IN THE SUPREME COURT OF NEW ZEALAND SC 62/2007

IN THE MATTER of a Civil Appeal

BETWEEN **CAMPBELL ROBERT THOM**

Appellant

AND **DAVYS BURTON**

Respondent

Hearing 8 April 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel J Cox for Appellant
C T Walker and P Paterson for Respondent

CIVIL APPEAL

10.00am

Cox May it please the Court, Cox for the appellant.

Elias CJ Yes Mr Cox, thank you.

Walker May it please the Court, Walker and Paterson for the respondent.

Elias CJ Thank you Mr Walker, Mr Paterson. Yes Mr Cox.

Cox In terms of the decision on which leave was granted, the issue for the Court today is whether the Court of Appeal was wrong to decide the appellant had suffered loss or damage on account of the respondent's negligence which caused the limitation period to commence by October 1993, being the date when the couple moved into the appellant's home in Rotorua.

The appellant's position is that the appellant or the respondent, sorry the appellant did not suffer actual relevant damage or loss either at the time of the execution of the prenuptial agreement or subsequently in 1993 in October when the parties moved into the appellant's property. The appellant was no worse off as a result of having signed the s 21 agreement and as a result of the potential unenforceability of that agreement as a result of the execution in the United States. In the appellant's submission at both these points in time, any loss or damage was contingent on a number of factors, all of which had to be fulfilled in order for the appellant to suffer any actual loss and consequently have any legal basis to bring an action against his solicitors in negligence. And the contingencies which the appellant contends were in existence were that the parties needed to return to New Zealand from the United States, they needed to move into the Rotorua property, the parties needed to separate, the parties needed to be residing in the Rotorua property at the time of separation, the Family Court would need to find the s 21 agreement void under s 21(8)(a) of the Matrimonial Property Act, the Family Court would then need to refuse to validate the premarriage contract under s 21 subs (9) and finally, assuming that the Court found that the agreement was not effective, the Family Court would have to find that there were no special circumstances under s 14 to justify the appellant retaining the entire property as his separate property.

So the appellant's position is that there were so many contingencies that the negligent advice and incorrect execution could have no cause of actual loss at the time of.

Tipping J Do you agree Mr Cox that the purpose of the instructions was to obtain protection from a claim. The purpose of what the solicitors were being asked to do was to obtain for Mr Thom protection against a possible claim in the future.

Cox Yes I do Sir. Yes. But the effect of the agreement was to give both parties to that agreement protection if it was valid. And in my submission the issue of contingency is particularly relevant when one considers what would happen if some time after February 1990, sorry March 1990 when the parties signed the agreement and married two days later, and then decide to move from the United States back to New Zealand, Mrs Thom has assets which exceed in value the appellant's assets, if she had decided

to sell up in the States and purchase a property in New Zealand where the parties were to reside, then the agreement could potentially have benefited the appellant. If at the time of separation the parties were living in Mrs Thom's house, purchased with her separate property then she would have found herself in the same position as Mr Thom in fact did. So.

Tipping J Doesn't the absence of protection, which was the whole purpose to obtain, in itself diminish the value of his asset, the contingencies going to how you value that diminution in value.

Cox In my submission Sir the category of case we have here is different from the line of negligence cases and the insurance policy cases in that it's not possible to actually value what a potentially unenforceable agreement might be as opposed to for instance valuing what a voidable insurance policy might be.

Wilson J I can't follow that. Isn't it that in each case the asset effectively voidable.

Cox Well in the insurance case it's voidable at the option of the insurer.

Wilson J And if a dispute emerges voidability will then be determined by the Court.

Cox Yes it will be. But given the level of contingency in my submission it's not possible to make a valuation at the point either at the time of execution or even at the time that the parties moved into the Devon Street property.

Blanchard J It may be a very difficult exercise to carry out but surely once it was established that the agreement was void or voidable, the asset was at risk of a claim and was not going to be saleable if he had wanted to sell it to somebody making full disclosure with that party then being obliged to accept such impediments as there might be from a potential claim by the wife. He wasn't going to be able to sell it for 100% of its original value. It had depreciated in value. It might have gone down to, his interest might have gone down to 50% or it might be somewhere in between. But he wasn't going to get 100% for it.

Cox Well Sir in my submission that presupposes that the parties are living in his property at the time of separation and those are two contingencies which.

Blanchard J Why, you will have to acquaint me more with property relationships law. Why is it important that they be residing in the property at the time of separation.

Cox Because in terms of s 2 of the Matrimonial Property Act the matrimonial home is defined under this 1976 Act as the dwelling house that is used habitually or from time to time by the husband and the wife or either of them as the only or principal family residence.

Blanchard J Is it not the position that once a property becomes the matrimonial home it ceases to be separate property and doesn't revert to being separate property when it ceases to be the matrimonial home.

Cox The status of the property in my submission can alter from being matrimonial property to separate property. In this case depending on whether the parties are using that property as the matrimonial home.

Blanchard J I had understood, and my knowledge of this I'd have to admit is pretty long ago and pretty vague, that once separate property became matrimonial property, it didn't revert without agreement to that effect despite the fact that it might no longer, as in this case, this hypothetical case, be the matrimonial home. Am I wrong in that.

Cox My understanding certainly Sir is that if, and in this case the parties had moved out of this property subsequent to October 1993 and at the time of separation the Devon Street property was not the matrimonial home as defined by the Act, then the property would not be subject to division under s 11.

Tipping J But wouldn't it be subject to division under some residual matrimonial property section or whatever it's called now. That's my brother's point.

Blanchard J That's my point, yes.

Tipping J There's no doctrine of reversion back is there simply because an asset ceases to be the matrimonial home. But anyway, I don't think all this matters. I think this is just one of the contingencies that you'd have to wrestle with in valuing at the date of the agreement the diminution in value from its ineffectiveness.

Cox Well as I say Sir, there is a possibility that what occurred here in March 1990 could have caused the appellant a windfall. If the parties had ordered their lives differently and had come and lived, come back to New Zealand and lived in Mrs Thom's house.

Tipping J You mean if the insurers were sued shortly after the ineffective agreement was entered into, ordered on some very difficult calculation admittedly, to pay 50,000 and a claim never came in the future at all, are you saying that the windfall derives from that process of thought. Because the diminution

in value could be overtaken by a contingency of no claim. Is that what you're arguing.

Cox Yes Sir.

Tipping J I see the point. But does it actually eliminate the fact that there is a diminution in value. No-one would pay, as my brother says, no-one would pay the same for a property that's vulnerable to a claim as against a property that's not vulnerable to a claim.

Cox Um.

Tipping J The contingency that a claim might never come would be taken into account in valuing the loss. This is what troubles me about this case Mr Cox, that it seems to me that it's not really a *Wardley* situation at all. You're not having a very happy time at the moment, but just so that you'll be on notice of what you've got to meet.

Cox Yes Sir.

Tipping J Because in *Wardley* the contingency, the fulfilment of the contingency creates the loss. In this case there is a loss which could be overtaken by a contingency. In other words eliminated by a contingency.

Cox In my submission Sir, at the time either of, well the first point in time that it could be argued in my submission that there was actual loss was in April 1998 when the parties separated and at the time they separated the Rotorua property was the matrimonial home. Now at that point two of the main uncertainties are no longer uncertain.

Elias CJ Well that's when he could quantify the loss. But I take it even further back than the underlying asset. If what the want of care led to was that your client was not protected, and you've said that that's what he was seeking to be, then surely he suffers, he doesn't get the bargain that he contracted for at that time. And while he doesn't know what loss he may suffer, that's not a bar to the cause of action accruing, it's just a very difficult question in terms of quantification of loss isn't it.

Cox Well, in my submission at the point that the execution occurs in the United States the appellant is not in any worse position than he would have been had he not instructed the solicitor. The agreement was potentially unenforceable. But certainly was in a position in line with the negligence type cases where he's entered into a covenant to pay a mortgage or clearly demonstrably suffered a loss.

Wilson J What about the fee that he paid for obtaining what proves to be an ineffective agreement.

Cox There was actually no evidence, I'm sure my friend will correct me if I'm wrong, as to whether there in fact was a fee. These parties, the lawyer and the appellant were friends.

Wilson J He would have had to pay a fee to another solicitor to obtain a replacement effective agreement wouldn't he.

Cox If he chose to enter into an agreement, another one, but equally in my submission if he'd been aware of the problem he could have ordered his affairs so that the parties did not move into the Devon Street property.

Tipping J Isn't his loss the difference between a property not vulnerable to a claim and a property that is vulnerable to a claim. The likelihood of a claim and all the contingencies surrounding that I would have thought go to quantification, not to existence of loss.

Cox Well in my submission it's simply not feasible to attempt to carry out that calculation in circumstances such as this where the whole regime is governed by the relationship property, or Matrimonial Property Act which.

