ascertainment and division of relationship property under the PRA.

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[35] [2013] UKSC34 at 44-45.

[36] relying on *R v Inland Revenue Commissioners, EXP TC Coombs & Co* [1991] 2AC 283,300.

[37] [2015] NZCA30 at 186. See also *Webb v Webb* CACI CA 7/17 at 55-56, p17.

(b) If a party who had or has relevant information available for that purpose fails to disclose it in the proceedings, the court may draw such inferences as it considers appropriate, including the adverse inference that the information would not have assisted that party if it had been disclosed;[130] and

(c) In drawing appropriate inferences for the purpose of making findings of fact, the court may rely on all the information that has been disclosed, its experience in cases of this nature and the inherent probabilities from the non-disclosure of information.

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130 Cf *Jones v Dunkel* (1959) 101CLR 298 at 308, 312 and 320-321; *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1NZLR 731 (CA) at [153]-[154]; *Kuhi v Zurich Financial Services Australia Ltd* [2011] HCA 11, (2011) 243 CLR 361 at [63]-[64]; *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [15]; leave to appeal refused *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZSC 89; and *Morgenstern v Jeffreys* [2014] NZCA 449 at [78]; leave to appeal refused *Morgenstern v Jeffreys* [2014] NZSC 176.

[65] How that principle is to be applied is as set out in the decision of the New Zealand Court of Appeal in *Ithaca (Custodians) Limited v Perry Corporation*[38] where the Court said:

> [153] ...Neither is it helpful to refer to the "rule" in *Jones v Dunkel*[39]. There is no rule. Rather, there is a principle of the law of evidence authorising (but not mandating) a particular form of reasoning. The absence of evidence including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when;
>
> (a) The party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
>
> (b) The evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
>
> (c) The absence of the witness is unexplained.
>
> [154] Where an explanation or elucidation is required to be given, an inference that the evidence would not have helped a party's case is inevitably an inference that the evidence would have harmed it. The result of such an inference, however, is not to prove the opposite party's case but to strengthen the weight of evidence of the opposite party or reduce the weight of evidence of the party who failed to call the witness.

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38 [2004] 1 NZLR 731 at 153-154, p767-8.

39 (1959) 101 CLR 298.

[66] Those authorities clearly apply to Mr Zwies' management of this case, a case where, apart from the Matavera lease, the parties' disclosed assets are of modest proportions.

[67] First, as the procedural section of Judgment No.1[40] noted, prior to the fixture, the case went through a number of call overs at three of which the Judges commented on Mr Zwies' failure to fully disclose his financial position and made orders requiring him so to do. It was only in his affidavits of 10 June 2017, 28 May 2018[41] and 27 August 2018[42] that Mr Zwies made any attempt to meet his obligations, and, even then, the information provided was minimal. In view of the particularly detailed minutes, he cannot justifiably assert he was unaware what the Court required him to provide.

[68] It also needs to be noted that virtually all the sparse information the Court has concerning Mr Zwies' financial position was put in evidence by Ms Daniel, not by the respondent. That implies that, had it not been for Ms Daniel's diligence, Mr Zwies may have been content for the Court to conclude this case without knowing anything of his superannuation or his other Australian assets.

[69] It is also noteworthy that, throughout this matter, Mr Zwies' evidence has largely been concerned about the parties'custody and access dispute – which is irrelevant as far as these proceedings are concerned – and with repeatedly claiming that Australia was the only jurisdiction for the resolution of all aspects of the couple's matrimonial property, but without backing up that latter claim with proper reference to the pleadings, arguments and judgments which supported his contention.

[70] Given that the couple's disclosed major asset was Cook Islands' realty, that was always likely to be an unpersuasive argument, yet he continued to make it at a time when he had Australian lawyers working on his property proceedings from whom he might have sought legal advice on the topic, when he was participating in these proceedings – and submitting to this Court's jurisdiction – without taking any step to have his assertion of the correct jurisdiction ajudicated upon in either country, and when he repeatedly failed to provide any information which might justify the significantly unequal division in his favour in the Australian orders on which he relied. He also continued to pursue a request for registration of

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[40] at [6]-[36].
[41] two days before the hearing.
[42] after delivery of Judgment No.1.

the Australian orders in the Cook Islands when he is likely to have known there was no legal power for that to occur.

[71] The evidence on Mr Zwies' superannuation is an example of the paucity of evidence he chose to put before the Court, in the face of orders to provide full information.

[72] Ms Daniels managed to adduce minimal evidence as to Mr Zwies' superannuation[43] and even though superannuation is normally valued at separation[44], Mr Zwies' response was to comment on generic matters concerning superannuation, not his own position. He failed, despite the nature of the findings in Judgment No.1[45] to provide evidence of, say, any circumstances which might limit his rights of withdrawal or provide an assessment of his entitlement at the date of separation or adduce the usual actuarial calculation of the present value of his entitlement's then worth.

