

**IN THE HIGH COURT OF NEW ZEALAND
BLLENHEIM REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WAIHARAKEKE ROHE**

**CIV-2020-406-5
[2021] NZHC 3101**

BETWEEN SIRPA ELISE ALALAAKKOLA
 Applicant

AND PAUL ANTHONY PALMER
 Respondent

Hearing: On the Papers

Counsel: C L Elliott QC for Applicant
 B A Fletcher for Respondent

Judgment: 17 November 2021

**JUDGMENT OF ISAC J
[Leave to Appeal and Costs]**

Introduction

[1] Ms Alalaakkola applies for leave to appeal a decision of the High Court¹ determining an appeal from the Family Court.² There is also a question of costs.

[2] I have concluded that leave should be granted on the question of law outlined at [17]. I have also awarded Mr Palmer costs on a 2B basis.

Background

[3] For the purposes of this application, only a brief summary of the proceeding is required.

¹ *Palmer v Alalaakkola* [2021] NZHC 2330.

² *Alalaakkola v Palmer* FAM-2017-006-00016, 10 February 2020; *Alalaakkola v Palmer* [2020] NZFC 1635. It is the second decision that determined the issue of copyright in the artworks and occupational rent.

[4] Ms Alalaakkola is a painter. During her 20-year marriage to Mr Palmer she created a number of original works. On separation an issue arose as to the status of copyright in the paintings: did the copyright amount to relationship property? The Family Court found copyright in the artworks was Ms Alalaakkola's separate property. Mr Palmer appealed that finding to this Court, as well as an issue relating to occupation rent which is not relevant to this application.

[5] In a judgment delivered on 7 September of this year I allowed Mr Palmer's appeal in part.³ I found that the copyright in the paintings was relationship property. In summary, my reasons for this conclusion were:

- (a) Copyright is a proprietary right, and the definition of property in s 2 of the Property (Relationships) Act 1976, in particular the phrase "any other right or interest" at s 2(e), captures copyright in artworks;
- (b) There is no indication in either the Copyright Act or the Property (Relationships) Act that s 16 of the Copyright Act — which effectively vests the exclusive right to copy the work in its author — was intended to remove intellectual property from the reach of the Property (Relationships) Act; and
- (c) At the point Ms Alalaakkola put her skill towards the production of an artwork during the course of the relationship, the subsequent copyright in that work became relationship property, as it came into existence during the relationship.

[6] In light of those findings, I found it was not open for the Family Court Judge to exercise a discretion on whether or not to transfer an interest in the copyright to Mr Palmer, or indeed to allow an unequal division of the copyright. The equal sharing presumption may only be displaced in extraordinary circumstances that make equal sharing repugnant to justice. I did not consider that to be the case here. I therefore remitted this issue back to the Family Court, noting the valuation of the copyright will be the most challenging task.

³ *Palmer v Alalaakkola*, above n 1.

Grounds of appeal

[7] Broadly, Mr Elliot QC raises the following grounds of appeal:

- (a) I gave undue preference or weight to the Property (Relationships) Act over the Copyright Act 1994;
- (b) I misdirected myself in relation to the issue of the presumption of equal sharing, specifically my interpretation of the Family Court decision;
- (c) I gave insufficient or no weight to the Family Court Judge’s view that the paintings had two distinct property rights and that these rights were severable, and that I erred in not giving sufficient weight to the fact that copyright is an intensely personal skill;
- (d) I erred in conflating the assets of a business with personal property;
- (e) I fell into error in finding that it was not open to the Family Court Judge to exercise the discretion noted at [6] above;
- (f) I erred in concluding that the fact Ms Alalaakkola may find herself in competition with herself was not a reason to decline to transfer copyright; and
- (g) my findings were contrary to the clean break principle.

[8] Mr Fletcher unsurprisingly rejects these grounds of appeal, but submits that if leave is granted the grounds of appeal should be distilled to the essence of the matter, that is: is copyright in artistic works produced during the marriage “property” in terms of the Property (Relationships) Act? If it is property as defined, then on the facts of this marriage is it relationship property or separate property?

Leave to appeal

[9] The application for leave to appeal is governed by s 60 of the Senior Courts Act 2016.⁴ The test is well-established. The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some public or private interest of sufficient importance to outweigh the cost and delay of the further appeal.⁵ The threshold for leave to bring a second appeal is high, and the purpose of a second appeal to the Court of Appeal is not general correction of error, but to clarify the law and to determine whether it has been properly construed and applied by the Court below.⁶ When the disputed matter is entirely or largely a question of fact the task of the applicant is harder.⁷

Discussion

[10] I do not think there can be any doubt that this appeal raises a question of law capable of serious argument and that it involves a public or private interest of sufficient importance to outweigh the cost and delay of the further appeal.