Tipping J Is your point, sorry to interrupt you, but just to sharpen it up, is your point that in terms of the recent English cases, particularly the *Law Society v Sephton's* case, the loss is not measurable, it's not capable of measurement, therefore the action doesn't accrue.

Cox Yes Sir.

Blanchard J Well that's not the attitude that the fully informed purchaser agreeing to take over responsibility for the results of a claim would take. That purchaser would surely have to say this is a damaged asset and I'm not paying full value for it.

Cox Sorry Sir, this is the third party purchaser?

Blanchard J Yes, a hypothetical person who says, well I know you have an asset here which might be subject to a matrimonial claim if this agreement is voidable and the Court is not prepared to come to the rescue by proving it, you want to sell it to me. I would be committing a fraud on your wife if I purchased and then denied her claim so I'm going to be subject to the claim if I buy, therefore I'm going to pay a discounted price. And that purchaser would obviously steer on the very conservative side because of the problems of quantification and the risk inherent. It's very difficult to see that the asset hasn't been trammelled by the claim.

Cox In my submission Sir that scenario could arise at the point where the parties separated and had been living at this property so that in terms of the Matrimonial Property Act regime the property was deemed to be subject to equal division under s 11, but prior to that I can't see that that would be the case because the agreement, although potentially unenforceable would still be a s 21 agreement which vested the property in the appellant.

Blanchard J Well if your client was being entirely open and honest with any person interested in buying the house, he would have to disclose the fact that the agreement may not have been properly executed and therefore that his interest in the house might be subject to a claim from the wife. It's a very strained situation to try to think of this scenario, but it does seem to me that the asset was in that way trammelled or affected by the deficiency in the agreement. What he anticipated getting was the freedom to deal with the house as if it were not matrimonial property, as if the wife had no claim to it. What he actually got was a situation of considerable doubt about whether that was so, which would only be clarified one way or another if the matter were ever put to the test. It follows that the asset doesn't have the value which he intended it to have, which was the purpose of the agreement.

Cox I agree Sir that as at the date of separation certainly there would be a good argument to say the asset did not have the value that he thought it did for him because the parties had separated and that was the matrimonial home.

Blanchard J But it was always possible that the marriage would fail. Any marriage could fail.

Cox Correct Sir but he obviously had no knowledge of the potential unenforceability of the agreement until some time later.

Blanchard J Well he had no knowledge of it but we're having to posit it on the basis that all is known and one is doing a before and after comparison. Before, he owned 100% of a house subject to no claim at all. Afterwards, he'd married with a potentially defective agreement. And if it was defective, his wife had a claim to half the house.

Cox But only if the parties separated and at the time of separation they were in that house.

Blanchard J But that was always a possibility. In any marriage. It might in some marriages I would hope be a remote possibility, but any marriage can come to grief and lead to a claim by the other spouse.

Cox I certainly see your point Sir. In my submission as far as the position of your third party purchaser goes, I can't see that there would be a diminution in value from Mr Thom's perspective if he were to try and sell that property prior to separation because at the point of separation and hearing of the Family Court claim, the issue would be dealt with by the Court there as to division of matrimonial property.

Elias CJ Well I have trouble, I should indicate, in looking at the matter in terms of the property. It seems to me that if the duty had been performed properly, your client would have been immune from application of the matrimonial property regime. It wasn't. He became vulnerable to application of the matrimonial property regime and I would have thought that was immediate damage to him. How it's assessed may be quite complicated, because of course even a valid matrimonial property agreement can be set aside, but I would like you to tell me why he didn't suffer immediate damage in attachment of the matrimonial property regime to him. It wasn't a contingent liability. It became the regime that attached.

Cox I think the regime itself, by its very nature, takes this case out of the ordinary. It doesn't match anything else in all the authorities that have been submitted because the nature of property can be, or the entitlement to property can be altered completely under the regime as a result of the way the parties order their lives. I get back to the point that the agreement could have been a benefit to him if the parties.

Elias CJ But that's only quantification of loss. He's actually suffered the detriment. He is not outside the regime.

Cox Well depending on whether the, what the Family Court ordered in terms of the application under s 21(9) to validate the agreement, then he was potentially under the regime in my submission.

Tipping J Well there are cross-contingencies in this case all over the place.

Elias CJ Not as to vulnerability to claim.

Tipping J Not as to vulnerability to claim, no.

McGrath J Mr Cox, can I just ask if your position in the end is that there's no loss until separation because there's no measurable diminished value in the appellant's interest in the property until that event occurs.

Cox Yes, yes Sir.

McGrath J If that was measurable, would that remove the principal plank of your argument.

Cox If the.

McGrath J If the diminished value in the appellant's interest in the house was measurable prior to separation, that is on moving into the home, that would remove the principal plank of your argument.

Cox It would, yes Sir.

McGrath J Yes.

Cox Yes, correct.

McGrath J I thought you'd conceded that.

Blanchard J Yes.

Cox Yes, yes. We definitely stand and fall on the basis there had to be a separation and there had to be separation at the time the parties were living in that property so that it fell within the regime.

McGrath J If the value of the appellant's interest wasn't measurable when they moved into the house, you say *Wardley* applies.

Cox Yes Sir.

McGrath J Yes.

Elias CJ Can I just pick you up on that. You say there has to be a separation but the regime attaches from marriage. A party can obtain identification of their property entitlements during the course of the marriage.

Tipping J You can get a vesting order for example.

Elias CJ You can get a vesting order, yes. And indeed as I think the courts below made the point, you can apply for validation of an agreement and all of those things. So why is the separation so critical.

Cox Because it fixes the point in time and where the parties were living, and so which property would be the matrimonial home for division.

Elias CJ Well again, it enables you to quantify the loss because there's a different regime that attaches, but there's still presumptions of equal sharing in respect of all property. So isn't it just a quantification that is possible at the date of separation.

Cox Well in my submission if the parties were not living in the Rotorua property at separation then there would have been no basis for any finding that the property was anything other than Mr Thom's separate property.

Blanchard J Well that might be so if they'd never moved into the property. But although I'm tentative about expressing this view, I would be very surprised that if it has become matrimonial property, as the matrimonial home, that it doesn't continue to be matrimonial property if they move out and acquire another matrimonial home. Assuming they have been fortunate enough to be able to keep both homes. It doesn't revert to being separate property. Once matrimonial property, as I understand it, it remains matrimonial property unless they agree to the contrary.

Cox Well in terms of the definition at s 2 of the.

Blanchard J That's a definition of matrimonial home, if it's the same one that you're.

Cox Yes, yes Sir.

Blanchard J Well that's not what I'm saying. I'm not saying it continues to be the matrimonial home. I'm saying that it continues to be matrimonial property and subject to a claim as such, not as a home, but as matrimonial property. I'd be very surprised if that's not the position under the Act. And I'm also surprised that you can't give us the answer.

Cox Well, s 11 deals with the division of the matrimonial home and family chattels. If the parties have not moved or were no longer living at.

Blanchard J Well you're just repeating something you said earlier.

Tipping J Is there any authority that you can point to that says that something that becomes the matrimonial home and ceases to be the matrimonial home but is still owned by one of the spouses, reverts to being separate property. I'm not aware of any but there may be some. But it need be pretty good authority. Because you're working on a hypothesis which I'm afraid I think begs the question. That's what my brother's. You're working on the hypothesis that it reverts. But we need to be persuaded that it reverts.

Cox Well in my submission in this case we have a s 21 agreement that although potentially unenforceable, records the parties' agreement that this property is Mr Thom's. At the point that in my submission if they had moved out of that house somewhere else, whether it be Mrs Thom's house or a rental property, then the Devon Street property would not be the matrimonial home, nor matrimonial property.

Blanchard J But you've got no authority for that proposition.

Cox No Sir.

Wilson J Mr Cox, like the Chief Justice, I'm interested in the position at the time of signing the agreement. Do you accept that you made at trial the submission which Mr Walker attributes to you at paragraph 72 of his submissions. Page 22.

Cox Yes Sir.

Wilson J Do you stand by that submission.

Cox Subject to the overall regime of the Act, I think I have to Sir yes.

Wilson J Doesn't it follow from that submission that Mr Thom did incur a significant loss at the point of signing.

Cox My submission there Sir is that the loss at the point of signing, the loss if any, was not measurable and could only be measurable once the parties had separated.

Elias CJ That can't be so because that would mean that wherever there is loss in the sense that somebody is not protected, for example a building defect, you could wait forever until the house fell down before the cause of action would accrue.

Cox Well, if one looks at it as a matter of what financial impact was there on Mr Thom at the time this agreement was signed.

Tipping J Are you really saying, I think what you're really saying Mr Cox, and I'm not necessarily doubting this, is that this was a paper loss rather than a loss in the pocket.

Cox Well yes Sir. It was a paper loss. Possibly a paper gain.

Tipping J Well whether it was a loss or a gain, overall, on the balance of all the competing factors, it was on paper only at this stage and it has to be a loss in the pocket, putting it colloquially, before it counts.

