

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA507/2010
CA726/2010
[2016] NZCA 584**

BETWEEN MALCOLM EDWARD RABSON AS
TRUSTEE OF THE MALCOLM
RABSON FAMILY TRUST
Appellant

AND LINDA GALLAGHER
First Respondent

MALCOLM EDWARD RABSON
Second Respondent

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

CA524/2010

BETWEEN LINDA GALLAGHER
Appellant

AND MALCOLM EDWARD RABSON
First Respondent

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

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

BETWEEN

MALCOLM EDWARD RABSON AS
TRUSTEE OF THE MALCOLM
RABSON FAMILY TRUST
Appellant

AND

LINDA GALLAGHER
First Respondent

MALCOLM EDWARD RABSON
Second Respondent

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

Hearing: 28 November 2016

Court: Randerson, Asher and Brown JJ

Counsel: No appearance for Mr Rabson
N Levy for Ms Gallagher
S A Barker and A M Crawford for Third Respondent

Judgment: 6 December 2016 at 3.30 pm

JUDGMENT OF THE COURT

A The application for clarification of the orders in *Rabson v Gallagher* [2011] NZCA 669 is declined.

B Mr Rabson must pay costs to Ms Gallagher as for an application for leave to appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] In the High Court proceeding Ms Gallagher obtained both a half share of her and Mr Rabson's relationship property and a finding of an institutional constructive trust in the amount of \$300,000.¹ The latter order was quashed on appeal and replaced by an order under s 44C of the Property (Relationships) Act 1976 directing Mr Rabson to pay Ms Gallagher an equivalent sum.² Having sought and considered further submissions concerning amendments that needed to be made to the High Court orders, on 20 December 2011 this Court issued substituted orders,³ which included the following reservation of leave:

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

[2] The present application by Mr Rabson purports to invoke that leave. Mr Rabson seeks clarification in the following respects:

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

¹ *Rabson v Gallagher* HC Wellington CIV-2008-485-2279, 1 October 2010. The judgment of Wild J remains subject to an order that: "No publication of this proceeding is permitted under s 35A of the Property (Relationships) Act 1976, except with the leave of the Court that heard the proceedings, and with the exception of publications of bona fide professional or technical nature."

² *Rabson v Gallagher* [2011] NZCA 459.

³ *Rabson v Gallagher* [2011] NZCA 669.

[3] At the outset it is appropriate to note that the application before us is merely for clarification of this Court's orders. As Mr Rabson stated in his memorandum of 21 November 2016 declining to provide submissions requested in support of his application:

2.0 No submissions are necessary. The application sought Orders in the above Judgment be "clarified" and not for them to be relitigated.

...

5.0 My application is not an argument but a simple request for clarification in circumstances where this Court expressly stated it would provide this if requested by any party. It lays out the questions clearly and I rely upon it as I will not be attending any hearing not requested or provided for by law.

As foreshadowed, Mr Rabson did not appear at the hearing.

Factual background

[4] Mr Rabson and Ms Gallagher (the parties) were in a de facto relationship from 1999 until 2006. The Malcolm Rabson Family Trust (MRFT) was a trust set up by Mr Rabson shortly after the parties entered the relationship. The Gallagher Rabson Family Trust (GRFT) was a trust set up by the parties approximately one year before the parties separated.

[5] In 2002 and 2003 the parties used the proceeds of a jointly-owned Lotto ticket to purchase three residential properties at Raumati, Paraparaumu and Plimmerton, which were purchased by the parties for the MRFT.⁴ In July 2003 the MRFT entered into six Deeds of Acknowledgment of Debt, namely one to each of the parties for one half of the value of each of the three properties. The total indebtedness was \$1.3515 million.

[6] In May 2005 the MRFT sold the three properties to the GRFT, with payment by a Deed of Acknowledgment of Debt for \$1.953 million (the then-market value of the three properties).

⁴ Ms Gallagher was made a trustee of the MRFT in July 2003, after the purchases.

High Court orders

[7] The relationship property the subject of the judgment of Wild J in the High Court comprised:⁵

Description	Amount
Acknowledgments of debt dated 4.4.02, 8.11.02 and 14.2.03	\$1,351,500
VW Passat motorcar (at value agreed at date of separation)	\$60,000
Surrender value of the lease of Mana Esplanade — Deed of Acknowledgment of Debt 29.9.04	\$326,663
Combined value of the beneficiary accounts in the MRFT as at 31.3.06	\$260,000
Total	\$1,998,163

[8] A one-half share of that property together with the beneficial interest under the constructive trust of \$300,000, being roughly half the difference between the purchase and sale prices of the three properties by the MRFT, totalled \$1,299,082.

[9] The High Court ordered that Mr Rabson and Ms Gallagher be removed as trustees of the GRFT and a new trustee be appointed. The detailed orders relating to the disposition of the various properties included a reservation of leave to the new trustee to apply for any further directions necessary to give effect to the orders.

This Court's orders

[10] On appeal the High Court judgment was varied in two material respects: first, the substituted order under s 44C of the Act; second, it was ordered that Mr Rabson be credited \$30,000, representing his half interest in the VW Passat car.⁶

⁵ *Rabson v Gallagher*, above n 1.

