IN THE SUPREME COURT OF NEW ZEALAND SC 61/2012

[2015] NZSC Trans 4

BETWEEN **NEIL STUART JOHNSTON**

Appellant

AND **CHRISTOPHER FREDERICK SCHURR**

First Respondent

AND **DEEM & SHEARER**

Second Respondent

Hearing:	17 February 2015
Coram:	Elias CJ McGrath J William Young J Glazebrook J O'Regan J
Appearances:	C R Carruthers QC, E J Hudson and J S Cooper for the Appellant R J B Fowler QC and P J Mooney for the First Respondent J M Morrison and N Levy for the Second Respondent

---

CIVIL APPEAL

MR CARRUTHERS QC:

May it please Your Honours, I appear with Mr Hudson and Ms Cooper for the appellant.

ELIAS CJ:

Thank you Mr Carruthers.

MR FOWLER QC:

May it please Your Honours, I appear with the first respondent together with Mr Mooney.

ELIAS CJ:

Thank you.

MR MORRISON:

May it please Your Honours. Morrison, I appear for the second respondent with my learned friend Ms Levy.

ELIAS CJ:

Thank you Mr Morrison. Right, Mr Carruthers?

MR CARRUTHERS QC:

May it please Your Honours. I have a short outline of the scheme of my oral argument if Your Honours will receive that?

ELIAS CJ:

Yes, thank you.

MR CARRUTHERS QC:

Your Honour I've handed to the registrar two other pieces of material. One is the regulations under the Act and the other is an article that simply deals with some statistics. I'll come to those and have the registrar –

ELIAS CJ:

Do we have those as well? They're coming. Yes, thank you.

MR CARRUTHERS QC:

I'll come to those pieces of material just in the course of my argument if Your Honours please. Your Honours, I want to start by dealing with the issue of the statutory duty of the legal basis for statutory duty. The analysis which I have made in the submissions is at paragraph [17] to [23], but the short point is this. That the way in which the first respondent has categorised the argument is to adopt what the Court of Appeal decided and my submission is that that analysis, both by the first respondent and by the Court of Appeal, involves a misinterpretation of category (A) in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, which is the analysis made by Lord Browne-Wilkinson, and it follows from that submission that my submission is that the analysis made by the Court of Appeal is wrong.

Now that analysis is in paragraph [87] of the Court of Appeal judgment which is at page 65 of volume 1 of the case. What the Court of Appeal says in that paragraph is first there are three bases on which it rejected statutory duty simpliciter, the category (A) in *X (Minors)*. "First, such action could not be brought for breach of statutory duty simpliciter, for s 49 precludes any action against the manager unless the act or omission was done without reasonable care or in bad faith. Put another way, the statute expressly excludes any category (A) claim." And then there's an analysis of the reason for that. But my submission is, that that is simply not so. That the existence of negligence or not does not exclude the category (A) claim.

If one goes to *X (Minors)*, which is in volume 2 of the cases under tab 1, and the analysis is –

ELIAS CJ:
Sorry, where is it again?

MR CARRUTHERS QC:
I'm in the bundle of authorities Your Honour and I'm at volume 2 and I'm dealing with case 1.

ELIAS CJ:
Yes.

MR CARRUTHERS QC:
And I'll deal with the preface to the categories that His Lordship identified, and I'm on page 730, beginning at letter F. "The question is whether, if Parliament has imposed

a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority. It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, not brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action. The distinction is important because a number of earlier cases, particularly in the field of education, were concerned with the enforcement by declaration and injunction of what would now be called public law duties. They were relied on in argument as authorities supporting the plaintiffs' claim for damages in this case: I will consider them in a little more detail later."

And then he identifies these categories, "Private law claims for damages can be classified into four different categories," namely, "(A) actions for breach of statutory duty simpliciter (ie irrespective of carelessness); (B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; (C) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; (D) misfeasance in public office," and he describes that.

The two categories that we're concerned with here are (A) and (C). His Lordship dismisses (B) on the basis that that is not, that does not support a cause of action. So the enquiry is as to what the statutory duty simpliciter was and it leaves the question of negligence completely to one side. So it arises irrespective of whether or not there is negligence. So that's why I've submitted at paragraph 4 of my outline that *X (Minors)* makes it clear that breach of statutory duty and common law negligence can sit side by side. That's category (A) and category (C). the presence of negligence does not remove the scope for breach of statutory duty. And then I tested the proposition in this way, by asking whether if a manager is negligent both duty and liability are avoided for the purposes of category (A) because my submission is –

ELIAS CJ:

Sorry where are you? I see, yes.

MR CARRUTHERS QC:

– the analysis is that you can have the statutory duty. There is quite a separate inquiry under the Act as whether there is liability for the statutory duty and that depends on whether there was bad faith or want of reasonable care. So that is why I submit that they sit side by side.

I suppose it's tested in this way too. Leave aside the proviso to section 49(1) and ask the question whether there can be a statutory duty or breach of a statutory duty where there is no negligence but not a statutory duty where there is negligence. In my submission that really gives the lie to the Court of Appeal's analysis because what we have here, on our argument, is a breach of statutory duty simpliciter. It's quite a separate inquiry as to whether there can be liability for that breach. So I've submitted that in the present case category (A) and category (C) sit side by side, however, because of the statutory provisions, the object of the statutory duty, that is the manager, avoids liability unless negligent.

And I've submitted, then, that the analysis is supported by *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) and that's under tab 2 in the authorities, and I have discussed it in paragraphs [20] and [22] of the submissions. I'll just identify the passages in the case for Your Honours.

ELIAS CJ:

I have to say that I have struggled with seeing where one can accept conceptually these different categories.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

But in this case why does it matter? That's what I'm struggling for because you're not arguing that this is one of those cases where there is a cause of action simply based on breach of the statutory duty. You are, in fact, arguing that the breach is because of a lack of care.

MR CARRUTHERS QC:

I'm arguing that there is a breach of the statutory duty and the issue of liability for that breach does arise because there does exist a want of reasonable care.

ELIAS CJ:

Yes because the defence isn't triggered if you were looking at it simply in terms of the statutory duty.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

But I don't see really how it's characterised subject to the Court of Appeal argument that the evidence could have been different, which is something that you deal with in your submissions.

MR CARRUTHERS QC:

Well, I come to that, yes.

ELIAS CJ:

But it just seems to me that there's total congruence and how it's described doesn't really seem to me to matter at all. In other words, the classifications don't give you the answer.

MR CARRUTHERS QC:

No, no, and with respect, I agree with that. The only point in my submission is to really illustrate why the Court of Appeal's analysis –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– that the existence of negligence means that there is no category (A) statutory duty. That's the only point of my submission to this point. So, Your Honour, I'm content with Your Honour's analysis.

WILLIAM YOUNG J:

A statement of claim actually, if one reads it uninformed by what later happened does rather look like a claim in negligence.

MR CARRUTHERS QC:

Well, Your Honour, that's the point that I come to when we get to the question of amendment because the statement of claim, as I've submitted is apposite to a claim in negligence as it is to breach of statutory duty. But you'll see that there is – well, if I can put it this way without any disrespect to those that drafted it, there is some confusion as to quite the way in which the case was being put, but it was plainly argued as a breach of statutory duty case as you will see from the judgment in the High Court.

The passage that –

ELIAS CJ:

And it cannot be right, surely, as the Court of Appeal says that the statute expressly excludes any category (A) claim.

MR CARRUTHERS QC:

No.

ELIAS CJ:

That's a question as to – there is a question as to whether it does, but it doesn't by simply providing a defence if you don't act deliberately.

MR CARRUTHERS QC:

With respect, I agree Your Honour, and that's the essence –

ELIAS CJ:

It's a narrowing of the actionable, yes, with the cause of action that can be based on the statutory duty.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Or the statutory duty is somehow defined on some way by section 49 because the idea that you can have a whole pile of actions for breach of statutory duty but no liability doesn't seem to be within the spirit of section 49. I know you want to argue it conceptually that way but it may be that this is just a statute where you can have an action but not one that is breach simpliciter but breached with bad faith or negligence.

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
So the duty itself is redefined in some way, and it really doesn't matter much. It's just a label on the action.

MR CARRUTHERS QC:
I accept that, Your Honour, and Your Honour was right to categorise the way in which I had put it is conceptually to really try and illustrate the error in the Court of Appeal judgment.

Just the passage in *Carter* that I rely on in the written submissions, *Carter* is in volume 2 under tab 2 and at page 172 in paragraphs [41] to [43] –

GLAZEBROOK J:
Sorry, I missed where it was. Are we still in volume 2?

MR CARRUTHERS QC:
Yes you're still in volume 2 but you're under tab 2 now, Your Honour and that's *Carter* in the Court of Appeal, and paragraphs [41] to [43]. And it's probably worthwhile capturing what Justice Tipping said, drawing the authorities together, drawing the authority of the *X (Minors)* at paragraph [42], "We respectfully agree with this approach. It's consistent with, indeed the logical culmination of a developing trend to place increased emphasis on the terms of relevant legislation when in a common law negligence case, that legislation is central to the relationship between the parties. The trend of authority has also regarded the legislative environment as informing the duty of care question, rather than as providing an alternative basis upon which a claim for negligence might be maintained. As noted above, a

negligence claim can logically be brought as one for breach of statutory duty only if there is a statutory duty to take care."

GLAZEBROOK J:
Which might be seen to support what I was saying just before that the statutory duty is one to take care and not to act in bad faith –

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
– but nevertheless a breach of statutory duty simpliciter as said at paragraph 41 of this.

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
And section 49 doesn't quite word in the statutory duty to take care sense –

MR CARRUTHERS QC:
No.

GLAZEBROOK J:
But it might be when you interpret them all together that that is, in effect, what it is.

MR CARRUTHERS QC:
Yes, and you're then drawing together the concept of the statutory duty with – drawing together the issue of duty and liability in that section.

GLAZEBROOK J:
Yes, because what's said earlier, "If the statute itself creates a duty to take care, a breach of that duty will result in a breach of statutory duty simpliciter," (ie. the failure to take care) and not a negligent breach of statutory duty which is excluded by the category (A).

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

Well, I question that. I don't see why they cannot overlap. I mean the forms of action can't continue to rule us.

GLAZEBROOK J:

Well I think that's the point that's been made in 41 that you can have a negligent if there's a duty to take care.

ELIAS CJ:

Yes.

O'REGAN J:

But isn't in this case section 49 the other way around? It's saying you can't take an action unless there is a failure to take care? That it's not creating the action, it's just limiting what they can be sued for?

MR CARRUTHERS QC:

But the Act creates the statutory duty and that's why I drew the distinction –

O'REGAN J:

Where do you say the Act creates it other than in section 49?

MR CARRUTHERS QC:

That creates it – oh –

O'REGAN J:

A duty to take care in the…

MR CARRUTHERS QC:

That is the analysis of the statutory provisions in line –

O'REGAN J:

So you're not pointing to a particular provision that says that? You're just saying when read as a whole the statute –

MR CARRUTHERS QC:

That's right. When one undertakes the exercise that Lord Browne-Wilkinson identified, and I do draw attention to that just in a moment, when you undertake the statutory interpretation exercise as to whether it creates a statutory duty then you've got to look at the nature of the statutory duty that it creates, and my submission is that you get to the point where you have a duty that involves taking reasonable care because of the liability provision under 49(1).

ELIAS CJ:

In some cases the scheme and purpose of the statute may give rise to an inference that there is no private law –

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

– action. The importance of section 49 really is that it makes it clear that it is envisaged that in some circumstances there will be, so there's no absolute prohibition on the statutory duty giving rise to a cause of action.

MR CARRUTHERS QC:

Yes, with respect I agree with Your Honour.

WILLIAM YOUNG J:

Are there any other cases where there's this legislative pattern, a statement of duties and then an immunity say for actions taken with lack of reasonable care or in bad faith?

ELIAS CJ:

A partial immunity.

MR CARRUTHERS QC:

Yes, is it Prince and Gardner? Just give me a moment Your Honour because the answer to that is yes and I think…

GLAZEBROOK J:

It's fairly common in trust deeds of course.

MR CARRUTHERS QC:

Yes, yes.

GLAZEBROOK J:

Which this is to a degree a trust, a fiduciary relationship in terms of property so one can understand the structure, perhaps, in terms of trust deeds. You obviously there have specific duties but then, then an indication of action is only for bad faith and – and obviously the self-dealing rule and things overlaid.