Cox Yes, yes.

Tipping J Is that what you mean by measurable.

Cox Yes I do Sir.

Tipping J Yeah well I rather thought that's what you were saying. It's not that it's incapable of measurement, but that it hasn't actually hit the pocket yet.

Cox Yes Sir, yes.

McGrath J You're saying it's in that class of case where you have to wait until the contingency occurs before the loss occurs.

Cox Yes.

McGrath J And you come back and.

Cox That's my submission in terms of *Wardley* and *Sephton* and yes Sir.

McGrath J And that you have some cases you say apply.

Cox Yes Sir.

Elias CJ But on the argument you've addressed to us, and my note of your acknowledgement at the beginning was that the effect of the agreement was to give both parties protection against a claim. That didn't happen. That loss is suffered. The rest is quantification.

Cox Yes I think the best way I could put it is it is a paper loss at that point, the point of execution.

Tipping J Have you got any authority which says that in this jurisprudence the word "actual" means in the pocket as opposed to on paper. Because that would be a reasonably startling proposition if it were correct. Because it would mean that losses actually have to be realised rather than sustained.

Cox No I don't Sir.

Blanchard J I must say I don't understand this term paper loss. What is a paper loss.

Elias CJ You should ask Justice Tipping, he suggested it.

Tipping J Well I was only seeking to try and assist poor Mr Cox who's having a hard time in trying to elucidate what perhaps was possibly behind his concept of measurable.

McGrath J I wonder Mr Cox whether you don't have to go to your best case to show us that it is a loss that fits into the category which that case covers which only occurs when the contingency occurs.

Cox Yes Sir. In that regard would be the *Law Society v Sephton*.

Tipping J Is there something in there which is really the most recent and very helpful English authority which really collects all the earlier authorities and explains them. Is there anything in that case that you suggest helps you Mr Cox. Because I think this is the key English case for present purposes, the *Sephton* case.

Cox Mm, yes Sir.

Tipping J I've forgotten what tab it is now.

Cox 24 Sir.

McGrath J 24.

Blanchard J I must say I read it last night and I thought it was dead against you. So I'll be interested to see what you come up with from it.

Cox I refer you to p 409, the top of the page. There's a reference there, in the first line, on the other hand if the damage is the difference between the defendant's position after entering into the transaction and what it would have been if he had not entered into the transaction, the answer may be more difficult despite the breach of duty the transaction may on balance have originally been advantageous to the plaintiff and some evidence may be necessary to show when he was actually in a worse position.

Elias CJ In para 22 however Lord Hoffmann points out the two different circumstances. One where you've entered into a transaction and you've failed to get what you should have from it, which is quantifiable damage even though further damage may result, and cases where a purely contingent obligation has been incurred. Now on the view that I put to you of this matter, there isn't a contingent liability, there is an immediate exposure to the application of the matrimonial property regime through the failure. So is this case not really one more comparable to cases like *Bell v Peter Browne* and the other cases there discussed.

Cox Well in my submission the whole of the matrimonial property regime takes this particular case out of those sort of cases as *Bell v Peter Browne* you know where the plaintiff demonstrably has lost a share in a property. Here, at the time of execution of this agreement, there can be no basis to say that he is in a worse position.

Elias CJ Well he is because he's not immune from application of the Matrimonial Property Act. He hasn't contracted out of it as he thought he had. And again in para 28 Lord Hoffmann's referring to this same antithesis and saying, disagreeing with Lord Hobhouse saying that *Wardley* is a different

solution, he says that it's a solution to a different problem and refers to the *Cartledge* case in which the plaintiff had on any view suffered damage but did not know it. Aren't we in that camp? The plaintiff is subject to the matrimonial property regime. That's the damage he's suffered. And as to what loss that leads to, that's a matter of quantification and assessment.

Cox Yes well Ma'am he would have been subject to the regime even if the agreement had been effectively signed.

Elias CJ Yes, and that's one of the contingencies that would have to be adopted in valuing what it was that he lost through this defective advice. The Court eventually might well have said that a valid matrimonial property agreement wouldn't be enforced.

Tipping J The contingency that it might not be enforced would effect.

Elias CJ The value.

Tipping J The loss.

Elias CJ Yes, the measure of the loss.

Tipping J Mm.

Elias CJ Yes. Not the fact that he had suffered immediate detriment, immediate damage which was with difficulty able to be quantified.

Cox Yes Ma'am I can only really reiterate the points I've made previously that.

Elias CJ Yes, I understand that. But can you take us to anything in the cases which suggests we are in a different camp, we're in *Wardley* rather in the more usual cases.

Cox No I can't Ma'am really. Just simply on the facts of this case, given that it is under the matrimonial property regime, it is of its nature a very different scenario in my submission than all the rest of the cases in fact.

Elias CJ Yes.

Tipping J Might it be, this doesn't help you, but might it be more absolutely strictly accurately the cause of action accrued the moment they got married, rather than the moment the executed the agreement. That's not going to help you but I'm just thinking to myself, if it's vulnerability to the claim being subject to the regime, it's the circumstance that where he rendered himself liable to the regime.

Elias CJ Well that may not in fact have been marriage because they weren't living in New Zealand. I hesitate to throw that into the mix.

Tipping J Well that could be, it's not going to make any difference, but I think we've got to be as accurate as we can in anything we write.

Cox Yes, yes.

Tipping J Because what the Chief Justice says could well be a valid point in response to mine. But again it's not going to help you. Well if it's real property based in New Zealand I'm not sure that, do you have to be married in New Zealand?

Elias CJ No you don't.

Blanchard J In the absence of an agreement, perhaps she wouldn't have had a claim on marriage because it would have remained separate property anyway, but certainly once they returned to New Zealand and moved into the home, then the asset became the matrimonial home and was subject to a claim. So I can see that arguably there was no loss until that point, but once that had occurred, she clearly had a potential claim to the asset as matrimonial home and she had that claim because your client hadn't done his job by protecting the asset against potential claim.

Elias CJ The other client.

Blanchard J Sorry, Mr Walker's client hadn't done his job.

Cox Yes, well certainly one of the key ingredients to the issue of whether there was loss was that the parties be living in hat house.

Elias CJ I think this, I do think that this is all too asset fixated and it may be because a lot of the cases are. But you've already said to us that what they were contracting for was immunity from the matrimonial property regime and that is what he didn't get. There may have been all sorts of other consequences, other property, it just happens to be the fact that it's this particular property. But I think there's a more general way of looking at it.

Cox Certainly the intent appears to have been focused on this agreement providing for the property to remain his separate property. And certainly the rest of the provisions are in more general terms.

Elias CJ Yes I understand. And effectively that is the measure of loss. One slightly loose thread that I've been a bit curious about is that the Trial Judge found your client to have been contributorily negligent in respect of his

knowledge at the time of entering into the transaction. It seems to me that that relation back to the entering into the agreement is significant because if that was the source of his contributory negligence it seems to me that there must be some symmetry with the damage caused by the solicitor. That may not be right but it seems a little odd to me that the contributory negligence is in respect of the circumstances of the transaction.

Cox Yes Ma'am and that was I believe an issue that was taken on appeal as to whether.

Tipping J But the symmetry perhaps has to be with breach rather than with loss when one's talking about contributory negligence.

Elias CJ Yes that might be right, that might be the answer.

Wilson J Doesn't that point really confirm that loss occurred at the time of signing.

Elias CJ Well that's what I was suggesting. But it may be that Justice Tipping is right that it may go to breach.

McGrath J Mr Cox in looking at the notion of it being a purely contingent obligation which is the way out and perhaps the only way out on *Sephton*, do you say that this is a purely contingent obligation case, and I'm looking at para 22 of *Sephton*, or do you say you can classify it in that way, it's a special *suri juris* situation.

Cox I think it is in the latter category Sir.

McGrath J So you're not saying that the potential application of the matrimonial property regime as a result of the negligence was the assumption of a purely contingent obligation in terms of Lord Hoffmann's formulation. You're not saying that?

Elias CJ Yes, I think he is.

Cox Sorry, yes Sir.

McGrath J Well can you just give me a bit of help as to say why it is a purely contingent obligation in terms of the cases like *Bell v Peter Browne*.

Elias CJ It's *Wardley* that's the purely contingent obligation. The others are cases where.

McGrath J Sorry, yes, like *Wardley*, yes.

Cox Yes Sir. That the application of the regime and in particular the requirement for the Court to scrutinise the agreement under s 21, make a final determination as to the disposition of property and in that process ascertain what was matrimonial property and what was not.

McGrath J Now can you relate that to the *Wardley* case circumstances at all. Is there a passage in the *Wardley* case that's your best passage as it were on that argument.

Cox Yes Sir, it's tab 13 at page 254, last paragraph there which refers to the sustaining of a detriment in a general sense.