[73] All those factors, in terms of the authorities, lead to the conclusion that the additional evidence Mr Zwies has been ordered on several occasions, but failed almost completely, to provide and his attitude to the case implies that his proper and full provision of that evidence would have harmed his case – probably in the sense of showing him to have more assets than appears in the evidence or they were worth more at the relevant date. That failure does not add to Ms Daniels' evidence but it weakens Mr Zwies' assertions and fortifies what Ms Daniels said about the couple's assets, particularly the Matavera lease and Mr Zwies' matrimonial property. It follows that, where there is a conflict between the parties in the evidence, Ms Daniel's version should be accepted and Mr Zwies' evidence as to his assets should be regarded as giving no more than their minimum value. That, in part, supports the 75%-25% split of the Matavera lease's value.

Costs

[74] This case has been in progress for over two years. As the parties' financial positions now appear, it is, apart from the unsatisfactory nature of the evidence concerning Mr Zwies' moveable property in Australia, a dispute within narrow proportions.

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[43] Daniel 5, Exhibits E-G.

[44] *Fisher on Matrimonial and Relationship Property* , para 10.26-10.34.

[45] at [99]-[102], especially the last, to put the base documents concerning his superannuation into evidence.

[75] That said, it has required four call overs, seven affidavits from the applicant, seven affidavits from Mr Zwies (plus a number of memoranda) and has necessarily involved a considerable amount of time on Mr Scowcroft's behalf.

[76] In light of the foregoing, there can be no doubt that Mr Zwies' approach to the litigation and his failure to comply with Court directions means that Ms Daniel's legal costs have been much greater than should have been necessary to resolve a relatively straightforward dispute. That mandates a greater award of costs against him than might otherwise have been appropriate.

[77] Mr Scowcroft's 22 February 2019 submissions on costs pursuant to the minute of 15 January 2019[46] sought costs pursuant to s 92 of the Judicature Act 1980-81 and s 40 of the 1976 Act. Drawing on the well-known New Zealand case on costs, *Morton v Douglas Homes Ltd*[47] he submitted that an award of costs is to impose an obligation on the unsuccessful party to make a reasonable contribution towards the costs incurred by the other party.

[78] Though without this judgment being available, Mr Scowcroft relied on the findings in Ms Daniel's favour in the first judgment coupled with Mr Zwies' attitude to the way in which he has participated in this case[48].

[79] Adopting the two step approach of considering the costs actually incurred and whether they were reasonably incurred and then to assess a reasonable level for the respondent to contribute, Mr Scowcroft said that, to the date of his memorandum, Ms Daniel had incurred legal costs (excluding VAT) of $32,873.50 plus $251.04 for disbursements. Though Mr Scowcroft exhibited his firm's fee notes, he did not disclose his charge out rate, but the costs charged to Ms Daniel do not seem unreasonable for the amount of work involved in this litigation. He relied on authority[49] to submit an award of costs within the – very wide – range of 20%-80% of a reasonable fee was justified having regard to the factors appearing in New Zealand authorities on the topic.

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[46] Received by the parties on 12 February 2019.
[47] [1984] 2 NZLR 620.
[48] Relying on *S v S* [2017] EWHC 2345 (FAN).
[49] *Maina Traders Ltd v Ngaoa Ranginui* (Costs) App.225/2011, Isaac J, at 16-18, 1 February 2013.

[80] Mr Scowcroft particularly relied on Mr Zwies' stance in the matter saying that he "has followed his own rules during these proceedings and has entirely ignored the rules of the Court and timetabling directions" and, although he is a litigant in person, his approach should weigh against him. He particularly relied on his preparation for Court on three earlier occasions when the matter had to be adjourned, at Mr Zwies' instigation, at the last moment. He relied on the procedural chronology set out in the first judgment and on R.13(c) of the Matrimonial Porperty Rules 1993 which expressly states that the failure of a party to comply with procedural directions "may be taken into account… in exercising the power under s 40 of the Act to make an order as to costs."

[81] Mr Scowcroft detailed the efforts made by the parties to settle the matter through mediation or other alternative dispute resolution only to be blocked by Mr Zwies' insistence that Ms Daniel submit to the jurisdiction of the Australian Federal Court as a prerequisite to mediation. However, that matter lies outside the evidence in the case and is put to one side.

[82] Mr Scowcroft also relied on Mr Zwies' evidence containing a large amount of irrelevant or repetitious material and the comments in the first judgment that, while repeatedly asserting that Australia is the only appropriate jurisdiction for the resolution of this dispute, Mr Zwies never took any step procedurally to support that contention. Mr Scowcroft particularly relied on the applicant's efforts to obtain full disclosure from the respondent by means of notices to produce and orders for discovery, drawing particular attention to specific instances where evidence from Mr Zwies was lacking. In addition, he relied on comments made by Judges during the course of this litigation as to the likelihood of orders for costs being made against Mr Zwies having regard to his actions or inaction. Against an accepted New Zealand starting point of a two-thirds award, he settled on seeking an award of 75% of Ms Daniel's legal costs,which he calculated at $23,747.63 plus $1,210 for the 5 December 2017 adjournment and reimbursement of the funds expended on her behalf[50].

