

GOODHEW v GOODHEW [2007] SBHC 140: TOWARDS A SOUTH PACIFIC JURISPRUDENCE?

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One of the concerns that the late Professor Bob Hughes shared with me was the reluctance of Pacific Island countries to develop a Pacific jurisprudence, in particular an equitable jurisprudence. Virtually all the jurisdictions of the region incorporate the principles of equity, either specifically or as part of the common law. While all introduced law is subject to the constraints of being applicable only so far as it is consistent with the independent status of a country, or local circumstances – or provisions to similar effect – the very nature of equity lends itself to adaptable development. In particular, both historically and today, equity may provide legal solutions to novel situations or where the law seems to be inadequate in some way.

Given the outdated nature of much family law still being applied in the region, equity may be particularly useful in the arena of family breakdown and dispute. While it is accepted that each Pacific island country has its unique heritage and contemporary features, family problems and issues relating to families cross national boundaries. In part this is due to similarities of experience, and also to the widespread influence of international shifts relating to women, children, gender, property and the institution of marriage.

In the Pacific, with its strong Christian ethos, many aspects of family life remain relatively unchanged. However, as more people acquire greater disposable wealth, with the shift to monetary economies, questions of property rights within marriage are likely to become more common. Within a single jurisdiction however they may not be so common as to give rise to a significant body of case law. For this reason a regional jurisprudence may have its uses.

The case of *Goodhew v Goodhew*,¹ decided in Solomon Islands last year, provides a faint glimmer of hope for the development of such a jurisprudence.

The case is not a complicated one. The Goodhews were tired of each other. They married in 2000 and wished to divorce seven years later. In September 2007 the High Court granted their wish. Following the *decree nisi*, Mrs Goodhew applied for a division of the matrimonial property as part of her claim for financial relief. The couple had quite considerable property: a boat, two vehicles, a canoe (with an engine), money in bank accounts in Solomon Islands and Australia and various chattels. The total value of these was SI\$1,767,000. Apart from a few personal items Mrs Goodhew had made no financial contribution to the acquisition of these, a point that Mr Goodhew was quick to emphasise.

¹ [2007] SBHC 140 <http://www.paclii.org>.

In opposing her claim for at least a third of the value of the property, counsel for Mr Goodhew sought to rely on the established common law position of separation of property of husband and wife established under the *Married Women's Property Act 1882*.² The purpose of this Act, which was seen as liberating at the time, was to allow married women – who had previously lost not only their identity but also their property on marriage – to acquire and retain their own property during the marriage. While the Act gave the court the power to determine who owned property where title was disputed between husband and wife, it did not give the court the power to re-allocate property interests. Only a divorce court could do that, exercising its powers under divorce legislation to ignore actual property rights in order to divide the property between the spouses.

Counsel for Mrs Goodhew sought to rely on the constructive trust, a measure developed to soften the rigidity of the law and to achieve justice when good conscience required it. The leading English law authorities, often cited in the region, of *Pettit v Pettit*³ and *Gissing v Gissing*,⁴ were called forth. So however, were four other cases, three from Solomon Islands and one from Vanuatu.

The High Court briefly (as far as is evident from the reported judgment) considered the three Solomon Island cases: *Sasango v Sasango*;⁵ *Chow v Chow*;⁶ *Takaohu v Waihou*.⁷

The High Court held that the three Solomon Island cases were ‘not really of assistance in regards to where the wife has no financial contribution whatsoever in acquiring the family property, and on what basis she should acquire interest in those properties’⁸ on the grounds that the divorcing spouses in these cases had agreed on equal shares ‘because they have contributed equally to the matrimonial property’.⁹ In fact it is not self-evident from the reported cases that this was the basis for the agreement. Certainly in *Sasango* it would appear that while the wife assisted her husband in running a store, there was no evidence that she contributed to its acquisition. As is so often the case, this was a small family business. Both spouses were involved in it. Reluctantly, after apparent dispute, the husband acknowledged this.