Tipping J That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers. In other words the balance is wrong.

Cox That assumes that the balance can be calculated. And in my submission the calculation or balancing of the benefits and burdens can't be assessed or calculated here once at least the parties separate and the property in question is the matrimonial home at the time of separation.

Tipping J Yes. Well there's one passage in *Wardley* that I've always thought was just a little bit troublesome and it's the one that immediately follows this. It's at the top of p 255. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. That I would have thought might be the passage you would be focusing on. I think that with respect is just a little wide or a little loose. I remember when we were looking at this in *Gilbert v Shannaghan*, although I don't think we expressly mentioned this, that that was a passage that just caused a little bit of anxiety for its apparent width.

Cox Yes Sir.

Tipping J But.

Cox Well clearly that would be an issue here in my submission as to how on earth in 1990 one could.

Tipping J You see it's not really consistent with *Cartledge* and *Pirelli* that had to be fixed in England by legislation and is going to have to be fixed in some respects in New Zealand by legislation. I just draw attention to that passage Mr Cox. I would have thought with great respect it was more helpful to you than the one that you read.

McGrath J It's the same paragraph.

Cox And at p 257 the last paragraph over to 258 say that there needed to be some measurable loss.

McGrath J Which brings us back to measurable loss.

Cox Yes.

Tipping J Of course all these cases depend to a significant extent on what is the source of the loss, whether it's the incurring of a liability which would not otherwise have conferred, and if that liability is contingent. But here the loss is said against you to be damage to an existing asset or interest or, as the Chief Justice is putting it, making you actually vulnerable to a regime that you didn't want to be vulnerable. The loss derives from that, loss is capable of manifesting itself in a whole range of ways and I think it's very important that one analyses what the actual loss is said to be. The *Wardley*, entering into a contingent liability, is not a loss until the liability matures. But if you suffer damage to an existing interest, or fail to get an advantage that you've contracted for, then I think the cases are far more readily susceptible to immediate loss analysis.

Cox I'd have to agree with that.

Tipping J One has to be very focused on the precise nature of the loss. And I think this is where *Wardley* may have trespassed a little wide but was perfectly correct against the facts of *Wardley*.

Cox Yes Sir.

Tipping J I just say that because it just seems to me that a sort of routine application of *Wardley* across the board is not likely I think to leave one in the right space.

Cox Sir I think the final passage which I'd refer to in *Wardley* is at p 562 halfway down the first paragraph. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur. The quantification of the diminution in value of an asset or of a liability incurred or the value of any benefit acquired may not be ascertainable at the time when the burden of the transaction is borne. In that event the suffering of any loss cannot be said to occur before it is reasonably ascertainable. Not before it is ascertained. That the burden which the plaintiff has borne is greater than the value of the benefits the plaintiff has acquired or will acquire.

Tipping J Well those are the so-called balance sheet cases aren't they where you've got cross-advantages and burdens so to speak and because of some

problem it is said that something that was going to be of value is of no or less value, you then have to take into account the whole of the balance so to speak. But this isn't a balance sheet case in that sense is it.

Cox Well it could be in my submission because if one's looking at it from the perspective of 1990, because again the potential unenforceability of the contract could have worked in Mr Thom's favour if they'd organised their affairs so that Mrs Thom liquidated her American assets, brought them here and they were living in her house at the time of separation.

Wilson J As I understand the evidence, your client was very concerned to ensure that this agreement was validly executed prior to the marriage. Presumably that was because he saw the agreement as to his benefit.

Cox There's no doubt he was aiming to protect this property. Yes Sir.

Tipping J I think what you're saying however is that you shouldn't look at this on an asset by asset basis, you should look at this on a global basis as to what is the consequent of the unenforceability, is that?

Cox Correct Sir. And at the point in 1990 or 1993, in my submission that consideration can't be properly made.

McGrath J Can I just ask you to look at p 263 of *Wardley*, about at line 16. Or perhaps going back. But when the actual loss that a plaintiff suffers depends not only on the making of an agreement but also in circumstances extrinsic thereto, the loss is not suffered until those circumstances have transpired and, in benefit and burden cases, is not until it's ascertainable. But the Judge then goes on to say, Justice Brennan, the present case does not involve any acquisition by the State of a contractual benefit: it was simply an indemnity given to the bank which entitled the bank to demand the payment of money upon certain contingencies. I think part of the problem you have, and this is a passage that Mr Walker's cited, is that it does seem that had this contract been correctly completed there would have been a contractual benefit derived, the benefit of protection against the matrimonial property regime applying to the appellant.

Cox If it was valid, that would be the case subject to the Court's overall discretion under the regime.

McGrath J I think this comes back to what the Chief Justice is saying though, that this may, this is a case unlike at least Justice Brennan's analysis of *Wardley*. This is a case which should have, if the document had been correctly executed, involved the deriving of contractual benefit on execution. It didn't and that's the loss and when it occurred. That's the argument

against you as I understand it and that's the point of distinction from *Wardley*.

Cox Yes in my submission that would be too simplistic an approach to the scenario that was faced at the time of execution of this agreement because of the potential impact on both parties of the Court saying that it is ineffective under s 21(8) of the Act.

McGrath J Could you elaborate on that, the fact that there is a benefit obtained by both parties rather than just the appellant, is that the point of distinction.

Cox Well there was a potential benefit for both parties.

McGrath J Yes. And why is that a relevant distinction. I mean I'm sure there would have been benefits to both parties in the contract in the *Wardley* case.

Cox Well, sorry, there were potential benefits to both parties arising from its potential unenforceability.

Elias CJ Just looking at the test that Justice Brennan refers to at the end of that passage at p 262 that you were looking at, if anyone had said to your client immediately after he signed the transaction, that agreement is unenforceable unless validated, are you worse off than you expected to be. He'd say, well of course I am. And really the contingencies that you're referring to are really the contingencies of life aren't you. They might have sold, they might have brought her assets to New Zealand, they might have done other things, but all of those were under the umbrella that he believed, that would have taken place under the umbrella that he believed he had secured to the extent that one can immunity from the application of the matrimonial property regime. So that loss, the fact that he wasn't protected in that way, was suffered at the time of the agreement.

Cox I accept that. However, the issue really is at that point the quantum, if he'd commenced proceedings against his solicitors at that point, given the uncertainties and the overriding regime that was yet to be played out, in my submission it would be impossible for the Court to calculate damages on any other basis than nominal. There was no evidence that he'd spent any money on the contracting out agreement, on the legal cost for it.

Blanchard J But he was never going to be able to move back into his own home with her without running the risk that if the marriage failed she'd have a claim against the home. So he must have got some damages for the fact that he was constrained in that way and might have to sell the home. They'd be more than nominal, they might be quite small.

Cox Again, in my submission, a bridge too far given that the parties at that point were living in America and the property is tenanted in Rotorua. Simply too much speculation in terms of the passage from *Wardley* relating to the estimation of damages, and in this case it seems to me that to try and estimate damages in this case in 1990, with all the various possibilities that were up in the air, would be impossible.

Tipping J I wonder whether there's any assistance for the Court, perhaps not so much for you Mr Cox, in the passage at the bottom of p 262 going onto the top of 263 in Justice Brennan's judgment where he says: There is a sense in which it is right to say that, when a misrepresentation – well forget misrepresentation – induces a plaintiff to enter into a transaction in which the plaintiff suffers a loss, the loss is suffered once the plaintiff becomes bound. The die is then cast and what follows can be viewed as evidence proving the extent of the loss suffered when the first binding step was taken - here not taken of course – That may be the correct analysis when the first binding step is such that, whatever extrinsic circumstances may transpire, a loss must be suffered. It think that's what's being put to you. That here there must be a loss and you have to say, don't you, looked at globally, that is not necessarily so. If you look at it as far as the interest in this particular asset is concerned, it may be so, but it's wrong to look at it on that. I'm just trying to help.

Cox Yes, I think that is the case and that we're not bound to this transaction because of the regime. There are a number of ways that the Court under the Matrimonial Property Act could have dealt with the situation to.

Tipping J Well no I don't think with respect I don't think you've got my point. My point, as I understand you to say is, that you shouldn't look at this on an asset by asset basis, you should look at what he's lost as a result of not being subject to the regime but also what he's potentially gained.

Cox Yes Sir, yes.

Tipping J By her not being subject to it either.

Cox Yes.

Tipping J Now I'm inclined to think frankly that that's yet another quantification contingency but I would have thought it's a way you could perhaps seek to put it.

Cox Well that certainly is what I was trying to say Sir.

Tipping J And I think that passage from Justice Brennan may give you some assistance in the sense that you've got to look at the thing in the round rather than just on specific assets when you're not bound by a regime.

Cox Mm.

Tipping J Sorry when you are bound by a regime that you didn't want to be. There could be some good in it for you as well as some bad.

Cox That's correct Sir. And that distinguishes the facts we've got here in my submission from every other case.

