



3 August 2020

PRESS SUMMARY

Webb (Appellant) v Webb (Respondent) (Cook Islands) **[2020] UKPC 22**

On appeal from the Court of Appeal of the Cook Islands

JUSTICES: Lord Wilson, Lord Carnwath, Lady Black, Lord Briggs, Lord Kitchin

BACKGROUND TO THE APPEAL

The appellant, Mr Webb, and the respondent, Mrs Webb, were married in New Zealand in December 2005 and made their home there. They are both New Zealand citizens. They have a daughter together and Mr Webb also has a son from a previous marriage. Shortly after Mr and Mrs Webb were married, Mr Webb established a trust known as the Arorangi Trust. He appointed himself as trustee and nominated himself and his son as beneficiaries. In February 2006, the Arorangi Trust acquired a leasehold interest in a property in the Cook Islands known as the Arorangi Property. It later acquired further property. In August 2013, Mr and Mrs Webb and their daughter moved from New Zealand to the Cook Islands, where they lived in the Arorangi Property.

In 2011, the New Zealand Inland Revenue Department (the “IRD”) began an investigation into Mr Webb’s business affairs which led to the issuance of default assessments, including shortfall penalties, by the Commissioner of Inland Revenue for the 2001-2009 tax years. Mr Webb unsuccessfully challenged those assessments and, as of 15 September 2017, the sum which remained unpaid was in excess of NZ\$ 26m.

Mr and Mrs Webb separated in April 2016. Mrs Webb and their daughter continued to live in the Arorangi Property. Mr Webb returned to New Zealand with his son and began a relationship with Ms Brenda Dixon. He arranged for the establishment of a new trust, the Webb Family Trust. The settlor was a business colleague of Mr Webb, and Mr Webb and Ms Dixon were appointed as trustees. Mr Webb, the son and the daughter were named as beneficiaries. Mr Webb arranged for the Arorangi Trust to transfer some of its assets to this new trust for a nominal consideration.

In May 2016, Mrs Webb issued these proceedings in the High Court of the Cook Islands for matrimonial property orders pursuant to sections 23 and 25 of the Matrimonial Property Act 1976 of New Zealand as that Act applies in the Cook Islands by virtue of the Matrimonial Property Act 1991-92 (the Act as incorporated into Cook Islands law is referred to as the 1976 Act). Mrs Webb contended, among other things, that the Arorangi Trust and the Webb Family Trust were invalid. Potter J dismissed the claim. She rejected Mrs Webb’s attacks on the trusts and found them to be valid. She found that there was a real likelihood that Mr Webb would have to pay the debts he owed to the IRD. They constituted personal debts which had to be brought into account and which, even if the trusts had been invalid, would have exhausted any matrimonial property, leaving nothing available for division.

Mrs Webb appealed to the Court of Appeal of the Cook Islands and her appeal was allowed. The court held that Mr Webb’s tax debt to the IRD should not be brought into account because it was unlikely to be enforceable in the Cook Islands, and that the two trusts were invalid. Mr Webb now appeals to Her Majesty in Council.

JUDGMENT

The Judicial Committee of the Privy Council will humbly advise Her Majesty that the appeal should be dismissed. Lord Kitchin (with whom Lord Carnwath, Lady Black and Lord Briggs agree) gives the advice of the Board. Lord Wilson, however, would have advised Her Majesty to allow the appeal.

REASONS FOR THE JUDGMENT

The purpose of the 1976 Act is, among other things, to recognise the equal contribution of the spouses to the marriage partnership and to provide for the just division of matrimonial property between the spouses when the marriage ends [26]. Assessment of the matrimonial wealth necessarily requires the debts generated by the marriage partnership to be taken into account [27]. Mr Webb’s liability to the IRD is a debt incurred by him and it is now a judgment debt [28]. The debt does not fall within any of the exceptions in section 20(7) of the 1976 Act. Mr Webb submits that it follows that the debt is a personal debt for the purposes of section 20. Mrs Webb responds, and the Court of Appeal agreed, that the matter is not so straightforward and depends upon whether the debt is enforceable in the Cook Islands [31].

It is a long-standing principle of the common law, referred to as the foreign tax principle, that the courts will not collect taxes of a foreign state for the benefit of the sovereign of that foreign state [32]. The foreign tax principle, if applicable, would preclude any attempt by the IRD, a receiver or a trustee in bankruptcy (called the Official Assignee in New Zealand) to enforce the judgment debt against Mr Webb’s assets in the Cook Islands [39]. It is inherent in the scheme in section 20(5) to (7) of the 1976 Act that for any unsecured debt to be a personal debt for the purposes of section 20 it must be enforceable or likely to be paid. It would make no sense to allow a debtor spouse to deduct from the value of any matrimonial property unsecured personal debts which are both unenforceable and unlikely to be met. If Mr Webb were permitted to deduct the judgment debt from the value of the matrimonial assets he holds in the Cook Islands, there would be nothing left to share with Mrs Webb. But if the IRD cannot enforce its judgment against those assets, Mr Webb can keep them all for himself. That cannot have been the intention behind section 20(5). The expression “personal debts” does not extend to those debts which are both unenforceable and unlikely to be paid [41]. This is social legislation and the word “debts” and the expression “personal debts” must be interpreted in a manner that reflects that statutory context [45]. This construction does not confer on the word “debts” in section 20(5)(b) a meaning different from the same word in subsection (5)(a) [46].

