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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV2003 404 002114

1598

IN THE MATTER OF	the Property (Relationships) Act 1976
BETWEEN	JOHN FRANCIS PERRY Appellant
AND	FELICITY PATIENCE WEST Respondent

Hearing: 28 November 2003

Appearances: Ms S.L. Abdale & Ms N. Fraser for Appellant
Mr N. Elliott for Respondent

Judgment: 15 December 2003

JUDGMENT OF LAURENSON J

Introduction

[1] This is an appeal against a decision, delivered on 25 March 2003 by His Honour, Family Court Judge Mather in the District Court at Waitakere, in which he found that a Colin McCahon painting remained the separate property of the respondent.

Background

[2] The painting in question had been purchased by the appellant in 1964 at a time when the parties were living together as a couple, and shortly before they married on 1 December 1964. The appellant had been taught by, and later exhibited with, the artist who had been a significant inspiration to him. The purchase money for the painting came from prize money awarded to the appellant whilst he was a

student at the Elam School of Fine Arts. The painting formed part of a collection of New Zealand art accumulated by the appellant.

[3] In May 1975 the parties separated. The appellant contended that about this time they agreed all the paintings were to remain his separate property. The respondent disagreed. She said there was an agreement, but in 1977. The result of this was, the appellant was to have all the paintings except the particular painting. There were two Colin McCahon paintings, a larger one and the one in issue. She contended that the parties drew straws to determine which of the two paintings each of them would keep. She drew the smaller straw and hence became the owner of the painting now in dispute. In fact all the paintings remained in what had been the matrimonial home for a period until in about 1977 when the appellant removed all but the particular painting. This remained with the respondent as it does to this day.

[4] The parties were divorced on 11 September 1978. On 19 October 1978 they entered into a matrimonial property agreement, apparently for the principal purpose of defining the respondent's ownership of the home. This agreement was in simple terms. It contained three operative clauses, namely:

> "1. THE ex-husband and ex-wife shall be sole owners of all furniture, household goods and personal effects in his or her personal possession at the time of the agreement.
>
> 2. THE ex-husband will transfer into the ex-wife's sole name the former matrimonial home situated at 12 Garfield Road, Helensville. It is acknowledged that the net equity in the former matrimonial home at the date the parties commenced living apart was $18,500.00. It is hereby agreed that if the ex-wife shall at any time in the future sell the former matrimonial home and not purchase a further home for herself and the children from the proceeds of such sale the sum of $9,250.00 shall be immediately made available to the children of the marriage in equal shares.
>
> 3. THIS agreement shall be in settlement of all rights and claims that the ex-wife and ex-husband have or may have under the provisions of the Matrimonial Property Act 1976, the Matrimonial Proceedings Act 1963 and the Family Protection Act 1955 or otherwise."

[5] In 1985 the respondent made plans to sell the painting. The appellant objected, as a result of which the painting was withdrawn from sale. Thereafter the appellant maintained that the painting had always been his separate property. In 1999 he commenced civil proceedings to recover it. These were discontinued after

the High Court held, on 27 October 2000, that the painting was *prima facie* matrimonial property and proceedings should be issued in the Family Court.

[6] The present proceeding was issued in that Court by the appellant on 4 May 2001. Because it was not heard before 1 February 2002, pursuant to s.97(2) of the Property (Relationships) Act 1976 (the Act), it was continued under this Act as amended by the Property (Relationships) Amendment Act 2001.

[7] The appellant sought the following orders under the Matrimonial Property Act 1976:

> "1. Declaration that the subject painting constitutes separate property of the Applicant. *S 9(2).*
>
> 2. Order performance of the oral matrimonial property agreement entered into by the Applicant and Respondent in 1975 by ordering the return of the painting to the Applicant. S*s55(1) and 57(5).*
>
> 3. Declaration that the Matrimonial Property Agreement of 1978 is void and of no effect in relation to the painting. *S.21(8)(b).*
>
> 4. Order of the costs of the proceedings to the Applicant. *S.40.*
>
> IN THE ALTERNATIVE, in the event that the painting is found to be matrimonial property, for:
>
> 5. Order that the Applicant be entitled to share in the gains of the property from the date of the Matrimonial Property Agreement 1978 until today's date, and that the increase be apportioned between the Applicant and Respondent in a just way taking into consideration the Applicant's purchase of the painting prior to the marriage of the parties. *Ss8(f),and 14.*
>
> 6. Order that the Respondent pay such sum to the plaintiff to compensate for the increase in value of the painting.
>
> 7. Order determining the share between the Applicant and Respondent in the value of the painting in accordance with the contribution of each to the marriage partnership. *S.14."*

