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
No appearance for or on behalf of Respondent

Judgment: 18 July 2018

JUDGMENT (No.1) OF HUGH WILLIAMS, CJ

Introduction, Chronology and Law

[1] On 10 March 2017 the applicant, Ms Daniel, applied for orders resolving her matrimonial property dispute with her former husband, Mr Zwies, the Respondent[1]. As far as is currently possible, this judgment deals with that application.

[2] Parliament in the Cook Islands passed the Matrimonial Property Act 1991-92[2] which, with exceptions, transposed the Matrimonial Property Act 1976 (NZ)[3] to be the law on the topic in the Cook Islands, but with the important qualification that the matrimonial property regime in the Cook Islands should "have no application to an estate in fee simple or to any other freehold interest whether legal or equitable of native freehold land" but gave the Court power,

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[1] The parties married in Rarotonga on 25 April 2011, separated, according to Ms Daniel, by July 2014 and the marriage was dissolved by the Federal Circuit Court in Brisbane, Australia with effect from 5 August 2017, Daniel 1, 11 and 20. Zwies 10, 17 exhibit B.

[2] "The 1991-2 Act"

[3] "The 1976 Act"

if such estates would otherwise have been available for division between spouses, to "make an order affecting any other property (notwithstanding that that other property may be separate property) [to] compensate a spouse to the extent that that spouse has been prejudiced"[4]. "Native Freehold Land" is not defined in either the 1976 or the 1991-92 Acts but in the Cook Islands Act 1915 the phrase is defined as meaning "land which, or any undivided share in which, is owned by a Native or a descendant of a Native for a beneficial estate in fee simple, whether legal or equitable". Caution always needs to be exercised in importing definitions from one statute into another, but the identity of the wording means that, although Parliament has not said so, it can be assumed it intended that the Cook Islands Act 1915 definition of "Native Freehold Land" was to apply in matrimonial property matters.

[3] Those exceptions have played a considerable role in reducing the number of matrimonial property disputes requiring adjudication by the Court, but they have relevance in this case.

[4] The 1976 Act effected a huge change in the matrimonial property law of New Zealand and the 1991-2 Act carried that change through into the law of the Cook Islands. But the 1976 Act had its limitations, one of which was that it applied only to married persons so that where persons lived together but did not marry or where, as in this case, cohabitation preceded marriage, cohabitation was relevant as a matter of narrative, but not of qualification or division[5]. Other provisions and pitfalls of the 1976 – and therefore of the 1991-92 – Act relevant to particular assets will be discussed at appropriate points of this judgment.

[5] The features of the New Zealand statute which are relevant to the present matter include first, that the value of any matrimonial property is prima facie to be its value at the date of the hearing but the share of a spouse in the matrimonial property is to be determined as at the date on which the parties ceased to live together as husband and wife and, secondly, where classification of property as matrimonial property depends on the use to which it had been put, that classification is to be determined by the use to which it was put by the parties to the marriage[6]. The 1976 Act was a code replacing the rules and presumptions of the Common Law

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[4] Section 4(1)(2).

[5] The New Zealand Parliament has radically modernised its law as it relates to spouses and partners (of either gender) since 1976 but the Cook Islands Parliament has not amended the 1991-92 Act.

[6] Section 2(2)-(4).

and equity[7] and, of importance in this case, the Act applies to moveables and immovables within the Cook Islands and movables situated in any jurisdiction if at the date of the Court application either or both the parties was domiciled in the Cook Islands, but the Court is empowered to decline to make an order in respect of movable property outside the Cook Islands if the order is sought against a person who is neither domiciled nor resident there.[8] Ms Daniel is domiciled and resident in the Cook Islands and Mr Zwies is resident in Queensland and domiciled in Australia

Procedural

[6] There have been two sets of matrimonial property proceedings between the parties to this matter: the present proceedings in the Cook Islands with which this judgment deals and proceedings in the Federal Circuit Court of Australia[9] which Mr Zwies initiated. He relies on its findings in this matter.

[7] It is accordingly pertinent to record, so far as the evidence discloses it, the course which each of these proceedings has taken and the evidence on which this judgment must needs be based.

[8] On what appears to have been 12 or 17 November 2016 Mr Zwies commenced the FCC proceedings but although, as will be noted, certain information and two orders which appear to come from those proceedings were put in evidence in this case, Mr Zwies, perhaps tellingly, has never put in evidence in this case the pleadings and evidence in the FCC proceedings, nor the judgments which led the Court into making the two orders in those proceedings which form part of the evidence here.

[9] More pertinently, though Ms Daniel issued proceedings out of the FCC[10] as a result of Mr Zwies not returning the couple's child, Jesse Caian Zwies born 26 December 2008, in accordance with the couple's access arrangements and failing to notify the child's whereabouts in Australia[11], Ms Daniel never entered an appearance or took any part in the FCC property

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7 Section 4.
8 Section 7.
9 Federal Circuit Court ("FCC") file number (P)BRC 10496/2016.
10 FCC (P)BRC 9177/2014.
11 Actions which Mr Zwies claimed were justifiable.

proceedings. Queensland solicitors acted for her in 2014 in 9177/2014 but she instructed nobody in Queensland to act for her in 10496/2016.

[10] An email dated 24 April 2017 from Ms Daniel's present Cook Islands' solicitors to the Queensland solicitors who acted for Ms Daniel in 9177/2014 responded to a letter from Mr Zwies' Queensland solicitors dated 12 April 2017 saying the papers in 10496/2016 had been served on Ms Daniel's solicitors on the record in 9177/2014. Ms Daniel's Rarotonga solicitors said in that email that "we are not filing anything in Australia in response to Ian's application as we do not recognise the Australian Court's jurisdiction to deal with the matter" and that "we have sent a letter to the Australian Courts to advise this (both by email and registered post) and have advised Ian's Australian lawyer". Those letters were not produced in evidence.

[11] Given this Court has no information suggesting that applications for substituted service or leave to serve out of the judisdiction were ever sought in 10496/2016, commenced in November 2016, and 9177/2014 was permanently stayed on 4 June 2015, it is difficult to conclude that the FCC could have accepted that service of the papers in 10496/2016 could ever have been validly effected by serving solicitors on the record in a separate proceeding dealing with different issues which was permanently stayed 17 months previously.

[12] Given Mr Zwies has, in these proceedings, steadfastly relied on orders made, without Ms Daniel's appearance, in 10496/2016, that is significant in relation to Mr Zwies' wish to have those orders recognised in this Court.

[13] The evidence for Ms Daniel commenced with her first affidavit sworn on 26 April 2017 listing her property, including a joint lease – all in Rarotonga – giving a brief history of the couple's relationship and giving certain details of Mr Zwies' property, including exhibiting his financial statement filed in 10496/2016, and saying:

> "22. I know Ian has significant property abroad, but I am not interested in that. I simply want the Rarotonga property, including the business, the lease, and the car, so that I can get on with my life here.
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> …
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> 24. Although Ian has assets abroad, the Cook Islands is where Ian and I have had our home. Although he has worked abroad for a large portion of our marriage, we have

always planned to live in Rarotonga and to build our home here. The children[12] and I have lived here for the duration of our marriage.

25. I am not interested in Ian's property abroad, so I am only seeking orders in respect of the Cook Islands property.

26. I do not have the resources to participate in a matrimonial property claim in the Australian Courts. I am already dealing with a custody application in Australia relating to Jesse and I cannot afford to also contest a property claim there.

