



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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1 JUNE 2023

## **MEDIA RELEASE**

SUTTON v BELL

(SC 8/2022) [2023] NZSC 65

### **PRESS SUMMARY**

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).

### **Suppression**

Pursuant to s 35A of the Property (Relationships) Act 1976, any report of this proceeding must comply with ss 11B, 11C and 11D of the Family Court Act 1980.

### **Background**

Section 44 of the Property (Relationships) Act 1976 (PRA) allows the court to set aside a disposition of property (eg a transfer, sale or gift) that has been made by one party in order to defeat another person's claim or rights under the PRA. Mr Sutton and Ms Bell were in a de facto relationship for around seven and a half years and had two children together. Just before the commencement of the de facto relationship, Mr Sutton transferred his residential property in an Auckland suburb (the Auckland property) to the trustees of the Todd Sutton Trust (the Trustees).

After the relationship ended, Ms Bell claimed that Mr Sutton had transferred the Auckland property to the Trustees in order to defeat her claim or rights under the PRA. Therefore, she applied for an order under s 44 setting aside the transfer and directing that a half interest in the Auckland property be vested in her. However, Mr Sutton argued that s 44 did not apply as he transferred the Auckland property before the couple's de facto relationship

commenced.<sup>1</sup> Mr Sutton submitted that he could not have intended to defeat Ms Bell's claim or rights as she had no such claim or rights to the Auckland property at the date of the transfer.

### **Lower Court judgments**

The Family Court originally held that the de facto relationship began before Mr Sutton transferred the Auckland property and that s 44 applied to the disposition. In light of new evidence, the High Court found that the de facto relationship began after the transfer of the property. However, the Judge concluded that s 44 applied to the transfer. The Court of Appeal also found that s 44 applied.

The Supreme Court granted Mr Sutton and the Trustees leave to appeal. The approved question was whether the Court of Appeal was correct to dismiss the appeal to that Court.

### **Supreme Court decision**

The Supreme Court has unanimously dismissed the appeal.

#### *Dispositions made prior to the commencement of a de facto relationship*

The Court concluded that there is no reason to restrict s 44 to dispositions made after the commencement of a marriage, civil union or de facto relationship. There is nothing in the wording of s 44 which favours this narrow interpretation. In fact, the references in s 44 to a "person" (rather than a "spouse" or "partner") and dispositions of "property" (rather than dispositions of "relationship property") indicate a broader approach is to be preferred. Additionally, a narrow interpretation would have considerable potential to significantly limit the effect of s 21 of the PRA (which allows parties to contract out of the PRA). If s 44 did not apply, a soon-to-be partner could unilaterally dispose of property without meeting the PRA's requirements for a valid contracting out agreement. The Court also relied on case law which held that s 44 can apply when there is an anticipation that a claim or rights *will* come into existence.

#### *At what point does s 44 apply to a disposition made before the commencement of a de facto relationship?*

The Court noted that a person should not be able to unilaterally dispose of property the day before commencing a de facto relationship. On the other hand, dispositions made in the early days of a relationship should not be vulnerable to attack under s 44. The Court took guidance from case law addressing s 21 to find that s 44 should apply to dispositions that occur when parties have a clear and present intention to become parties to a de facto relationship. The factors set out in s 2D(2) of the PRA (relevant to determining the commencement of a de facto relationship) are also relevant in determining whether the required intention exists. However, the Court disagreed with the Court of Appeal's conclusion that living together establishes a strong but rebuttable presumption that s 44 is engaged.

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<sup>1</sup> Under s 2D of the Property (Relationships) Act 1976 (PRA), a de facto relationship commences when persons who are at least 18 (and are not married or in a civil union with one another) "live together as a couple". There are a range of factors in s 2D(2) of the PRA that are relevant to determining whether a de facto relationship exists.

The Supreme Court was satisfied that Mr Sutton and Ms Bell had a clear and present intention to commence a de facto relationship when the disposition of the Auckland property was made. They were on the cusp of a de facto relationship at the time of the disposition, with their relationship showing signs of permanence.

*Mr Sutton's intent to "defeat the claim or rights" of Ms Bell*

The Court applied *Regal Castings Ltd v Lightbody* [2008] NZSC 87 to find that an intent to defeat does not require a conscious purpose to defeat rights or cause loss. Instead, it is sufficient if the person disposes of the property in the knowledge that this would defeat the claim or rights of the other party. The Court agreed with the Courts below that Mr Sutton knew the transfer of the Auckland property would defeat Ms Bell's future claim under the PRA. The fact Ms Bell knew of, and initially supported, the transfer was not relevant as she had not entered into a valid contracting out agreement. Therefore, the Court concluded that Mr Sutton's transfer of the Auckland property was made in order to defeat the claim or rights of Ms Bell.

*Remedy*

Mr Sutton and the Trustees argued that the Court should: make no order under s 44, defer the vesting of the Auckland property until the younger child turns 18, and/or credit Mr Sutton and Ms Bell with their contributions to the Auckland property. The Supreme Court held that these proposed outcomes were not available or appropriate. The Court also found that immediate vesting of the Auckland property would not cause Mr Sutton undue hardship as the couple had been separated for over 10 years. Significantly, the Court concluded that depriving Ms Bell of a substantial part of her relationship property entitlement (or delaying this entitlement) would not be in the children's best interests.

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