[8] Mather FCJ found, as I have already noted, that the painting, which had remained in the respondent's possession and control at all times since separation in 1975, is her separate property. He summarised his findings in paragraph 103 of his judgment as follows:

> "[103] The main findings are:

a) There was no oral agreement concerning the painting in 1975.

b) There was an oral agreement concerning the painting in 1977, to the effect that it was to be Ms West's.

c) In 1978, when the written agreement was signed, the painting was a family chattel and hence matrimonial property as defined in the 1976 Act.

d) The written 1978 agreement encompassed all matrimonial property, including the painting, which was to remain Ms West's property.

e) The 1978 agreement incorporated or overtook any prior oral agreement as to property, it was intended to be a final division of property, and it has governed the ownership and disposal of all matrimonial property (relationship property under the 2000 Act) since.

f) There is no basis for finding extraordinary circumstances making it repugnant to justice that there be equal division of domestic matrimonial property in 1978 (under the 1976 "Act), or all relationship property now (under the 2000 Act).

g) The test of serious injustice has not been met, entitling the Court to set aside the 1978 agreement. This takes account of Mr Perry's claim to the painting as his *taonga* under the 2000 Act.

h) The painting, which has remained in Ms West's possession and control all times since separation in 1975, is her separate property."

[9] In a separate judgment dated 16 May 2003 the Judge awarded the respondent $10,000 plus disbursements of $191.09 in respect of the substantive proceedings and $2,000 in respect of an earlier application for leave to bring the proceeding out of time.

[10] The appellant advanced three grounds of appeal before this Court, namely that the Judge erred:

"1. In finding that the 1978 agreement should not be set aside;

2. In not finding that the painting was separate property at the date of acquisition in 1964 and remained so as the appellants *taonga* until the present;

3. In awarding the costs he did."

The 1978 Agreement

[11] Essentially this ground of appeal came down to a submission that the appellant had not been adequately advised regarding this agreement by the appellant's then solicitor, Mr Denholm, when it was signed on 19 October 1978.

[12] Section 21F of the Act states:

> **"21F Agreement void unless complies with certain requirements** - (1) Subject to section 21H, an agreement entered into under section 21 or section 21A or section 21B is void unless the requirements set out in subsections (2) to (5) are complied with.
>
> (2) The agreement must be in writing and signed by both parties.
>
> (3) Each party to the agreement must have independent legal advice before signing the agreement.
>
> (4) The signature of each party to the agreement must be witnessed by a lawyer.
>
> (5) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement."

[13] The appellant submitted in relation to ss21F(5) that it was apparent from Mr Denholm's evidence that he was not aware at the time the agreement was signed, that the painting in question was not in the appellant's possession. Had he done so and, because he understood all paintings were the property of the appellant, then he would not have advised the appellant to sign the agreement. In other words the agreement was signed under a mistake of fact.

[14] The issue as to whether the appellant was adequately advised at the time of signing the agreement was not argued before Mather FCJ who noted in paragraph [69] of his judgment:

> "[69] So far as unfairness is concerned, the focus is primarily on the circumstances in which the agreement was entered into: see **Fisher on Matrimonial and Relationship Property** para 5.81. There is no evidence to suggest that either party was not properly legally advised at the time the 1978 agreement was signed. The normal formalities required under the 1976 Act for such agreements were complied with. The agreement came three years after separation, with ample time to consider the issues."

[15] The appellant submits, however, that it is within the inherent jurisdiction of this Court to examine this particular issue if, for no other reason, that the issue arose unexpectedly during the course of Mr Denholm's evidence. It is now submitted that there was an onus on Mr Denholm to satisfy himself that clause 1 of the 1978 agreement did, in fact, correctly record the position as between the parties at the relevant time and to explain to the appellant the effect and implications of the agreement

[16] The plaintiff referred to *Russell v Russell* (2000) NZFLR 312 in which, at p.322, Hammond J referred, with approval, to Ellis J's decision in *Ward v Ward* [1996] 6 FRNZ 668 where he said at 674:

> "Ellis J with respect correctly asserted that it was not the fact of advice but the quality and depth of the advice which is the important factor. He said: ...I agree that in assessing whether there has been independent advice, the quality and depth of that advice is an important factor. ... The advisor must be aware and properly informed of the facts of the case and must also ensure as best as they may be that the spouse concerned not only appreciates the advice, but that he or she is in a fit state to make up his or her own mind."

