

IN THE PRIVY COUNCIL

No. 39 of 1975.

BETWEEN:

DOROTHY HALDANE

Appellant

- and -

GEORGE CHRISTOPHER
HALDANE

Respondent

CASE FOR RESPONDENT

RECORD

- 10 1. This is an appeal from a Judgment of the Court of Appeal of New Zealand (McCarthy P., Richmond and Woodhouse J.J.) given on 21 February 1975, allowing an appeal from a judgment of the Supreme Court of New Zealand (Wild C.J.) given on 19 June 1974.
- 20 2. The question in this appeal is the extent to which the Appellant (hereinafter referred to as "the wife") is entitled to a share in the assets of the Respondent (hereinafter referred to as "the husband") by virtue of the provisions of the Matrimonial Property Act 1963.
- 3. The wife commenced proceedings under s.5 of the Matrimonial Property Act 1963 on 23 December 1970.
- 4. At all material times s.5 provided as follows:
- 30 5. Property disputes - (1) In any question between husband and wife as to the title to or possession of property (including any question

pp.1-2

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as to investment by one party of money of the other without consent) the husband or the wife, or any person on whom conflicting claims are made by the husband and wife, may apply to any Judge of the Supreme Court, or subject to the provisions of subsection (4) of this section, to a Magistrate's Court.

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(2) On any such application the Judge or Magistrate may make such order as he thinks fit with respect to the property in dispute, including but without limiting the general power conferred by the foregoing provisions of this subsection any order for -

- (a) The sale of the property or any part thereof and the division or settlement of the proceeds; or
- (b) The partition or division of the property; or
- (c) The vesting of property owned by one spouse in both spouses in common in such shares as he thinks fit; or
- (d) The conversion of joint ownership into ownership in common in such shares as he thinks fit; -

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and may make such order as to the costs of and consequent upon the application as he thinks fit, and may direct any inquiry touching the matters in question to be made in such manner as he thinks fit.

(3) Subject to the provisions of subsection (2) of section 6 of

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10 this Act, the Judge or Magistrate may make such order under this section, whether affecting the title to property or otherwise, as appears just, notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.

20 (4) A Magistrate's Court may exercise jurisdiction under this section where the value of the property in dispute is not more than \$14,000 in the case of an estate or interest in land or of a matrimonial home and not more than \$5,000 in the case of any other property: Provided that a Magistrate's Court may make an order under this Section granting to the husband or wife the right to occupy the matrimonial home or to possession of the furniture therein irrespective of the value thereof.

30 (5) An order made under this section shall be subject to appeal in the same way as an order made by the Judge or Court in an action in the Supreme Court or a Magistrate's Court, respectively, would be.

(6) This section shall apply with respect to any matrimonial home, whether or not it is a joint family home within the meaning of the Joint Family Homes Act 1964:

40 Provided that no order may be made under this section in respect of a joint family home after the date of death of either spouse if at that date the spouses were cohabiting.

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(7) In this section and in sections 5A, 6, 7, 8 and 8A of this Act the terms "husband" and "wife" include the legal personal representatives of the husband or wife and also include the parties to a former marriage and the parties to a purported marriage that is void.

5. In addition to s.5 the following provisions of the Matrimonial Property Act 1963 are material: 10

(a) The definition of "Marriage" in s.2 which, unless the context of the Act otherwise requires, is as follows:

"'Marriage' includes a former marriage; and 'party to a marriage' has a corresponding meaning." 20

(b) The definition of "Property" in s.2 which, unless the context of the Act otherwise requires, is as follows:

"'Property' includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest." 30

(c) Section 6 which provides as follows:

6. Matters to be considered by Court - (1) In considering any application under section 5 of this Act, the Judge or Magistrate shall, where the application relates to a matrimonial home or to the division of the proceeds of the sale of a matrimonial 40

home, and may in any other case, have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever).

10 (1A) The Judge or Magistrate's Court may make an order under section 5 of this Act in favour of a husband or wife, notwithstanding that he or she made no contribution to the property in the form of money payments or that his or her contribution in any other form was of a usual and not an extraordinary character.

20 (2) The Judge or Magistrate shall not exercise the powers conferred upon him under section (2) or subsection (3) of section 5 of this Act so as to defeat any common intention which he is satisfied was expressed by the husband and the wife.

(d) Section 6A which provides as follows:

30 6A. Relevance of conduct - On any application under Section 5 of this Act, the Judge or the Magistrate's Court, as the case may be, in determining the amount of the share or interest of the husband or the wife in any property or in the
40 proceeds of the sale thereof, shall not take into account any wrongful conduct of the husband or the wife which is not related to the acquisition of the property in dispute or to its extent or value.

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6. In addition there are a number of provisions contained in the Matrimonial Proceedings Act 1963 which are relevant to the consideration of the interpretation of the Matrimonial Property Act 1963. Both Acts were enacted on the same day. These provisions are :

- (i) s.41 Payment of Capital sum - (1) 10
 In addition to or instead of making any other order under this Part of this Act, the Court may, if it thinks fit, on or at any time after any decree of divorce, -
- (a) Order the husband or his personal representative to pay to the wife such capital sum as the Court thinks fit: 20
- (b) Order a settlement to be made to the satisfaction of the Court of the property of the husband or of the husband's estate, or any part thereof, for the benefit of the wife.
- (2) An order under this section for the payment of a capital sum may provide that the sum shall be payable at a future date specified in the order, or shall be paid by such instalments specified in the order as the Court thinks fit. 30
- (ii) s.43 Principles to be followed in making order for maintenance - 40
 In considering any application for an order under section 40 or section 41 of this Act, the Court shall have regard to -

- (a) The ability of the wife, if she has no dependant children, to support herself or, if she has dependant children, to support herself without working; and
- 10 (b) The means and responsibilities of the husband or the extent of the husband's estate, as the case may be; and
- 20 (c) In the case of an application for an order under section 41 of this Act, any contribution by the wife to the assets of the husband, whether in the form of financial assistance or otherwise; and
- (d) The conduct of the parties; and
- (e) The length of time (if any) that has elapsed since the making of the decree; and
- (f) Any other circumstances which the Court thinks relevant.
- 30 (iii) The definition of "Matrimonial Home" in section 55(1) which, unless the context otherwise requires, means:
- "any dwelling (including a flat) being used exclusively or principally as a home by one or both of the parties to a marriage in respect of which a decree of divorce is or has been granted, in any case where -

8.