27. Despite the fact that Ian has filed proceedings in Australia, I ask that the Cook Islands Courts deal with this application as the Cook Islands is the appropriate venue where the property is located in the Cook Islands and my children and I reside in the Cook Islands."

[14] Service of these proceedings on Mr Zwies led to his first affidavit sworn on 8 May 2017. Though most of the affidavit irrelevantly dealt with the parties' ongoing access dispute[13], pertinent to these proceedings the affidavit stated:

"b. The respondent Mother and applicant Father have Parenting Orders for the child Jesse Cain [sic] Zwies dated 18 November 2014 from the Federal Circuit Court, Australia.

c. The respondent Mother and applicant Father have Orders for the Property Settlement dated 8 May 2017 from the Federal Circuit Court, Australia.

Divorce and Property Settlement:

d. The respondent Mother has previously instructed her Brisbane, Australia solicitors, on record, to receive notice and act for her. These same solicitors were served an application for Divorce on 19 October 2016 and a Property Settlement application on 22 November 2016 by my solicitor."

[15] Comment has already been made concerning the likely ineffectuality of service of the proceedings in 10496/2016 on the solicitors who acted for Ms Daniel in 9177/2014 but the FCC order of 8 May 2017 in 10496/2016, to which Mr Zwies refers noted the lack of appearance by or on behalf of Ms Daniel, directed her to file and serve any material in response to the application for property settlement within 28 days of the order and gave Mr Zwies

[12] As well as the couple's child, Jesse, she has a daughter from a previous relationship.

[13] Paragraphs A-W.

"liberty to apply for default orders" if Ms Daniel did not file the material. The order noted that "this matter involves a jurisdictional argument".

[16] These proceedings were listed for mention before Potter J on 10 May 2017. The Judge made timetable orders and noted that the "position is that if Mr Zwies wishes to challenge this Court's jurisdiction in relation to matrimonial property situated in the Cook Islands, it is for him to do so." She directed that the matter be listed for mention in the July 2017 sitting of the Court.

[17] That minute led to Mr Zwies filing his second affidavit sworn on 10 July 2017. Part related to the couple's access dispute under DP 4/17 in the Cook Islands and part was critical of Ms Daniel personally – matters which are almost wholly irrelevant in "no-fault" statutes such as the 1976 and 1991-2 Acts – and part asserted that it was contempt of Court for Ms Daniel to put Mr Zwies' financial statement in 10496/2016 in evidence in this Court. However, some commented on property issues, including asserting omissions from Ms Daniel's affidavits. The affidavit concluded:

> "Understandably I am unable to engage, in the same matter, in another, different *jurisdiction*, as both the applicant mother and myself already have this matter on foot in Australia, with corresponding, existing Australian orders."

The correctness of that last assertion is open to doubt.

[18] Ms Daniel then filed her second affidavit sworn on 21 July 2017 again contending the Cook Islands was the appropriate jurisdiction for resolution of the parties' property dispute and saying that "I have never consented to, made any appearance in, or filed anything, in relation to the Australian Matrimonial Property application". She repeated that "I am not seeking orders in respect of property outside the Cook Islands."[14] She went on to comment on aspects of Mr Zwies' assertions concerning property matters.

[19] These proceedings were mentioned before Doherty J on 27 July 2017. The Judge set both this and the custody and access dispute down for hearing in the December 2017 sessions.

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[14] Daniel 2, para 10.

[20] Ms Daniel filed a brief third affidavit sworn on 30 October 2017 giving her income and expenditure and saying the property in contention totalled $95,731.04 gross with liabilities at $19,500[15]. She followed that with a fourth affidavit sworn on 1 December 2017 annexing the accounts for her business, The Salon Limited, and giving additional details of the parties' joint lease of land at Matavera, Rarotonga.

[21] Perhaps as a prelude to the 5 December 2017 fixture in this case, Mr Zwies filed a further affidavit sworn on 3 December 2017 saying he had been unable to take part in these proceedings because "I have been involved in the property settlement in Australia which involves the same properties and parties" and that in consequence there was insufficient time to respond to Ms Daniel's fourth affidavit. He sought an adjournment. He repeated his assertion that Australia was the appropriate jurisdiction for the resolution of this dispute and said:

> "I dispute that the mother did not take part in the Australian proceedings. She has engaged Australian solicitors who had been engaged by her to act for her and have been included on the file. The solicitors have received notice regarding the Australian application for property settlement from my Australian solicitor. My solicitor has sent information regarding our property settlement to their office."

[22] Perhaps most pertinently to this matter is that Mr Zwies followed that with a further affidavit sworn on 19 December 2017, exhibiting an order made on 21 November 2017 in 10496/2016 on which Mr Zwies particularly relies. That order, after noting the lack of appearance on Ms Daniel's behalf, read:

> "**THE COURT ORDERS ON A FINAL BASIS:**
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> 1. That the parties, within 28 days of the date of this order disclose to each other all of the parties' assets and liabilities, including but not limited to real estate assets, superannuation entitlements, chattels, business interests and financial [sic] irrespective of whether such property or financial resource is located in Australia, the Cook Islands or New Zealand.
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> 2. That upon such disclosure as stipulated in order 1 herein, the parties be entitled to receive the following net property:
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>   a. 70% to the husband;
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>   b. 30% to the wife.

[15] The dollar figures in this judgment are mainly NZD, the Cook Islands' currency, but some are in AUD, according to the locus of the asset and, at this stage, no attempt has been made to factor in the fluctuating exchange rates.

2 That in the event that the wife fails to comply with the provisions of order 1 herein, the husband be solely entitled, to the exclusion of the wife, to any and all property registered in the husband's name or under the husband's control.

IT IS NOTED

A. That these Orders were made in the absence of the wife and that pursuant to Rule 16.05(2)(a) of the Federal Circuit Court Rules 2001 the wife may apply to have these Orders set aside."

[23] In the meantime, on 5 December 2017, these proceedings were called before Grice J. The Judge summarised Mr Zwies' position, including his application for an adjournment, an application he renewed during the hearing by teleconference phone call (which was disconnected). After reviewing the parties' positions in both these and the access proceedings, the Judge reluctantly concluded "that I am unable to proceed to a hearing without Mr Zwies being present to participate". After indicating her preparedness to preside over any possible judicial settlement conference, Grice J observed:

> [14] ... Mr Zwies application to adjourn the hearing was made late and without appropriated supporting material. It was fortunate that we were able to arrange a telephone link with him to hear his application. Otherwise there would have been no appearance by him which appears to be his initial approach. The court was inconvenienced and it was only through the efforts of the court staff that contact was able to be made with Mr Zwies. In those circumstances costs should be awarded in favour of the applicant.

[24] Grice J's timetable required Mr Zwies to serve a further affidavit setting out his asset position by 5 February 2018.

[25] According to the file, Mr Zwies did little towards compliance with those directions bar the filing of his 19 December 2017 affidavit and a memorandum, not an affidavit, dated 2 March 2018 in response to Ms Daniel's application for "unless" and production orders. It largely repeated issues raised by him in his previous correspondence[16].