Chow was somewhat different as both spouses had their own businesses. In part therefore the court was able to apply the principles of the *Married Women's Property Act* by awarding to each their own separate property. In the case of the disputed property however the court held

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² This is incorrectly dated in the report.

³ [1970] AC 77.

⁴ [1970] 2 All ER 780.

⁵ [1991] SBHC 26 <http://www.paclii.org>.

⁶ [1991] SBHC 34 <http://www.paclii.org>.

⁷ [1991] SBHC 31 <http://www.paclii.org>.

⁸ [21].

⁹ Ibid.

In a case such as this where the marriage existed for some years and both parties made a contribution to the marriage ... in general the property should be split equally between the parties. In the case of the residential properties that is a relatively simple order to make. The difficulties arise in relation to the businesses of the parties. Even if the court should rule that one party should receive a financial payment for his or her stake in the other's business, the business may not be able to pay that sum out without putting the business itself into financial difficulty.¹⁰

In the third case, *Takaohu v Waihou*, the court was satisfied that both parties had contributed to the capital invested in a business, although the nature of that contribution was not clear, especially on the part of the wife. Finding it to be joint property, the court ordered equal division. However, where chattels were in issue the court was prepared to find that some items were personal property and others joint, based on intention rather than contribution.

While the High Court's engagement with these authorities is perhaps disappointing, in as much as it would be good to see regional courts considering regional cases with as much attention as they consider foreign ones, what is encouraging is the willingness of the court to look beyond its borders to another Pacific jurisdiction.

The Vanuatu case, *Fisher v Fisher*,¹¹ was on its facts not dissimilar from *Goodhew*. The wife had made virtually no financial contribution to the family home, which the husband had acquired some time before the marriage with the help of a mortgage. During the marriage this had been paid off, largely by the money earned by the husband in compiling an Asian Development Bank report. Mrs Fisher had provided secretarial support. On a strict application of the *Married Women's Property Act* she had no property. The court however held:

Even if she does not earn money, a wife looking after the home and children and contributes substantially to the family well-being. Over the years she acquires an increasing large interest in the family property, which can include property acquired by either party before marriage. A non working wife who brings nothing into a marriage acquire very little in the first few years of marriage, but for a marriage lasting several years the starting point for assessing the share is one third.¹²

Although Mrs Fisher did not succeed in her claim to a half-share in the value of the matrimonial home, she did achieve a modest award based on her indirect contribution to the mortgage repayment. What is interesting from the jurisprudential development point of view was the acknowledgment in the Solomon Island's High Court that *Fisher*

¹⁰ *Chow*, above n 6.

¹¹ [1991] VUCA 2 <http://www.pacilii.org>.

¹² *Fisher*, as quoted in *Goodhew*, above n 1, [41].

provided 'a view or an approach which ... is significant and appropriate to Solomon Islands as well.'¹³

Although the facts of *Fisher* are distinguishable from *Goodhew* on the grounds that in the former there were children whereas in the latter there were not, both marriages were of relatively short duration – four years and seven years respectively, when the *Goodhew* case went on appeal in July 2008, the Court of Appeal indicated that while the Vanuatu case could not be considered as giving rise to any 'rule of thumb' which would be binding in Solomon Islands, it was nevertheless 'authority that requires the court, if it is taking into account pre-marriage assets, to consider whether it is right that the entire value of those assets should be brought into account.'¹⁴ Although the Court of Appeal quashed the judgment of the High Court and remitted the matter back for a re-hearing as regards quantum to be awarded to the wife, it is clear that equitable considerations were a factor which should be taken into account.