The Cook Islands are now a distinct sovereign state. They have their own parliament and they have their own government. They make their own laws and they control their own constitution. In these circumstances and on the materials before the Board, the better view is that the general common law principle that the courts of one country will not enforce the penal and revenue laws of another country is one that now applies to the Cook Islands [55]. The Board is also unable to accept that, in so far as the matrimonial property is out of reach of Mr Webb’s creditors, he will ever voluntarily apply it to meet his debts [63].

The Board was given no details of any steps a receiver has taken or could take to gather in Mr Webb’s assets, let alone assets that require enforcement steps in the Cook Islands. Nor has the Board been given any details of how the New Zealand Official Assignee could take control of Mr Webb’s assets, whether in the Cook Islands or elsewhere, were there to be bankruptcy proceedings. There appears to be some doubt as to whether the New Zealand Official Assignee would be recognised in the Cook Islands at all. Moreover and in any event, the foreign tax principle applies to the direct and indirect enforcement of the revenue laws of another state [65]. There was some discussion before the Board about section 655(1) of the Cook Islands Act 1915, but the Board is unable to attach any significant weight to that provision in the context of these proceedings [66]. The New Zealand tax debt should not be taken into account in determining the value of the Cook Islands matrimonial property available for division. On the materials before the Board, the stronger argument is that the debt is unenforceable in the Cook Islands [67].

As to the two trusts, Mr Webb's powers under each of the trust deeds were such that, in equity and in all of the circumstances of this case, he can be regarded as having had rights in the trust assets which were indistinguishable from ownership. He had the power at any time to secure the benefit of all of the trust property to himself and to do so regardless of the interests of the other beneficiaries. The Court of Appeal was entitled to find that the trust deeds failed to record an effective alienation by Mr Webb of any of the trust property. The trusts were therefore invalid [89]. Further, the Court of Appeal could not be criticised for declining to interfere with Potter J's findings that the trusts were not shams [91]. The Board expresses no final view on Mrs Webb's case that transfers of property into the Webb Family Trust are defeated by section 44 of the 1976 Act, but it observes that the circumstances are highly suspicious [94].

Mrs Webb also argued that the two trusts are void because they breach the common law rule against perpetuities in that the shares the beneficiaries will take is not known at the date of creation of the trust. The Board expresses no final view on this point [95-96]. However, at the date of the Webb Family Trust deed, there was a very real possibility that a future interest might vest outside the perpetuity period, and it was therefore immediately void at common law [97].

As to the valuation of shares in a company called Solar 3000 Ltd (which are matrimonial property), the circumstances of the case call for a similar approach to that explained by Lord Sumption in *Prest v Petrodel Resources Ltd* [2013] UKSC 34. Mrs Webb is essentially dependent upon the disclosure and evidence given by Mr Webb as the economically dominant spouse. This is a matter to which the Justices of Appeal were entitled to have regard and it was permissible for them to draw upon their experience and to take notice of the inherent probabilities in deciding what Mr Webb was likely to be concealing [99, 105]. The valuation arrived at by the Court of Appeal was realistic [106]. In addition, the Board should not interfere with the Court of Appeal's finding that the shares in another company, Kuru Investments Ltd, did not form part of the matrimonial property [107]. There was no reason to interfere with the Court of Appeal's overall implementation of the division of the matrimonial property [108].

Lord Wilson, dissenting, would have advised Her Majesty to allow Mr Webb's appeal [110]. The overall purpose of the Act is to set firm rules for the division of matrimonial property irrespective of the overall financial position in which, in the light of any difference in the amount of their separate property, each spouse is left as a result of their application [116]. To say that the word "debts" in subsection (5)(b) of section 20 means "debts enforceable against the debtor's matrimonial property" is to put a gloss on the word. The 1976 Act could have used those words, but it did not [118]. By favouring a construction of the word "debts" in subsection (5)(b) different from the word in subsection (5)(a), the Court of Appeal departed from a conventional canon of construction that words in the same Act are presumed to have the same meaning [119]. The Court of Appeal's construction also has the consequence of requiring a court, confronted with a claim to deduct a debt under section 20(5)(b), to determine, without assistance from the creditor, whether the debt is enforceable against specified assets [120].

As to section 655(1) of the Cook Islands Act 1915, Lord Wilson considers that there is no material to support the suggestion that the Cook Islands might now decline to afford to a New Zealand bankruptcy order the effect for which the law of New Zealand continues to provide. It would also be wrong to consider that if otherwise obliged to recognise the right of the Official Assignee in New Zealand to assert title to the debtor's property in the Cook Islands, the court there could decline to recognise it by reference to the identity of the Commissioner as the petitioning creditor behind the bankruptcy [121]. It is impossible in the present case to conclude that for practical purposes Mr Webb's tax debt can be disregarded [126]. On Lord Wilson's analysis, the tax debt is enforceable [131].

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.