MR CARRUTHERS QC:

Yes Your Honour. Yes, the answer to Your Honour Justice Young is actually in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, which is under tab 4, and that was actually brought as a negligence claim, but alleged breach of duties under the, it's the Children, Young Persons, and Their Families Act 1989, there is a similar exception and if Your Honour will just bear with me, I'll try and find it now. Yes, Your Honour, can I just take you to tab 4, and if I take you to page 290 and you'll see between lines 10 and 15 there's a reference to section 41(8), and that's of the Children and Young Persons Act, and that has a similar provision to the provision that we're dealing with here.

WILLIAM YOUNG J:

And I have got a feeling that we've had, there have been slightly similar provisions in issue in leaky building cases as to whether immunities are implied duties.

ELIAS CJ:

I think there have been too. In fact I'm surprised at the lack of reference in submissions we've had to some of the leaky building cases because they did seem to offer some parallels.

WILLIAM YOUNG J:

I think in the case in relation to the claims against the –

ELIAS CJ:

Certifiers.

WILLIAM YOUNG J:

– what it was, the building control – whatever the building authority, whatever the top body was, that did have an exemption from liability which was said to indicate an assumption that it might have a duty of care, although that argument didn't prevail in that particular case.

ELIAS CJ:

Except with the minority.

WILLIAM YOUNG J:

it did receive some support from one of our number.

MR CARRUTHERS QC:

Well Your Honours that provision in *Prince and Gardner* is the only one that I was –

WILLIAM YOUNG J:

And is that Justice Henry's judgment?

MR CARRUTHERS QC:

I think –

WILLIAM YOUNG J:

Yes it is, yes it is. So he's saying yes there is a duty of care and in support of that he's deploying the immunity saying it would otherwise be unnecessary.

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

Yes.

MR CARRUTHERS QC:

So I then go along to just look at the relevant statutory provisions creating the statutory duty and I don't need to dwell on this too long. I then pointed to the starting point of the analysis in paragraph 18 of the submissions where it simply repeats what Lord Browne-Wilkinson identified in *X (Minors)* as being the relevant indicators for a

statutory duty giving rise to a private right or action, and if I could just give you the reference in *X (Minors)*. It's in volume 2, under tab 1, page 731, and it's the paragraph between letters D and G. Now it simply supports the proposition in the submissions.

So I then submitted that the discussion at the requisite indicators is at paragraphs [24] to [40] of the submissions where I go through all of the relevant statutory provisions and point to the conclusion at paragraph [39] in these terms, where I submitted, "That all the indicia of a private law cause of action for breach of statutory duty are present in this case. The purpose of the legislation is to protect a limited class of vulnerable persons. In any given case, a manager's duties are owed to a single, identified individual and not to the world at large." Secondly, "The nature of the manager's duties, including the paramount duty to provide and protect the best interests of the subject person, are specific to managing the property of the subject person and are akin to those of a trustee." Thirdly, "There is no other enforcement mechanism in the legislation that would apply in this case, or generally, except in limited circumstances," and I'll come to that. And fourthly, "The provisions of the PPPRA are consistent with and imply the existence of a private law cause of action."

I then identified the key relevant sections relied on as supporting the duty and they are sections 36. The legislation, Your Honours, is in volume 1 of the bundle of authorities and it's under tab 1, section 36, it just sets out the functions and duties of the manager. Section 43 deals with the manager's duty to consult the person subject of the order. Just going back to section 31(8), this is a requirement for the Court to specify a date by which the manager is required to apply to the Court for a review of the order. So those are the essential provisions on which I rely but the analysis, as I have said, is set out fully in the written submissions and unless Your Honours want me to take you through those in any greater detail I'll move to the question of the role of the Public Trustee because the reasoning both in the High Court, but more particularly in the Court of Appeal, was that the legislation provided a mechanism by which the Public Trustee could enforce any right against the manager. I have dealt with that in paragraphs 31 through to 34 of the submissions.

Can I just take you to the section that deals with the Public Trustee because it's a curious provision to be used in the way in which the Courts below have used it. It's in part 4 of the Act, dealing with the question of managers, and section 37 deals with security for the performance of the manager's duties and you'll see in subsection (1)

there's power to require security from a manager, except where the manager is a trustee corporation for the performance of the duties of the manager. A description as to the kinds of security that maybe provided. Provision in subsection (3) for further security, and then there's provision for the Court to give leave to the Public Trustee to enforce the security and the Trustee shall proceed on that. Then (5) all monies received are part of the property for which the person is or was the manager and costs and expenses incurred by the Public Trustee shall be paid out of that property. And then subsection (6) provides the, "Public Trustee may commence or institute proceedings against any such manager for any breach of duty, and may apply to the Court ex parte for an injunction to retrain any such breach or any threatened breach."

Now that sits in a section that deals with –

ELIAS CJ:
I've lost the – which –

WILLIAM YOUNG J:
Page 51 of the statute.

ELIAS CJ:
Sorry, I had 55, thank you.

MR CARRUTHERS QC:
So that provision sits within a section that provides for security for managers other than trustee corporations and relatively the subsection (6) deals with commencing or instituting proceedings against any such manager for any breach of duty, and the submission that's made is that that seems to me that it applies to a manager who has been required to give security and that's the analysis that I have made in paragraphs [31] to [34]. But just looking at the conclusion –

GLAZEBROOK J:
One of the difficulties with that submission just, and it is in an odd place, but if they're not required to give security and have breached their duty and the protected person isn't in any position by their very nature to institute proceedings, then who is going to enforce duty? So if the Public Trustee has, for some reason, decided that the person is fine and they go off on a tangent then who is instituting proceedings?

MR CARRUTHERS QC:

Well I think it's important to recognise that the Act is very careful to acknowledge that there are degrees of capacity in the sense that there is the requirement to consult, there's the requirement to involve the incapacitated person, so it's not that a person is necessarily completely incapacitated so that they couldn't give –

GLAZEBROOK J:

Well let's assume they are.

MR CARRUTHERS QC:

All right.

GLAZEBROOK J:

Then if somebody has been playing fast and loose in the absence of having been given security.

MR CARRUTHERS QC:

Right, well there would be two ways of dealing with it. One would be the appointment of a litigation guardian –

GLAZEBROOK J:

But by whom though, who's instituting that?

MR CARRUTHERS QC:

Well, well that, it would be, it would obviously be somebody who had knowledge or found out that the manager was playing fast and loose, to use Your Honour's words –

ELIAS CJ:

The Attorney-General could, couldn't he? Couldn't the Attorney-General?

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

I'm just thinking of other powers to –

MR CARRUTHERS QC:

Well another power is to apply to the Court to appoint another manager to deal with the breaches that the manager –

ELIAS CJ:

I'm just thinking about general powers outside the scheme of this. I suppose this argument, in this argument you're making to us, though, in terms of the discussion you've had with Justice Glazebrook, it really depends what the "such manager" in subsection (6) refers to because –

GLAZEBROOK J:

As you're looking at it, it probably refers to subsection (1) –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– which is where you've been required to give security so I think that probably is the answer to that.

MR CARRUTHERS QC:

Yes, yes.

ELIAS CJ:

That's right.

GLAZEBROOK J:

So it's not a general power.

MR CARRUTHERS QC:

The other curious feature is that that provision giving the power is completely dislocated from section 47 which is the exemption for the manager. One would have thought that if there was an overall power in the Public Trustee to deal with the liability of a manger it would be in some way related to section 49, sorry.

McGRATH J:

But it fits with the general heading of dealing with what the Public Trustee can do.

MR CARRUTHERS QC:
Sorry Your Honour?

McGRATH J:
Well it certainly extends what the other provisions are in relation to security for the Public Trustee, but it's a Public Trustee provision. It's not an illogical place to put it although it's a power at a different time.

MR CARRUTHERS QC:
No, I – the lack of logic comes when it's not related in any way to section 49.

GLAZEBROOK J:
That's if it was a generalised power rather than one which the Public Trustee is already interested because of holding the security.

MR CARRUTHERS QC:
Yes.

ELIAS CJ:
On that point have you looked at general powers that the – I don't know what the answer is. Whether there are general powers that the Public Trustee has to enforce trusts on the –

WILLIAM YOUNG J:
Under section 7 just about anyone can apply to the Court under section 7 and anyone can apply with the leave of the Court.

ELIAS CJ:
Yes, yes, that's true. Yes, thank you.

MR CARRUTHERS QC:
What I've been submitted, just to deal with the Public Trustee's position, I've submitted that there are practical obstacles to the argument that only the Public Trustee has a right of action, and the question is how can the Public Trustee know about breach by a manager and the scheme of the Act is that in section 45(2) a manager is required to prepare a statement in the prescribed form and file it with the

Court and under section 46 where a statement is filed in a Court under 45, the registrar of the Court shall transmit one copy of the statement to the Public Trustee and send the other copy to the person who's acting, and that gives the Public Trustee the opportunity to examine the statement. But under the regulations, and I handed up the regulations, and regulation 4 requires the annual statement of management and if you go to the schedule you'll see under form 2 the material that's required in the annual statement. So it requires the property and an estimated value, the method of valuation, change in condition of the property, change in the amounts payable to the person for whom the manager's acting. So its valuation and financial information that is provided in a formal way. There is nothing in that procedure that involves what consultation there's been or what other duties have been performed or how they've been performed. The short point is that there is nothing in that process that is likely to alert the Public Trustee to any breach of duty on the part of the manager, and that, in my submission, is one of the reasons against saying that the Public Trustee's role removes any private law cause of action.

Now the other feature of those statutory provisions is that they depend on compliance by the manager. It depends on the fact of compliance and the manner of compliance, and just to illustrate the point, let me take you to what happened in this case, and if I can take you to volume 3 please.

WILLIAM YOUNG J:
Sorry, volume 3 of the case?

MR CARRUTHERS QC:
Yes Your Honour, volume 3 at page 612. This is to illustrate the practical problems and the obstacles that exist. Sorry, here is the – this is the letter from the Court to the manager just drawing attention to the fact that there has been a failure to comply with the obligations to file annual statements of account, and I just leave you to quickly look through that letter and then go to 683 in the same volume and there's a mix up with the pages here Your Honours that I'll just deal with.

At page 683 is the start of a letter from the case flow manager that, in fact, finishes at 684. So I'm sorry but there is –

ELIAS CJ:

I think ours have been reassembled, or mine has been anyway. It means we have some funny holes in the right-hand side.

MR CARRUTHERS QC:

Right. So you'll see here in April 2004, the case flow manager in the Court is referring the matter to the Crown solicitor. Now the only point in drawing attention to that state of affairs is to illustrate that the system doesn't necessarily give the Public Trustee any information that would allow the Public Trustee to deal with the case. And then I pose the question, if a person makes a complaint to the Public Trust –

ELIAS CJ:

This is all well after what we're concerned with isn't it? You're using this for illustrative purposes, is that right?

MR CARRUTHERS QC:

No, this is during the case man – this is during the manager's conduct of his appointment as a manager.

ELIAS CJ:

Right.

MR CARRUTHERS QC:

So there is a failure to comply with the filing of the statements.

ELIAS CJ:

Yes I see.

MR CARRUTHERS QC:

So I'm just saying that's the practical obstacle to this. So then I've raised the question of if a person makes a complaint to the Public Trustee, how does the Public Trustee fund litigation unless there is security? And that's a reference back to section 37.

I come to the next biggest issue for the practicality of saying that the Public Trustee has the sole role. In the Atkin article that I've handed up, and the only reason I want

to use that article is that he has put together some statistics from the Ministry of Justice, and if you go to page 443, this is where I've drawn the information and those – it's in the first paragraph on 443, "Statistics show that over 2000 applications under the Act were made in the five year period from 2004 through to 2010, and 2573 in 2009/2010," and so my submission is that really the Public Trustee would have no relevant resources to supervise each of the reports required by the regulations in relation to those cases.

The only other aspect I should draw attention to is I give it a reference to the judgments in the High Court and Court of Appeal on the Public Trustee's position.

Your Honours, I now turn then to the common law duty, and the analysis that I have made there is at paragraphs [41] through to [43] and I –

ELIAS CJ:
Both are common law duties.

MR CARRUTHERS QC:
Yes.