Tipping J Well what you're really saying is there's an analogy here with the balance sheet cases strictly so-called.

Cox Correct Sir.

Tipping J I think that's what you're seeking to argue.

Cox Yes.

Tipping J It's not a balance sheet case in the common sense, in the ordinary connotation that that's used in this field, but there is some analogy with it because it's not all bad.

Cox No that's correct Sir, yes.

Wilson J On that reasoning, in the insurance context, when you have to wait until the end of the term of the policy to see whether or not a claim is made.

Cox Well in your insurance context, once you've got a voidable policy, there's never going to be a better scenario for you. It's always going to be a voidable policy.

Tipping J There's no good to compensate the bad.

Cox There's no good to come out of it, yes Sir. So in my submission that is quite a different scenario.

Elias CJ This is a very different case though because it's not a, it is a contracting out of a status rather than a contract for specific benefits. Or even unspecific benefits.

Cox It could perhaps be looked at both ways really. And that's where the balancing up of the good and the bad in my submission has to be undertaken. And that can't happen.

Tipping J It has to be said doesn't it that from your client's point of view it would be wholly advantageous if there was some good in this scenario.

Cox Yes Sir. Mm. But at the point in 1990 where both parties' assets were substantially equal in value, they were living in the United States, planning to move to New Zealand with two young children, it certainly would not be out of the way for the scenario to occur that Mrs Thom liquidates her assets and brings them back to New Zealand.

Blanchard J And doesn't keep them separate.

Cox And doesn't keep them separate Sir.

Tipping J So really you've got three points haven't you. You've got contingency, measurability and the global point.

Cox Yes Sir.

Tipping J Is that a fair?

Cox I think so Sir.

Elias CJ I think it will be necessary for you to finish off what you were saying about why the, assuming that we're with you in terms of the application of *Wardley*, why the correct date is the date of separation unless you'd finished those submissions.

Cox Yes in my submission the date of separation eliminates firstly the contingency that the parties have to separate, which.

Tipping J No they don't have to separate. We had this a bit earlier. I don't understand why they have to separate to make you vulnerable to the regime.

Cox Well for the property to be at risk in my submission the parties do need to be living there as the matrimonial home at the date of separation in order for there to be a quantifiable loss.

Tipping J Well that's a different point. Why do they have, that's a separate point. Why do they have to separate before he's vulnerable to the regime. Couldn't she put a notice on and then seek a vesting order for example. Don't have to separate, she might just think it's all going a bit wobbly.

Cox Well at that point, however, well at any point between 1993 and 1998 the parties could have moved out, moved to another property.

Tipping J Yeah, granted that. But I'm sorry you're not really directly addressing the issue of why do they have to separate before he becomes vulnerable to the regime or before she can do something if you like that's going to prejudice his interest. Whack a notice on, get a vesting order. I don't know, it's a long time since I practised in this field. But is that all changed now.

Cox No Sir.

Tipping J No.

Cox So I'd have to acknowledge that was a possibility.

Blanchard J I think your best point is the global point, that this was an agreement dealing with her assets as well as his. That it's not until you know how the balance works out between them that you can tell whether he's actually suffered any loss at all. And that that won't be worked out until there's a separation and a claim and we know where assets are and whether under the regime they are vulnerable to cross-claims.

Elias CJ Will it be ascertained before, given the discretion under the Act, a Court has ruled on it.

Blanchard J Well that would come into the mix. But assuming that no application was made of that kind, you'd just have the Property Relationships Act as it's now called, then the Matrimonial Property Act applying and you wouldn't know how it would apply until a matrimonial claim is made and you know where the assets are and what their particular status is at the time.

Cox Yes Sir and whether the Court was prepared to give effect to the agreement under s 21(9).

Tipping J I agree with my brother, I think that's your best point. Whether it could get anywhere is another matter. Because the other ones are, there's no contingency and it is measurable.

Blanchard J But what you're really saying is that this is a case like I think it's *Nykredit* where there's some good and some bad in what's occurring but you don't know how much good and how much bad and therefore whether the balance will be against your client.

Cox Yes it's the ascertaining of the balance under the matrimonial property regime.

Blanchard J Mm.

Tipping J Is this a point you've actually made in your written submissions, this global point. It is, Mr Walker's nodding.

Cox Ah.

Tipping J You're not prejudiced, no. I must confess I hadn't seen it coming as sharply as all that. But I'm not saying it's not available to you.

Cox Well it certainly has become more sharp in the last few days Your Honour.

Tipping J Few minutes you mean (laughter). Is there anything on this global point that you feel you can refer to by way of reference to authorities Mr Cox. There are the conventional sort of balance sheet cases, the benefits and burdens. But this is a slightly, well I suppose conceptually it's not different, but factually it's very different if you like.

Cox Yes, yes.

Tipping J Is there anything specific that you think would be helpful to us.

Cox Really all I can rely on are those authorities relating to the weighing up of the benefits and burdens and here there being definitely quite distinct benefits and burdens.

Tipping J Are you saying that both sides are subject to contingencies when you really can't make any sense of it until the chips are down so to speak.

Cox Yes Sir.

Blanchard J What you're really doing I think is saying that the answer to my point about the immediate diminution of his value in the matrimonial home is the fact that she had assets and he remains free to claim those if he's able to do so, which depends on where they are and particularly whether they ever come to New Zealand and cease to be separate property.

Cox Yes Sir.

Tipping J Can you offset a definite loss against a contingent gain.

Elias CJ Well that's measurement of damages.

Tipping J Not sure, not sure. Anyway, I think we've fleshed out what really your best hope Mr Cox.

Cox Yes Sir.

Tipping J And I'm not forecasting a view on that.

Cox Yes I don't know if I can take that point much further Sir.

Elias CJ Is there any other matter you want to advance.

Cox No Ma'am.

Elias CJ Thank you Mr Cox, we'll take the morning adjournment now.

Adjourns 11.26 am
Resumes 11.46 am

Elias CJ Yes Mr Walker.

Walker Thank you Ma'am. I will take you through the submissions but I don't propose to dwell on bits though.

Elias CJ Do you want to do that, you've heard the discussion this morning, Mr Walker.

Walker Yes.

Elias CJ I wondered whether where we ended up seemed to be the strongest point being made against you. We have read your submissions.

Walker Yes well perhaps I will turn to that but it might be worth just clearing up a couple of points about the operation of the regime itself.

Elias CJ Yes.

Walker And it might be useful if you were to turn to the second authority, the Act itself. It's in the appellant's bundle. Your Honours rightly pointed out that it's not correct that you have to wait until separation before the regime has any practical impact. Section 25(3) of the Act, I take you to 25. 25 is defining the circumstances in which an application can be made. And perhaps if you look first at s 23 you'll see that an application may be made by either spouse or by the husband and wife jointly or by the Official Assignee in bankruptcy or by any person on whom conflicting claims in respect of property are made by the husband and wife. And then if you turn to 25(2) you'll see that the Court isn't to make an order determining the division of the property unless it's satisfied either that the husband and wife are living apart, the marriage of the husband and wife's been dissolved, there's a risk of dissipation of the property, and (d) the husband or the wife is an undischarged bankrupt.

But then 25(3) goes on to say that notwithstanding subs (2), the Court may make such declaration or order relating to the status, ownership, vesting or possession of any specific property as it considers just at any time.

Blanchard J Yes.

Walker So the point is, which Your Honours already have, that the status of matrimonial property is a status that applies during the course of the marriage. It wouldn't only be separation, it would be the event of bankruptcy, but also any situation in which someone wished to make an application to the Court to get at least a declaratory order as to what the status was at that particular time.

Tipping J Well you could put a notice on couldn't you.

Walker You can, that's s 42. Section 42 provides for the equivalent of a caveat. So the wife in this case, or both parties actually, have a protected interest in the matrimonial home and that's an interest that can be protected by way of a caveat. Now Justice Blanchard was exploring in questions earlier whether it would be possible to say that the husband suffered a diminution in the value of the property by virtue of the fact that he might be restricted in selling it. I don't think that's the issue because s 19 of the Act provides that: Except as otherwise expressly provided, nothing in the Act shall (a) affect – reading down – the power of either spouse to acquire, deal with or dispose of any property or to enter into any contract or other legal transaction whatsoever as if this Act has not been passed. So I don't think it's that that's the, if you like, the *Forster v Outred* analogy. The real analogy comes down in s 22 subs (2) which provides that each spouse shall have a protected interest in the matrimonial home which interest shall – and this is the relevant part – (a).

Blanchard J Sorry, what section are you.

Walker Sir this is s 20 subs (2) Sir. So each spouse has a protected interest. So we're in a subs (1) case.

Tipping J But there is something still, I suspect despite s 19. Because s 19 is a bricks and mortar section isn't it. You can actually dispose of, but if you're valuing your underlying interest if you like.

Walker Yes.