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- (a) Either or both of the parties or the personal representative of one of them -
 - (i) Owns the dwelling; or
 - (ii) Owns a specified share of any estate or interest in the land on which the dwelling is situated and by reason of reciprocal agreements with the owners of the other shares is entitled to the exclusive occupation of the dwelling; or 10
 - (iii) Holds shares in a company which owns any estate or interest in the land on which the dwelling is situated, and by reason of holding those shares is entitled to the exclusive occupation of the dwelling; and 20 30
- (b) Either or both of the parties owned the dwelling or the specified share in land or held the shares, as the case may be, at the date of the decree"

(iv) Section 58(1) which provides as follows:

Court may direct sale of home or direct payment - (1) The Court, on making a decree of divorce, if it is satisfied that both parties to the marriage have made 40

a substantial contribution to the matrimonial home (whether in the form of money payments, or services, or prudent management, or otherwise howsoever) may, if it thinks fit, on the application of either party made before the decree of divorce is made, make an order -

10 (a) Directing the sale of the home (including the land on which it is situated and such other land appurtenant thereto as the Court directs) and the division of the proceeds, after the payment of the expenses of the sale, between the parties in such proportions as the Court thinks fit:

20 Provided that where the home comprises part of a building that is not used exclusively or principally as the home of the parties, or where the land appurtenant to the home is not used exclusively or principally for the purposes of a home, the Court shall not make an order
30 under this paragraph, unless in the special circumstances of the case the Court considers it is fair and equitable; or

(b) Directing that either party pay to the other such sum, either in one sum or in instalments and either forthwith or at a future date and either with or without security, as the Court thinks fair and reasonable in
40 return for the contribution made by that other party.

(v) Section 64(1) which provides as follows:

RECORDPower of Court under matrimonial
Property Act 1963 unaffected -

(1) Nothing in this Part of this Act shall affect the powers of the Court under section 5 of the Matrimonial Property Act 1963 (which relates to the settlement of disputes between husband and wife as to property).

7. The evidence before the Court was confined to affidavits sworn by the parties, by three children of the parties and by a law clerk (the last relating only to searches of the husband's properties in the Land Registry Office at Napier). None of the persons who were deponents by way of affidavit were called for cross examination. 10
8. The history of the matter as shown in the aforesaid affidavits may be summarised as follows: 20
- p.2, 1.33-37 (a) The parties were married in 1940 when they were both aged 19 years. There were five children of the marriage the eldest born mid 1941 and the youngest born early in 1948. The husband was an only child. His parents owned a large family home in Hastings and also owned a farm property of approximately 112 acres some distance from the family home. The parents were people of substance and farmed the property in a limited way and not to its full capacity. The husband worked on the farm with his father. 30
- p.3, 1. 1-7
- p.3, 1. 8-12
- p.3, 1.13-21
- p.3, 1.21-33 (b) Following the marriage the parties lived with the husband's parents in the family home for approximately one year. The husband served with the Armed Forces for roughly three years returning to civilian 40
- p.3, 1.34-43

RECORD

- 10 life late in 1944. The parties again lived with the husband's parents for about a year until the parties moved into a home built for them by the husband's parents on the farm property. At that time, or thereabouts, the farm property was gifted by the husband's father to the husband, the property being then subject to a mortgage of \$12,600.00 to the Public Trustee. The husband therefore took over and assumed liability for an existing mortgage debt owed by his father. As well, the husband gave a mortgage back to his father securing \$5,300.00.
- 20 (c) The husband's father died in December 1955 at which time the father's mortgage had been reduced to \$2,550.00 whilst the Public Trustee's mortgage had been increased to \$17,540.00. The affidavits do not show whether the reduction in the father's mortgage was by means of further gift or by actual payment by the husband. It was certainly not reduced by the wife. By the father's will the father's mortgage was discharged from the husband's share in the estate and as well he received from the estate cash or assets to the value of approximately \$29,000.00.
- 30 (d) During the years from 1945 until 1962 the husband's farming activities were limited to the grazing of sheep and the harvesting annually of 50 acres of grass-seed and one paddock of peas. The husband then decided to switch to intensive farming of the property with the objective of growing peaches, asparagus, maize, beans and tomatoes. He planted a total area of 30 acres in asparagus in two stages and an area of 15 acres in peaches. He became the largest
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p.3, 1.44-45

p.19, 1.9-15

p.19, 1.16-22

p.19, 1.22-27

p.11, 1.10
et seq.

p.3, 1.46-47

RECORD

grower for "Birdseye" (a leading cannery company).

p.11, 1.32-34

During the 4 or 5 years that these areas of land were being developed there was no income being derived therefrom but the husband did crop approximately 20 acres of potatoes and 40 acres of maize each year.

p.4, 1.7-10

The property was by the husband's own labour developed into a first class cropping and fruit farm.