ELIAS CJ:
I'm just wondering whether, in a way, the language gets in the way of understanding in some of these cases. I baulk a little bit, although Lord Browne-Wilkinson used it at the reference to private law claims. They're private claims as opposed to public claims but they're still private causes of – I'm not sure that the law's so easily compartmentalised.

MR CARRUTHERS QC:
No. I suppose that it's simply – I agree with Your Honour but it's simply a convenient way if distinguishing between the statutory duty and the –

ELIAS CJ:
But there may be a statutory remedy and that's a different thing.

MR CARRUTHERS QC:
Yes.

ELIAS CJ:

But if the statute – yes, but enforcement of a statutory duty is still a private cause of action.

MR CARRUTHERS QC:

Yes. I was just – when Your Honour just questioned me on my reference to common law duty, I'm really just using it as a distinction between the cause of action – the statutory cause of action that I've argued for and I've turned now to look at what is the negligence claim.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Can I just check with you, do you accept that there would be a difference with your statutory cause of action to what you call the common law negligence action or do you argue that, in fact, it doesn't matter? But if it's a statutory cause of action it would in effect the same as the negligence cause of action?

MR CARRUTHERS QC:

Yes –

GLAZEBROOK J:

Which is contrary to what the Court of Appeal considered.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

And you're going to be dealing with that at some stage explicitly?

MR CARRUTHERS QC:

Well, I deal with it when I come to deal with the pleadings issue because what say is that one can read the pleading and read it as a pure negligence pleading or one can read it as a statutory duty to take reasonable care.

GLAZEBROOK J:

And in your submission the elements would be exactly the same because of the statutory context?

MR CARRUTHERS QC:

Yes, but my submission is that they are really interchangeable which is probably the real point that Justice Tipping was making in *Carter* where the modern trend, that's actually reflected by *Prince and Gardner*, where the modern trend is to cast the claim in negligence and draw on the statutory scheme to deal with the requisite elements to support the cause of action in negligence.

GLAZEBROOK J:

Because then the argument would be, I suppose, well if it's called statutory duty or common law duty of negligence, if the elements are the same, why should that matter? So what's it matter, what it's pleaded in, if the elements are the same, the actual nub of the case will still be the same?

MR CARRUTHERS QC:

Yes, that's right, but in this case I'm drawn to the position –

GLAZEBROOK J:

I understand.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

I understand why it's argued this way.

MR CARRUTHERS QC:

Yes, yes.

GLAZEBROOK J:

It's just that if that's accepted by the Court then it really doesn't matter what it's pleaded on.

MR CARRUTHERS QC:

Precisely, yes, yes. If the Court is with me on the statutory duty analysis then I don't need to be concerned with negligence or the amendment.

GLAZEBROOK J:

Well we could have been with you on statutory duty but say that – oh I suppose, no, that's right, that's probably right.

MR CARRUTHERS QC:

Yes, but the other way –

ELIAS CJ:

But the point, sorry.

MR CARRUTHERS QC:

Pardon?

ELIAS CJ:

No, you finish.

MR CARRUTHERS QC:

The other way around, if you're against me on statutory duty then I do need the negligence –

GLAZEBROOK J:

You do, yes.

MR CARRUTHERS QC:

– cause of action, yes.

ELIAS CJ:

Well except you might fail on both for the same reason if they really are equivalent but really if they are equivalent there was no reason to turn down the application for amendment.

MR CARRUTHERS QC:

No.

ELIAS CJ:

No.

MR CARRUTHERS QC:

No, and –

ELIAS CJ:

If it was necessary.

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

Can I just, is there no limitation issue as to the amendment? None has been raised.

MR CARRUTHERS QC:

No it's never been raised and I think that turns on the analysis of what a cause of action is and I can address that if it is –

WILLIAM YOUNG J:

Well I, it wasn't raised by the Court of Appeal and it's not raised in submissions

MR CARRUTHERS QC:

No, it's never been put in issue since the amendment issue was raised in the notice of appeal.

ELIAS CJ:

And it would probably turn on how – whether the pleading was act because you don't have to label your legal, you don't have to plead law as long as all the elements are there.

MR CARRUTHERS QC:

Precisely and even if there is a limitation issue, that actually is not an absolute bar. I mean *Smith v Wilkins and Davies Construction Co Ltd* [1958] NZLR 958 is probably the leading case there where it would depend on the circumstances and the circumstances here would be the identity of the cause of action by the pleading.

GLAZEBROOK J:
It may be met by an argument that it's too late to us to amend the pleadings given that, if there are differences between how the cases would have been run, which is why I asked you the – one of the reasons I asked you that question, not the only reason.

MR CARRUTHERS QC:
Yes, I can deal with that. The word "prejudice" is really used without any analysis of just how there could possibly be prejudice in this case and as I have dealt with – and just moving forward, I picked up the point in paragraph [16], I said there's no room for any claim of prejudice on the basis that different evidence, or a different approach would have been adopted at trial. As part of the argument of breach of statutory duty the first respondent had to deal with the issue without reasonable care, which is precisely the same issue.

If I can just back to do the section that, section (d) that I was dealing with the negligence cause of action, and I've said that reliance is put on *B v Attorney-General* [2004] 3 NZLR 145 and that is under tab 3 in volume 2. There Lord Nicholls adopts the passage from *Prince* and that's the passage that I have relied on in the submissions at paragraph [42].

GLAZEBROOK J:
Sorry, which paragraph number are you referring to?

MR CARRUTHERS QC:
Paragraph [15] Your Honour. Then at [29] and [30] Lord Nicholls draws the conclusions concerning the duty of care. I simply draw that to your attention and again you'll see that's a reference to the exception that I took Your Honours to from *Prince* earlier on.

If I can come to now deal with the amendment of the pleading and I have submitted that the starting point is to recognise that the pleading is as apposite to common law duty of care as it is to breach of statutory duty and I am in volume 1 of the case at page 88 which is where I want to begin. The cause of action is described just simply as breach of duty and then if one looks at paragraphs [18] through to [21] that pleading, as Justice Young noted, actually reflects all the ingredients of a claim in

negligence, and all that it is being sought is the amendment to paragraph [22] so as to make it clear that the duties which have been breached were those under the Act and at common law. so my submission is that there is really an identity that makes the amendment unremarkable and appropriate.

I have then, taking Your Honours to paragraph [16], and I have just recorded that the formal argument, the formal written argument concerning amendment is at paragraphs [44] to [48].

ELIAS CJ:
It strikes me that paragraph [22] is apt for a claim that had been headed claim in negligence anyway because although it might have been perhaps more accurately expressed the statute is the source of the proximity relied on so that they are duties owed under the Act.

MR CARRUTHERS QC:
Yes, yes. I think that the concern Your Honour was, of course, against the background of the High Court judgment which had dismissed our –

ELIAS CJ:
Yes, yes, I understand why that amendment application was made, but I'm just really querying whether it was necessary at all.

MR CARRUTHERS QC:
Yes, well it is simply there for, to make it quite clear that is the, that is part of the case that the appellant pursues but, with respect again, I agree with Your Honour that what we are relying on is the duty owed under the Act.

O'REGAN J:
Yes but you haven't framed the claim in that way so that isn't the way the case has been argued in the trial Court?

MR CARRUTHERS QC:
I can certainly – I meant the way in which the argument is recorded in the High Court judgment, I agree entirely with Your Honour, which is why the application for amendment was made in the notice of appeal to the Court of Appeal and why it was argued that way in the Court of Appeal.

O'REGAN J:
But do you accept that it wasn't that the High Court Judge accurately described the way it was argued in the High Court or is there some contention about that?

MR CARRUTHERS QC:
Your Honour, there is more than a hint that what was actually being argued was a negligent breach of duty in the High Court argument but in fairness to the High Court Judge I think she fairly records the basis on which the argument was put. But Your Honour, I go on to emphasise immediately that she didn't have before her any application for amendment or any specific argument along the lines that's being submitted now and was submitted in the Court of Appeal that we're really looking at a similar issue and there can be no prejudice so that one couldn't resist an amendment.

WILLIAM YOUNG J:
Leaving aside the sort of technicalities, the case in the High Court must have been along the lines of negligent breach of statutory duty because the plaintiffs really did have to address section 49, the plaintiff had to address section 49.

MR CARRUTHERS QC:
Yes. That's fair Your Honour and it's very clear from, well, it's clear actually from the pleadings and it's clear from the way in which the arguments are recorded by the High Court Judge that it was plainly put on the basis of negligence in relation to the statutory duty.

Now, I've then gone on to deal with the breach itself and I've noted that the argument is set out comprehensively in paragraphs [49] to [72] of the submissions, and I'm trying to capture what the first respondent is saying and the appellant's response in paragraphs [19] and [20], and the first respondent relies essentially on three arguments. Firstly that the manager, Mr Schurr, had no power to settle matrimonial property claims. Secondly, he had no duty to seek power to do so and thirdly, a settlement would have put in jeopardy the appellant's ability to stay on the farm.

Now there is a formal response to those arguments at paragraph [51] of the submissions, but let me just take you to the order and the schedule to the Act so that one can see just what the limitations were on his powers because while it's true to

say he had no power to settle matrimonial property, he certainly had an ability to ensure that that issue was dealt with. So let me take you to volume 4 please and the order is at 889 in volume 4, and you'll see the scope of the powers and the rights and powers that were given to the manager, and let me take you to the way to deal with that. If I can take you to the Act, which is in volume 1 of the bundle of authorities under tab 1?

GLAZEBROOK J:
I'm sorry, I think I've just slightly missed where – I missed that first part I think.

MR CARRUTHERS QC:
I'm in volume –

GLAZEBROOK J:
No I understand that. Sorry, what was the particular thing you were taking us to the Act for?

MR CARRUTHERS QC:
I was taking you to the formal order and the first asterix in the formal order, the manager shall have, et cetera.

GLAZEBROOK J:
Yes, I understand now.

MR CARRUTHERS QC:
And it's just a tabulation of provisions which is really unhelpful as to what he didn't have power to do. So what I've done, what I'm doing now is taking you to –

GLAZEBROOK J:
That's what I've missed, the particular order that you were taking us to.

ELIAS CJ:
So did I pick up from the judgments that this order is actually made by a registrar?

MR CARRUTHERS QC:
Oh, no, no –

ELIAS CJ:

It's not?

MR CARRUTHERS QC:

No, I think it's –

ELIAS CJ:

It doesn't mention any Judge, it just says the Court makes an order. Anyway, that's all right.

O'REGAN J:

There was a judgment –

MR CARRUTHERS QC:

Yes, no, it was an order made by a Judge, yes.

ELIAS CJ:

Right.

McGRATH J:

The previous page has a minute.

ELIAS CJ:

Does it? Right, yes. I see, yes, thank you.

WILLIAM YOUNG J:

So where's the exclusion for relationship property?

MR CARRUTHERS QC:

Let me, I'm trying to be helpful to Your Honours. In the schedule to the Act and under tab 1 if you go to page 94, the first schedule sets out the powers and the power that the manager has, he has a relevant power under section – under paragraph 1(a)(iii), that is to lodge a notice of claim under the Matrimonial Property Act 1976 and then his –

WILLIAM YOUNG J:

So that's, the subclause 3 power wasn't included?

MR CARRUTHERS QC:
Sorry Sir?

WILLIAM YOUNG J:
The subclause 3 power is not included? It's about the only thing, as far as I can see, that wasn't included in the order.

MR CARRUTHERS QC:
In 1?

WILLIAM YOUNG J:
Yes.

MR CARRUTHERS QC:
No, no, we've got, he's got the power.

WILLIAM YOUNG J:
I don't think he has, has he?

McGRATH J:
Not at page 889.

WILLIAM YOUNG J:
No.

MR CARRUTHERS QC:
No, no, these – sorry. I'm taking you to the powers that are excluded.

WILLIAM YOUNG J:
Yes, I see.

MR CARRUTHERS QC:
That's my mistake, sorry. So 1(a)(iii) is excluded and then on page 98, paragraph (k) is excluded. So he may not make application under the Act. Paragraph (l) is excluded. So he may not enter into an agreement under the Act.

ELIAS CJ:

Well that's the important one here, is it?

MR CARRUTHERS QC:

That's – yes it is. It's important Your Honour, in my submission, because of the limited scope of it in the sense that it doesn't stop him from putting in place a mechanism to deal with an issue that was current and needed to be dealt with.

GLAZEBROOK J:

Only the Court could really have done that though by appointing someone else, couldn't they?

ELIAS CJ:

Or appointing him.