[26] These proceedings came before Potter J on 23 March 2018. She allocated a one day fixture during the sessions commencing on 21 May 2018 and made the following, unusually specific, directions:

> [2] In order to progress this matter, there will be the following orders:

[16] In para 2 of his 2 March 2018 memorandum, Mr Zwies refers to an affidavit dated 22 February 2018. That does not appear to be on the Court file.

a) by 4pm on 6 April 2018, the respondent Mr Zwies is to file and serve on the applicant a clear and unambiguous affidavit listing his Assets and Liabilities as at the date of the parties separation 31 July 2014. (The applicant notes that a proforma statement form used in Australian proceedings will suffice but it must be completed as at 31 July 2014 being the date of separation and the date that is critical in these proceedings under Cook Island Law).

b) by 4pm on 6 April 2018 the respondent is to be provide by post or email to the Solictors for the applicant copies of all documents listed in the memorandum attached to the applicants memorandum filed for this call under the heading, Schedule.

c) by 4pm on 20 April 2018 the applicant is to provide her response by Affidavit filed in this Court and served on the respondent.

d) On or before 4pm on 4 May 2017 the parties are to exchange submissions. Submissions should cover legal issues, any authorities or cases referred to in the submissions are to be provided with the submissions but in a separate booklet.

e) by 4pm on 4 May 2018, the applicant is to file a chronology of events. If the respondent does not agree with the chronology he may file a separate chronology.

Ms Daniel filed a fifth affidavit sworn on 7 May 2018 attaching a number of documents relevant to the parties' assets, again matters that will require consideration later in this judgment.

[27] Mr Zwies' filed an affidavit sworn on 28 May 2018[17] commenting in detail on property aspects of this matter – detail which will be considered later in this judgment – stating "Australia is the appropriate jurisdiction for divorce and property settlement" and continuing:

4. I wish to state that I will adhere to Orders from Federal Circuit Court of Australia dated 21 November 2017. I have always made the Cook Islands Court aware of my position pertaining to the Australian Property Settlement Matter, which was on already, on foot, well before the Cook Islands application was filed. I have been helpful to the Court, keeping them updated with progress and filing the Australian Property Settlement Orders with the Court of the Cook Islands on 7 January 2018

5. All correspondence and communication with the applicant's Australian solicitors on file in the Australian Courts for matter FILE NO. (P)BRC 10496/2016

[17] The affidavit is dated "28 May 2017", but the header, jurat and exhibit notes all read "28 May 2018" so the former date must be an error.

> pertaining to Property Settlement was sent to "Go to Court Solicitors" and they represented the applicant in Australia for our property settlement, they were listed on file in the Courts for the applicant and accepted documents for her, including the application into the Australian Courts.
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> 6. "Go to Court Solicitors" also represented the applicant mother in 2014 for her parenting Orders FILE NO. BRC 9177/2014, in which she put a further application into the Australian courts with her solicitors to permanently stay the case and it was closed on 4 June 2015. The Divorce and Property Settlement was a new application brought forward on 22 November 2016, Matter BRC 10496/2016."

[28] Mr Zwies' acknowledgment that 9177/2014 was completed on 4 June 2015 and that 10496/2016 was a separate application rather undermines his assertion that Ms Daniel's solicitors in the earlier case "represented the applicant in Australia for our property settlement … and accepted documents for her including the application into the Australian Courts".

[29] That lengthy resumé of the procedural issues relating to this matter is necessary because Mr Zwies expressly has requested assistance from this Court[18] and no doubt would argue that the 21 November 2017 order in 10496/2016 resolves all matrimonial property issues between these parties and brings the matter to an end.

[30] As to the first of those issues, the lack of legal authority for the registration of this Court's parenting and access orders in Australia, coupled with the lack of legal authority for similar Australian Court orders to be registered in the Cook Islands, has been one of the points of difficulty which has hampered resolution of those issues between these parties. The Cook Islands' Parliament reformed significant portions of its outdated family law when it passed the Family Protection and Support Act 2017 effective from 1 July 2017. Sections 130 and 131 of that Act provide for the mutual registration of documents and orders in the Cook Islands and overseas jurisdictions, but only in respect of parenting, support and protection orders, not orders relating to matrimonial property. It follows, therefore, that, while as a matter of judicial comity, Courts in the Cook Islands will continue to have due regard to matrimonial property orders made in other jurisdictions, those orders have no legal force in the Cook Islands and there remains no legal authority for the registration and enforcement of overseas orders in this country.

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[18] Zwies, 3 December 2017, para 26.

[31] As to the possible finality of the 21 November 2017 order in 10496/2016, as already noted, there is nothing before this Court as to the pleadings and evidence in that case or the process of reasoning which led the Judge to make the order.

[32] However, it must be said that, on its face, the order appears contradictory because, though expressed to be final, paragraph 1 requires disclosure by the parties of their assets in their jurisdictions, and then proceeds to a division of property, 70%-30% to Mr Zwies and Ms Daniel respectively, but only upon such disclosure. It then further provides that if Ms Daniel fails to make full disclosure Mr Zwies is entitled to all the property in his name or control, but then continues by providing that since the orders were made in Ms Daniel's absence she has the right to apply to set the orders aside.

[33] It is difficult to see how or why the 70%-30% division could be ordered prior to mutual disclosure, still less why, if Ms Daniel failed to disclose as directed, the default position is that Mr Zwies is entitled to all his assets – presumably not those in the parties' joint names or those owned by Ms Daniel wherever situated – still less, if the order is to be regarded as final, why the order should explicitly provide that Ms Daniel has the right to apply to set it aside, especially when she had, as is her right, declined to enter an appearance in 10496/2016.

[34] The correct interpretation of the 21 November 2017 orders may be that they are only "final" on the basis that they are final in relation to disclosure, and that the division and default provisions, seeing they were coupled with the right to apply to set the orders aside, were intended by the Court to provide a spur for both parties to make disclosure for Mr Zwies to achieve the 70% distribution in his favour and a further spur to Ms Daniel to provide disclosure to prevent the operation of the second order numbered 2. The 21 November 2017 orders may therefore be the default orders contemplated by those of 8 May 2017.

[35] As mentioned, from this Court's vantage point, assessing the matter on the evidence in this case, there must be significant doubt whether the proceedings in 10496/2016 were ever effectually served on Ms Daniel. Were that the case, all subsequent steps in that proceeding and any orders made may be open to challenge, at least those that relate to the parties' property outside Australia. That possibility, coupled with the lack of power to register the orders in the Cook Islands, the lack of evidence as to the reasons for the orders being made and doubt whether the orders in 10496/2016 amounted to final orders relating to all aspects of the parties' joint and several property, leads this Court to put the orders in that case to one side as raising

any type of *res judicata* against this Court undertaking an adjudication as to the parties' matrimonial property. It accordingly passes to consideration of the merits of the issues raised in relation to those matters on the evidence before it.

[36] Seen in another way, there is force in the submission of Mr Scowcroft, counsel for Ms Daniel, that, by participating in these proceedings as he has, Mr Zwies has submitted to this Court's jurisdiction. He may have repeatedly asserted that Australia is the appropriate jurisdiction for the resolution of the the parties' matrimonial matters, but has never followed up on Potter J's 10 May 2017 comment and challenged this Court's jurisdiction by seeking stay or striking-out of these proceedings on *forum non conveniens* grounds, presumably because he wishes orders to be made in his favour concerning the parties' Matavera lease and recognises that only this Court can make orders in that regard.