What emerges from *Goodhew* is therefore, an equitable approach which might be said to combine several tests. First, if there is evidence as to agreement of shares in the matrimonial property between husband and wife the court will not enquire further. Secondly, and as applied on the facts in *Goodhew* in the High Court,

in the absence of such evidence (the) court must draw inferences to decide the common intention of the parties at the time the assets were acquired ... If nothing was said the court has to look at the actions and the conduct of the parties during the course of their marriage and draw inferences to that effect.¹⁵

In making that inference the court is not restricted to considering direct or even indirect financial contribution but may take into account any part played by either spouse in the joint venture of marriage. This approach is not only compatible with 'local circumstances' where many spouses will contribute in non-financial ways to family businesses, or the home, but is also in line with recent law reform found in the Fiji *Family Law Act 2003*. This provides that in resolving matters pertaining to the property of a divorcing couple the court shall take into account direct and indirect financial contribution as well as non-financial contribution including 'the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent.'¹⁶ A third consideration, suggested by the Court of Appeal is whether the non-financial contributing spouse has already derived a benefit from property either brought into or acquired after the marriage, which should be off-set against any allocation of property on divorce so as to avoid unjust enrichment. The decision of the court may be influenced by the nature of the assets concerned – whether they are wasting as in the case of the vehicle and boat in *Goodhew*, or have increased in

¹³ *Goodhew*, above n 1, [41].

¹⁴ *Goodhew v Goodhew* [2008] SBCA 7 [32].

¹⁵ *Goodhew*, above n 1, [24].

¹⁶ Section 162(1)(c).

value – as with the house in *Fisher*. Here the application of equitable principles may be of assistance.

Other Pacific Island countries do not have the advantages of a new family law statute like Fiji's. Keeping the law relevant to the twenty-first century family may be a task that falls largely on the courts until national legislatures decided to intervene. In this enterprise courts of the region can help each other. It is here that the development of a regional jurisprudence has scope.

Of course one of the greatest obstacles to the development of a regional jurisprudence has been, until recently, the difficulty of ascertaining what decisions are being made and what rationales are being formulated in different jurisdictions. Increasingly, however, access to a growing body of electronically stored case law through the efforts of the Pacific Legal Information Institute (PacLII) is now breaking down knowledge and national barriers, so that it is possible, for example, for a lawyer or judge in Nauru to know how the courts are deciding divorce cases in Samoa, or determining sentences for juvenile offenders in Kiribati.

The emergence of a regional jurisprudence has been slow in coming. The reasons for this are various. Firstly, and quite naturally, judges of one country may see no merit in considering what those elsewhere in the region decide. They are, after all, not bound by any such judgments. Secondly, accessing such information has been a challenge. Historically the publication of official law reports has been sporadic and those that do exist have not been widely disseminated. Indeed some jurisdictions are remarkably reluctant to let outsiders have access to this information. Since the advent of PacLII an increasing body of law has been held electronically. However even where judges and magistrates do have access via computer and the internet to electronically held data bases, it is not always easy to ascertain what material is relevant. This is partly due to the nature of search engines and also a lack of training on the part of the judiciary, many of whom will not have had opportunity for computer based learning. Thirdly, judges, wherever they are located, may be unaware of the merits or relevance of considering what their learned colleagues elsewhere have decided. In part this is attributable to a judicial mindset. Ironically however, it is not so unusual to find Pacific island judges referring to the decisions and reasoning of courts which may be further removed, both in time and distance, from their nearest Pacific neighbours. In part this is due to the way in which the written constitutions of the region direct judicial thinking.¹⁷ In part it is also probably attributable to the influence of foreign trained, and foreign judges sitting in courts, although the latter, especially at the Court of Appeal level, should provide an opportunity for the nurturing of a regional jurisprudence.¹⁸

¹⁷ The written constitutions of the various Pacific Island countries invariably make provision for the transition between colonial rule and independence including the sources of law. In particular the general principles of common law and/or equity (as developed through case law) may be referred to, although there is usually a "cut-off" date for these.

¹⁸ In a number of countries of the region there is no permanent Court of Appeal. When it sits, therefore, the bench is composed of both local and non-local senior judges.

While it may be inappropriate in some areas of law to advocate a regional jurisprudence, for example, land rights, because of the unique local nature of such rights, arguably there are others where it is eminently appropriate either because a number of countries in the region are facing similar challenges,¹⁹ or because certain cases raise unique questions of law which are not country-specific,²⁰ or because there are initiatives to formulate a regional policy and approach to particular issues, or because countries share a common commitment to international standards.²¹

CONCLUSION

Goodhew indicates that there is potential to draw on the case law of other jurisdictions in the region to develop a body of common principles applicable to certain similar fact situations. The challenge is to make such small experiences translate into a regional jurisprudence. Clearly access to the information is important, and in many respects PaCLII will facilitate this process, provided of course that the regional courts are able and willing to provide the raw materials – transcripts of judgments as they are made – and the material is then presented or accessible in such a way that researchers can easily find out what decisions have been made in other regional, jurisdictions.