Tipping J Which is subject to this greater vulnerability.

Walker Well that's precisely what I was going to say.

Tipping J Oh sorry.

Walker Because the answer isn't simply the property's being sold.

Tipping J No.

Walker Therefore that's the end of the problem, because the proceeds of the same would ordinarily be turned into matrimonial property anyway. And what I mean by that is that it's not as if the wife's, in this case, ceases upon the sale of the property. There's still the question of what happens to the proceeds then. And I believe it's s 8 para E (e) which says that any property acquired after the marriage for the common use and benefit of both the husband and the wife out of property owned by either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned, is matrimonial property. So I think it is a bit more complicated than that. But the point I was trying to make is that leaving aside s 19, I don't need s 19 because I have s 20 subs (2) and that in my submission is very similar to the situation in *Forster v Outred*. There is a practical detriment to the husband during the course of the marriage. And the practical detriment is that in this case half of the property is no longer available to him. For example it's no longer available to his unsecured creditors, it's not something that he could pledge in that sense.

Elias CJ Well in the matrimonial home, which it wasn't.

Walker It was at the time.

Elias CJ At the time the agreement was entered into.

Walker Correct. Yes I'm obviously not departing from my principal point.

Elias CJ No.

Walker I agree with the point you've expressed in questions which is really this is a secondary argument for our side. For me the primary argument is that what was supposed to be acquired were some binding contractual rights which immunised the client in particular ways from the operation of the Matrimonial Property Act and he didn't get that and he suffered loss. But I was just addressing the question of whether even if you look at it on a property basis, the impairment of a property right, in my submission there clearly is an impairment in an analogous way to *Forster v Outred*. Because from October '93 he no longer effectively had the whole of the house to himself as he would have done if this agreement had been effective.

Blanchard J Does the Act deal specifically with the question that Mr Cox wasn't able to answer about what happens if you have something that is separate property that then becomes the matrimonial home and then ceases to be the matrimonial home.

Walker The Act doesn't deal with it but there is some authority to the effect that my learned friend is right about that. In fact in the High Court one of the matters motivating Justice Simon France to regard this regime as being very contingent and difficult, sorry, so that it was difficult to ascertain loss at an earlier stage, was the fact that the matrimonial home might become separate property. Perhaps if I just hand up a passage from *Fisher*. Just before we read the passage, in terms of the Act itself, the only opening I can see for it is that the classification is the division of matrimonial property is taken care of in s 11 of the Act. And there it provides that, subject to the provisions of this section upon the division of the matrimonial property each spouse shall share equally in the, the matrimonial home. And matrimonial home is defined to mean: the dwelling house that is used habitually or from time to time as the only or principal family residence. Now I don't pretend to have read all the authorities that *Fisher* is citing, but I take it that the reasoning must be that what's been divided under s 11 is the matrimonial home at the time so that it follows that if something was the matrimonial home but no longer is, it may not be matrimonial property. Now I say may not be because as a practical matter it would be the unusual case in which the husband and wife, when I say, the husband in this case brought a property into the relationship. It became the matrimonial home and they moved out and acquired a completely separate property while retaining the first one in some capacity. I'm not saying it's inconceivable but it would be the unusual case and it may just not have been thought about as being a likely scenario in 1976 when the Act was passed.

But the passage from *Fisher* that I've handed up, the most relevant passage.

Elias CJ Isn't, it's obscured unfortunately, but s 8 it looks like (f). Can you, I can't read the first, it's been cut off in this.

Walker 8(f).

Elias CJ Isn't that property obtained from the disposition of matrimonial property.

Tipping J The trouble is it may not have been disposed of.

Blanchard J If it was disposed of when it was the matrimonial home.

Elias CJ Oh I see.

Tipping J It's a bizarre consequence just on the face of it. But maybe.

Elias CJ I see.

Tipping J Sorry, which passage in *Fisher* was it Mr Walker you were going to.

Walker Yes so it's 11-14. So it's really that first two sentences and then the example, which I think my learned friend was putting to you, is the next sentence.

Blanchard J Well that's interesting. That was the contrary of what I was putting to Mr Cox. I'm not getting much right this morning.

Elias CJ You're referring to the 1973 Act perhaps.

Walker The submission for the respondent is that this is all beside the point because this does all go to quantification. Clearly there are all sorts of possibilities in terms of the eventualities that follow from a valid or invalid matrimonial property agreement. But if you were to go back and ask yourself the two questions, had the client suffered loss when the agreement was signed and had he suffered a loss in October '93 you would say yes. Notwithstanding that you could postulate a scenario in which ultimately he might be better off if things turned out well.

I'd also emphasise that as a practical matter this isn't the scenario that happened in this case. It's not actually a likely scenario that they would sell, sorry that they would keep the matrimonial home and acquire a completely new home and that's in fact, it didn't happen here and it wouldn't normally happen.

I would also emphasis that my learned friend was making the, what's been termed the global argument, that things might have turned out for the best, it might have been a good thing for Mr Thom that the lawyer had got the agreement wrong. And my learned friend made that submission in writing at paragraph 7.19.4 of his submissions, that's on page 16. And it's that first full paragraph on page 16 that I wanted to draw your attention to.

And the basic assumption in this is that the parties went into this relationship with roughly equal assets in the sense that Mr Thom had a property in Rotorua but Ms Lawrence, as she then was, had a property in California. And so the idea was that perhaps if they had gone to live in that property in California, it might have become matrimonial property. Just as a matter of law that's not right because the Act doesn't apply to immovables outside New Zealand. So her property wasn't at risk of becoming matrimonial property. And so my learned friend adjusted his

submission orally and posited the chance that she might sell that property, bring what would be the proceeds which would be separate property back to New Zealand, then buy a matrimonial property in New Zealand, and then they would live in it while keeping Mr Thom's former home as a house which on his argument would then become separate property again.

And the reason I am going through this rather convoluted point is that as a practical matter Mr Thom rightly saw a benefit to protecting his property back in October '93 because he evidently didn't regard that as a scenario that he was particularly worried about. He thought it was his property that was at risk and he was right about that. So for him the crucial thing was to protect Devon Street. That's what he wanted from his lawyer and that's precisely what he didn't get.

And on this global point I don't think it's an answer to say that, well if you don't get a valid matrimonial property agreement we could wait and choose a particular point in time at which possibly it might work out to be economically overall better for you. That's a true contingency going to quantum and in my submission it's no different from the contingency in *Forster v Outred* that the son might actually repay the loan that the mother became a principal debtor in respect of. It is no different from the contingency in *D W Moore v Ferrier* that the supposedly restrained member of the company might not take off and set up in competition, it's really only going to quantification.

If you are to put yourself back at earlier points in time, you can clearly say that Mr Thom is worse off. If you ask yourself immediately after signing the agreement, he is supposed to have a valid matrimonial property agreement, which immunises him from the effect of the Act and he doesn't have it, it was a complete waste of time going to his lawyer, so that he has lost at that point. And then if you ask yourself in October '93, he's done exactly what he didn't want to do, which is expose his house to his wife as matrimonial property. She has a protected interest in the property from that point. His interest is correspondingly reduced, and if he had gone to court at that point he would have been told that he was worse off and entitled to damages.

And I think my learned friend's submission also misses the point that a matrimonial property agreement isn't like a ball thrown into a roulette wheel, where you simply spin the wheel and see what comes out at the end of the relationship. It's actually something that determines how you behave during the relationship. The reason that Mr Thom moved into Devon Street with his wife was because he thought he was protected. He was absolutely adamant in his evidence that he would never have moved in if he had known that the agreement was defective.

And perhaps if I could just show you that evidence. It's in the second volume in the Case on Appeal. Now he said it in his brief of evidence and I will just take you to that. So it's 170 in the Case on Appeal. This is Mr Thom's principal brief of evidence. And at paragraph 21, the fourth sentence, he says, "If I had been told at that time" and by that time he means in about 1992 when he supposedly consulted Mr Rogers, the solicitor, about the agreement. "If I had been told at that time or some earlier time by Mr Rogers the agreement was not certified correctly, I would have asked Sarah to sign another agreement or ensure that we did not live in the Devon Street property. The whole purpose of the agreement from my perspective was to protect the Devon Street property as my separate property".

And in cross-examination he reaffirmed that a number of times, I will just point you to 218 in the notes of evidence. And I put the question to him, "If you had found out the agreement was defective before October 1993, what would you have done?" And he said, "Well if it didn't protect my interest in the property at Devon Street, I would say we wouldn't have moved in there, because then it becomes matrimonial property. And if it was unprotected I didn't want that to happen, that was the whole purpose of getting this thing done right in the beginning was to protect my interest. We would have got another property", he says.

Tipping J Just to be clear on this and I think I am, it didn't become matrimonial property and therefore subject to the regime until they moved in.

Walker Correct Sir.

Tipping J Is that right, because it then became the matrimonial home automatically cancelling it's separate property hitherto status.