Property matters

Preliminary

[37] The Court's consideration of the property issues raised on the evidence is underpinned by the following factors:

a) That although it is common, in relation to immovable property, for individual countries' matrimonial property statutes to be restricted in their reach to immovables in the country itself, it is also not uncommon for such statutes to extend their reach to movables which qualify as the parties' matrimonial property even though that property may be in another jurisdiction. It is well-recognised by Conflicts of Laws authorities that provisions such as that can create concurrent jurisdiction in respect of movable property.

b) That although Ms Daniel has repeatedly said she does not seek orders affecting property outside the Cook Islands, the Court, in determining the parties' entitlement to orders must necessarily consider the nature, extent and value of all the parties' assets, wherever situated, provided they fall within the definition of matrimonial property. Put another way, though the orders Ms Daniel seeks concerning the distribution of matrimonial property and her ownership of the same may be restricted to movable and immovable property in the Cook Islands,

in valuing and assessing the parties' shares in property, all their property which qualifies as matrimonial property – movables and immovables in the Cook Islands and movables in Queensland – must be taken into account.

Te Auere Section 14B, Matavera, Rarotonga

[38] Ms Daniel said that on 10 September 2013, that is, after marriage, the parties jointly leased 3247m^2 of land at Te Auere Section 14B, Matavera, Rarotonga, being part of the land in an Order of Investigation of Title made on 7 December 1917 and being more particularly delineated and described on Plan RO2059 in the Office of the Chief Surveyor at Rarotonga[19]. The lease is in evidence. It is a standard 60 year Cook Islands lease commencing on 1 April 2013 at a rental of $1 per annum for the first five years and thereafter as fixed by arbitration or agreement. The lease was approved by the Leases Approval Tribunal on 19 July 2013. Ms Daniel said they paid no consideration for the lease which is on standard family terms. The parties intended to build a home on the land but it remains vacant (and apparently unemcumbered) and is on a section that was the subject of a land exchange with another family with the leased portion allocated to her father and his siblings as their share. She said the leased area is all her father's allocation "so I would not be able to obtain another lease if the current one was sold or transferred" and she only put Mr Zwies' name on the lease because he was her husband and they were then jointly committed to the marriage partnership. Mr Zwies said he paid the legal costs for obtaining the lease and sent Ms Daniel considerable sums towards construction of the couple's proposed home. Ms Daniel accepted the former assertion but said it was normal marital expenditure because both were then working towards erecting a home on the land. Mr Zwies wishes the lease to be sold and the proceeds utilised in meeting the couple's joint or several debts and legal costs.

[39] Ms Daniel put in evidence[20] a valuation as at 18 September 2017 which, by use of statistics from comparable properties, valued the land at $127,000. Mr Zwies accepted the lease's value at $127,000[21]. Neither challenged that figure as not being the hearing date valuation.

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[19] Daniel 1, at 18, exhibit B.

[20] Daniel 3, para 6(b), exhibit A.

[21] Zwies 28.5.18, para 14 Supporting the valuation, his FCC financial statement valued his 50% share in the leased land at $60,000.

[40] Dealing with the lease in the light of the qualifications in the matrimonial property regime effected by the 1991-92 Act, Mr Scowcroft submitted that, although the lease was not a freehold interest[22] because it was created out of the applicant's father's entitlement, the respondent would not be able to obtain the landowners' agreement to a lease on this land and it is likely the Court would refuse to confirm a lease to the respondent solely. Mr Zwies would not qualify because he is neither a Cook Islander nor a permanent resident. He submitted that because Ms Daniel would not be able to obtain another lease of this land, her interest and that of her father is "temporarily extinguished by the lease". He submitted that Mr Zwies only obtained his interest in the land through the "temporary conversion of the applicant's interest" into the lease so to give him the benefit of that interest would do violence to the protection afforded to Cook Islanders in respect of land.

[41] By reference to Article 65(2) of the Cook Islands Constitution and s 5(j) of the Acts' Interpretation Act 1924, while Mr Scowcroft submitted that orders which take into account the intent and spirit of those statutes would effect in an equal distribution of matrimonial property except in relation to the lease.

[42] There was, he submitted, a further public policy reason for vesting the lease in Ms Daniel. This was because she was not required to include Mr Zwies as a joint tenant and did so only out of respect for the institution of marriage. Allowing him to have a share in the lease despite his lack of contribution to obtaining the asset when he is not a Cook Islander might have the effect of discouraging Cook Islanders from including non-Cook Islands spouses on leases obtained for the benefit of the marriage. With respect to counsel, that seems a rather far-fetched possibility.

[43] Mr Scowcroft submitted that, if the Court were not to find that vesting the lease and the Suzuki Swift in the applicant was an appropriate distribution of the parties' net matrimonial property, then he relied on *Haldane v. Haldane*[23] to submit that if the lease were taken out of the calculation the parties' contributions to the marriage partnership were roughly equal. Mr Zwies sent some money back but the bank statements annexed to Ms Daniel's fifth affidavit show approximately $19,925 remitted from January 2012 to 31 July 2014. Mr Scowcroft submitted, that was not a large sum over the course of two and half years when he was possibly

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[22] Though, in other passages of his submissions, he referred to it as such.

[23] *Haldane v. Haldane* [1976] 2NZLR 715.

a high earner and she was dependent on her business to support herself and her children. That notwithstanding, Mr Zwies' payments would amount to a contribution under s 18(1)(e).

[44] The Matavera lease is not excluded from the 1991-92 Act because it is not "Native Freehold Land". The freehold in Te Auere Section 14B Matavera is held by the lessor landowners[24]. In real property terms, leasehold is one link of tenure away from freehold. The Court therefore has power to make orders affecting the lease in these proceedings.

[45] Turning to assessing the issues between these parties, if it were it simply a matter of comparing, as between Ms Daniel and Mr Zwies, what the evidence shows as to their respective contributions to the marriage partnership, especially those which resulted in assets at the date of separation, the most sizable contribution, by some measure, would be that of Ms Daniel enabling the couple to acquire the Matavera lease without payment. However, that is not the entirety of the exercise mandated by the 1976 and 1991-92 Acts.

[46] The reason for that is that s 18, defining the contributions which spouses make to marriage partnerships deals with the care of children, management of the household, performance of household duties and other matters but does not include the provision of property. True, it lists the provision of money for the purposes of the marriage partnership, but the Matavera lease is not money and although it speaks of the "acquisition or creation of matrimonial property" including the payment of money, the asset has to become a matrimonial property for that provision to apply. Here, because the Matavera lease was obtained by the couple during the course of their marriage, it is presumptively matrimonial property. Even were the Matavera lease regarded as being a contribution of a monetary nature, s 18(2) expressly states that there shall be no presumption that monetary contributions, including income, are of greater value than non monetary contributions.

[47] A prime thrust of the 1976 Act is that all property owned jointly or in equal shares by the husband and the wife during marriage is matrimonial property[25] unless it is separate property which is property of "either spouse" which is not matrimonial property.[26] Here Ms Daniel made the deliberate decision to include Mr Zwies' name as a lessee because of her

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[24] On whose behalf the Registrar of the Court signed the document.

[25] S 8(c).

[26] S 9(1).

respect for the institution of marriage and the fact that the parties' separation was not then in contemplation. Preternaturally, property which is obtained during marriage and is owned jointly or in equal shares by the spouses is matrimonial property unless it is segregated out to retain its separate property character, and Ms Daniel's deliberate decision is archetypically the type of decision which means the asset acquired during marriage became matrimonial property.