⁶ *Rabson v Gallagher*, above n 3.

[11] Hence this Court's judgment confirmed that Ms Gallagher was entitled to a total of \$1,239,081, which comprised the following amounts, less the \$30,000 Ms Gallagher was liable to pay Mr Rabson for the VW Passat car:

- \$675,750 (being the debts owed by the MRFT to Ms Gallagher to reflect the Lotto winnings);
- \$163,331 (being the debt owed by the MRFT to Ms Gallagher for the Paremata property);
- \$300,000 under s 44C of the Act owed by Mr Rabson out of his share of the relationship property; and
- \$130,000 (being half of the combined value of the beneficiaries' accounts in the MRFT as at 31 March 2006).

[12] The substituted orders of this Court repeated the reservation of leave to the GRFT trustee to apply to the High Court for directions. In addition the orders included a further reservation of leave to any party to apply to this Court for clarification of any matter relating to "these orders", namely the substituted orders of the Court of Appeal.⁷

[13] The Supreme Court declined Mr Rabson's application for leave to appeal, recording that his primary proposed ground was that this Court's orders unduly favoured Ms Gallagher by giving her a priority right to payment notwithstanding that the eventual sale price of all three properties was not then known and those that had since been sold had realised less than was estimated.⁸ The Court observed:

The payments ordered to be made to Ms Gallagher are, however, on account of her overall entitlement and leave has been granted to any party to apply to the Court of Appeal for clarification of any matter related to its orders. Mr Rabson would therefore be able to seek from the Court of Appeal an adjustment of its orders if there were to be a change of circumstances for which he bore no responsibility and, as a consequence, the orders would lead to an overpayment of Ms Gallagher. We should add that it is not at this stage apparent that this may occur.

⁷ At [1] above.

⁸ *Rabson v Gallagher* [2012] NZSC 26 at [2].

The Court remarked that there was substance in the submissions of Ms Gallagher that Mr Rabson may have misunderstood the determinations of the Courts below.

Discussion

[14] Although in its primary judgment ([2011] NZCA 459) this Court made initial orders and invited submissions on consequential amendments required to be made to the High Court orders, in the subsequent judgment ([2011] NZCA 669) for clarity this Court preferred to replace the original form of the order in its entirety.⁹ It was for that reason, we infer, that the Court made the further reservation of leave in Order C(d).

[15] In our view, the nature of the leave reserved to the parties in Order C(d) was confined to determining any issue about the meaning of the terms of the orders. The leave did not extend to questions directed to the reasoning in the preceding judgments, including the High Court judgment, which was substantially upheld.

[16] The clarification Mr Rabson seeks in the form of the four questions in his application goes well beyond any attempt to clarify the meaning of the Court's orders. Rather, his questions are directed to the rationale for the substantive rulings, the mode of assessment of quantum and the powers and obligations of the GRFT trustee.

[17] We consider that none of the questions posed is within the scope of the reservation of leave specified in Order C(d). Consequently, the application is declined.

[18] We do not consider when it referred to "adjustment"¹⁰ the Supreme Court had in mind any substantive change to this Court's orders under the leave this Court reserved. However, on the basis of the submissions received from Ms Levy and Mr Barker, there are a variety of factors that, individually or in combination, account for differences in amounts received by Ms Gallagher and Mr Rabson, including:

⁹ *Rabson v Gallagher*, above n 3, at [31].

¹⁰ At [13] above.

- (i) Ms Gallagher's priority right to payment in respect of which leave to appeal to the Supreme Court was declined;
- (ii) the relationship property was fixed by reference to the amounts of the acknowledgement of debts, not the value of the properties, while the award under s 44C was fixed arithmetically on the basis of the difference between the purchase and sale prices of the three properties by the MRFT;
- (iii) the GRFT's ability to meet its debt obligation depended upon the quantum of the proceeds of sale of the three residential properties;
- (iv) the expenditure of GRFT trust funds necessitated in addressing a series of legal challenges by Mr Rabson, as explained in Mr Barker's submissions and in the affidavit of the trustee, Mr W S Chapman; and
- (v) the implications of certain other litigation referred to in Mr Barker's submissions, namely, first, the judgments obtained by the liquidators of Vision Ltd and Double Zero Holdings Ltd, companies of which Mr Rabson was a director, against the GRFT and, second, the declaration of the High Court in *Shephard v Rabson*¹¹ that the plaintiffs in that case are entitled to payment from funds held by Mr Chapman as trustee towards settling their judgment debt.

Disposition

[19] The application for clarification is declined.

Costs

[20] We have been assisted by Ms Levy's submissions on aspects of the background to the various matters raised in Mr Rabson's application. Mr Rabson's application has been unsuccessful. We consider Ms Gallagher is entitled to costs to reflect the filing of submissions on her behalf and the appearance of her counsel at

¹¹ *Shephard v Rabson* [2015] NZHC 3137.

the hearing. Accordingly, Mr Rabson must pay costs to Ms Gallagher as for an application for leave to appeal on a band A basis and usual disbursements.

Solicitors:

M Jeffcoat, Wellington for Ms Gallagher

Buddle Findlay, Wellington for the Trustee of the Gallagher Rabson Family Trust