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p.12, 1.20-22

(e)

The parties had a comfortable home and the wife had the use of a family car which she used freely for social purposes. From 1963 onwards she was the head of the local branch of the Red Cross Society. The

p.22, 1.42
et seq.

p.5, 1.13-22

children were educated at private boarding schools, in the case of the girls at Queenswood School at Hastings (as day pupils) for their primary education and Chilton St. James in Lower Hutt for their secondary education, and in the case of the boys at Hereworth School at Havelock North for primary education and then at Wanganui Collegiate School for their secondary education. The primary school fees were partly paid for by the husband's father until his death in 1955 but the entire cost of the secondary education was borne by the husband. At their highest level the fees amounted to \$5,000.00 a year.

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p.5, 1.20-22

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p.12, 1.27-31

p.13, 1.24-27

p.12, 1.36-38

p.4, 1.31-32

(f)

Notwithstanding these expenses the parties lived well. The high standard of living of the parties is reflected in the fact that, notwithstanding a repayment of \$11,600.00 in 1956 from monies received by the husband from his father's estate, and the availability of the balance of his interest in the estate, the

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p.19, 1.31-34

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husband's mortgage on the property increased over the years until, in 1967 it stood at \$46,000 in accordance with the following table:

| <u>Year</u> | <u>Amount of Mortgage</u> |
|-------------|---------------------------|
| 1955 | \$17,540 |
| 1956 | 24,000 |
| 1956 | 12,400 |
| 1959 | 16,000 |
| 1961 | 18,000 |
| 1962 | 24,000 |
| 1963 | 30,000 |
| 1963 | 36,000 |
| 1964 | 40,000 |
| 1967 | 46,000 |

p.19, 1.15
to
p.20, 1.2

p.54, 1.1-11

These increases were necessitated by an excess of expenditure on normal living expenses and school fees over farming income. The husband from time to time became heavily in debt to either his trading bank or his stock firm or both and the husband would then increase the amount secured by mortgage to clear his current indebtedness. As well he sold his shares to the value of \$2,000.00. The only capital expenditure on the farm property was a total of \$7,000.00, comprising \$4,000.00 for irrigation carried out in 1957 and \$3,000.00 for additions to the residence.

p.20, 1.3-6

p.3, 1.7-12

p.3, 1.13-19

(g) The following table shows the husband's net income after taxation, his personal drawings and the net deficit for the financial years 1959 to 1969 inclusive:

RECORDSCHEDULE OF INCOME AND PERSONAL DRAWINGS

| <u>Year Ended</u> <u>30th June</u> | <u>Net Income</u> <u>after</u> <u>Taxation</u> | <u>Personal</u> <u>Drawings</u> | <u>Life</u> <u>Insurance</u> | <u>Net</u> <u>Deficit</u> |
|---------------------------------------|--|------------------------------------|---------------------------------|------------------------------|
| 1959 | \$1319.17 | \$6454.49 | | \$5135.32 |
| 1960 | 1175.67 | 6298.41 | | 5122.74 |
| 1961 | 2954.24 | 7904.41 | | 4950.17 |
| 1962 | 4591.27 | 7214.78 | | 2623.51 |
| 1963 | 2280.91 | 9192.53 | \$335.50 | 7247.12 |
| 1964 | 92.50 | 3371.18 | 740.00 | 4018.68 |
| 1965 | 1591.84 | 5996.99 | 56.64 | 4461.79 |
| 1966 | 4968.19 | 6055.48 | 56.65 | 1143.94 |
| 1967 | 2128.38 | 4733.34 | 56.65 | 2661.61 |
| 1968 | 3544.72 | 3206.21 | 656.65 | 318.14 |
| 1969 | 2266.34 | 4674.78 | 706.40 | 3114.84 |
| | \$26,913.23 | \$65,102.60 | \$2,608.49 | \$40797.86 |

(h) There is a conflict between the parties as to the financial arrangements between them throughout the marriage. 20

p.4, 1.32-35

(i) The wife alleges that she was often embarrassed by lack of money and had to borrow money from the grocer. The husband denies this allegation. There is no other evidence to support the wife's assertion and there was no finding of fact on this. 30

p.13, 1.10-12

p.4, 1.39
et seq.

(ii) The wife alleges that there was no provision made for her by way of regular maintenance payments except for a few months before the parties finally separated in June 1969, during which time the husband paid to her the sum of \$40.00 weekly for food and household requirements. The husband 40

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|----|--|-------------------------------------|
| | agrees that no allowance was paid to the wife prior to 1960 and says that this was due to lack of money. He says that all accounts were paid by him and groceries were purchased through his stock and station agency namely Dalgety & Co.Ltd. | <u>RECORD</u> p.13, 1.22-24 |
| 10 | In 1960, he says he gave the wife the sum of \$200.00 per month reducing to \$160.00 per month after 6 months. He says that this ceased after a time because the wife could not or would not manage within the allowance. He therefore ceased paying the allowance and reverted to the previous practice of paying all accounts himself. | p.13, 1.27-29 |
| 20 | During the years 1965-67 the husband paid the wife an allowance of between \$40.00 to \$80.00 weekly. This was intended for the purchase of groceries, meat and minor household accounts. The husband paid electricity and telephone accounts . In 1967 | p.13, 1.30 p.13, 1.30 et seq. |
| 30 | the husband reduced the allowance to between \$30.00 and \$40.00 weekly. He refers to the fact that his records show that in the year ended 30 June 1969 (his balance date) he paid to the wife a total of \$2,288.00 - an average of \$44.00 a week. The wife does not deny that payments were made but says that whether payment was made was a matter of the husband's personal whim and was likely to be increased or reduced or eliminated as he saw fit. | p.14, 1.1-16 |
| 40 | | p.14, 1.17-25 p.23, 1.32-38 |