MR CARRUTHERS QC:

Well he could give instructions –

GLAZEBROOK J:

Well there was a conflict so the Court –

ELIAS CJ:

Yes but leaving that aside, yes.

MR CARRUTHERS QC:

Or he could have given instructions to solicitors to deal with that in consultation with Mr Johnston who had a capacity to understand that that issue needed to be dealt with and had virtually been dealt with at the time of his accident.

GLAZEBROOK J:

I just have some difficulty in saying that somebody had capacity to – certainly there is capacity to decide that you might want to have it dealt with but whether you have capacity – if you didn't have capacity to do any of these other things, which clearly the Court was of the view that they did not, to have the ability to understand the advice and to be sure that he had understood the advice.

MR CARRUTHERS QC:

Well one can see that in that context the proper cause would be to apply to the Court concerning approval of the, of any agreement.

GLAZEBROOK J:

Or just get somebody appointed to do these things that had been excluded.

MR CARRUTHERS QC:

Yes –

GLAZEBROOK J:

Which would be the simplest way I would have thought.

MR CARRUTHERS QC:

Yes, that's right, it would be to just say I haven't got these powers, I need another manager.

GLAZEBROOK J:

But whether Mr Schurr had a duty to do that is, of course, the question but that would have been the most simple way of dealing with this, is to have someone –

MR CARRUTHERS QC:

Well whether the failure to deal with it was a want of reasonable care in terms of –

GLAZEBROOK J:

No, no, I understand the argument on that.

O'REGAN J:

What about a duty to Ms Johnston. Wouldn't it have been against her interest if that was the case. If she, by now, had said she didn't want a settlement, wouldn't it be against her interests to procure that the Court appoint someone to make it happen?

MR CARRUTHERS QC:

Well –

O'REGAN J:

I mean if he did it wouldn't he now be facing an action by her, that she missed out on this?

MR CARRUTHERS QC:

Well I mean it would have to be approval of an agreement she would have to be part of. But he had no duty to her. This is part of the complaint on the appellant's part, that –

O'REGAN J:

Well he acted for them both, previous –

MR CARRUTHERS QC:

No, but he was appointed as a manager under the Act to act for Mr Johnston –

O'REGAN J:

Yes, but not in relation to matters in respect of which he had a conflict of interest and an obligation to her.

ELIAS CJ:

Well I'm not sure that it was a conflict of interest. Isn't that was identified to the Judge, that isn't a reason for it. The reason these powers weren't conferred is that the memorandum in support doesn't ask for those powers –

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

– and says that the matrimonial property issues can be parked. I'm just looking at page 861, which is the memorandum, because I wondered whether these inclusions of powers were standard ones and that matrimonial property matters were always excluded. But in fact the Judge has adopted what was put before him.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

And it's not explained in terms of conflict of interest.

MR CARRUTHERS QC:

No and the sequence of it was, that this was a temporary order for a period recognising that this was an issue that had to be dealt with.

O'REGAN J:

But wasn't his position that because he had acted for them as a couple, it was not appropriate for him to act for either of them in relationship to a matter where they were in dispute with each other?

MR CARRUTHERS QC:

But as a matter of fact, Your Honour, as I've gone through the evidence in the analysis that I made, he did deal with Ms Johnston in relation to matrimonial property matters, in relation to calculations, in relation to payments throughout this period. So it's not a matter where he said, "I'm sorry Ms Johnston. I can't deal with you and I can't deal with Mr Johnston in relation to matrimonial property." The evidence is that he actually continued to deal with her and preferred her interests to Mr Johnston. That's what the evidence is.

O'REGAN J:

Do you accept that he had a conflict of interest? If he had acted for them both and acted for one or other of them in a matrimonial property dispute. Because if you do accept that then he couldn't deal with matrimonial property as the manager under this legislation, and the Judge was right to exclude that from the power.

MR CARRUTHERS QC:

No, I don't' accept that he had a conflict of interest. I don't accept that at a factual level because he – he was an accountant who had acted for, in the family, and if he did have a conflict of interest, Your Honour, he certainly breached that duty because he continued to act which rather suggests that no matter what is said that he didn't have a conflict, that he didn't think he had a conflict of interest.

O'REGAN J:

Well let's just take it away from this case. Do you accept that a family accountant, who acts for a family in relation to a farm, that when they decide to separate, and

they have a dispute about matrimonial property matters, it would be inappropriate for him to act for either party?

MR CARRUTHERS QC:
Yes I do, of course I do, but as a professional ethic, yes.

ELIAS CJ:
But your point is that there were steps that could have been taken by someone who was seized of the management of the estate?

MR CARRUTHERS QC:
Yes.

ELIAS CJ:
Which might have involved getting someone else appointed?

MR CARRUTHERS QC:
Yes.

WILLIAM YOUNG J:
And you also say, I mean there are references in the material to decisions that in reality did relate to relationship property?

MR CARRUTHERS QC:
Yes I do.

WILLIAM YOUNG J:
And particularly there's an affidavit reviewing it that Mr Schurr filed, that's at page 908.

MR CARRUTHERS QC:
Yes, yes, there's a sequence of events, and one of the illustrations is the Carrington letter in volume 3 at 507. This is a letter that Mr Schurr received in relation to matrimonial property. This is against the background and this is where the trial Judge's findings are very important, where she found that Ms Johnston would have accepted what was proposed. There was already an agreement that had been prepared that was – where there was evidence that it had been approved without the

formalities of signature and advice, and then this letter is received from Mr Carrington, and I think in the submissions we've referred to him as Peter Carrington, it's Paul Carrington, and – but Mr Schurr receives this letter and does nothing with it and that is an indication of a step that he could have taken to deal with matrimonial property and resolve that issue.

O'REGAN J:
What order was in place at that time? Was that the initial three month order or was it a later one?

MR CARRUTHERS QC:
That was the initial order, Your Honour, the three month order was in place at that time. So that's an indication of a step that he could have taken against the analysis that we made in paragraph [51] in answer to that issue.

On the second argument, that's dealt with at paragraph [53] to [54] of the submissions and the submission here is that after the first temporary order, he had a duty to inform the Court that the issue of matrimonial property needed to be addressed and a failure to do so was not in the appellant's interest. That is the appellant's interest as to have that issue addressed and on the basis that the matrimonial property issue was one that was recognised, that needed to be resolved but could await further attention after the initial temporary order, then my submission is that he had an obligation, a duty to inform the Court that that issue needed to be addressed by saying that his powers were inadequate and other powers were needed because that was a review of his powers but, to the contrary, he was reporting to the Court that his powers were adequate.

GLAZEBROOK J:
Where's that report?

MR CARRUTHERS QC:
Right.

GLAZEBROOK J:
The application is 906 I think.

MR CARRUTHERS QC:

At 893 – 892 is his application to review his order and that's in August 2000.

ELIAS CJ:

Sorry, which colour is this one?

MR CARRUTHERS QC:

It's the green one, volume 4.

GLAZEBROOK J:

And that does refer specifically to conflict at 893.

MR CARRUTHERS QC:

Yes, 893 and at paragraph [8]. Now –

O'REGAN J:

Do these applications get dealt with on the papers or does the Judge actually hear from…

MR CARRUTHERS QC:

They are dealt with on the papers I understand, Your Honour. So the position that we have as these orders are renewed is that he is required to review and no review is undertaken. And on that third issue that a settlement would put in jeopardy the appellant's ability to stay on the farm, that's dealt with in [58] and [59]. And the evidence is really quite clear, the financial evidence is quite clear that there was no obstacle to his staying on the farm, and that issue was dealt with specifically in paragraph [59].

ELIAS CJ:

[59] of your…

MR CARRUTHERS QC:

Yes, of the written submissions. That third issue on the issue of the farm is dealt with at paragraphs [58] to [60] and all of the references to the financial ability to make the settlement from the available funds without having any access to the farm or putting the farm at risk in any way.

ELIAS CJ:

But they did require borrowing didn't they?

MR CARRUTHERS QC:

No. See in paragraph [60], Your Honour –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– you can actually see the strength of the resources that were available to pay out either the original agreement, or indeed the Carrington letter proposal.

ELIAS CJ:

Were there any – well, one of the curious things about this case is despite the fact that there was pretty extensive evidence, there seemed to be very few findings of fact. What were the findings of fact in the High Court on this question?

MR CARRUTHERS QC:

They were strongly in favour of the position that I'm putting to you, if you just bear with me?

ELIAS CJ:

You can come back to that. I'd be interested to have a look at those or have the references.

MR CARRUTHERS QC:

Your Honour, I'm about to go onto the Deem & Shearer claim. If that's a convenient time I can look up those references over the break and deal with that after the break.

ELIAS CJ:

Thank you. We'll take the adjournment now.

COURT ADJOURNS: 11.27 AM
COURT RESUMES: 11.46 AM

MR CARRUTHERS QC:

Your Honour the Chief Justice asked me about the findings in the High Court on the issue of the matrimonial property settlement. In volume 1 of the case at page 9, paragraph [16] and [17] of her Honour's judgment deal with the issue and I'll just read those so you can see the strength of the findings.

GLAZEBROOK J:
Sorry, can you just, I just need to find it sorry.

MR CARRUTHERS QC:
Volume 1, page 9, paragraphs [16] and [17]. "Mr Schurr and Deem and Shearer have attempted to prove that no other outcome than what has resulted was possible because Ms Johnston was not open to resolving the relationship property issues after Mr Johnston's accident. I accept that at the time Mr Johnston had his accident, and for a good part of the time in the early 2000's, the prognosis for his recovery was unclear. In such circumstances, he was in no position to take over responsibility for managing the family farm, which was a factor against buying Ms Johnston out of the partnership at that time. Nonetheless, there is correspondence which suggests to me that in 1999, had someone pushed the issue of resolving the relationship property, Ms Johnston would have entered into a settlement. The opportunity was there, but it was not taken. Whether a settlement at that time would have been financially viable, or whether it would have left Mr Johnston in a perilous financial position, which may have placed his long-term ownership of the farm at risk, is another issue." And I'll come back to that.

Paragraph [17], "I can understand why Mr Johnston is unhappy with the way his affairs were managed while he was unable to look after them himself. Since he had always wanted to maintain the family farm, I can understand that, from his perspective the sooner Ms Johnston was paid her share of the relationship property, and he gained sole ownership of the farming business, the better. From Mr Johnston's perspective the accident he suffered could not have occurred at a worse time. After some months of negotiations, the lawyers had reach an agreement on the terms to be included in the relationship property agreement. In such circumstances, I consider that the execution of the written agreement was no more than a necessary formality. Deem and Shearer argued that at this time it was still open to Ms Johnston to reject the agreement. Technically, this is correct, but I consider that the extent of the correspondence between each spouse's lawyer makes it clear that any sticking points had been resolved in the course of the lawyers'

correspondence, and that the reason for both sides reaching the state where a formal written agreement had been prepared was because the terms of the agreement had already been decided."

So Your Honour will appreciate the strength of the finding –

GLAZEBROOK J:
Did she make any finding on the perilous financial position?

MR CARRUTHERS QC:
Your Honour, can I deal with that…

ELIAS CJ:
Is that right, by the way, that a formal written agreement had been prepared?

MR CARRUTHERS QC:
Yes it was.

ELIAS CJ:
It was prepared, right, thank you.

MR CARRUTHERS QC:
Yes it was, yes.

ELIAS CJ:
And is that in the –

MR CARRUTHERS QC:
Yes, it is in the materials.

ELIAS CJ:
That's all right.

MR CARRUTHERS QC:
I'll give you a reference to it, volume 3 at 458 Your Honour.

McGRATH J:

But it was sent shortly after the accident, wasn't it –

MR CARRUTHERS QC:

Yes.

McGRATH J:

– or have I got that wrong?

GLAZEBROOK J:

Well she also accepted at paragraph [16] that there were factors against buying Ms Johnston out of the partnership given the situation with Mr Johnston and his inability to take over the farm.

MR CARRUTHERS QC:

Well the farm was being – well there were sharemilkers on the farm so in part the farm was, in that sense, running itself, and it was Ian Johnston, was he – he was a farm manager.

GLAZEBROOK J:

She did come back and have some involvement though didn't she?

MR CARRUTHERS QC:

Yes he did, yes he did, certainly did.

GLAZEBROOK J:

No she did as well, sorry? I thought she was doing accounts and things, or helping. Have I got that wrong?

