



HIGH COURT OF AUSTRALIA

6 October 2021

G CHARISTEAS v Z V CHARISTEAS & ORS
[2021] HCA 29

Today the High Court unanimously allowed an appeal from a judgment of the Full Court of the Family Court of Australia dismissing an appeal from the Family Court of Western Australia. The questions for determination were whether the Family Court's orders should be set aside on the ground of apprehended bias and whether the Family Court had power to make orders for the settlement of property under s 79 of the *Family Law Act 1975* (Cth) ("the Act").

The appellant ("the husband") and the first respondent ("the wife") married in 1979 and separated in 2005. In 2006, the husband commenced proceedings under s 79 of the Act for orders settling the property of the parties to the marriage. In 2011, Crisford J of the Family Court made orders for the settlement of property ("the 2011 Property Orders"), which included orders providing for the early vesting of an identified trust ("the Early Vesting Orders"). On appeal, a Full Court of the Family Court set aside the Early Vesting Orders but did not make any consequential orders, whether remitting that issue for rehearing or otherwise. In 2015, Walters J of the Family Court ("the trial judge") held that the 2011 Property Orders were not final orders and the Court retained power to make orders under s 79 of the Act. On 12 February 2018, the trial judge purported to make orders under s 79 of the Act which did not set aside or vary the 2011 Property Orders but were inconsistent with them ("the 2018 Property Orders").

In May 2018, in response to an enquiry from the husband's solicitor, the wife's barrister disclosed that, between March 2016 and February 2018, she had communicated with the trial judge in person, by telephone and by text, although she said they had not discussed the substance of the case. The communications took place otherwise than in the presence of or with the previous knowledge and consent of the other parties to the litigation. The husband appealed the 2018 Property Orders on the grounds of apprehended bias and absence of power to make property settlement orders. By majority, the Full Court dismissed the appeal.

The High Court held that the 2018 Property Orders should be set aside on the ground of apprehended bias. The apprehension of bias principle is that a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. Once a case is underway or about to get underway, ordinary judicial practice is that, save in the most exceptional of cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. There were no exceptional circumstances in this case. The communications should not have taken place. A fair-minded lay observer would reasonably apprehend that the trial judge might not bring an impartial mind to the resolution of the questions his Honour was required to decide. The High Court held that the matter must be remitted for rehearing before a single judge of the Family Court and that the Family Court retained power under s 79 of the Act to deal with the property the subject of the Early Vesting Orders.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.