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- p.6, 1.27-36 (i) The wife was the beneficiary to the extent of one half of the income from a trust fund established by the husband's mother in 1951. Latterly the wife's income from this fund amounted to \$330.00 annually.
- p.14, 1.29-31
- p.5, 1.40 et seq. (j) The marriage was an unhappy one. There were separations in the years 1958, 1962 and finally in 1969 since when the parties have remained living apart and they are now divorced. 10
- p.58, 1.21-26
- p.17, 1.32-36 (k) Following the final separation in 1969 the husband embarked upon a sub-divisional scheme in respect of the farm property as a result of which the farm was divided into five separate allotments of which four were sold at a total price of \$117,400.00. The allotment upon which the matrimonial home was situate contained an area of 17 acres 1 rood 4 perches and was sold for \$37,500.00. The husband retained one allotment containing nearly 31 acres. Expenses in connection with the sub-division and sales, the repayment of the mortgage on the farm and the bank overdraft totalled \$74,600.00 leaving a surplus available to the husband of \$42,800.00. Of this sum the husband spent the sum of \$34,000.00 in acquiring two properties, namely, two flats at Flaxmere Hastings and a Beach Cottage at Waimarama. 20
- p.18, 1.3
- p.9, 1.10-15
- p.10, 1.4-10
- p.18, 1.5 et seq. (l) At the date these proceedings were commenced the husband had the following assets: 30
- p.20, 1.25 et seq.
- | | |
|--------------------------|----------|
| Land worth approximately | \$60,000 |
| Flaxmere flats | 22,000 |
| Beach house | 12,000 |
| Farm equipment, say | 2,000 |
- 40

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|----|----------------------------------|------------------|
| | (brought fwd) | 96,000 |
| | Company shares | 3,200 |
| | Company debenture | 3,000 |
| | Two motor cars, valued at | 8,000 |
| | Bank of New Zealand, Hastings | 4,000 |
| | H.B.& Gisborne Savings Bank | 2,300 |
| 10 | Bank A/C in London | <u>2,000</u> |
| | | <u>\$118,500</u> |

(m) At the date these proceedings were commenced the wife had no assets but was receiving maintenance from the husband at the rate of \$50.00 per week and as well was in receipt of her share of the income from the trust fund mentioned in paragraph 8(i). p.6, 1.40-41
p.39, 1.20-24

20 9. At the hearing before the Supreme Court the wife sought an order that the husband pay to the wife such sum as the Court thought fair and reasonable upon the grounds that the wife had made contributions by way of services, prudent management and otherwise to the property of the husband. It was agreed by Counsel that the assets of the husband at the date of hearing as set out above represented the original farm property of the husband in one form or another. p.2
p.39, 1.42-43

30 10. At the hearing both in the Supreme Court and again in the Court of Appeal the following matters were advanced on the wife's behalf by way of "contribution" in terms of s.6 -

40 (a) In the early years of the marriage the wife's time was fully devoted to caring for the children and managing the home so that it was not possible for her to give direct assistance on the farm. p.4, 1.11-15

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- p.4, 1.18-28 (b) The wife alleged that she had prepared and taken to the husband morning and afternoon teas and lunches where he was working. She also alleged that she provided morning and afternoon teas for one contract gang which came each year for several years planting tomatoes but the wife conceded that it was generally the practice for contract gangs to supply their own refreshments. 10
- p.4, 1.35-38 (c) The wife alleges that she sold tomatoes and walnuts at the gate of the property to get money for the purchase of household requirements. She puts forward no figures in support of this.
- p.5, 1.35-39 (d) The wife alleged that while the eldest son was studying for the final units of his law degree at University she worked for 4 months at a food processing plant in Hastings to be able to send him money for his living expenses. 20
- (e) The wife relied generally upon her position as wife and mother throughout the years of marriage pointing in particular to -
- p.4, 1.28-29 (i) The difficulties under which she laboured throughout the marriage and 30
- (ii) The lack of an allowance already referred to and
- p.5, 1.4-12 (iii) The fact that the children were her responsibility, that the husband did not take a great deal of interest in them and was not closely involved in their day to day upbringing. She alleged that the 40

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husband was able to devote his full attention to the farm because she substantially had the responsibility for the children.

11. (a) As to 10 (a) the wife herself says that it was never considered that she would be involved in the activities of harvesting and planting the crops. p.41, 1.15-18
- 10 (b) As to 10 (b) above the husband says that the wife no more than once or twice a year brought out morning and afternoon teas, at his insistence and that the wife was always reluctant to do so. He said that he had the help of a friend during the tomato planting and that he begged the wife to bring out morning and afternoon teas to maintain cordial relationships with the friend and the other two men. He further denied that the wife supplied morning and afternoon teas to a contract gang for several years and said that there were only the aforementioned three men engaged in planting tomatoes, which in any event were first planted in about the year 1962. p.11, 1.37 et seq.
p.12, 1.1-12
- 20 (c) As to 10 (c) the husband agrees that some selling of produce was done by the wife but says that he has no knowledge of the extent to which this was done. He further states that the proceeds of such sales were not applied to household requirements but were spent on the wife's own requirements or for liquor. p.11, 1.12
- 30 (d) As to 10 (d) the husband agreed that the wife had worked at a food processing plant for a period of about 6 weeks, but that he did not know the reason for this. He p.15, 1.6-23
- 40

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doubted that the wife had sent any money to the eldest son at that time and explained that he was not supporting the son then because he had taken 7 to 8 years to complete his law degree although he was engaged upon full time studies most of that time. He further stated that the son worked for the last 2 years of his course in a Wellington Law Office and received financial assistance from his sisters who gave him \$200 in each of those 2 years. To a large extent these allegations are confirmed by the son in his own affidavit. The son's affidavit shows that by the time he was studying in his final year at University, he was already admitted as a solicitor and a partner in a legal firm. It was during this year that he says he received payments from his mother of sums of \$10 to \$20. He further says that until 1968 he occasionally received money from his father.