[48] Ms Daniel might have taken steps to retain any separate property character the Matavera lease might have had but, since she had continuation of the parties' marriage firmly in mind when she obtained the lease through her father, it was never likely that she would take steps to put the lease in her name alone and retain what might have been arguably her separate property as such. She could have had , but did not contemplate, the spouses signing an agreement under s 21 to retain the Matavera lease as separate property.

[49] Further, she did not but even if she might have argued that the acquisition of the lease for no consideration possibly amounted to a gift from her father, there is no suggestion that the lease was not intermingled with other matrimonial property so as to preserve its separate property quality under s 10. The parties treated the leased land as a site for their planned matrimonial home and, though the amount may be in doubt, there seems no suggestion Mr Zwies did not remit funds towards that end. He paid the costs of acquisition which could be a contribution under s 18.

[50] Though this was a marriage of only just over three years, there was no application for the Court to utilise the extended definition of marriage of short duration[27] and in any case, since the lease was obtained after marriage, s 13 could not apply.

[51] While there is a certain weight in Mr Scowcroft's submissions that Mr Zwies could never have been granted the Matavera lease in his name alone, that is hardly to the point as many lessees in the Cook Islands are not Cook Islanders and in any event that possibility disregards the fact that Ms Daniel chose to put the lease in the couple's joint names.

[52] Rather than emphasising the unique location of the Matavera lease and the fact that Ms Daniel is unlikely to obtain a lease elsewhere, the strongest point in her favour would appear to be not mainly that she obtained the Matavera lease from her family connections, but that the

[27] S 13(3).

couple obtained a lease for no consideration. Given the agreed valuation, that is tantamount to Ms Daniel contributing an asset with a market value of up to $127,000 to the marriage partnership only ten months before separation. But, even looking at the matter in that way, putting the lease in their joint names and taking no step to preserve whatever may have been its separate property character at the time would still amount to the acquisition or creation of matrimonial property.

[53] The proportions – equal or unequal – in which the parties should be held to be entitled to share in the value of the lease will be determined when the extent and value of all their other matrimonial property is determined.

[54] The Court accordingly finds the parties' joint lease of Te Auere Section 14B, Matavera, Rarotonga to be matrimonial property and fixes the value of the lease at $127,000.

The Salon Limited

[55] Ms Daniel, a hairdresser, started a hairdressing and beauty business in November 2008, that is, prior to marriage, under the name The Salon Limited and worked full time in the business from January 2009[28]. Mr Zwies said he paid for the fitout and building materials for the salon and participated in the building work but found that, while he was working overseas, Ms Daniel transferred the business into a company without his knowledge. He said a small shareholding was given to an uncle and he was not included in the company documentation. He asserted that Ms Daniel spent money from the business without it going through the books and as a consequence a bill for tax was incurred[29].

[56] Ms Daniel disputed Mr Zwies' assertion of paying for the fitout work. She says she paid the account out of her savings and the transfer of the business into a company was discussed with Mr Zwies in detail as she wanted to adopt a company structure for VAT purposes. She said she asked Mr Zwies to be a shareholder, he declined and her uncle became the second shareholder. The money she withdrew from the business was used to support the children and her and although she asked Mr Zwies to help with the tax the business owed he refused, asserting indigence.

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[28] Daniel 1, paras 7 & 8.
[29] Zwies 10.7.2017, 31 to 33.

[57] Ms Daniel put the accounts for The Salon Limited as at 31 December 2014 in evidence. They show a modest business with a nett loss of $9,914, after deducting $45,409 for wages. Another accountant said the asset schedule was erroneous and an undated valuation of the business by a real estate agent showed a probable sale price of the assets and business's rental agreement would be in the vicinity of $6,000 plus VAT "providing an experienced operator could be found as purchaser", that being after deletion of the erroneously-included assets. The reason for the minimal value was because there was little goodwill in the business and minimal assets[30] However, in a letter dated 17 May 2018 produced at the hearing, an accounting consultant said the 2014 accounts were further in error in their treatment of historical cost minus accumulated depreciation so that the fixed assets should have read $8,349, the current and non current assets should have totalled $15,108, and the total for assets minus liabilities should have produced a loss of $1,165.

[58] In Mr Zwies' FCC financial statement he said his 50% share of The Salon Limited – which he called the partnership – was worth $32,500, thus estimating the worth of the business at $65,000. He was dismissive of the valuation of The Salon Limited at $6,000 saying Ms Daniel had for years not declared amounts of cash to minimise tax and suggested that "it is obvious to anyone purchasing a business that makes wages of $45,000 plus covers costs that it is worth more than $6,000."[31]

[59] Mr Scowcroft submitted that Mr Zwies' estimate was no more than speculation since he has had no involvement in the business or access to its records for a number of years.[32] There is force in that submission, especially as it is by no means unknown for the value of small businesses to depend more on the owner's reputation and the capacity of the business to generate the owner's income than on the worth of the assets employed.

[60] Ms Daniel's response was that Mr Zwies' estimate of $65,000 for The Salon Limited took no account of there being a tax liability of "about $38,504", but that comment appeared to predate the valuation of the business[33].

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[30] Daniel 4, paras 6 to 8, exhibits A & B.
[31] Zwies 28.5.18, p 7.
[32] Submissions 30.11.2017, para 13(b).
[33] Daniel 3, para 6(a).

[61] The Salon Limited is not a partnership. It is a limited liability company in which Ms Daniel holds 99% of the shares, her uncle only being a shareholder to satisfy the Companies' Act requirements for a company to have two shareholders. Incorporation in such circumstances is standard. Though neither the company documents nor the Certificate of Incorporation were put in evidence, it seems likely, as Mr Scowcroft submitted, that the company was incorporated prior to the parties' marriage. That notwithstanding, and partly for the reasons discussed in relation to the Matavera land, Ms Daniel seems to accept that her shares in the company were matrimonial property under s18(1)(c)(e) and (f) as at the date the parties separated and that, as with other assets, the valuation of the company should be undertaken as at the date of the hearing[34].

[62] The difficulty is to assess the value of the company as at the present time given the lack of evidence on the topic.

[63] Mr Scowcroft submitted the business should be valued at $6,000 for matrimonial property purposes but that was in his submissions dated 7 May 2018, and thus before the adjustments effected by the 17 May 2018 letter. What adjustment should be made to the accounts, as opposed to the valuation, remains unclear, as does any effect on the valuation of the business at separation. Alternatively, Mr Scowcroft submitted that it was separate property because it was a business formed by Ms Daniel before marriage[35] and was not acquired in contemplation of marriage. The latter submission may be correct but the former is not as the business is matrimonial property pursuant to s 18(1)(c)(e) or (f) and Ms Daniel does not appear to dispute such a finding.

[64] In those circumstances, it would be speculative for the Court ascribe a value to The Salon Limited as at the date of the hearing on a "willing seller-willing buyer" basis. There will therefore be a direction that within one month from the date of delivery of this judgment the applicant is to provide an affidavit valuing the business of The Salon Limited at the hearing date calculated on that basis. If he does not accept that valuation affidavit, Mr Zwies is to have two weeks from its receipt to provide any contrary evidence, not speculation, as to the valuation.

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[34] The 1976 Act s 2(2)(3).