[83] There can be no doubt that because of Mr Zwies' attitude to this litigation, it has gone on much longer than the matters in issue between the parties justified and has needed many more conferences, callovers and affidavits than the issues warranted. There was no great legal complexity in those issues – most have been able to be resolved by reference to established precedent – but by reason of Mr Zwies' failure to comply with directions as to disclosure of

[50] $23,747.63+$1210 = $24,957.63 & 75% of $32,873.50 is actually $24,655.12

his assets or to respond to comments made by Judges as to the course he should take in managing the litigation, as the judgments show the facts of the dispute became uneccessarily complicated and, by reason of the various adjourned fixtures, much more time was required on Mr Scowcroft's part than the issues between the parties would ordinarily have necessitated. Further, as the review of the evidence as shown in the judgments makes clear Mr Zwies repetitively raised issues of no relevance in the proceeding – eg. the custody and access dispute between the parties – and raised issues which ought never to have been raised, such as Ms Daniel's interest in a family trust house in Auckland, New Zealand. Further, he has largely been unsuccessful on all the matrimonial property issues between the parties and his obdurate refusal to make full disclosure of his financial position at the relevant dates means that, even after more than two years, Ms Daniel's success in the litigation may perhaps be at a lower figure than would have been justified had full disclosure by Mr Zwies been undertaken.

[84] Looking at the matter generally, the Court's view is that the Cook Islands' range of 20%-80% of costs for an award is so wide as to be of little guidance and that it is preferable to use the common New Zealand starting point of two-thirds of costs incurred, and adjust the percentage up or down according to the individual case.

[85] Having regard to all the factors discussed as impacting on costs in this case, Mr Scowcroft's application for recovery by Ms Daniel of 75% of her legal costs – only 8.6% above the starting point – is not unreasonable and there will be an order that the respondent pay the applicant the sum of $24,750[51] for legal costs plus disbursements of $251.04, a total of, say, $25,000.

Result & Implementation

[86] The upshot of that consideration of the parties' respective entitlements is that, as earlier found, Ms Daniel is entitled to $119,374.27 of the couple's $175,249.27 of distributable matrimonial property and Mr Zwies is entitled to the balance, $55,874.27, of that sum, but, also to be taken into account, is that, pursuant to the order in [85], Ms Daniel is also entitled to payment by Mr Zwies of a contribution towards her costs and disbursements of $25,000.

[87] In light of that how should this litigation be finalised?

[51] Adjusted for the factors in footnote 50.

[88] As noted, the Suzuki is in Mr Zwies' name but has been in Ms Daniel's possession since separation, Assuming Mr Zwies will agree to transfer the Suzuki into Ms Daniel's name, that the parties will treat the joint bank accounts as cancelled as at separation date with the credits distributed equally, and leaving the costs award aside for the moment, Ms Daniels, already being entitled to half the value of the Suzuki and therefore nominally paying Mr Zwies' $4.500 for his share will have received $10,517.14[52] towards her entitlement of $119,374.27 and Mr Zwies will have received $37,732.14[53] towards his entitlement of $55,874.27

[89] Ordinarily, to enable each of the parties to receive their full entitlement, the lease would be sold with the unpaid balances of the entitlements – $108,857.13 for Ms Daniel and $18,142.13 for Mr Zwies – being met from the proceeds[54]

[90] However, in this case two factors affect that means of achieving finality.

[91] The first is that when the costs award is factored into the exercise, the result would be that, to meet that award from Mr Zwies' share of the proceeds, $25,000 would need to be deducted from his share and added to Ms Daniel's share. On an assumed sale price of $127,000, that would result in Ms Daniel being paid the whole of Mr Zwies' share of the lease proceeds and still being liable to Ms Daniel for the difference of $6,857.87.

[92] The second factor is that Ms Daniel has consistently said in her affidavits that her aim in this litigation is for the Matavera lease not to be sold but transferred into her sole name.

[93] The parties are directed to collaborate on finalising the matter, but it would appear that completion might best be effected by:

a) confirming the matrimonial assets in the parties' sole names, other than the Suzuki, as their separate property;

b) by Mr Zwies transferring the Suzuki to Ms Daniel;

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[52] $6,000+$4,500+$17.14 = $10,517.14

[53] $9,444+$6,660+$17,111+$4,500+$17.14 = $37,732,14

[54] Adjusted 75%/25% for increases or decreases in the sum of $127,000.

c) by Mr Zwies signing the necessary instrument of alienation to transfer the Matavera lease into Ms Daniel's sole name;

d) and by Mr Zwies paying Ms Daniel $6,857.51.

[94] However, that method of distribution is no more than the Court's suggestion and, if the parties cannot agree on the means of effecting the distribution within 20 working days of delivery of this judgment, they may file memoranda – including, if necessary, any application for charging orders – and the Court will then make the necessary orders to conclude the matter.

Hugh Williams, CJ