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p.28

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p.27, 1.40
to
p.28, 1.1
p.29, 1.11-13

(e) As to 10 (e) the difficulties under which the wife alleged she laboured during the marriage were almost entirely confined to matters of conduct which are irrelevant because of the terms of s.6A of the Matrimonial Property Act. In any event there is a strong conflict between the parties as to where the fault lay. The husband's reply to the allegation of a lack of allowance is dealt with in paragraph 8 (h) (ii).

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The extent of the wife's responsibilities for the care and upbringing of the children is not disputed by the husband save to the extent that the children were educated at private boarding schools.

12. In the Supreme Court of New Zealand
Wild C.J. ordered as follows: p.43
- (i) That a one quarter share of the
remaining farm land of the
husband be vested in the wife.
This represented in 1971
values the sum of \$15,000.00.
- (ii) That the husband pay to the
wife in cash the sum of
\$4,000.00. p.38, 1.1-13
- (iii) That the husband pay to the
wife her costs in the agreed
sum of \$500.00 together with
all disbursements including
agency charges. p.38, 1.14
et seq.
p.39, 1.1-7
p.39, 1.7-16
13. Wild C.J. began by indicating that any
order made should take the form
following that indicated by the decision
of the Court of Appeal of New Zealand in
E. v. E. [1971] N.Z.L.R. 859. He
reviewed the facts and held that any
question of wrongful conduct was not to
be taken into account since it did not
relate to the acquisition of the property
in question. He did, however, attach
some weight to the fact that the children
of the parties were, broadly speaking,
in support of the wife. He then
compared the relative positions of wife
and husband with particular reference to
their asset position and referred to the
order sought by the wife and to Counsel's
agreement that the assets of the husband
represented the balance of the original
farm property purchase with the proceeds
of sale. p.39, 1.17
et seq.
14. His Honour then mentioned certain of the
submissions made on behalf of the
husband, as he interpreted them, and
held that it was an unreal view to take
of the matter that the husband's assets
were not matrimonial property having
come from his father but had become the
p.40, 1.4
et seq.
p.40, 1.26
et seq.

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p.40, 1.15-25

husband's business to which the wife had made no contribution. He agreed that the facts were quite different from those in Burgess v. Burgess [1968] N.Z.L.R. 15. He accepted that the wife had contributed nothing towards the acquisition of the property.

p.40, 1.26
et seq.

However, he accepted a submission of Counsel for the wife that it was artificial not to treat the home and the area of land on which it stood as one family unit which ought properly to be regarded as matrimonial property. He then went on to indicate what were in his view the reasons for the increase in value of the property, including the fact that the husband had worked on the property throughout the marriage and the fact that the wife had kept the house and family and made it possible for the husband to do that work. However, he indicated that there were other reasons for the increase in value, the most important being the appreciation of land values over the years and the development of the food canning industry in Hastings. He then emphasised the part that the husband's work had played in the increase in the value of his assets but held that this was contributed to by the wife's services and management and her general contribution as a wife and mother.

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p.41, 1.17-18

His Honour held that the wife did do her share in the running of the husband's business and accordingly he felt that the view expressed by North P. in E. v. E., which declared that a wife could not possibly obtain an order in respect of a business owned by the husband and in the running of which the wife had no share, merely on the basis of her having been a good wife and having looked after her husband well domestically, had no application to the facts of this matter.

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15. Wild C.J. then proceeded to assess the wife's contribution applying the principles, as he said, laid down in E. v. E. as to the onus of proof and as to the origins of the property. He accepted the submission of Counsel for the husband that her contributions as outlined in paragraph 10 (a) (b) (c) and (d) were minimal but reiterated his earlier finding that the wife's real contribution was her general services and management throughout the marriage. He also took into account that the wife had no regular allowance virtually until the final separation. He accepted that obviously both parties had lived extravagantly yet nevertheless he held that the wife did not have what wives were entitled to expect and most received, namely, a regular allowance for herself. Another factor taken into account by His Honour was the forbearance that the wife had to show in the circumstances of the marriage as deposed to by the children. The fact that the children were substantially educated at boarding schools was not overlooked, but His Honour held that the wife's part in the upbringing of the family was vitally important. Finally he considered that he was entitled to take into account the fact that an offer of compromise, which essentially related to the provision of maintenance for the wife, had been made by the husband, as reflecting an acknowledgement by the husband that there was an obligation upon him in regard to the property.
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16. The husband appealed to the Court of Appeal of New Zealand from the Judgment of the Supreme Court on the grounds that the Judgment was erroneous in fact and law. Judgment of the Court of Appeal was delivered on 21 February 1975 when the Court, in separate Judgments delivered by McCarthy P. and Richmond J.
- p.41, 1.25
et seq.
- p.42, 1.1
et seq.
- p.42, 1.25-30
- pp.44-45

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(Woodhouse J. dissenting) allowed the Appeal.

