

CD v ND

Case Ref No: F23-22

Date of Hearing: 27 February 2024

Division and Senators: Extra; Lord Malcolm, Lady Wise, Lord Armstrong

Livestreamed Hearing?:  Yes  No

**Agents and Counsel (*if known*):**

**For the pursuer and reclaimer**

R. Pugh KC, A. Donachie; SKO Family Law Specialists

**For the defender and respondent**

M. Clark KC, Ceit-Anna Macleod; Miller Samuel Hill Brown LLP

**Link to Judgment Reclaimed / Appealed (*if available*):**

<https://www.scotcourts.gov.uk/media/dgucgjpe/2024csoh98-cd-against-nd.pdf>

**Case Description:**

This is an appeal against the decision of the Lord Ordinary following a proof (trial) in an action for divorce and financial provision. The pursuer and reclaimer, CD, is the husband of the defender and respondent, ND.

The issue for determination during the proof was the “relevant date” within the meaning of section 10 of the Family Law (Scotland) Act 1985. This provision sets out how the court should identify, and fairly share, the parties’ matrimonial property. Section 10(2) defines the net value of parties’

matrimonial property as the value of their combined property at “the relevant date”. Section 10(3) defines “the relevant date”, among other things, as the date the parties ceased to cohabit. Parties are considered to cohabit with one another only so long as “they are in fact living together as man and wife” (1985 Act, section 27(2)).

The exercise of identifying the relevant date was complicated by the fact that, during the latter stages of the parties’ marriage, CD lived and worked in the United Kingdom whilst ND lived in Australia with their children.

CD, before the Lord Ordinary and in this appeal, contended for a date of 30 December 2017. On this date, he discovered texts on ND’s phone suggesting infidelity on her part. There was a row and he told her the marriage was over. His position was that they ceased living as spouses from that date; whilst he continued to stay at the former marital home when he was in Australia they were no longer together so far as he was concerned.

ND’s position was that this row was not the end of the marriage. Instead, the parties continued to cohabit until January 2020, whereupon CD returned to the UK (and was subsequently unable to return to Australia due to that country closing its borders due to the COVID-19 pandemic shortly after).

The Lord Ordinary, having heard the evidence, preferred ND's account and held that the relevant date was 6 January 2020.

CD now reclaims (appeals). He argues first that the Lord Ordinary failed to apply the correct legal test when assessing the evidence with a view to determining the relevant date. Second, the Lord Ordinary intervened and interjected during the evidence in the case, to the point where the proof became unfair. Third, the Lord Ordinary was plainly wrong in the way he assessed the evidence, and in particular by assessing the evidence of ND.

The appeal will be argued over one day before an Extra Division chaired by [Lord Malcolm](#), sitting with [Lady Wise](#) and [Lord Armstrong](#).