[17] Reference was also made to *Shallue v Shallue* (HC Hamilton, M.53/94, 26.4.96) in which Penlington J said:

> "Plainly each case will depend on its own facts. The solicitor must have a proper knowledge of the facts of the case. He or she must ensure that the spouse concerned is in a fit state to give a free and informed consent. A simple situation may require a minimal amount of advice. A complex situation however may require extensive advice, possibly after legal and other research and considerable discussion. The solicitor must see that the party whose signature he or she is about to witness fully comprehends the agreement both now and for the future and is willing and able to give a clear and informed consent (38-39)."

[18] In *Odlum v Odlum* [1989] 5 FRNZ 41, Doogue J said at p.46

> "In my view of the matter, without putting a particular onus on any particular solicitor in any particular case, a solicitor advising under the provisions of s.21(6) of the Act in respect of a contracting out agreement, is necessarily obligated to ascertain, at least in a general way, the property of the parties, so that he or she can advise the person who is being advised of the consequences for that party of the provision on the Act in respect of that property and in respect of other property which would come within the Act and of the consequences of the agreement, both in respect of that property and in respect of the provisions of the Act. In my view the present case is an admirable example of the need for a solicitor to address himself to the

property of the parties and the provisions of the Act and to ensure that the party being advised is aware of not only the simple consequences of the agreement but the consequences of the Act which the agreement relates to. Unless the party is aware of the consequences of the Act for the property which the parties have at the time of marriage or may acquire thereafter, how can the party be aware of the true consequences of the agreement being entered into? In particular, how can it be said that the party has a real understanding of the significance of the agreement when, as in this case, the respondent was totally unaware of her rights under the Act which she was forfeiting by entering into the agreement?"

[19] So far as the present case is concerned, Mr Denholm said in summary:

1. He understood the appellant's paintings remained his property;

2. That the appellant had removed them from the matrimonial home and had lent them out to friends to care for them at a time when, after leaving the home, he could not care for them himself. One of the paintings had been left with Mr Denholm.

3. The clause in question so far as it referred to personal property was very simple and absent any query from the appellant he had assurance each of the parties had taken possession of the items they were entitled to.

4. The paintings were not therefore referred to specifically by either the appellant or himself

[20] In my view in the present case it is not reasonable to say that there was an onus on Mr Denholm to go to the extent submitted by the appellant's counsel. This was a very simple clause so far as the personal property was concerned. The status of any particular property was defined very simply by reference to who presently had possession.

[21] This was a factual issue within the particular knowledge of the particular party. This was not a case where, as in *Odlum*, a party was left unadvised of legal rights pertaining to particular property. A similar example is *Murphy v Murphy* [1994] NZFLR, 835 where the parties had signed a Matrimonial Property agreement including a farm for the purpose of obtaining income tax relief, possibly for estate planning purposes. The division agreed to by the husband was in excess of that to which the wife would have been entitled under the 1976 Act in the event of a marriage break down. This had not been explained to him.

[22] I have concluded, bearing in mind that the onus is on the husband to satisfy me that the agreement should be set aside, that it would be inappropriate to do so in this case on the basis of an allegation of inadequate advice on the part of Mr Denholm.

[23] I have to say that in coming to this conclusion, and despite the appellant's stated reasons why the painting had been left with the respondent when he uplifted the others, I have great difficulty in accepting that the appellant would not have raised the issue of the particular painting when he signed the agreement if, in fact, he considered it was still his.

[24] In the same way that Mather FCJ found it inexplicable that the appellant would not have removed it earlier, along with the other five paintings, in or around June 1977, so do I regard it as inexplicable that he would not have raised the issue with Mr Denholm in October 1978. It is, I think, reasonable to infer that the fact that the issue was not raised then is a very good indication there was no issue to be raised. Furthermore the appellant claimed that about the time he left for Rotorua in late 1978 he went to the respondent's home to claim the painting. He says he could not see it, but he was able to take away another item.; There is sworn and uncontested evidence from two persons who say the painting was on display in the home at the time.