[35] Daniel 1, para 7.

[65] It should be added that if Ms Daniel or the business have tax liabilities arising from her management of the business, there was no specific evidence to that effect and the question of debts generally is dealt with elsewhere in this judgment. Such evidence as there was concerning the salon's debts was also unclear: she initially said it had a tax liability of "around $25,000, around $20,000 of that accrued before we separated" but then said its debt was "about $38,504"[36]. To be clear, any indebtedness Ms Daniel or the company has a result of her operation of the business is not a factor to be taken into account on the directed valuation as no purchaser would accept that liability.[37]

2005 Suzuki Swift

[66] Ms Daniel is in possession of a 2005 Suzuki Swift bought in November 2012, after marriage. She said it was initially jointly owned but in 2013 was transferred to Mr Zwies[38] because, according to Ms Daniel, the car would then be immune from tax[39]. His FCC financial statement valued the Suzuki at $8,500 with his share at 100%.

[67] Ms Daniel estimated the value of the car at approximately $9,000 and claimed half as a family chattel[40].

[68] Mr Zwies claimed Ms Daniel asked for the vehicle to be transferred into his name post separation because the business's tax was in arrears and "she did not want anything in her name". He said he paid her for the vehicle.[41] He accepted Ms Daniel's estimate of the car's value at $9,000 and appears to accept that it is matrimonial property divisible equally between the parties[42].

[69] The value of the Suzuki Swift at $9,000 at a time proximate to the hearing being agreed, the Court fixes the value of the car at $9,000 under s 2(2) and the shares of the parties in the vehicle at 50% each.

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[36] Daniel 1, para 23, and 3 para 6(a).
[37] Daniel 1, para 23, and 3 para 6(a).
[38] Daniel 1, para 17.
[39] Daniel 2, para 25.
[40] Daniel 3, para 6(d).
[41] Zwies 10.7.2017, para 34.
[42] Zwies 28.5.2018, p 9.

Certificate of Title NA 74A/300 North Auckland Registry, New Zealand

[70] Mr Zwies claimed that Ms Daniel initially omitted to disclose that she was the owner of real property in Te Atatu, a suburb of Auckland, New Zealand. He put the relevant certificate of title in evidence[43], and asserted that Ms Daniel's share in the property should be taken into account in these proceedings at around $211,000 having regard to recent prices in the area.

[71] In response, Ms Daniel said the New Zealand property is a home held by the Anita Daniel Family Trust and owned by her mother, her two brothers and herself for the benefit of the wider family. She said this property was owned well before her marriage to Mr Zwies.

[72] The title discloses that the property in question has been owned by the same four registered proprietors, including Ms Daniel, since 20 October 1988, long before the parties' marriage. New Zealand law has for many years forbidden the entry of any notification of a trust on a Land Transfer register, but when the registered proprietors are a number of persons with similar surnames or including their solicitor or accountant, the usual inference is that the property is held by a trust. The Court accepts Ms Daniel's evidence is correct.

[73] Her share of the property having been held by her since well before her marriage to Mr Zwies, there being no evidence that it has been used for matrimonial purposes since the parties marriage on 25 April 2011 and, in any event, it being immovable property outside the Cook Islands, it is outside the reach of the 1991-2 Act. There was no basis whatever for Mr Zwies' assertion that it was matrimonial property divisible between these parties.

63 Arthur Street, Naracoorte, Queensland

[74] Mr Zwies' FCC financial statement said he owned a property at 63 Arthur Street, Naracoorte, Queensland valued at $106,000. The statement also said he owed $99,000 to the Commercial Bank of Australia, but whether that secured just his borrowings for the land or more generally was unclear. He said it was bare land[44].

[43] Zwies 10.7.2017, para 24, 19.12.2017, para 4, exhibit B.
[44] Zwies 2.3.2018, para 13.

[75] Like Ms Daniel's share in the Te Atatu family trust property in Auckland, Mr Zwies' property at 63 Arthur Street, Naracoorte, Queensland is realty situated outside the Cook Islands. There is no evidence of when it was bought, or of its being purchased with matrimonial property or of the purchase somehow being achieved in any way which could bring its value within the matrimonial property regime. It thus cannot be matrimonial property[45].

Bank Accounts

[76] Ms Daniel, after initially saying that her assets included "various bank accounts containing approximately $650,"[46] then said that she had cash in the bank of approximately $1,500,[47] but provided no supporting evidence until exhibiting three sets of bank statements to her affidavit of 7 May 2018.

[77] The first of those bank statements is a joint account of the parties under number 2000205134 at the Bank of South Pacific Limited covering the period 4 January 2012 – 21 April 2015 when the balance was reduced to zero and the account presumably closed.

[78] Ms Daniel asserts the parties separated in July 2014 but gives no date, but, as at 31 July 2014, the account was in credit to the sum of $15.84. That would appear to be extent of the matrimonial property in that account as at the date the parties commenced to live apart so, for matrimonial property purposes, the Court fixes the shares of each of the parties in that asset at half that balance, namely $7.92.

[79] The second account put in evidence was in Ms Daniel's name alone and was account 2000298352 at the Bank of South Pacific Limited. The exhibited account ran from 31 July 2012, when the account was in overdraft to the tune of $10.28, to 17 August 2012 when the balance was reduced to zero and the account closed. There is therefore no evidence of anything to be divided between the parties as at the date of separation in relation to that account. It is difficult to follow why it was raised in evidence.

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[45] Section 7(1)(a).
[46] Daniel 1, para 2(d).
[47] Daniel 3, para 6(c).

[80] The third account was account number 336553, a priority cash management account held by the parties jointly at ANZ, the statements covering the period 31 May 2011 – 15 December 2014 when the account was closed[48]. The credit as at 31 July 2014 was $18.42. This is accepted as being matrimonial property and is thus divisible between the parties at $9.21 each.

[81] Mr Zwies' superannuation bank account is considered later.

Mr Zwies' Movable Property in Australia

[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 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.

[83] In that regard, Mr Scowcroft's submissions expiated on the history of these proceedings and submitted that Mr Zwies had been regularly in breach of directions from the Court by failing to file a clear statement of his financial position at the date of separation and not providing the disclosure to which Ms Daniel was entitled. He relied on the United Kingdom's Supreme Court decision in *Prest v. Petrodel Resources*[49] and the New Zealand Court of Appeal decision in *Clayton v. Clayton*[50] that there is a public interest to spouses having a duty to make full and frank disclosure of all material facts in family disputes and that, in default of proper disclosure, 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"[51].

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[48] The exhibited bank statements contained duplicate pages.
[49] *Prest v. Petrodel Resources* [2013] UKSC 34.
[50] *Clayton v. Clayton* [2015] NZCA 30.
[51] Scowcroft 7.5.18, para 35.

[84] That there is such a duty is undoubted but, in proceedings under statutes where the outcome is dependent on precision, Mr Zwies' failings may sound in costs but it would be speculation not sufficiently grounded in evidence to extrapolate from no more than submissions into orders of the Court.

[85] However, what follows is to result in equal division of Mr Zwies' movable assets in Australia which fall within the reach of the 1976 and 1991-2 Acts.

Motorcycle

[86] In his FCC statement, Mr Zwies said he owned a 2012 BMW motorcycle model K1300S, registration 661JK worth $12,000.