Walker Correct Sir. And so the point is, as I was saying, it's not simply a ball in a roulette wheel. It's in the nature of a sort of prophylactic device that actually affects the way Mr Thom behaves during the marriage. And through what's been found to be his lawyers' negligence he did exactly what he didn't want to do, which was expose his property to being matrimonial property and that's not just a hypothetical exposure, there's an actual protected interest in the wife at that time.

Tipping J So when they moved in, irrespective of any questions of short duration.

Walker Yes.

Tipping J She acquires a protected interest.

Walker She does.

Tipping J Yes. Under s 20 subs (2).

Walker Correct. I think it's also worth highlighting the point that was made in *Knapp*, which was the English Court of Appeal case about the insurance policy. And that's the third in the line of cases where it's found that you suffer loss immediately upon getting the voidable policy. And there the point was made that it's actually wrong to assume the counter-factual, that Mr Thom had found out about this and had headed off to his lawyer. Because the reality is he didn't. The whole point of this is he thought he was protected and he wasn't. So he did blithely go on and move into Devon Street and as a result his wife had a protected interest in the property.

Wilson J Just talking briefly about insurance policies.

Walker Yes.

Wilson J And you'll know much more about insurance practice than I do these days. If a policy is avoided by an insurer, is any premium then payable.

Walker The premium's normally paid back.

Wilson J The premium's paid back.

Walker Yes.

Tipping J It doesn't have to be though does it.

Walker Not if it's misrepresentation or fraud. No. If it's innocent misrepresentation it's normally paid back but if there's any, yes that's the practice.

And that just underlines the point that a valid insurance policy is valuable to you regardless of whether it's called upon.

Tipping J So it's your case is it Mr Walker that the cause of action arises when this inadvertent creation of the protected interest arises, happens.

Walker That's.

Tipping J At the very latest.

Walker At the very latest. My case is that it happened immediately upon defective execution of the agreement.

Wilson J It's an alternative argument you're putting fwd.

Walker That's right. And it is important to go back to the pleading. If I could ask you to turn.

Tipping J Are you going to develop that, that it arises at. I don't want to make a meal out of something that's possibly not going to make any difference.

Walker Yes.

Tipping J But is the asset not vulnerable, it's not vulnerable to a claim is it until it becomes matrimonial property.

Walker That's correct.

Tipping J So how can the cause of action arise earlier than the vulnerability date.

Walker Because with great respect I think it's a mistake to focus on the precise practical effect on the property at the point in time because it's mistaking what Mr Thom wanted. It's true that a consequence of what he wanted was when they did move in, in October '93 it wouldn't become matrimonial property. What he actually went to his lawyer to get was a binding and enforceable agreement, that's what he.

Tipping J Has he suffered any harm until that asset becomes vulnerable.

Walker Yes, in my submission yes. Because the agreement, if it was valid, perhaps I should make two points about this. The agreement doesn't just relate to Devon Street.

Tipping J No.

Walker The agreement also relates to any property bought jointly during the course of the marriage and any family chattels. And if you'd like me to help to take you to the agreement.

Tipping J No, no, no.

Walker So it's a mistake in the first place to think of this as purely about October '93. The very first day they go out and buy a couch or a fridge, the agreement is in play if you like. Now it so happens there wasn't evidence in the District Court about when they bought their fridge or their couch because that wasn't in issue. But the point I'm making is it is a broader agreement than simply an agreement about the matrimonial home.

So that's the first point, it has a practical, if you're concerned with the practical impact on property rights it has an effect as soon as they buy joint family chattels.

But in my submission it's not right to look for the practical benefit or as it's sometimes called the real loss. The loss in the pocket if you like or whether it's on paper or in the pocket to me is beside the point. The point is that the contract itself is a valuable *chose in action*. If he'd walked out of the notary public's office with a binding agreement which immunised him from many of the effects of the Matrimonial Property Act, he would have had something valuable. And in fact he would have had precisely what he instructed his lawyer to get. And his evidence clearly is that was of value to him and you can understand why it was of value to him. And walking out of the notary public's office without that agreement he'd suffered loss. And in my submission the fact they weren't married yet isn't to the point either.

Blanchard J So it was like an insurance policy.

Walker Yes it's not a perfect analogy, but yes. It's a valuable *chose in action*. It's like a restraint of trade. The fact that it hasn't had any practical impact yet doesn't mean that it wasn't valuable to have.

Tipping J Just remind me, I'm sorry to be slow. Its actual status because of these vices was that it was voidable or void subject to being rehabilitated if you like.

Walker Void.

Tipping J Void.

Walker Yes. Justice Simon France in the High Court described it as being *prima facie* void. And what he meant by that I think is voidable. But in my submission, and I'll take you to the Act. The Act is pretty clear.

Tipping J You don't need to, it's s 21 is it.

Walker 21(8)(a) says it's void. And included in the authorities is a case called *Bailey v Bailey*. Now I only put that in there to illustrate what I think is the correct approach to a matrimonial property agreement where no legal advice has been given and no certificate exists. And that is simply to ignore it. It's not an agreement so it's just void. So the idea that there was, I should say my learned friend in his submissions has taken things to the point where he's saying in fact it was *prima facie* valid until declared void by a Court. So the significance of that being that Devon Street supposedly didn't become matrimonial property in October '93. It only

became matrimonial property when the agreement was actually avoided. And in my submission that can't be right. The section is clear. 21(8)(a) says void. And rightly so because an agreement where there's no legal advice is not an agreement under the Act. As I say in the submissions, it's no better than a table napkin. In fact he would have been better off with a table napkin because at least he wouldn't have been under any illusion about what he'd got. Now rather than continue on through.

Wilson J Were you going to take us to the pleadings you mentioned.

Walker Yes, well the point of it being was to reinforce a point I've now made which is, it's at p 32 in the first book of the case on appeal.

Elias CJ There was no argument was there, sorry, this is just again another loose thread. There was no argument about remoteness of damage questions in this case. I continue to be bothered about this finding that he was contributorily negligent to the extent of 50%.

Walker Yes.

Elias CJ And also the finding that the defect was reasonably discoverable by him. Because it does tend to raise questions about whether some of the subsequent losses which in fact arose because of the conduct on the mistaken assumption were too remote. There weren't any arguments, in fact I wondered whether really it could be said that if he was 50% contributorily negligent in terms of the entering into the agreement, he was only 50% contributorily negligent in relation to assessment of loss. I suppose that's the same thing as saying is there a remoteness issue here.

Walker Yes the way it worked in the District Court was that the learned Judge, Judge McGuire, he was firmly of the view that the loss was the failure to get an agreement, a valid agreement.

Elias CJ Yes.

Walker So the loss accrued on the day the agreement would have been executed properly if the solicitor had given the correct advice.

Elias CJ Yes.

Walker And in those circumstances it's understandable that he would say that he was contributorily negligent in a way that did go to the loss. But I did argue it as a causation as well as a contributorily negligence point and I'm not sure that the reasoning is totally pure in the District Court. Because it seems to me that if what you're acknowledging in contributorily negligence is in fact that these defects were so obvious that you should

have realised there was a problem with this agreement, then it is difficult to say that the loss thereafter was actually caused by the solicitors' negligence as opposed to caused by your unwillingness to confront the apparent defects.

Elias CJ But that was in fact not a problem that the District Court Judge had to confront because of his view in terms of the application of the Limitation Act.

Walker That's right.

Elias CJ Yes. Yes, thank you.

Walker The point about the pleading is a relatively short one. This is the third amended statement of claim at p 32 of the case on appeal. And the point starts at para 4. The plaintiff instructed the defendant to advise him concerning the procurement of an enforceable contracting out agreement. Then in 5. The contract of retainer was one whereby the defendant would take such steps and give such advice as was required in order to procure an enforceable contracting out agreement. And it says at 6(b), pursuant to that contract the defendant did advise as to the manner of protecting the property at Devon Street to guard against any claim. So it's not just about what happens once he's separated. It's actually about guarding against a claim.

And then if we turn over to the allegations of duty and breach at 14 on p 35. The relevant duty as it turned out was the one in (c), he had to undertake all necessary steps to ensure the contracting out agreement was valid and enforceable.

Over at 15, the breach was the failure to advise about certification in the United States. And then there was an allegation that he'd actually reviewed this document before the parties had moved into Devon Street. That was rejected on the facts but the allegation was that he should have advised at that point that the agreement was potentially unenforceable.

Elias CJ The pleadings move around a lot on the question of whether the signed agreement was supplied to the solicitor don't they. But eventually at trial it was not, it was accepted that the solicitor didn't see it until the date of separation effectively wasn't it.

Walker It was a finding of fact. There was a dispute on the evidence and that, the principal part of the claim in the District Court focused on the allegation that the solicitor had actually reviewed the agreement but that was rejected by the District Court.

Elias CJ Yes.