[25] Whilst the Judge did not consider this issue, it is, I think, important to note that he carefully examined the provisions of s.21J which replicate those of s.21(8) and (10) of the 1976 Act. Having considered the matters relevant to the consideration of whether, even if the formalities are satisfied, an agreement should be set aside on the ground that to do otherwise would cause serious injustice, he concluded that this did not arise in this case.

[26] For the same reasons I reject the first ground of appeal.

The Painting was Taonga

[27] Section 2 of the Act excludes from the definition of family chattels:

a) Chattels used wholly or principally for business purposes;

b) Money or securities for money;

c) Heirlooms;

d) Taonga.

[28] The appellant had contended that the painting in question was his *taonga* and hence, it having been acquired by him as such, it never was an asset which could become the subject of the 1978 agreement.

[29] The Act does not define *taonga*. Mather FCJ referred to the definition in "Dictionary of the Maori Language", Williams H.M. 1988, namely "property, anything highly prized". He went on to say in paragraph [88]:

> "... It appears in the Treaty of Waitangi in the expression "*ratou taonga katoa",* which has been translated as "all things valued or all things treasured". The concept has been considered in a number of Waitangi Tribunal reports, including the Orakei report (1987), the Muriwhenua Fishing Report (1988), and Te Ika Whenua Rivers Report (1998). From those and other reports it is apparent that *taonga* are not confined to objects or possessions but can include cultural property, and as a Maori notion must be seen within the context of Maori cultural values."

[30] The Judge also referred to *Page v Page* [2001] 2 FRNZ 275 which dealt with an interlocutory matter in relation to a claim by a husband that paintings by his late mother and other artists were his separate property. It was anticipated that the substantive hearing might take place after the Act came into force, in which case the husband would argue that the paintings were his *taonga*. In an *obiter* comment, Durie J. indicated that the ability to claim a chattel as *taonga* is not restricted to Maori alone and "I see no reason why it cannot apply to a person of any ethnic or cultural background."

[31] Other authorities referred to or consulted by me were:

(a) Relationship Property in New Zealand by Atkin & Parker, Chapt. 3.4.6 Heirlooms and Taonga.

(b) The definition in Oxford New Zealand Dictionary edited by H.W. Orsman 1997, namely:

"taonga. Also taoka (SI), occas. Tonga. [Ma./taonja/: Williams 381 *Taongo* ..Property, anything highly prized] As a *collective*, goods, valuables; treasure; as a *distributive*, in recent use, a treasured artifact (including such 'intellectual property' as language) or person"

(c) The Reed Dictionary of Modern Maori by P.M. Ryan [1995] defines *taonga* as "property, treasure, apparatus, accessory (equipment)". *Taonga* can also be used in conjunction with other Maori words to create the following nouns:

taonga-a-iwi – cultural resource
taonga hiri – rubber stamp
taonga kingi – regalia
taonga mahi – tool, instrument, apparatus
taonga mau tonum- permanent fixture
taonga mihini – technology
taonga no namata – artefact
taonga tinana – personal effects
taonga tukuiho – legacy, relics
taonga whakanui reo – microphone.

(d) *Taranaki Fish & Game Council v McRitchie* [1997] DCR 446 in which at p.17 of the decision there is reference to observations in the **Muriwhenua Fishing Report** at pp.179-181. This includes the following:

'(b) To understand the significance of such key Treaty words as "taonga" and "tino rangatiratanga" each must be seen within the context of Maori cultural values. In the Maori idiom "taonga" in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals and the cosmos itself, a holistic body encompassing living and non-living elements.'

[32] Importantly, Mather FCJ makes the point at paragraph [89]:

"[89] In the 2000 Act *taonga* is limited in scope by its inclusion in the definition of family chattels. Although it is a Maori word, it describes a relationship between a person or persons and property, and I see no reason why it cannot apply to a person of any ethnic or cultural background."

[33] Having noted this he concluded that the painting in dispute in this case was capable of being categorised as *taonga* in view of the circumstances surrounding its acquisition by the appellant. He went on to find, however, that there were two other

elements which dictated that the painting was either not *taonga* to the appellant or, if it was *taonga* then it had this status for both parties and therefore fell for division between them along with other family chattels.