- p.45, 1.17-23 17. In his Judgment Mc Carthy P. began by stating that his approach to the Appeal was dominated by two considerations, namely, the judgment of the Court of Appeal in E. v. E. and the case's own particular facts. He then referred to the discussion that had taken place following the delivery of judgment in E. v. E. and declared that the views of the majority in that judgment must be accepted as being definitive of certain aspects of the application of the Matrimonial Property Act however they may conflict with any particular view of what should be recognised as the social rights of wives in these days. 10
- p.45, 1.24-33
- p.46, 1.1
18. McCarthy P. then set out seven propositions which, in his view, correctly stated the law governing applications under the Act. He did so in order to remove uncertainty. The propositions were as follows: 20
- p.46, 1.9 et seq. (1) S.5(1) is directed solely to the determination of disputes regarding identifiable items of real or personal property and each item must be considered individually before the Court can make an order in respect of it : the 'community of surplus' approach must be rejected as not compatible with the Act. 30
- p.46, 1.19 et seq. to p.47, 1.15 (2) That, except in those cases where a right enforceable at law or in equity exists independently of the Act, a spouse's claim must be based on contributions and an award can be made only if and to the extent that the claimant spouse establishes contributions. It is proper to take a more benevolent attitude in favour 40

10 of a wife when she claims in respect of a matrimonial home, and perhaps also of some other assets which can fairly be regarded as "family" assets. Too much regard should not be had to the way the legal or equitable interests of the husband and wife in the matrimonial home have been defined. The onus lies on a wife to establish her claim including a claim to a share in the matrimonial home but the burden of proof will not readily be held unsatisfied in a matrimonial home claim by a wife who has performed her matrimonial responsibilities with credit.

20 (3) A spouse will not be entitled to share in the other's business interests as distinct from the matrimonial home and possibly other "family" assets, unless it is shown that they both had carried on the business more or less jointly and the fact that the wife has been a good wife looking after her husband well domestically will not itself justify an order in respect of the business assets, but the words "more or less jointly" are not to be interpreted in a heavily technical fashion.

30 A wife who has deliberately accepted a reduction in her standard of living and gone without in order to make more money available for employment by the husband in his business activities with consequent growth in his assets, has a permitted claim. The Court may also, exercising the discretion given it by s.6, in claims in respect of a husband's business assets, have regard to the assumption of domestic responsibility in some special or unusual way if that form of contribution resulted in freeing the husband to add to his assets.

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p.47, l.16
et seq.

p.47, l.29-43

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property in dispute or to its extent or value. The Court can take, in those circumstances, wrongful conduct into account in determining both the form and the extent of the order.

- 10 (7) There is no justification for allowing a spouse an interest in property obtained by the other by way of gift or inheritance during the marriage unless it be established that both spouses were intended to be beneficiaries. There is an exception to this; the case where the claimant spouse can show that by his or her contributions in one form or another he or she has contributed to the retention of a property received by way of gift or to some increase in its extent or value.
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19. McCarthy P. then indicated that his application of the foregoing propositions to the special facts forced him to a different view from that taken by Wild C.J. He stressed that the equity in the farm property on which the matrimonial home was erected was derived originally by the husband as a gift from his parents. He could not accept the contention that the husband should be regarded as a normal purchaser. In His Honour's view, although the husband took the property subject to certain mortgages there was no evidence which justified an assumption that the equity at the time of acquisition was not substantial. In these circumstances he held that under the law as established by E. v. E. the wife had a claim only to the extent that the property was retained or improved as a result of her contributions.
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20. His Honour then proceeded to examine what he called "the remainder of the
- p.49, 1.13-33
- p.49, 1.34
to
p.50, 1.17
- p.50, 1.17-33

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21. Richmond J. began his judgment by reviewing the facts in considerable detail. In the course of this review he emphasised that the wife's specific contributions were minimal and that there was no evidence of frugal management or special services such as gardening, decorating the house or vegetable growing. He concluded that the impression from the evidence was that the parties lived well and the wife did not go short as regards her personal requirements. He accepted that the wife had cooked the meals, looked after the children when they were at home and had generally carried out ordinary domestic duties in a reasonable and proper way. He also considered that the wife had received the benefit of what appeared to have been, at the very least, a fairly high standard of living.
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22. His Honour then dealt with what he described as the central submission made on behalf of the husband namely, that the entire farm (with the exception of the matrimonial home itself) was a business asset of the husband and that the wife had made no such contribution either to the acquisition of that asset or to the carrying on of the business itself, which would entitle her to an order of the Court vesting in her some interest in the land. He reviewed the relevant passages from the judgment of Wild C.J. and then referred to a decision of the Court of Appeal of New Zealand which has not been reported (Aitken v. Aitken C.A. 28/73 Judgment 30 November 1973) in which the principles enunciated in E. v. E. were re-affirmed and in particular, a passage from the judgment of North P. in that case was expressly approved as definitive of the law. North P. had held that a wife must prove in a reasonable way the nature of the contributions she made to a particular
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- p.52, 1.8
et seq.
pp.53, 54, 55,
57 and 58
p.56, 1.5
p.56, 1.18-22

p.56, 1.8-14

p.56, 1.15
et seq.

p.58, 1.27
et seq.

p.58, 1.40
to
p.60, 1.9
p.60, 1.12-13

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| <p>p.60, 1.30 to p.61, 1.13</p> | <p>property and that he was not prepared to extend the observations in <u>Hofman v. Hofman</u> [1965] N.Z.L.R. 795 to the husband's business assets unless it was shown that the spouses had carried on the business more or less jointly.</p> | <p>Richmond J. agreed with that view of the law which had already been adopted by McCarthy P. in his judgment. His Honour referred to the use by Wild C.J. of the expressions "family unit" and "matrimonial property" and pointed out that they were not to be found in the Act which distinguished only between a "matrimonial home" and other forms of property. In the absence of a definition of "matrimonial home" in the Act, His Honour accepted the popular meaning of being the dwellinghouse itself with its immediate domestic grounds. His Honour then upheld the first part of the submission namely that the entire farm with the exception of the matrimonial home itself was a purely business asset of the husband.</p> | <p>10</p> |
| <p>p.61, 1.14-42</p> | <p>His Honour proceeded to examine the contribution made by the wife to the running of the business and he rejected the view expressed by Wild C.J. that the wife had done her share. He pointed out that what the wife had really done, namely, the keeping of the home and family was no more than was done by every good wife whose husband went out to work, but this was insufficient in the light of the principles of law applicable to entitle the wife to an interest in a business. He held that for a wife to become entitled to an interest in a business asset it had to be shown that she had played a real part, either in contributing to its acquisition or in the carrying on of the business and he upheld Counsel's submission in its entirety.</p> | <p>20</p> | <p>30</p> |
| <p>p.61, 1.42 to p.62, 1.4</p> | <p>entirety.</p> | <p>40</p> | |