MR CARRUTHERS QC:

No, I think – there was a farming partnership so she certainly had a role in the farming partnership in that sense. But, Your Honour, I'll try and find where Her Honour deals with the financial position but I've actually dealt with that in paragraph [59], and if I can just take you –

GLAZEBROOK J:

No, no, I understand that. I was just asking about her findings.

MR CARRUTHERS QC:

Oh, right. Let me deal with that then. Your Honour I'm my learned junior has really confirmed my understanding. The Judge didn't actually deal with the financial position in relation to the ability to sell but we certainly have.

GLAZEBROOK J:

At some stage are you going to deal with causation of loss? Because it really was a question of inflation, wasn't it, and there can't be an assumption necessarily that farm values will go up, they could easily have gone down and then would you be faced with a claim that you shouldn't have settled, you should have left it behind?

MR CARRUTHERS QC:

Well, Your Honour, let's capture the nature of the cause of action. Essentially the cause of action is loss of a chance and what is important is appreciation of the risk and not suggesting that they ought to know, but the concept is that you have a provincial accountant in a farming town. You have a firm of solicitors in a farming town who on any, both of whom on any view would know of a risk of rural property values increasing and I suppose it's a matter of having an appreciation or having a knowledge of what dairy prices were doing at that time, but this was a time when –

GLAZEBROOK J:

It's like having a knowledge of foreign exchange rates, isn't it?

MR CARRUTHERS QC:

Well…

McGRATH J:

I think Mr Schurr gave evidence of this, he said there was also a risk of property prices decreasing, even if they had been increasing at any point in time, if the economy turned.

MR CARRUTHERS QC:

Well that's right but that comes down in the end to the Court's assessment on the value of the chance and that would be an issue that would have to be dealt with in any loss hearing.

McGRATH J:

I think we're dealing with the question of causation at this hearing, aren't we? We're not dealing with quantification if we get to that. I think we are dealing with causation?

MR CARRUTHERS QC:

Well, the causation certainly is the risk that was involved in leaving the matrimonial property issue, and I've referred to it consistently that way because that was the legislation at the time at large and that's a matter that affects Mr Schurr and Deem & Shearer. There's another dimension –

GLAZEBROOK J:

It's actually not pleaded as loss of a chance. I just indicate that it definitely does not seem to be pleaded in that way.

ELIAS CJ:

It doesn't have to be pleaded does it?

WILLIAM YOUNG J:

I think it might be loss of opportunity.

GLAZEBROOK J:

Well maybe not but –

WILLIAM YOUNG J:

Page 102, loss of opportunity.

GLAZEBROOK J:

Well opportunity to settle them, not opportunity to take advantage of rising or falling prices.

MR CARRUTHERS QC:

Well, throughout the pleading it is referred to as a loss of opportunity –

GLAZEBROOK J:

Loss of opportunity to settle though.

MR CARRUTHERS QC:

To settle, yes, and –

GLAZEBROOK J:

It may not matter in terms of the pleading I mean but the difficulty is you have causation of loss in respect of what is an uncertain issue as to whether property prices are going up or down, and one of the difficulties is say, well, does that mean you have to decide you won't settle at the moment just in case they might to up or you don't settle because if they go down then you'll be doing better later on, because in fact, whatever's happening, the other side's being kept out of the money and the other side has the opportunity to invest in another which might go up and down as well.

MR CARRUTHERS QC:

Well certainly the case is put on the basis that by deferring a settlement which Mr Johnston wanted and which was in his interest because of his health, as the carers have given evidence on, that situation put him at risk of the value increasing and really the – there's no evidence that really points to an equivalent risk at the time of property decreasing, despite what Mr Schurr says, as Your Honour, Justice McGrath, has drawn my attention to. So –

GLAZEBROOK J:

Many people would probably have said that before the share market crash of '87 wouldn't they?

MR CARRUTHERS QC:

Not those that sold their shares in the week before the crash, Your Honour, because they were the people that appreciated there was a risk, and I mean I'm not being flippant about that because there was a significant class that did exactly that. But, Your Honour, I expect that you'd be right. The event showed that the majority in the week prior probably thought the risk of the market crashing was negligible.

GLAZEBROOK J:

I was looking at a slightly longer term than a week.

MR CARRUTHERS QC:

Yes.

O'REGAN J:

The willingness to settle was during a period of the first three month appointment and then at what point does that change to being a preference on Ms Johnston's part to leave it until after the share-milking agreement had been finalised?

MR CARRUTHERS QC:

Well, let's be very clear. The willingness to settle is on Mr –

O'REGAN J:

The Judge found that was in 1999. That was in 1999. That was at the time of the accident effectively.

MR CARRUTHERS QC:

And for a period after.

O'REGAN J:

She doesn't say that does she?

MR CARRUTHERS QC:

Well, I'll give Your Honour the reference because it's –

O'REGAN J:

She says, "In 1999 had someone pushed the issue, Ms Johnson would have entered into a settlement," that's what she says.

MR CARRUTHERS QC:

You had before, Mr Schurr, you had both the, the first formal written agreement and you have the Carrington, you had the Carrington letter so he had that, that material in front –

O'REGAN J:

Well, I'm just going on what the Judge found. She didn't make any finding that Ms Johnston was ready to settle in 2000/2001/2002, did she?

MR CARRUTHERS QC:

Just let me have a moment, Your Honour, because that issue is actually dealt with in the material that is in the application. Your Honour, the first time it's formally on record is Mr Schurr's application in August 2000. It's in volume 4 beginning at 892 and it's at the bottom of 893 in paragraph 9 and that results from a letter from Deem & Shearer to Mr Carrington, which is in volume 3 at page 550 and the top of page 551, where Deem & Shearer say, "As the PPPR orders are again up for review I spoke again to Christine. I understand that her current view is that she sees merit in the matrimonial property issues being deferred until nearer the time the current sharemilking agreement is due to expire 31 May 2002." That's where the …

O'REGAN J:

So you're saying the opportunity that was missed was between the date of the accused and some time just before July 2000, is that –

MR CARRUTHERS QC:

Well, no, Your Honour, my submission would be that that opportunity continued to be, to be missed. This is, this is Christine agreeing to deferring the matrimonial settlement, but it's, there's no evidence that she ever refused or would have refused to settle. It –

O'REGAN J:

Well, there's no finding that she wouldn't have either though.

MR CARRUTHERS QC:

No, there's no, there's no finding so –

GLAZEBROOK J:

There are very few, there are very few –

O'REGAN J:

So what are you relying, what finding are you relying on?

MR CARRUTHERS QC:

I'm –

O'REGAN J:

What finding are you – you took us to this High Court [16] and [17] and said, "That proves my case." What I'm saying to you is it proves that she would have settled in 1999 but that's not your case. Your case is she would have settled later.

MR CARRUTHERS QC:

Well, in fairness to me, Your Honour, the Chief Justice asked me what the High Court findings were concerning, concerning that issue and that's what I took her to and what I'm submitting to you is that there is, there is no evidence that Christine refused to settle or would have refused to settle. It was simply put on the basis that that was her position that she was agreeable to deferring that issue –

O'REGAN J:

Well, what did she say in evidence?

ELIAS CJ:

Can you pause because it bothers me that in this case there are so few findings of fact despite the fact that there was evidence. You are taking us to parts of the evidence and if we had to make a finding, we will have to go through the whole evidence so Justice O'Regan is quite right to ask you to take us to the evidence, but I'm wondering whether that is an appropriate course for this Court to be asked to take and that if we were of the view that the Judge had not made findings of fact on the evidence because of the view that the matter had not been set up properly and we disagreed with that whether it would be available to us to make primary findings of fact which haven't it seems to me been made.

MR CARRUTHERS QC:

Well …

ELIAS CJ:

We could do it but if we're going to do it Justice O'Regan is right, you've got to take us through all the evidence.

MR CARRUTHERS QC:

Yes. Well, yes, I accept that and in the way that I have put the case, in the way in which I put the case orally is to take the, is to point the Court to where I've done the analysis and I have done the evidential analysis on those issues that I thought the

case turned so Your Honours have every reference in the written, in the written submissions.

ELIAS CJ:
Do they include –

MR CARRUTHERS QC:
I'm just –

ELIAS CJ:
– references to the evidence –

MR CARRUTHERS QC:
Yes, yes, they do.

ELIAS CJ:
– as opposed to, I'm sorry, as opposed to the exhibits because there's –

MR CARRUTHERS QC:
Yes, yes, they do, they do. There are passages that …

ELIAS CJ:
Well, that's all right. Perhaps you should respond to Justice O'Regan's question.

GLAZEBROOK J:
There is cross-examination of Mr Johnston about whether there was any evidence she was going to be prepared to settle which I just happened to turn up at page 193, so it was clearly an issue in the High Court. And that's just talking about having no evidence that she was prepared to settle post-accident that the only evidence was pre-settlement.

ELIAS CJ:
It might be more important to look at what she said I suppose.

GLAZEBROOK J:
I know I understand that it's just that I happened to open it there.

WILLIAM YOUNG J:

Ms Johnston's evidence at 380 refers to a letter she received from her solicitor. I'm not sure whether that's going to be –

ELIAS CJ:

Is that the one advising her that she shouldn't have agreed?

WILLIAM YOUNG J:

Yes.

MR CARRUTHERS QC:

Sorry, can Your Honour give me that reference?

WILLIAM YOUNG J:

At page 380, it will be at page 467, the exhibit. So he's saying that he didn't think it was a very good deal.

GLAZEBROOK J:

What page are you on sorry?

WILLIAM YOUNG J:

467.

GLAZEBROOK J:

467 of?

ELIAS CJ:

The exhibits, the blue one.

MR CARRUTHERS QC:

I expect, Your Honour, the answer to that is the Judge's finding which deals with the period of 1999 and that letter is dated 15 April 1999. We get to the Carrington letter, which is October 1999, against which Her Honour was making her findings, and part of the evidence that I can take you to is at page 428, which is at the end of volume 3, end of volume 2, I beg your pardon. Oh 423 I'm sorry, page 423, which is Ms Christine Johnston's evidence and at line 8, "If your valuation issues had been resolved will you have signed a matrimonial property agreement if one had been

presented to you in 1999?" "If I had been presented with a satisfactory settlement offer I would have signed it."

O'REGAN J:
It slight begs the issue of what a "satisfactory offer" would have been but you've got the Judge's finding on that.

MR CARRUTHERS QC:
I've got the Judge's finding Your Honour but I need to answer Your Honour on what her position was at a later time. I think the direct answer to Your Honour Justice O'Regan's question is that no I can't point to anything in the oral evidence as to what her position was about resolving matrimonial property issues. I can do this, I took Your Honour to page 550 in volume 3, and I read the passage that found its way into the application in August 2000 but the previous paragraph might give Your Honour some assistance on what her position was. At the bottom of –

GLAZEBROOK J:
Sorry, I'm slightly lost in terms of where you are?

MR CARRUTHERS QC:
I'm sorry, I'm in volume, volume 3, blue volume at 550.

GLAZEBROOK J:
Thank you.

O'REGAN J:
And this is July 2000?

MR CARRUTHERS QC:
Yes, that's right, yes, yes, but the importance of it is the, the last paragraph on 550 where Deem & Shearer are writing to Mr Carrington, "At the time the latest extension to the order was sought, January 2000, I had a brief conversation with Christine who indicated at that time she was happy for Chris Schurr to be appointed for a further six months, but the matrimonial property issues needed to be addressed in the not too distant future," and then there's that paragraph that indicated she was prepared to have those issues deferred nearer the time the sharemilking agreement was entered into.

McGRATH J:

Was due to expire in May 2002?

MR CARRUTHERS QC:

Yes, 2002.

O'REGAN J:

Shouldn't she have just been asked directly what she would have done? It's – I mean if it's an important part of a case that the counter-factual is she would have settled if she'd been asked to in 2000, don't we need something from her saying that?

MR CARRUTHERS QC:

Well, the best I can do, Your Honour, is to point to the Judge's finding and while you limit that to 1999, the Judge was seized of the whole issue over the whole period and it is susceptible of the interpretation that the Judge formed the view from the evidence that she would be prepared to settle.