[34] The two matters were:

a) The parties were both art students influenced by McCahon and in a close personal relationship when the painting was purchased by the appellant.

b) That there was evidence to show that the appellant was prepared to sell the painting. The Judge said at paragraph [95]:

> "[95] Finally I consider it inconsistent with an item being *taonga* that the person making that claim is willing to sell it simply to realise cash for other routine purposes such as housing, except in the most pressing situation. Mr Perry sold both the other McCahon and the Rita Angus paintings for this purpose. When asked whether he might sell the smaller McCahon in dispute if it were to be his, his response was: "Not necessarily. I have paintings I live with and enjoy. It is very saleable. It is not just a cashable asset. McCahon was a source of inspiration for me." The evidence does not satisfy me that he would not similarly sell the McCahon in dispute, notwithstanding the manner of its purchase."

[35] The appellant submitted in relation to the findings referred to in paragraph [34] above that the Judge erred for the following reasons:

a) As a matter of law it was wrong to describe the painting as "an enduring family chattel at acquisition" because to do so was to import the concepts of the equal sharing regime of the Matrimonial Property Act 1976 to a chattel acquired in 1964 when those concepts did not apply. The short point was that the parties were not married in 1964 and there was clear evidence supported by other witnesses that the painting was acquired by the appellant in circumstances which clearly indicated that it was then, and thereafter remained, a treasured item or *taonga* to him alone. Furthermore the parties had separated in 1974 prior to the Matrimonial Property Act 1976 coming into force.

b) That the factual findings leading to the conclusion that the appellant would be prepared to sell the painting were flawed.

[36] Counsel for the respondent submitted that –

a) For a chattel to be regarded within the overall concept of *taonga* or heirloom, Parliament must have intended that only items that are so highly treasured by one party because of their history or association before they could be accepted as not being family chattels; (???)

b) That the element of being highly prized was essential for such exception otherwise without this restriction the effect could be to interfere significantly with the concept of equal sharing of family chattels;

c) Before the status of *taonga* could be attached to a chattel the same objective assessment was required as is required with other property under the Act. An example was a homestead under s.12. The owners subjective view was obviously relevant, but not by itself determinative. An objective assessment must necessarily take into account the family relationship in which the particular chattel is placed.

[37] Having considered the arguments presented by both parties I have concluded that the Judge was correct in his final decision that this painting was not in fact *taonga* to the appellant by the time the 1978 agreement was signed. I reach that conclusion, however, for somewhat different reasons. These are:

a) On the evidence available I can accept, as did Mather FCJ, that the particular circumstances surrounding the acquisition of the painting could justify a finding that it was *taonga* to him at that time when he was unmarried and despite his relationship with the respondent;

b) If the appellant had, thereafter, consistently maintained his personal attachment to what was to him a prized possession in terms of its sentimental value to him, then again I consider it could have been said to remain *taonga* to him;

c) With respect for the Judge's view, I disagree, however, with his assessment of the significance to be attached to the possibility of the appellant later selling the painting. The references mentioned above indicate to me that the word *'taonga'* is used not only to describe objects of value, but also to convey a concept of value to be ascribed to anything, be it material or not, which has attached to it a special significance. This significance may attach for any number of reasons. These may range from simply being the bounty of nature to a site where an occasion of particular moment occurred, to a special, personal gift or ability reposited in a group or individual. I do not pretend to be able to supply an exhaustive list of such examples. However, by reason of the breadth of the meaning of the word as I perceive it, it seems to me that consequences of something being

described as *taonga* will differ. At one extreme will be an acceptance that the *taonga* is sacred and inviolate and the other extreme may be an acceptance that the *taonga* is simply deserving of respect. In between will lie an acceptance of responsibilities to nurture and pass on to others.

d) Quite clearly, and as was noted by Mather FCJ, it is only specific objects attracting the description of *taonga* which are relevant for the purposes of the Act.

e) A particular object may attain the status of *taonga* in two ways. The first is where the object is acquired by an individual because it has a special significance to that individual. The second is where the object assumes the special status of *taonga* because others also ascribe to it or bestow upon it a special significance for example, in the sense of gifts made to recognise a special relationship between the donor and the recipient. In either case the monetary value is irrelevant in determining whether the object is *taonga.*

f) There is, however, an essential difference which may exist between the two categories. In the second case the nature of the gift may be such that it would be quite inimical to the recipient's receipt and possession of the object for it even to be sold for a monetary return. In the first case however, if an individual, having acquired the object without reference to others, simply because it was of special significance to him or her, then decided to sell it, then that would not, to my mind, necessarily indicate that the object had not, to that point, been regarded as an object of *taonga* to the owner.

g) Therefore I consider that whether or not the appellant may have been prepared to sell the painting is not determinative of the issue whether or not at some earlier point it could properly be regarded as the appellant's *taonga*.