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23. His Honour then resolved the question as to whether the wife had acquired a right to have some interest in the property recognised in relation to her contribution to the matrimonial home. He contrasted the present case with the usual case of a home purchased after marriage where a small cash deposit is made and a mortgage is advanced and the parties effect repayments of the mortgage, whilst at the same time, inflation is adding to the value of the property. Nonetheless he concluded that it was just by virtue of the wife's services, to make an order recognising her interest in the entire property but he emphasised that the case was governed by its own particular facts. In particular was the fact that the home together with the farm, was given to the husband.
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- In quantifying her interest His Honour accepted Counsel's calculations as to the net value of the allotment of land upon which was situate the matrimonial home and awarded the wife \$5,000.00.
- Richmond J. concluded his judgment by adding that the wife had a further remedy by application to the Court under the Matrimonial Proceedings Act which enabled a capital sum to be awarded in suitable cases of special need.
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24. Woodhouse J. in his dissenting judgment, began by setting out certain of the facts in a brief way. Having done so he categorised the action of the husband in appealing against the decision of Wild C.J. as a grudging attitude and expressed his strong views that the appeal was without merit.
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- Fundamental to His Honour's reasoning was a finding by him that the farm property was not a gift derived by the husband from his family. In His Honour's view the land should have been regarded
- p.62, 1.5
to
p.63, 1.3
- p.63, 1.5-37
- p.63, 1.38
to
p.64, 1.9
- p.64, 1.23
to
p.66, 1.32
- p.66, 1.33
to
p.67, 1.37

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p.67, 1.38
to
p.69, 1.35

as any other asset acquired by purchase during marriage. His Honour also did not agree that the standard of living of the parties was a high one. He concluded that on the available evidence, when school fees, which he said, were the sole responsibility of the husband, were deducted from actual expenditure, there was no extravagance on living expenses and that it was necessary for the wife to exercise a good deal of prudent restraint in order to prevent a strained economic situation becoming far worse. His Honour agreed that there was no evidence that the farming operation had been carried on by them jointly - in the sense that both toiled in the field but he considered it was clear that the wife had demonstrated that she had done everything that could be expected of her as a wife and mother of five children and as an unpaid housekeeper. His Honour claimed that if the husband had been obliged to pay someone to manage his home during the marriage then the mortgage would certainly have been much greater and that it was improbable that the husband could have retained the farm if there had been such an additional drain on his resources. His Honour did not agree that an absence of direct or physical or money contributions to the farming business excluded any entitlement by the wife to a share in the capital asset concerned with that business and he did not consider that that proposition was justified by the decision of E. v. E. nor did he consider it to be in accord with the underlying purpose of the Act itself. He went on to contrast the present situation with a bad housekeeper who could have seriously prejudiced the husband's ability in handling his business interests and from that statement he drew the conclusion that a domestic contribution that freed a

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p.69, 1.36
to
p.70, 1.44

- man to apply himself to business activities was an important, even if indirect, contribution to the business activity and to the preservation of the capital assets of the business. In His Honour's view the true need was to compare the relative performance of each spouse in order to consider what has been the respective influence of each upon the acquisition and the accretion to or diminution of the property concerned whether or not that contribution or influence could be regarded as direct or indirect. His Honour referred to his own decision at first instance in Aitken v. Aitken which, he said, had been approved by the Court of Appeal.
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- p.70, 1.45
to
p.72, 1.42
- His Honour concluded his judgment by again stating that in his opinion the property was not a gift to the husband although he agreed that there was a need to take into account the benefit received by the husband from his father's estate to the extent of \$31,500.00. In his opinion the wife was responsible neither for the increase in the mortgage liability nor for the costs of boarding school education.
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- p.73, 1.1-24
- His Honour would have dismissed the appeal.
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- p.73, 1.29
24. The Court of Appeal of New Zealand on 8 July 1975 granted the wife final leave to appeal from the Judgment of the Court of Appeal to Her Majesty in Council.
25. The husband submits that the Judgment of the Court of Appeal of New Zealand was correct for the reasons -
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- (a) The wife's claim in this case is to be determined by the provisions of the Matrimonial Property Act 1963 and not the Matrimonial Proceedings Act 1963. The

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latter Act makes comprehensive provisions for the re-allocation of income and capital on divorce. If the wife had elected to do so she could have pursued a claim for all or any of the remedies available under that Act. She did not do so but confined her claim to the Matrimonial Property Act under which the Court's jurisdiction is of a very much more restricted and limited character.

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(b) The Matrimonial Property Act 1963 is primarily concerned with a "question" between husband and wife as to "the title to or possession or disposition of property". The Court, in determining the "question", in regard to the "property in dispute" (s.5(2))

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(i) must have regard to the contributions (if any) that the wife is proved to have made to the matrimonial home: (s.6(1));

(ii) may in its discretion have regard to the wife's proved contribution to other property in dispute (s.6(1)).