[87] Apparently responding to some submissions made by Mr Scowcroft,[52] not on evidence, – Mr Zwies said that an equity figure apparently quoted by Mr Scowcroft was incorrect and that a dealer's price to purchase the vehicle would be $13,990 not $14,000[53][sic]. He put in evidence what appeared to be a dealer's website page supporting that assertion.

[88] The FCC financial statement showed that at 17 November 2016 Mr Zwies owed $11,115.06 on the motorcycle with a date of final payment of 25 September 2016 which may suggest the deal was a "lease to buy" one rather than hire purchase.

[89] Mr Scowcroft's 7 May 2018 submissions sought to incorporate a website for motorcycles in Australia of Mr Zwies' BMW type to suggest that the average value of the prices listed on the website page was approximately $A25,145. He submitted that the Court could take the figures from the FCC financial statement to give an equity of $A25,145 - $A11,506 = $A13,639 with the equity at the date of separation being $NZ14,943.44.

[90] While the Court has extensive powers in proceedings such as this to accept evidence whether or not legally admissible[54], relying on such undated websites goes too far. That said, while Mr Zwies' FCC financial statement was approximately 2 ½ years after separation, and given he has not fully responded to orders requiring him to give details of his financial position

[52] Which were not on the Court file.
[53] Zwies 28.5.18, para 23, page 5.
[54] The 1976 Act, s 36.

as at the date of separation, it is reasonable to assume that if a 2012 BMW motorcycle, like all motor vehicles a wasting asset, was worth $12,000 on 7 November 2016, it would have been worth the sum for which it was insured, $20,000, in 2014[55] at the date of separation. If the implication from Mr Zwies' FCC financial statement of 17 November 2016 that the financing arrangement was on a "lease to buy" basis[56] is correct, the Court is tentatively prepared to take the view that the value of Mr Zwies' BMW motorcycle at the date of separation was $20,000, $11,500 was owing on it at that date and thus the equity for matrimonial property purposes is $A8,500 translated into New Zealand dollars at 31 July 2014.

Mercedes Benz motor car

[91] Mr Zwies' FCC financial statement showed him owning a 2010 ML350 Mercedes motor vehicle registration 653TLO at 17 November 2016 with the vehicle being said to be worth $38,000 at that juncture. The statement showed a debt to the Macquarie Bank of $37,400 on the "vehicle". Mr Zwies said the Mercedes Benz motor vehicle was bought with 100% finance and he had no equity in it at separation[57]. That evidence may possibly again suggest the purchase was on a "lease to buy" basis, but it could also be a "no deposit" hire purchase deal.

[92] Ms Daniel exhibited a contract whereby Mr Zwies borrowed $66,108 commencing on 19 February 2014 on a Mercedes Benz ML300 station wagon, so the vehicle must have been worth at least that amount at that date, only five months before separation. The monthly repayments under the loan were $1,376.97[58].

[93] Mr Scowcroft argued for a principal reduction by the time of separation of approximately $4,500, but that seems too high. To repay a loan of $66,108 over 60 months on a flat basis requires monthly reductions of $1,101.80 but this debt may have been more likely to have been on a table basis so the early payments would only have reduced the principal by small amounts.

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[55] Daniel 5, exhibit B.
[56] The amount of the final payment being almost identical to the declared value.
[57] Zwies 28.5.2018, para 23, p5.
[58] Daniel 5, exhibit D.

[94] Therefore, accepting the probability that the purchase price of Mr Zwies' Mercedes Benz was greater than $66,108 on 19 February 2014 it is not unreasonable to take the value of that vehicle at that date as a rounded total of $66,000, all borrowed, assume that, of the $6,884.85 paid by way of five monthly instalments up to separation, about $1500 would have been utilised in reducing the capital of the loan and thus tentatively find that for matrimonial property purposes Mr Zwies' equity in his Mercedez Benz motor vehicle at the date of separation was $A1,500 translated to New Zealand dollars at that date.

Holden Commodore

[95] Ms Daniel put in evidence a certificate of registration in Mr Zwies' name dated (though barely legible) 17 January 2013 for a Holden Commodore motorcar but with no indication of value.[59]

[96] Mr Zwies exhibited an agreement dated 29 April 2013 whereby he agreed to sell the Holden Commodore for $5,200 to Ms Daniel's brother payable at $100 per week[60] commencing on 3 April 2013 and finishing on 26 March 2014. Mr Zwies said the applicant's brother did not meet the whole of the debt, but does not say by how much or when[61].

[97] The Agreement for Sale and Purchase is evidence that Mr Zwies' Holden Commodore was worth at least $5,200 fifteen months before separation and, even if the applicant's brother was dilatory in meeting the weekly payments, as the vehicle does not feature in the FCC financial statement of 17 November 2017, it must be assumed to have been fully paid off by that date and transferred by Mr Zwies to Ms Daniel's brother.

[98] However, the Agreement for Sale and Purchase provides for the weekly payments to go directly to Mr Zwies' bank account with a final payment due four months before separation, so either the Holden was no longer an asset of Mr Zwies at separation with its value being incorporated in his bank statement, or there is no evidence as to the value of Mr Zwies' equity in the Holden at separation. In either event, the Holden must be held to have had no value or no proved value for matrimonial property purposes.

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[59] Daniel 5, exhibit C.
[60] Zwies 28.5.2018, exhibit H.
[61] Zwies 28.5.2018, para 23, p5.

Superannuation

[99] Ms Daniel put in evidence (though again incomplete and barely legible) part of a superannuation trust deed for Mr Zwies' self-managed fund for Merlin International Superannuation Fund showing evidence that it required a tax number on 3 November 2012. That was shortly after Mr Zwies began work in Queensland so is probably about the period the fund was set up. As far as Mr Zwies is concerned his share in Merlin International Superannuation Fund appears to have been managed by Merlin Maritime International Pty Limited. The evidence shows the Merlin Maritime International Pty Limited bank account at 30 March 2014 was in credit in the sum of $13,841.28[62]. Mr Zwies is listed as the sole director and company secretary of Merlin Maritime International Pty Limited. He included the Fund at $1,603.80 in his FCC statement.

[100] Mr Scowcroft's analysis was that the bank statement had monthly credits averaging $1,648.75 with monthly outgoings of $256 and a net monthly average increase in the account of $1,392.75. He therefore submitted that for matrimonial property purposes Mr Zwies' superannuation credit at the date of separation should be assessed at $A18,016.53, being the $13,841.28 plus approximately four monthly increases.

[101] Mr Zwies' response[63] was to say he sent large amounts of money to Ms Daniel which, when required, were borrowed from his superannuation fund, but he gave no further detail other than to exhibit a Commonwealth Bank account statement addressed to him but being that of both Merlin entities showing that at 31 July 2014 the account was in credit in the sum of $19.89. That was the balance after a debit of $6,500 on 24 July 2014 which he claimed, in a handwritten note on the statement, was money sent to Ms Daniel for The Salon Limited. However, since the statement records the debit as "transfer to CBA account, CommBank app", without some evidence as to how and why a payment to another CBA account could have been sent to the applicant when the Commonwealth Bank does not operate in the Cook Islands and Ms Daniel presumably had no account in Australia in 2014, leads the Court tentatively to reject that explanation.

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[62] Daniel 5, exhibits E-G.

[63] Zwies 28.5.18, para 24, p6 and exhit I.