[38] The determining factor in my view is the manner in which the painting was dealt with in the context of the relationship. It is at this point that the evidence in relation to the 1978 agreement again becomes relevant. In this regard the Judge found as matters of fact:

1. It had been treated as relationship property prior to separation;

2. There had been no oral agreement in favour of the appellant in 1975;

3. There had been a drawing of straws in 1977 resulting in the respondent having possession of the painting;

4. This was confirmed by the 1978 agreement;

5. The appellant's protestations that he had not seen the painting in the house in 1978 are not substantiated;

6. The first agreed time when he maintained a claim to the painting was not until 1985

[39] The net result is, in my view, that originally the painting could have been categorised as *taonga* and hence separate property. However, by reason of the subsequent dealings with it within the context of the relationship it ceased to be the appellant's *taonga*.

[40] For these reasons I also dismiss the appellant's second ground of appeal.

Costs

[41] Having received written submissions from the parties, the Judge ordered the appellant to pay the sum of $10,000 plus disbursements of $191.00 in respect of the substantive proceedings, and $2,000 in respect of the application for leave to bring proceedings out of time.

[42] The reasons for awarding costs are summarised in paragraph [13] of the separate costs decision as follows:

> "In my view this case is quite different from those which involve the Court dividing matrimonial or relationship property between parties who have been unable to do so themselves. Primarily for that reason the usual rule that parties meet their own costs should not apply. Having initiated a claim of this kind so many years after separation and after entering into a written agreement, and having failed to have that agreement set aside or to secure an order in his favour in respect of the painting in dispute, the applicant must expect to make a reasonable contribution to the substantial costs of the respondent. That is not to punish him but to reimburse the respondent for the substantial costs she has incurred defending an application which has been found to lack merit."

[43] The level of costs was referred to in paragraph [17]

> "In my view because of the applicant's decision to challenge a settled situation in respect of property, and put in dispute ownership of an extremely valuable asset, and having failed to succeed with his claim, his contribution to the applicant's costs should be at the upper end of that range. The circumstances do not, however, call for full indemnity costs. So far as costs on the application for leave to appeal are concerned, the respondent was entitled to contest that application. The fact that the application was

successful should however reflect in the costs awarded to the respondent, notwithstanding the grant of leave being an indulgence."

[44] The appellant submitted that the costs awarded in the face of the usual practice not to do so in such cases was unjustified and excessive, given:

a) Leave had been obtained beforehand which implied he was justified in bringing the claim;

b) The fact that leave was granted was further evidence that the appellant was not challenging a "settled" situation;

c) The reference to the costs being set on a partial indemnity basis was the result of incorrectly factoring in the challenge element in the context of considerable delay which had, to an extent, been disputed.

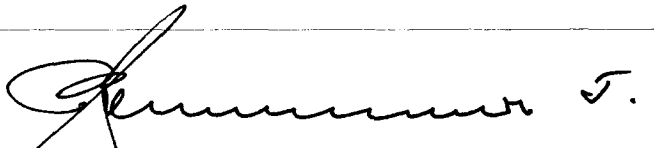
[45] In my view the fact that leave had been granted is far from being a determining factor because, when the substantive action was heard and the evidence considered, the result was very clearly that the appellant was challenging the position as finally settled by the 1978 agreement. Furthermore whilst there may be some dispute as to the reasons for the delay until 1999 when the civil proceedings were commenced, the fact remains that the parties concluded an agreement in 1978. There is no clear evidence of any dispute until 1985. No proceeding was issued until 1999.

[46] In the final analysis the award was made as a matter of discretion by a trial Judge who had undertaken a hearing of four days. Whilst the award may be at a higher level, I cannot see that it is excessive in the circumstances.

[47] For these reasons I do not consider it appropriate to interfere with that discretion.

[48] This ground of appeal therefore also fails.

[49] The appellant has been unsuccessful on all counts. The respondent is accordingly entitled to costs which I fix on the 2B formula together with disbursements to be fixed, if necessary, by the Registrar.



Delivered at 10 am/~~pm~~ on 17 December 2003

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