This by itself however is not enough. If a body of jurisprudence is to emerge then it is important that judges articulate their reasoning clearly and soundly and they are assisted to do so by well supported argument presented by counsel. This implies high standards of law reporting, judicial decision making and presentation of argument by legal counsel at every levels, all of which may require ongoing professional development.²²

To encourage a regional approach there also needs to be a willingness on the part of judges not only to look outside their own national legal systems, but to look first at other Pacific island jurisdictions rather than the decisions of the English courts or those of Australia or New Zealand. Above all, however, as in the *Goodhew* case, the lawyers appearing before the courts of Pacific Island countries must have the courage and conviction to present legal argument that draws on this growing body of Pacific law.

Editor's Note

In July 2008 the Court of Appeal considered the High Court ruling and overturned it, largely on the basis that the value of the assets had been miscalculated.²³

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¹⁹ For example, in the case of the foreign adoption of children.

²⁰ For example, an increase in cohabitation outside marriage.

²¹ Because for example, they are signatories to the same international conventions or treaties which set international standards or goals which all signatory states are expected to aspire to and meet.

²² Arguably this should be part of the legal strengthening of the region.

²³ *Goodhew v Goodhew* [2008] SBCA 7 <http://www.paclii.org>.

of view was the acknowledgment in the Solomon Island's High Court that *Fisher* provided 'a view or an approach which ... is significant and appropriate to Solomon Islands as well.'²⁴

Although the facts of *Fisher* are distinguishable from *Goodhew* on the grounds that in the former there were children whereas in the latter there were not, both marriages were of relatively short duration – four years and seven years respectively, when the *Goodhew* case went on appeal in July 2008, the Court of Appeal indicated that while the Vanuatu case could not be considered as giving rise to any 'rule of thumb'²⁵ which would be binding in Solomon Islands, it was nevertheless 'authority that requires the court, if it is taking into account pre-marriage assets, to consider whether it is right that the entire value of those assets should be brought into account.'²⁶ Although the Court of Appeal quashed the judgment of the High Court and remitted the matter back for a re-hearing as regards quantum to be awarded to the wife, it is clear that equitable considerations were a factor which should be taken into account.

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In making that inference the court is not restricted to considering direct or even indirect financial contribution but may take into account any part played by either spouse in the joint venture of marriage. This approach is not only compatible with "local circumstances" where many spouses will contribute in non-financial ways to family businesses, or the home, but is also in line with recent law reform found in the Fiji *Family Law Act 2003*. This provides that in resolving matters pertaining to the property of a divorcing couple the court shall take into account direct and indirect financial contribution as well as non-financial contribution including 'the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent.'²⁸ A third consideration, suggested by the Court of Appeal is whether the non-financial contributing spouse has already derived a benefit from property either brought into or acquired after the marriage, which should be off-set against any allocation of property on divorce so as to avoid unjust enrichment. The decision of the court may be influenced by the nature of the assets concerned – whether

²⁴ *Goodhew*, above n 1, [41].

²⁵ *Goodhew*, above n 22, [32].

²⁶ *Ibid.*

²⁷ *Goodhew*, above n 1, [24].

²⁸ *Family Law Act 2003* (Fiji) s 162(1)(c).

they are wasting as in the case of the vehicle and boat in *Goodhew*, or have increased in value – as with the house in *Fisher*. Here the application of equitable principles may be of assistance.

Unlike Fiji, other Pacific Island Countries do not have the advantages of a new *Family Law Act*. Keeping the law relevant to the twenty-first century family may be a task that falls largely on the courts until national legislatures decide to intervene. In this enterprise courts of the region can help each other. It is here that the development of a regional jurisprudence has scope.