O'REGAN J:

And I think one of the problems is that on the Judge's findings on duty, the factual findings sort of were almost just an introductory point, weren't they, and so she didn't need to expl – having found there wasn't a duty, she didn't really need to explore this but, as I understand it, the pleaded breach is not a 1999 breach, it's a later breach and the only finding as I read it and, I mean, I hear what you just said, but as I read [16] and [17], they're talking about an opportunity that existed in 1999. They're not, they're agnostic as to whether that opportunity continued into the period that the claim relates to.

MR CARRUTHERS QC:

Well, I suppose that I can put it this way to Your Honour that you can have that as the finding and then I think you can look at the, at the correspondence between the question of settlement and the, and the various applications to the Court and the supporting material that was in those applications, but they simply, they again are probably, are probably neutral as to whether she would have, she would have settled or not. But the issue was never, was never squarely put, was never squarely put to her which is part of the complaint of course.

O'REGAN J:

But the problem is if she, if we don't have evidence that she would have settled, we don't have evidence that the failure to ask her to caused any loss, do we?

GLAZEBROOK J:

And the onus was on your clients as well to prove causation, so I'm not entirely sure why you say it should've been put to her and that was part of a complaint because I would have thought your …

MR CARRUTHERS QC:

No, I'm talking about the –

GLAZEBROOK J:

You mean, the – so it's a loss of opportunity that she may have agreed to settle and that you then, your client would then have not had the inflationary effect of rising prices?

MR CARRUTHERS QC:

Yes, that's the way I simply must put it.

GLAZEBROOK J:

So two loss of chances?

MR CARRUTHERS QC:

Mmm.

ELIAS CJ:

Sorry, so you now want to, you haven't been able to embark on your case against the second respondent. Is that where you're up to?

MR CARRUTHERS QC:

Just give me a moment. There are two short matters I wanted to deal with. Your Honour the Chief Justice asked me whether the settlement would have involved borrowing and can I just draw attention to paragraph [59] of the written argument where it's recorded that Mr Schurr accepted in cross-examination that there was sufficient cash, or equivalent resources, for settlement on the basis of the 1998

agreement without the need for further borrowing, and I've given the reference to the evidence, and then secondly, settlement on the basis of the Carrington letter could also have been achieved by using the cash on hand at the bank and sale of AMP shares without requiring any further borrowing, or by the transfer or cashing in of the life insurance policies.

Now the only other topic I want to just draw attention to, because we've been focusing on the insurance policies, but focusing on the matrimonial property issue as one of the issues that the first respondent raises but there is another leg to the claim and that is the insurance policies issued, which I have dealt with at paragraph [62] through to [72], and that's an issue that doesn't depend in any way on a foreseeability issue. That is simply an issue where Mr Schurr went ahead and did not consult with Mr Johnston as he was bound to do as part of the obligation under the Act. You'll see that part of the complaint in that section of the argument is that having redeemed the insurance policies Mr Schurr then paid out to Ms Christine Johnston a share for the purchase of a section and that is recorded in volume 3 at paragraph [618], where he says," With regard to the monies withdrawn by Christine Johnston for the purchase of her section I would advise you," and this is advice to Mr Carrington, "that I have taken the same amount of money out and invested it separately for Neil so that matters have been kept equal. As far as the writer is concerned as personal property manager for Neil Johnston this withdrawal was agreed by the writer and Christine as a withdrawal of funds and that is why I have withdrawn the same amount for Neil and that the property purchased by Christine with the use of that money has no part of the matrimonial property. I trust this clarifies the position for you," et cetera. So there is a quite separate issue concerning issue.

GLAZEBROOK J:
Are were there any findings in the High Court on that, I just can't remember? I can't see any immediately.

MR CARRUTHERS QC:
I think the position is that that was not dealt with.

GLAZEBROOK J:
That's what I – I couldn't see it.

MR CARRUTHERS QC:

No, no, I agree with Your Honour, I couldn't. That brings me to the case against the second respondent, Deem & Shearer, and I begin by dealing with the incapacity and the duty of care and I – the argument for the appellant concerning the continuing nature of a retainer is at section 74 to 79, so this puts an issue, the Judge is finding that the retainer was brought to an end by the, by the appellant's incapacity and in paragraph [74] I've dealt with blankly showing that the retainer doesn't come to an end and similarly that there's no concept of frustration by the clients incapacity and an analogous position arose in the *Donsland Ltd v Van Hoogstraten* [2002] EWCA Civ 253 case which I dealt with at [77] and then I've just simply drawn attention to the provisions of the conduct and client care rules, so the, the submission is that the contract of retainer continues to exist notwithstanding the incapacity and with it the duty of care. Now, that's, so that's the legal basis for it but the submission is that the retainer, the facts show that the retainer continued and I deal with that at paragraph [80] to [85] and set out the re – set out the facts that show the retainer was not terminated but continued and, and I, at paragraph [84] I've tabulated the occasions on which Deem & Shearer held themselves out as acting as Mr Johnston's solicitors including in relation to matrimonial property, and I've given an example in volume 3 and I've taken you there before at page 550 just as an illustration and I come to deal with some other illustrations as well, but the main, the factual basis for the continuation of the retainer is set out in paragraph [84].

Now, there is a further argument if the retainer has been terminated so that Mr Johnston was no longer a client of Deem & Shearer, the submission is that they still, that they still owned him a duty by the assumption of responsibility even though he was a non-client and that argument is at [86] to [94] of the, of the written submissions and it draws on probably *Dean v Allin* the most significant case where in that case the non-party had only one brief meeting in consultation with the solicitor and the solicitor's actual client, by contrast we have the significant extensive conduct, or contact, that I'm taking you to in the written submissions. So the argument is that because of the conduct of Deem & Shearer, if the retainer was at an end they assumed responsibility by their conduct, and the existence of that duty is dealt with beginning at paragraph [90] and running through to [94].

So I then come to the argument about breach of the duty of care and I've noted that that's [95] through to the end of the submissions at page 100, and the second respondent's case seems to involve three arguments. First, there was no duty of

care. Secondly, there was no breach of duty. Thirdly, there was no foreseeable loss. So the answer to those arguments is as follows, and the first argument is really the duty of care argument which I dealt with at paragraph [73] to [94] of the submissions. The breach of duty I have dealt with at [95] to [100] of the submissions and a relevant example is the claim of reliance on Mr Schurr, and that's at paragraph 1(b) of the second respondent's submissions, where they argue it was reasonable for the firm to rely on the advice of Mr Schurr but settling relationship property carried the significant risk that Mr Johnston could not remain on the farm long-term.

In fact there is actually no evidence that they relied on Mr Schurr at all, no evidence was called for them, and it was not reasonable to rely on them when they knew of what they said was his conflict and they had their own knowledge of the financial position. Can I just draw attention to that in volume 3 at 458. So this is the agreement that was prepared by Deem & Shearer and you'll see at paragraph [9] the agreement actually, on page 459, it sets out the resources so that Deem & Shearer knew precisely what the financial position was in relation to the farm.

Now the question of Mr Johnston's interest in the farm were conveyed by the appellant's carers as to what was in his best interests and Mr Shearer agreed to resolve matrimonial property issues and the detail of that issue is set out in paragraph [9] of the written submissions. The way it's put is this, "Mr Johnston also remained anxious to settle. His evidence is that he did not ever instruct Deem & Shearer or Mr Schurr to put his matrimonial property issues on hold. To the contrary he says, "I told everyone around me of my desire to resolve my outstanding matrimonial issues," that's supported by the evidence of the psychologist and his care assistant. On 13 April 2000 at a meeting of persons involved in Mr Johnston's care, Ms Powell gave her opinion that matrimonial property needed to be resolved so Mr Johnston could move on. Mr Schurr agreed that he would proceed to settle Mr Johnston's matrimonial property issues and I've given the evidence references.

On the question of foreseeable loss and I probably dealt with this in part before, I've dealt with the property values issues that I've said a provincial solicitor dealing with farming clients had to appreciate the risk of increase in the value of rural land and similarly, and this is not an issue that effects Mr Schurr but it certainly affects, clearly, Deem & Shearer, the solicitors cannot have been unaware of the likely changes in the matrimonial property legislation and I've explained the impact of that in the written submissions.

GLAZEBROOK J:

Although do you accept that the shares were the same because that's what's met, that's the, your argument is met by but, in fact, they didn't have any affect those changes.

MR CARRUTHERS QC:

Could I just confer a moment? I thought there was a different analysis. Your Honour, I know that's the submission that's made, but for my part, I didn't think that could actually be discerned on the, on the figures that were, in fact, in issue and I thought that in principle there was certainly a difference between what was possible under the original legislation and the amended legislation.

GLAZEBROOK J:

That's certainly right –

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

– it's just that the answer I think that's met is the settlement percentages were exactly this, the argument that's made –

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

– is a settlement percentages where however exactly the same as they would've been under, it might've been either the 1999 or the Carrington, I can't remember which settlement so that, in fact, there was actually no difference so while theoretically Ms Johnston could perhaps have insisted on something more under the new Act, she didn't.

MR CARRUTHERS QC:

Yes. Let me listen to the way in which the submissions developed and I'll reply on it, but I thought there was an issue –

GLAZEBROOK J:
It was certainly a potential difference –

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
– but I think the, it's met by, well, I there might've been a potential difference but it didn't eventuate but maybe it is better to hear from your friend.

MR CARRUTHERS QC:
Yes, yes, let me hear what's said. Those are my submissions in support of the appeal.

ELIAS CJ:
Yes, thank you, Mr Carruthers. Yes, Mr Fowler?

MR FOWLER QC:
May it please the Court, Madam Registrar, I have an outline of oral submissions. In respect of that outline if the Court pleases, needless to say I'll need to stray at various places to address matters that have been raised.

What I had intended to cover, Your Honours, was, first of all whether any action could lie against a manager appointed under the Protection of Personal and Property Rights Act 1988 for a breach of statutory duty and if an action could lie, whether it could extend to the particular omission that's asserted here, assuming an action could lie has there been a breach? I had not originally intended to address causation but I fear that as a result of some exchanges that have occurred I might need to dip into that topic as well, should the pleading amendment to add to negligence be permitted and finally, the issue of the claim for surrender of the insurance policies.

Starting with that first issue as to whether an action could lie at all of this type, the core of it seems to be at the appellant's written submissions at paragraph [21], and I set out the relevant part there, that there cannot be a cause of action for breach of statutory duty simpliciter where the statute provides a defence against claims unless there is a lack of reasonable care or bad faith, and that is said by the appellant to be wrong in respect of a position taken by the Court of Appeal.

My submission is that that doesn't fairly and accurately capture what the Court of Appeal analysis was and if I can take the Court to paragraph [80], it's page 63 of the case. That's the red volume, Your Honour, volume 1, page 63 at paragraph [80]. What the Court says there is, "Lord Browne-Wilkinson explained that breach of a statutory duty ordinarily confers no private law cause of action, even if the breach was careless but it may do so if it can be shown as a matter of construction of the statute that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of a duty." And then in the next paragraph – well, I'll just finish. And the rest of paragraph 80 sets out the classic indicia, triggering whether or not you've got an available cause of action for breach of statutory duty.

And then over at 81, the Court continues, "Category (A) claims depend neither on breach of any common law right, nor on the defendant's carelessness, category (B) claims involving the careless performance of a statutory duty leads to a cause of action only if the legislation contemplates a cause of action for breach of statutory duty." So back at my notes, my submission is that the Court of Appeal analysis doesn't, in fact, rule out an action for breach of statutory duty simpliciter based on careless performance if the legislation contemplates a cause of action but if all the statute says is that there can be no claim unless there is a lack of reasonable care, an available action is unlikely, and that's obviously pertinent to the exchange earlier on with my learned friend.

ELIAS CJ:

What does that mean?

MR FOWLER QC:

It means that you need something else than just a throwaway line that refers to reasonable care providing a defence. You need the – it comes back to construction of the statute, Your Honour, from which you glean or distil your breach of statutory duty.

ELIAS CJ:

But doesn't the fact that a defence is provided indicate that liability to individuals is contemplated by the statute?

MR FOWLER QC:

Well it might be something of a pointer but my submission is that it's a very faint and mild point and you've got to discern more than that, and I'll come back to this section 49 issue in a moment. It was in fact raised in the exchange earlier in terms of how to write it or write it in the context of an available defence which, in my submission, is significant. But in terms of where it starts and finishes, it starts and finishes with what the statute says and in my submission if all that the statute does is to restrict claims to those based on reasonable care or bad faith then that has to be intended to confine or channel such claims to the common law, or at least point that way. In other words it's a curb and channelling type exercise where the legislature is saying, well there are claims at common law that can be brought, but if they are brought then there is this defence to whatever claims there are, that arises by dint of section 49(1) with the two qualifications in respect of careless, that is lack of reasonable care, and of course lack of bad faith – lack of good faith, or bad faith. So that's – it is a backhanded method of getting to a statutory duty if ever you were to find one. In my submission it takes much more than that to actually distil some sort of statutory duty that is available.