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(iii) shall not take into account any wrongful conduct of the husband or the wife which is not related to the acquisition of the property in dispute or its extent or value, in determining the amount of the parties' respective interests or shares in such property (s.6A).

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(c) Accordingly the Supreme Court was bound to assess (and the majority in the Court of Appeal rightly assessed) what contribution it was proved that the wife had made to the matrimonial home, and was entitled to take into account (which the majority in the Court of Appeal rightly did) what contribution it was proved that the wife had made to the remainder of the husband's property. The majority in the Court of Appeal rightly held that the wife's proved contribution to the matrimonial home consisted solely in the performance of domestic and household duties, and that her contribution to the husband's other property was minimal, and it correctly assessed and awarded the capital worth of such contribution. The Supreme Court had no jurisdiction to award the wife anything on the basis of an assessment of the wife's future needs in respect of a capital sum or a settlement of any part of the husband's property for her benefit; such jurisdiction is available only under the Matrimonial Proceedings Act 1963.

(d) Nor was any discretionary power available in the circumstances of this case under the Matrimonial Property Act 1963 to enable the Supreme Court (or, on appeal, the Court of Appeal) to assess the wife's share or interest in the relevant property at a higher rate than that represented by the worth of her proved contributions. The Court may not make an order so as to defeat any common intention expressed by the parties: s.6(2). But in

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the present case there was no evidence of any expressed common intention and no evidence from which any common intention or understanding could have been inferred.

- (e) Accordingly the Court was obliged to limit itself to assessing as best it could on the evidence the worth of the wife's contributions to the husband's capital and in doing so the majority in the Court of Appeal acted on correct principles. 10
- (f) The Court of Appeal correctly decided the case upon its own particular facts for the reasons:
- (i) That the husband's assets were wholly or substantially derived from farm land and other assets acquired by way of gift or inheritance from his father. 20
- (ii) That the land in which the wife was awarded one quarter share by the Supreme Court of New Zealand was not the matrimonial home or derived from it but was the balance of the land owned by the husband and used by him as a business asset. 30
- (iii) That the wife made no contribution to the acquisition of the husband's assets nor to the retention, development or improvement thereof. 40

- 10 (iv) That the wife and husband lived extravagantly throughout the years of their marriage and the wife shared in the benefit of that extravagance. The husband's assets were, as a result of that extravagance, not maintained or enhanced in value but were diminished.
- (v) That the wife's claim was limited to the matrimonial home as her contribution consisted of no more than her ordinary services as a wife and mother.
- 20 (g) The onus of proof was on the wife, and she failed to prove facts which could have justified the inferences drawn by Woodhouse J. in his dissenting judgment in the Court of Appeal or by Wild C.J. in the Supreme Court.
- 30 (h) That the Court of Appeal of New Zealand correctly interpreted the provisions of the Matrimonial Property Act 1963 and, in following the decision of that Court in E. v. E., acted correctly. In particular -
- 40 (i) The Matrimonial Property Act 1963 was remedial of the law as it existed before the passing of that Act to the extent that it conferred jurisdiction upon the Court to interfere with legal or equitable rights and to the further extent that it enabled the Court to take into account a wife's contributions which were of a non-monetary character.

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- (ii) The Court of Appeal rightly held that the Act did not admit of the "community of surplus" approach nor of the broad approach contended for by Woodhouse J. in Hofman v. Hofman. When Hofman came before the Court of Appeal ([1967] N.Z.L.R. 9) the Court expressly left open for further and more refined consideration "the opinions which Woodhouse J. expressed so interestingly on the provisions of the new Act and the spirit in which they should be interpreted." 10
- (iii) The Court of Appeal rightly held that a global approach is not permitted by the Act and that contributions to each separate item of property must be assessed. The Court has, in subsequent decisions, clarified and explained the approach to be adopted by the Court in cases involving more than one item of property. 30
- (iv) The Court of Appeal correctly preserved the distinction to be maintained between applications brought under the Matrimonial Property Act and applications brought under the Matrimonial Proceedings Act, and correctly left open to her such remedies as she might have under the latter Act. 40

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- (i) That even if it be held that the decision of the Court of Appeal in E. v. E. is wrong, the decision of the Court in this case is correct upon the facts.
- (j) That if it be held that the Court of Appeal of New Zealand acted incorrectly in this case then it would be wrong to restore the Judgment of Wild C.J. at first instance because having regard to the animosity between the parties it would be unjust to the husband if a share in the land is vested in the wife because -
- (i) The wife would then have the power to compel the sale of the land, thereby depriving the husband of the ownership of his principal asset and the main source of his income.
- (ii) The wife may then as a co-owner, be able to claim her share of the income from the land since the separation in 1969, although the husband has been providing for her maintenance out of that income. It is difficult to see how the husband could resist such a claim, and his right, if any, to have the maintenance adjusted is uncertain and cannot be relied on as a means of "balancing the ledger" between the husband and the wife.
- (iii) Even if the wife does not compel the sale of the land, there would inevitably be problems over administration and control of the land,

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and remuneration of the husband for his own farming work before the nett profit is determined for division between the parties.

26. The husband contends that this Appeal should be dismissed with costs for the following among other

R E A S O N S

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1. The decision of the Court of Appeal of New Zealand was correct upon the facts.
2. The Court of Appeal of New Zealand correctly interpreted and applied the Matrimonial Property Act 1963 in E. v. E. and in this and other cases.


A.K. Monagan

No: 39 of 1975.

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW
ZEALAND

B E T W E E N :

DOROTHY HALDANE

Appellant

and

GEORGE CHRISTOPHER HALDANE

Respondent

CASE FOR THE RESPONDENT.

Wray, Smith & Co.,
1, King's Bench Walk,
Temple,
London, EC4Y 7DD.