[11] There is clearly a live — and novel — question concerning the interaction of the Property (Relationships) Act and the Copyright Act. As far as I can tell, this has not been the subject of judicial consideration in this country before. The resolution of the issue will also have consequences for the wider creative community and indeed New Zealand's property relationship law. These factors clearly outweigh the cost and delay of the further appeal.

[12] The real issue is how best to frame the questions for appeal, which the parties have been unable to agree upon.

[13] Mr Elliott proposes a single question with four subparts:

Whether copyright is property within the meaning of the PRA. If copyright is property within the meaning of the PRA, whether it should be classified as

⁴ Section 39B of the Property (Relationships) Act 1976 which makes the Senior Courts Act 2016 applicable to appeals against decisions of the High Court.

⁵ *Waller v Hider* [1998] 1 NZLR 412 at 413 (CA).

⁶ *Simon v Wright* [2014] NZCA 199 at [6]–[7] citing *Waller v Hider*, above n 5, and *Snee v Snee* (1999) 13 PRNZ 609 (CA).

⁷ At [7].

separate property, relationship property, or the property of the parties' separate businesses. If copyright is relationship property, whether there are extraordinary circumstances that make equal sharing repugnant to justice. If copyright is relationship property subject to equal division, whether the copyright should remain with or otherwise be vested in the author, leaving only the value to be shared at the Court's discretion.

[14] Mr Fletcher accepts the first part of the framed question is appropriate, being:

Whether copyright is property within the meaning of the PRA. If copyright is property within the meaning of the PRA, whether it should be classified as separate property, relationship property...

[15] He submits, however, the remainder of the question is inappropriate. Reference to "or the property of the parties' separate businesses" has no basis in law given the Act defines relationship property and separate property; the "extraordinary circumstances" reference is not squarely raised in the formal leave application; and in any event that is a factual question, not a question of law of general importance.

[16] I accept Mr Fletcher's submission. The question for the Court of Appeal should not be unduly restrictive and should be broad enough to capture the issues at play. Of course, the Court of Appeal is not constrained by the question for appeal as I define it.

[17] I consider this to be sufficient:

Is copyright "property" for the purposes of the Property (Relationships) Act?
If so, how should it be classified in terms of that Act?

[18] Questions as to whether extraordinary circumstances exist that make equal sharing repugnant to justice and whether the copyright should remain with or otherwise be vested in the author are both factual matters that are consequential on the answer to the legal question identified at [17] above, and are specific to this proceeding. So, they may well be considered, but should not form part of the question for appeal.

Result

[19] I grant leave to appeal to the Court of Appeal on the question of law outlined at [17].

Costs

[20] There remains the issue of costs for the High Court proceedings.

[21] The parties have been unable to agree on these because although Mr Palmer was largely successful, Ms Alalaakkola did not engage in the High Court proceedings. Mr Elliot submits — in reliance on *Kawerau Jet Services Holdings Ltd v Queenstown Lakes District Council*⁸ and *Wang v North Shore District Court (No 3)*⁹ — that it would be wrong for a party who has chosen not to engage in any way in the proceeding to be responsible for costs. He invites the Court to exercise its discretion under r 14.7 to refuse to make an order for costs.

[22] All matters relating to costs are of course discretionary.¹⁰ But the discretion must be exercised on a principled basis. And the determination of costs, so far as possible, should be both predictable and expeditious.¹¹

[23] The two cases cited by Mr Elliot are readily distinguishable. They both involved parties who indicated they would abide the Court's decision. Ms Alalaakkola is not in that position. She simply chose not to participate in the appeal before the High Court. She also did not advise the Court that she would abide. In fact, her decision to appeal to the Court of Appeal indicates that was never her position. I do not consider a party who picks and chooses when they wish to appear in a proceeding affecting their interests can expect to be immunised from costs.

[24] Nor can I see any reason why Mr Palmer — who was successful on the main point of the appeal — is not entitled to costs, or that there should be a departure from the usual course that the party who fails with respect to a proceeding should pay costs to the party who succeeds.¹²

⁸ *Kawerau Jet Services Holdings Ltd v Queenstown Lakes District Council*, HC Invercargill CIV-2008-425-518, 19 May 2009.

⁹ *Wang v North Shore District Court (No 3)* [2015] NZHC 1611, [2015] NZAR 1678.

¹⁰ High Court Rules, r 14.1.

¹¹ Rule 14.2(1)(g).

¹² Rule 14.2(1)(a).

[25] Mr Palmer is awarded costs as claimed on a 2B basis.

Isac J

Solicitors:
Zone Law Ltd, Wellington for Applicant
Gascoigne Wicks, Blenheim for Respondent