Walker So then at 16, the consequence of the breach of duty is the plaintiff wasn't aware he had an agreement that was potentially unenforceable. That's (a). And (b) the plaintiff lost the opportunity to have his partner execute the agreement in accordance with the requirements of s 21. And then it's the consequence of those breaches of duty that he suffers the loss and damage of the property being divided (a) in a way which wouldn't have happened if the agreement had been quote valid and enforceable.

So the claim was very clear and it was totally consistent with the evidence. He'd gone to his lawyer to get a valid matrimonial property agreement, his precise interest, his principal interest let's say, was to protect Devon Street, and he didn't get it. He got something that was, at least on his case, potentially unenforceable and in our submission worthless and void. And as a consequence of that he did suffer the eventual loss on division.

Now I would just make one further point in relation to *Wardley* and the passage that was being referred to by Justice Tipping from Justice Brennan's judgment.

Tipping J It was at page something-62 wasn't it.

Walker 262.

Tipping J What tab was *Wardley*, can you just remind us.

Walker This is tab 13 in the appellant's authorities.

Tipping J Thank you.

Walker It's in regard to the passage where Justice Brennan is suggesting, talking about, yes it's at the top of 263. And the point was made that there might be an argument based on that passage. That this is a case where someone's entered into a contract where extrinsic circumstances are relevant to the occurrence of loss. But what I think what Justice Brennan had in mind there was the *Wardley* case which was a contract case where they'd entered into a contract to indemnify but it was found that there was an extrinsic circumstance, namely the liability which would have to be indemnified in the making of a claim. And that's what he's talking about there. I don't think he's talking about our case. Our case is one where the loss is immediate by virtue of not having the valuable *chose in action* from the outset. And all matters thereafter, they might be called extrinsic, but they're really in the nature of contingencies going to the quantification of the loss.

McGrath J Would that passage at line 16 support that approach, support that interpretation of Justice Brennan's judgment.

Walker Exactly, yes. So that's my point. He doesn't have in mind our sort of a case.

Just for your, it's not directly on point but it may be of interest and it's not mentioned in the submissions, tabs 15 and 16 of the appellant's authorities are the High Court and Court of Appeal decisions in *Korving v Dell*. And that was a situation where a matrimonial property agreement was actually drawn up after a separation and a dispute but it wasn't properly certified. And the High Court and Court of Appeal found that the husband would have been in a better position if he'd had a valid matrimonial property agreement than as he did having a voidable agreement or a void agreement. And in the particular case the benefit was that it would have put him in a much better negotiating position and it potentially might have avoided the cost and expense of having to go off to the Family Court to resolve the matter.

Elias CJ Can you take us to the passage that you're relying on.

Walker Yes, so in the High Court Justice Morris, page 39 just under the heading C. Perhaps it's the second paragraph under C which puts it best. Had he gone into the settlement discussions with a written agreement in his possession the wife would have been faced with the task of setting aside that agreement. Her advisers could not possibly have been absolutely certain of the outcome of any such application. Their advice would have been tempered accordingly. It follows that he certainly lost a bargaining tool by not having the signed agreement.

And the Court of Appeal made the same point. Justice Henry delivered the judgment of the Court. And if you look for example at p 4 bottom of the page. Morris J was undoubtedly right in holding that the existence of a certified agreement would have been a bargaining point of some value to Mr Korving.

Tipping J This wasn't in a limitation context I take it.

Walker No it wasn't but the point is that the Court found that he'd suffered loss because he didn't have a valid agreement which would have been, as they put it, a valuable bargaining tool. But that's just an instance.

Tipping J I don't think there's any doubt that he suffered loss. The question is when did it accrue.

Walker But my point is that he would have had that from the beginning.

Tipping J Yes I understand the point. But I don't see this as being a particularly strong authority in favour of a date. Because the Court simply wasn't addressing the question of date was it.

Walker No but they were making the point that a valid agreement as opposed to a void or voidable agreement is valuable. Here the value was that it was a bargaining tool.

Blanchard J It's the point about losing the *chose*.

Tipping J Yes.

Walker That's right. Yes.

Tipping J Or having a weaker *chose*.

Walker Yes. Or no *chose* in this case. Now I'll just check that there's nothing further I can help with.

Tipping J I just want to ask you, when you've checked your notes on something Mr Gilbert, but please check your notes first. Sorry, Mr Walker.

Walker It's alright Sir, it happens a lot.

Tipping J I even thought your Christian name was Gilbert at one point Mr Walker, I do apologise for my. The point I was wanting you to help me a little bit more with is, because I think this is probably the crunch point in the case is you're submitting that the global submission is answered by the proposition that the global issue is a facet of quantification, not a facet of the ultimate existence of any loss. And I understand the force of the submission, I've been toying the point up in my mind, but can you say there has been any loss until you strike the ultimate balance so to speak where there are contingent harm and contingent gain, if you like, out of the default.

Walker Yes.

Tipping J Could you just elaborate that a little bit more for me because I see this as really the kernel.

Walker Yes, the first thing to do is to understand that the ultimate disposition of property is it's a circumstance which does flow from the failure of the agreement, but you shouldn't regard that as being the primary or first loss. He first suffers loss when he was supposed to get a *chose in action* and he didn't. And it was a *chose in action* that was valuable to him because it

wasn't just about regulating the position upon separation. It was something that gave him if you like a right or a licence to behave in a certain way during the course of the marriage which he promptly proceeded to do, presumably by buying fridge's and couches, but then in October '93 moving into the property. So he'd already lost at that point, irrespective of the ultimate economic position upon division of the property.

And the next point is that if you are concerned about the, if you like, the practical consequent or the real loss, if you might call it that, you can point to points in time during the course of the marriage when he was worse off. So in October '93 he was in a position where he had made his home matrimonial property, his wife had a protected interest in the property and so he could no longer, of his own, as a matter of his own control of the situation, protect that property. It was at risk. And if the wife had gone off to the Court at that point for a declaration she would have obtained a declaration that the property was half hers as matrimonial property and she could have gone off to the Land Transfer Office and lodged a caveat to protect her interest. And at that point he's clearly worse off.

The fact that in the future if he does nothing it might eventuate that things work out for the best, in my submission is just one of those contingencies going to quantification.

Tipping J The fact that these definite losses might be overtaken at the end of the day but a favourable balance, if you like, doesn't stop them from being definite measurable losses.

Walker That's right Sir.

Tipping J That's how it fits into it being ultimately a quantification.

Walker Yes.

Tipping J Well it's not ultimately a quantification point then is it. It is simply that they have earlier been definite losses which may in the end be eliminated by a favourable balance and the contingency therefore goes more to valuation than to existence of the loss.

Walker Yes. And perhaps another way to look at it is that because the common law would not regard this as two causes of action, it regards it as one cause of action so damage can only accrue once, the fact that damage has accrued at an earlier point means the cause of action has accrued. The fact that in the future circumstances might eventuate in the way that economically conceivably he proves to be better off, which in fact he wasn't and it wasn't actually practical that he ever would be, that's just a

matter that judge can take into account in assessing damages. And in my submission a judge looking at that submission would give it a pretty low chance of happening.

Wilson J You say losses are losses even if they haven't crystallised.

Walker Yes Sir.

Blanchard J Well that's actually consistent with *Nykredit* because the crucial date there was the date on which the lender actually suffered the loss attributable to the valuers breach of duty. And here you say, well there was an actual loss at least at the point when he moved into the house, if not before.

Walker Yes Sir.

Blanchard J And the fact that things might have improved is no different from the possibility that there might have been an improvement in *Nykredit* because the house values or property values had gone up in value again.

Walker Exactly. But perhaps I would say that I look at it at a prior point. I mean if you think of the *D W*.

Blanchard J I understand that.

Walker But just to explain my point about *D W Moore v Ferrier* which is the restraint of trade case, they suffered a loss irrespective of whether anyone, the member in this case, actually left and set up in breach of the restraint of trade that they would have had. Because the whole point is that as soon as they didn't have the *chose in action* they should have had, they'd suffered loss.

Tipping J As soon as they got a less valuable, if one wants to look at it in those terms, *chose* than they were supposed to get.

Walker Yes.

Tipping J That's all that needs to be shown.

Walker Yes. So I don't have anything further to add to my written submissions. I'm happy to answer any further questions.

12.33 pm

Elias CJ Thank you Mr Walker. Yes Mr Cox do you want to be heard in reply.

Cox My learned friend referred to the protected interest in the matrimonial home in terms of s 20 subs (2). That applies to the matrimonial home and consequently that protection would last for only as long as the property retained the matrimonial home status. So going back to the point I made earlier, that if the parties had moved out of the Devon Street property it would no longer be the matrimonial home and that protected interest essentially would not apply. I have nothing further.

Elias CJ Thank you. Well thank you counsel. We will take time to consider our decision in this matter. Thank you very much for your assistance.

Court adjourns 12.35 pm