ELIAS CJ:

Sorry, are you saying that section 49 then is a restriction on an external common law claim?

MR FOWLER QC:

On, yes, indeed.

ELIAS CJ:

That's all.

MR FOWLER QC:

Indeed.

ELIAS CJ:

Yes.

MR FOWLER QC:

Well it could be raised, I would imagine, within the statute in terms of perhaps proceedings which might be brought involving the Public Trust, because it isn't

expressed as limited. But certainly it does extend to all sorts of common law proceedings that might be possible and could be brought and are therefore countenanced by the use of those qualifications in section 49.

ELIAS CJ:

Of course it applies to all actions that might be brought or all claims of breach of statutory duty, not simply those which result in loss and seek recovery of the loss.

MR FOWLER QC:

Yes, yes, Your Honour. That would be right. It's possible you could contemplate claims against a manager that went into economic torts, trespass nuisance, issues like that, because of course it is by definition a property manager. Somebody who is dealing with the affected person's property rights. So it's perfectly conceivable that other sorts of proceedings could arise of that ilk. Indeed any form of tort claim. Possibly contract is ruled out by, or at least is affected by subsection (2) I think but certainly 49(1) would be open to be applied in respect of a broad range of claims, and that, in our submission, is what is intended, and that's all that's intended.

The statute, has already been pointed out, the statute provides its own enforcement mechanisms albeit the remedies in alignment of those are different from where –

ELIAS CJ:

Sorry, you could get injunctive relief –

MR FOWLER QC:

Yes.

ELIAS CJ:

– is the sort of point I'm raising with you.

MR FOWLER QC:

Yes, yes, Your Honour, you could.

WILLIAM YOUNG J:

It sort of would be extraordinary if a manager wasn't liable for careless conduct of the affairs of the affected person.

MR FOWLER QC:
Oh, and indeed that's accepted, Your Honour.

WILLIAM YOUNG J:
So it's really quite a semantic issue here, isn't it, whether it's treated as being one of negligence or whether it's treated as arising out of an implicit duty under the statute to take reasonable care in the conduct of the protected person's affairs?

MR FOWLER QC:
Well no, Your Honour, with respect, negligence obviously covers your lack of reasonable care, careless basket, but for breach of statutory duty you're looking for something that actually defines or distils the statutory duties. There are strands of authorities and I'm sure you're aware that some degree of precision is required.

ELIAS CJ:
Why, I don't see why there should be precision if they overlap in the particular case.

GLAZEBROOK J:
There's quite a lot of precision in the Act anyway. You've got to do these things and then if you take it as a negligent breach of statutory duty you've got to do them and take reasonable care.

MR FOWLER QC:
Well there certainly are duties that are spelt out but this particular legislation also spells out how those are accountable and who they're accountable to and what happens.

WILLIAM YOUNG J:
But you can't just be accountable to the Public Trustee?

MR FOWLER QC:
Well it would be possible, for example, for counsel for the affected person to take steps.

WILLIAM YOUNG J:
But why not for the affected person? Are you suggesting that the affected person can't sue?

MR FOWLER QC:

Not under the Act Your Honour but in common law, yes.

WILLIAM YOUNG J:

So you accept that there is a claim for negligence?

MR FOWLER QC:

I accept that there would, if it had been pleaded and brought a claim for negligence could be brought. I'm not suggesting that there isn't a common law claim for negligence, and indeed I would submit the wording of the qualification to section 49 clearly points that way.

GLAZEBROOK J:

If the affected person can have a litigation guardian appointed surely the affected person could claim under the Act for an injunction, a mandatory injunction to do something on the part of the manager?

MR FOWLER QC:

No Your Honour. In my submission what a – neither counsel appointed, nor the affected person, could bring a claim under the Act. They could bring a claim at common law but not under the Act.

GLAZEBROOK J:

What would the claim in common law be if it was saying, "I want you to do something you're required to do under the Act?" I would have thought that if somebody's required to do something under the Act surely the very person whose affected must be able to come along and say, "You have to do this and I want the Court to tell you to do it."

MR FOWLER QC:

Well for injunctive relief or something direct shortfall in respect of a carrying out of obligations under the Act, then what you would expect is for an application to be made to the Court –

GLAZEBROOK J:

By who though –

MR FOWLER QC:

By, well either by –

GLAZEBROOK J:

You're saying it can't be the affected person?

MR FOWLER QC:

By the, by counsel appointed – well, of course the ambit of people who can apply, Your Honour, is quite broad. The provision is –

WILLIAM YOUNG J:

It must include the affected person, mustn't it?

MR FOWLER QC:

Yes, yes, there's quite a, there's a range of people that can bring, yes, a range of people that can bring applications under the Act. There's no particular restraint on that and so one would –

GLAZEBROOK J:

So the affected person if he wasn't being consulted, he or she wasn't being consulted for instance, as required under the Act, could bring a claim to require him to be consulted, couldn't he?

MR FOWLER QC:

Yes –

GLAZEBROOK J:

He might have to do it via a litigation guardian.

O'REGAN J:

He'd just apply to the Family Court, wouldn't he, for the order to be enforced?

GLAZEBROOK J:

Yes but the submission was that there wasn't any claim for a breach of a statutory duty. I was just challenging that.

MR FOWLER QC:

Well there are steps that can be taken to enforce the statutory duties Your Honour under the Act and applications can be brought because the exchange, as I understood it, was referring to the possibility of an injunctive relief to enforce various statutory obligations and the like, and my response to that is, yes, those can be brought under the Act and by a variety of persons, it's not confined to the affected person or the manager.

WILLIAM YOUNG J:

Would you accept, and I suspect you might be reluctant to, that the case at trial was conducted on the basis that the essence of the claim was the performance without reasonable care of statutory functions?

MR FOWLER QC:

Correct Your Honour.

WILLIAM YOUNG J:

And that's in substance the same as a claim in negligence, isn't it?

MR FOWLER QC:

Well I intend to return to that at some point but certainly it's not accepted that in terms of the way this particular trial was conducted that that's where the focus was, and certainly there would be evidential opportunities that were bypassed that would affect that. But I'll return to that.

Just on the question of what the statute actually does add, or where one works for distillation of a possible actionable breach of statutory duty, my learned friend referred to sections 36, 43 and 31(8) and if I can take the Court to those using the appellant's bundle of authorities at tab 1. In my submission sections 43 and 31(8) don't really advance matters particularly. Section 43 creates the manager's duty to consult. That's quite a specific duty. It's not a broad, it doesn't point to a broad duty of care. Section 31(8) refers to the Court –

GLAZEBROOK J:

Yes, although if you accept that there is liability in negligence, then you must accept there's a broad duty of care, and that must be created by the statute. Whether it's,

whether it is properly characterised as a negligent breach of statutory duty, however you look at that it still must be created by the statute.

MR FOWLER QC:

I accept that the *Carter* type analysis applies to identifying a duty of care, Your Honour, yes, but what I'm answering here is the suggestion that there is a specific actionable breach of statutory duty for carelessness, for negligence that you can distil from the statue, three provisions we've pointed to and, as I say, 43 doesn't seem to do that, 31(8) doesn't seem to do that so the nearest that you go to is section 36 which is the broad functions and duties of the manager and that, if you look at that, what that's, the duty that's created by subsection (1) is to use the property in the promotion and protection of the best interests of the person for whom the manager is acting, it's quite specific and my submission is that doesn't go nearly far enough to be able to be the stepping stone to identify this suggested actionable duty, breach of duty that can arise in respect of this Act for just broad carelessness. And perhaps the next part of that in terms of analysis is looking at section 49 itself and this was touched on in earlier exchanges.

GLAZEBROOK J:

Isn't this sort of analysis usually done to say that you can't out of the statute have an, have an action in negligence because it wasn't intended that it be a personal action, the sort of *Prince and Gardner* analysis rather than to say that there isn't a statutory duty to perform these with reasonable care when there clearly is and you accept that.

MR FOWLER QC:

No, Your Honour, the –

GLAZEBROOK J:

Sorry, I probably put that wrong –

MR FOWLER QC:

Yes.

GLAZEBROOK J:

– but there is a duty to perform these with reasonable care because you accept that there's an action in common law negligence.

MR FOWLER QC:

At common law, at common law there is in respect of the statute, of course, we have those fundamental principles about what you need to identify and to trigger an actionable breach and that's –

ELIAS CJ:

But which are those are an impediment here? You mean things like the extent of the class that the statute is concerned about in matters such as that?

MR FOWLER QC:

Yes and you also need some wording other than something like, such as appears in section 49 –

ELIAS CJ:

But you can't be arguing surely that you have to have a liability provision in the Act in order to have a brief of statutory duty?

MR FOWLER QC:

No, Your Honour, I'm not arguing that. What I am arguing is that you need sufficient wording that clearly indicates in terms of the classic tests, the breach of statutory duty that it was intended that there would be a separate civil liability actionable as a breach of statutory duty. That's what I'm arguing.

WILLIAM YOUNG J:

But it's the sort of slightly, it's a slightly old fashioned claim now, but the cases are a lot of the cases in which it arose for personal injury cases or I suppose sometimes property damage cases, but the enquiries that were made in those cases were so similar as to be almost indistinguishable from the, from a negligence duty enquiry, aren't they?

MR FOWLER QC:

That might be so, Your Honour, but I would suggest that recent trends of authority are going the other way. Recent trends of authority are suggesting you need, you really do need to try to identify something fairly specific or more detailed that triggers the availability of this sort of action.

ELIAS CJ:

Well, you said words a few moments ago, do you say that there has to be something explicit in the statute?

MR FOWLER QC:
Certainly more explicit, Your Honour, than what we've got here.

ELIAS CJ:
Well, like what?

MR FOWLER QC:
Well, if, for example, you had –

ELIAS CJ:
What would be enough?

MR FOWLER QC:
– you might have the reference to reasonable care or whatever and then tied or cross-referenced to particular duties or to particular obligations, for example, then there's plenty of legislation that has, provides that sort of, that sort of provision. There's even a reference I think in *X (Minors)*. There's a reference in *X (Minors)*, tab 1, page 748 where the Lord Browne-Wilkinson says, "All the duties imported by schedule 2 to the Act of 1989 are to take reasonable steps to do certain things. The duty to make enquiries under section 47 is limited to such enquiries as they consider necessary. Thus all the statutory provisions relied on in the *Bedfordshire* case are as one would expect made dependent on the subjective judgment of the local authority. To treat such duties as more than public law duties is impossible." That's an example of what I mean in terms of the sort of precision or specificity that is lacking here.

GLAZEBROOK J:
But that's saying you can't have an action even outside of the statute because there's not enough specificity in the statute itself. Here, you're accepting that there is an action in negligence for breach of those dut – of the not taking reasonable care in the performance of those duties, so isn't it just semantics to say how you characterise it apart from the issue as to whether there is a difference between what you might have to prove.

MR FOWLER QC:

No, Your Honour, because otherwise what you would run into, smack into is the very thing that Lord Browne-Wilkinson was identifying and that is if you just have a bland statute that simply refers to negligence and rolled up in other references to or creation of other statutory duties that won't do it.

ELIAS CJ:

But it can't – it's not just whether there's bland references. One has to look at the whole statute and what it's trying to achieve and if you're appointing a manager to look after the property of somebody who's incapacitated, surely the legislature expects the manager to take reasonable care.

MR FOWLER QC:

Precisely, Your Honour and that would be subject to common law, at common law –

ELIAS CJ:

I see so –

MR FOWLER QC:

– so the backdrop –

ELIAS CJ:

– it's just the pleading point really that you're making here, the characterisation.

MR FOWLER QC:

Well – yes, well, certainly had, I'll put it another way, Your Honour, had it been properly pleaded from day 1 as a negligence case and had it been confronted as a negligence case in the High Court then that would be entirely different, but what we're, what it's been run as or has been run as up until now, amendment aside, is, as an actionable breach of statutory duty and it is the identification of that availability that the first respondent challenges.