[102] In light of all of that – and disregarding Mr Zwies' explanation for the $6,500 debit –, for matrimonial property purposes Mr Zwies' entittlement to superannuation in Merlin Martime International Pty Limited and Merlin International Superannuation fund should be tentatively fixed at $A14,000 as at separation. Because the bank account was increasing, in default of proper discovery by Mr Zwies, it is reasonable to take the credit in the bank account at 30 March 2014 plus $1,400, a minimal increase for the four months to separation, with the amount then being translated into New Zealand dollars.

Paradise Enterprises Limited

[103] Ms Daniel put in evidence an Agreement for Sale and Purchase of shares in a Cook Islands company called Paradise Enterprises Limited whereby four persons agreed to sell their 32,000 shares in that company to three other persons including Mr Zwies. He was to have 24% or 7,630 shares for either $550,000 or $412,500 – the documents are again almost impossible to read and are incomplete – but since the exhibit speaks of it being based on company accounts as at 18 March 2014, it was likely to have been current at the date of separation[64].

[104] Mr Scowcroft accepted there was no evidence the transaction was ever completed and it therefore had no value for matrimonial property purposes, but submitted it was evidence that Mr Zwies had substantial funds available to him at about the time of separation.

Loan to purchase "Are Tuoro", Rutaki, Arorangi, Rarotonga

[105] On 22 July 2014 Mr Zwies entered into a loan agreement to pay the ANZ Bank $105,000 to purchase the Bank's interest in the property known as "Are Tuoro", Rutaki[65].

[106] Again, Mr Scowcroft conceded that there was no evidence the transaction ever settled but submitted that it was further evidence of Mr Zwies' liquidity at about the time of the separation.

[107] Mr Zwies did not comment on the evidence relating to either of those matters.

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[64] Daniel 5, exhibit H and Daniel 1, 19.

[65] Te Rakai Part Section 911, Arorangi, Daniel 5, exhibit I.

Mr Zwies' Tax and Financial Position

[108] As part of his submissions concerning what he suggested was Mr Zwies' ample financial position at or about the date of separation, Mr Scowcroft pointed to the evidence of the respondent's 2014 Tax Assessment showing his taxable income for the year ended 30 June 2014 at $A186,957 plus a refund of $A10,321.65. He was liable for $A57,677.65 for tax but because he had paid $A73,608 he was entitled to the refund. After deducting Mr Zwies' estimated expenditure Mr Scowcroft submitted that as at the date of separation Mr Zwies had at least $A86,722.55 in cash.

[109] That evidence certainly suggests Mr Zwies was in receipt of a good income at around separation date, but, without evidence of that income translating into assets, that is of little assistance in dealing with property issues. The 1991-2 Act is concerned with the "just division of matrimonial property between spouses when their marriage ends"[66]: it is not an income division statute (unless, of course, that income forms part of any divisible bank account.)

Other property

[110] Ms Daniel gave evidence of owning a Yamaha Nuovo Scooter, registration AA748, but said Mr Zwies took the scooter back before he left Rarotonga and she has no knowledge of the whereabouts of the vehicle. Mr Zwies did not mention this in his evidence. That vehicle therefore passes from consideration.

[111] Ms Daniel also said that Mr Zwies told her he has a number of silver bars and may have a number of shares[67]. Again Mr Zwies did not comment and, without detail to work off, that matter cannot proceed further.

Debts

[112] The evidence on the couple's indebtedness at the date of separation was indefinite.

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[66] 1976 & 1991-2 Acts: Long Title

[67] Daniel 1, 4.

[113] To recapitulate, in Ms Daniel's first affidavit[68] she said The Salon Limited had a tax liability at the date of swearing, 26 April 2017, of "around $25,000" of which "around $20,000" accrued before separation. In her third affidavit[69] she said her total liabilities were $19,500 including a loan of "approximately $16,000" and a bill for repairing her car of $3,500. There was no additional particularity provided of hers or the company's debts.

[114] Mr Zwies, apart from asserting he remitted substantial sums of money to Ms Daniel for various purposes including maintenance and their planned house construction, also gave little precise evidence concerning his indebtedness. Unless those payments are proved to have resulted in increased worth of the matrimonial assets (in which case they will be subsumed in the valuation of those assets) or in indebtness at the date of separation which one or other party claims should be taken into account in the division of their matrimonial property, that evidence is irrelevant in an application which concerns assets and debts.

[115] In his memorandum of 2 March 2018[70] Mr Zwies said at the time of separation he owed the New Zealand Inland Revenue Department $77,058 for a student loan incurred during the parties' co-habitation. However, Ms Daniel's chronology[71] said Mr Zwies' absence in New Zealand for studying work lasted from March 2010 until April 2011 so, if that resulted in Mr Zwies' student loan liability, it would have been incurred prior to marriage.

[116] Mr Zwies also asserted in the memorandum that Ms Daniel has a significant tax liability to the Cook Islands Government but that "we both have an obligation to repay these"[72] [sic] and in his 28 May 2018 affidavit[73] he said he wished to have the parties' lease sold "to pay our outstanding liabilities and debts to both the Government in New Zealand $78,000 (Inland Revenue Department) and the Government of the Cook Islands $38,000 (Revenue Management Department) which were incurred during our marriage". But in the exhibited email he said that the Cook Islands tax debt "under the name of 'The Salon' or Caroline Ann Daniel ... is matrimonial property" so his evidence is unclear as to the extent of the debts and the liability for payment.

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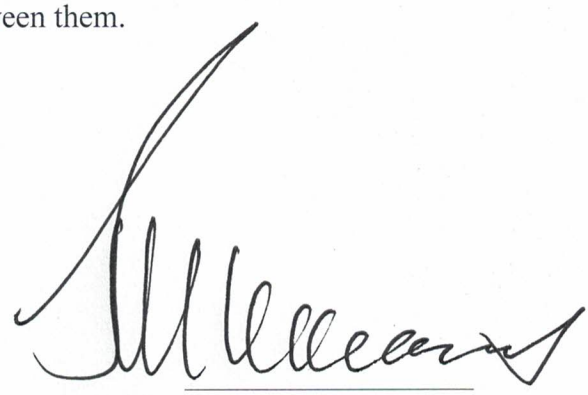
[68] At 23.
[69] At 2D and 7.
[70] Para 10.
[71] Daniel 1, para 10.
[72] 2.3.18, para 10.
[73] Para 13 and exhibit D.

[117] The evidence on this aspect of the parties' dispute is clearly unsatisfactory, particularly as the question of allowable or deductible debts may well have significant impact on the valuation and distribution of the parties' matrimonial property. It would seem that either one or both owes substantial amounts to the New Zealand and Cook Islands revenue authorities – and may have other debts as well – but just when the debts were incurred, by whom, whether they qualify as debts under s 20, and the precise amount of debt owed by either or both which they contend were matrimonial debts as at the date of separation and should be taken into account as part of the resolution of this dispute is simply not in evidence.

[118] If they wish the Court to deduct some or all of their debts in calculating how the parties' matrimonial property is to be distributed or dealt with, within one month of delivery of this judgment, they are directed to provide further affidavits with documentary evidence as to their debts, joint or several or of The Salon Limited, which they contend are matrimonial debts under s 20 of the Act together with evidence of the amount of the debts as at the date of the marriage and as at the date of separation and their reasons for contending those debts should be taken into account in the division of matrimonial property between them.



Hugh Williams, CJ