ELIAS CJ:

All right, we'll we better take the adjournment, we'll resume at 2.15, thank you.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.16 PM

ELIAS CJ:
Yes, thank you, Mr Fowler.

MR FOWLER QC:
If the Court pleases, I want to see if I can wrap up this piece around section 49 and its function in terms of whether or not an action lies at all. And in that regard, can I draw the attention of the Court to the passage from a case already referred to? That's the *Prince and Gardner* decision appearing at tab 4 and my learned friend referred you to page 290, where a not dissimilar exemption with qualifications, the same qualifications, that's bad faith and reasonable care.

There's a component of section 41, subsection 8 of the, I think it's the adoption legislation that's under scrutiny there. And then below that, starting at line 19, the Court continues, "It was introduced by the 1982 amendment. The reason is not evident from a reading of the New Zealand parliamentary debates. I do not think it lends weight to the argument in favour of imposition of the duty under section 41 subsection 7 a social worker can, or can be required by a Judge, to report in respect of a complaint under section 27. The social worker can for this purpose obtain information from a principal or head teacher. The subsection does not purport to create any criminal liability, nor does it purport to create civil liability. It simply gives protection unless there has been bad faith or lack of reasonable care."

Now I acknowledge immediately that *Prince and Gardner* certainly at that appellate level is exploring that issue in terms of common law negligence. But the width of the dicta is notable, and the other interesting thing about *Prince and Gardner* is if you go back to page 265 and look at the history of this proceeding at line 23 a third cause of action for breach of statutory duty on the part of the social worker for failing to prepare certain adoption reports to the Magistrate's Court carefully was struck out by the High Court and is not pursued. I can take it no further than that but I suggest that the dicta is interesting in the context of what happened there and the observations of a Court of Appeal with regard to the effect of that sort of exemption.

The last matter that I wish to refer to on section 49 is really more of a response to a position that's taken by the appellant on this. I think at paragraph 36 of the written submissions the point is made that, well, section 49 is only explicable if there is an actionable breach of statutory duty available. In my submission if you refer to section

43 subsection 2 which you can find at tab 1 of the appellant's bundle of authorities, and we've looked at it briefly this morning, volume 1, Your Honour, tab 1. It's the Act, the PPPR Act, section 43, and it's the duty to consult on the part of the manager.

If you look at subsection 2, it mirrors the same sort of exemption wording with the two qualifications and my submission on that is that it would be very curious to have a statutory duty to follow or not follow advice from other persons consulted as some sort of actionable breach. Section 43(1) is permissive and in my submission that points, yet again, to what is intended by the legislature here is that there is no separate actionable statutory duty but that Parliament always intended the availability of a common law claim for negligence would be there. Now that's all I'd intended to address the Court on in respect of that section 49 and that first broad issue unless the Court has some particular issues that it wishes to pursue.

ELIAS CJ:
Sorry, that's just – I'm a bit slow about this but that's dealing with if having taken advice the manager does or doesn't do something following that advice, then he's not liable –

MR FOWLER QC:
Unless.

ELIAS CJ:
Yes, unless. But suppose he doesn't take advice. That's not dealing with that is it?

MR FOWLER QC:
No, no, and if that falls outside the catchment of section –

ELIAS CJ:
But there's still a statutory duty to consult.

MR FOWLER QC:
Yes, there's a statutory duty to consult, Your Honour, without a doubt but what I'm submitting is that there can't be a cause of action available for breach of statutory duty to consult or not consult.

ELIAS CJ:

I'm not sure why you say that based on the text of 43(2) which is dealing with a different matter, and that is where you actually do act on advice after consulting in accordance with your duty.

MR FOWLER QC:

Yes. What I'm saying, Your Honour, is that the question of what Your Honour raised would be something that would fall outside section 43 and, therefore, be caught by the common law. That's the acknowledgement I make, but within the ambit of section 43, within the ambit of section 43 how could you have statutory –

ELIAS CJ:

Leaving aside - in this case it may be that because of section 7, you could say that there's no right of – there's no action for breach of statutory duty but if there hadn't been a section 7, so that your way of enforcing the statutory duty was simply by going to the general Courts, what is there in 43(2) that is a pointer against that?

MR FOWLER QC:

Well, I'm saying, Your Honour, that it's a point in favour of it. It's actually pointing the would be plaintiff towards a common law remedy and nothing else. That's the important bit, and nothing else.

ELIAS CJ:

Well I still don't quite understand. If you are simply trying to enforce the statutory duty to consult, it's not a question of whether you've been in breach of a duty of care or something like that. Anyway, forget it. I'm beginning to think this is all dancing on pins really, but you might…

MR FOWLER QC:

Well I'll move to the next topic, Your Honour. If you are roughly following the notes I'm picking it up at page 3, point 11 there, paragraph 11.

ELIAS CJ:

Yes.

MR FOWLER QC:

The submission is the statute does not contemplate the manager as being in a unique or singular position trigger a review or recommendation by reason of

section 87(2). What I'm addressing here is whether, assuming that the Court finds that an action does lie, does it lie on these particular circumstances, and my first point there is section 87(2) doesn't put the manager some sort of sole of singular position. Not that that's a complete answer, I'm not suggesting that, but, as I say, it's a pointer.

The next point I make is that nor does the statute contemplate a duty on the manager, or anyone for that matter, to identify all powers that might be necessary for a PPPR order. Once orders are in existence, any statutory duty of inquiry and recommendation must derive from the manager's powers. But the manager, certainly at that point, has only the powers that the Family Court has already chosen to confer. So the submission is that in those circumstances, and particularly given the principles of minimal interference – I've set out the statutory references there, sections 8, 11(3), 28 and 36 – any duty to initiate augmentation, because that's what it is, initiating augmentation, must surely lie with counsel for the affected person, not the manager, that's on the scheme of the Act as it works.

ELIAS CJ:

Counsel for the affected person, you might need to take us to those provisions. My impression was that counsel for the affected person is appointed to assist in the making of the order and putting the affairs of the person under management.

MR FOWLER QC:

Well, that's a continuing role, Your Honour, because it regurgitates each time that –

ELIAS CJ:

Yes, I understand that, but isn't it to communicate the views of the affected person on having their affairs put under management?

MR FOWLER QC:

I anticipate, Your Honour, that it's a broader function than just simply communicating views.

ELIAS CJ:

Well, just show us what you rely on in that, what provision in the Act. Which is the counsel –

MR FOWLER QC:

I may need to –

ELIAS CJ:

Which is the counsel provision, appointment of counsel?

MR FOWLER QC:

I think it's 65, Your Honour. Well, I would immediately point to subsection (2)(b), Your Honour.

ELIAS CJ:

But it's all about the capacity question and the need for someone to administer, it's not about acting generally for them.

MR FOWLER QC:

Well, in my submission the words, "Evaluate the solutions for the problem for which an order is sought," would –

ELIAS CJ:

But –

MR FOWLER QC:

– take us into the territory we're talking about here.

ELIAS CJ:

But it's not about settling matrimonial property or things like that, it's about the decision that the Court has to take as to whether to appoint a manager, isn't it?

MR FOWLER QC:

Certainly, Your Honour, but remembering that what we have here in the case of the first respondent was an order that quite explicitly accepted the –

WILLIAM YOUNG J:

Could you just pause there a minute.

MR FOWLER QC:

Mr Schurr's position, similarly, had not explicit reference to the Matrimonial Property Act, yet it's being urged on this Court that he had some sort of obligation to augment or draw the position to the Court's attention. In the case of counsel appointed to represent the affected person there is this quite explicit reference in 2(B) to evaluating solutions for the problem for which an order is sought.

ELIAS CJ:

Well I must say I think you're reading much too much into this and if you look at the purpose for which, for example, there's cross-examination, it seems to be directed at the whole question of capacity and the appropriateness of the appointment of a manager. I'm just questioning your submission in your paragraph 14.

MR FOWLER QC:

Well I would emphasise again Your Honour that there's also the regurgitation aspect because this is secular in that, sorry circular, in that each time these orders are reviewed or renewed, the involvement of counsel for the affected person is very much in evidence as one can see in the documents in the bundle, and is required to report to the Court.

ELIAS CJ:

Well is there any, are there any texts dealing with this which deal with what is thought to be the responsibility of counsel appointed?

GLAZEBROOK J:

It just seems fairly extensive to say that counsel appointed should actually be inquiring into the minutiae of the actual property arrangements as against the capacity and then initiating, that's not to say I suggest that your client should be doing so either.

MR FOWLER QC:

No.

GLAZEBROOK J:

But it doesn't seem particularly fair when in fact the counsel appointed would have no ability of talking to Ms Johnston for instance to assess whether there was anything

wrong with what's been said in terms of her wanting to, or being content to the leave the matter.

MR FOWLER QC:

No I accept that. In terms of Your Honour the Chief Justice's point, no I'm not aware of any texts on this topic.

McGRATH J:

The trouble it seems to me Mr Fowler is that the provision seems to envisage a role that's responsible to particular applications, and which by implication then ends, when that application is disposed of, rather than one that is continuing and with any responsibility to take initiatives in between applications.

MR FOWLER QC:

That may be so Your Honour, but it is interesting that 2(A) and 2(B) refer to the person's wishes taken, and we have evidence apparently from the appellant that he was consistent in terms of wishing to see issues if matrimonial property disposed of.

ELIAS CJ:

But this is similar to counsel for children perhaps, in relaying their wishes, but this is in the context of a particular application which is simply to determine the management question. Why for example would the, is it the legislation or is it the schedule, why would it identify dealing with matrimonial property as one of the range of responsibilities of the manager if you're saying it's also the responsibility of counsel?

MR FOWLER QC:

Well there's no reason Your Honour why they can't overlap. In my submission it would be a surprising result, particularly where we're talking about here, augmentation or a lacuna or whatever, and orders that were sought, if counsel who's been appointed for the affected person who has an explicit obligation to seek out his views, and so on, is bound to have such an exiguous sort of brief and role, that the issue that's been pressed on the first respondent here in a culpable sense entirely escapes counsel appointed to assist.

GLAZEBROOK J:

Well we have no idea whether he actually did say in counsel to assist and you couldn't possibly have an inquiry.

MR FOWLER QC:

No Your Honour, and I'm aware of that, but I'm pointing out though in terms of issues of duty, in terms of the particular breach that's asserted here, my submission is one would've thought that it would be counsel appointed for the affected person who in the first instance would've been answerable to this sort of duty, an obligation to do something about augmentation.

GLAZEBROOK J:

Well I'm not sure because if he says, I want it settled, and I'm perfectly capable of settling it myself, then you wouldn't be wanting augmentation because augmentation takes away the decision making power of the affected person and what counsel assisting is supposed to do is to make sure that there is as minimal as possible. Now of course whether it was realistic to say in these circumstances that he would have been able to settle is, of course, another matter.

MR FOWLER QC:

That's perfectly true Your Honour and exactly the same restriction is placed on the manager. The minimal interference principle.

GLAZEBROOK J:

I understand that. I'm not saying it follows that it – it's just I'm really slightly concerned about expanding the role of counsel assisting to be doing things which mightn't be in the least bit – and they're brought up to them.

MR FOWLER QC:

In my submission it's not an expansion as such if, if the purpose of the appointment is to scrutinise the competence issue and to assist the Court in terms of the making of the orders, the very ambit of the orders –

GLAZEBROOK J:

But the application excluded that.

MR FOWLER QC:

Yes, and –

GLAZEBROOK J:

But you just wonder why then would there be a duty to try and expand it on the part of counsel assisting if, in fact, the person in question doesn't want it?

MR FOWLER QC:

If the, is Your Honour referring to the appellant?

GLAZEBROOK J:

So, it's supposed to be the application, and the application excluded matrimonial property, it seems odd that there'd be a duty on the counsel assisting to say that the Court should expand – there might be a duty on the Judge to enquire.

MR FOWLER QC:

My point, Your Honour, is that there is a duty on somebody, other than the first respondent, to address the augmentation. Who do you look to? Your Honours mentioned possibly the Family Court Judge and my submission simply is that in the first instance one might have thought that the person appointed to represent the affected person who is presumably scrutinising the ambit of the orders and presumably the reasons for exclusion one would have thought might be the person on whom the duty reposes.

I intend to move now, if the Court pleases, to the issue of breach, and I'm down at paragraph [15] of the notes. The claimed breach can only be some sort of failure to augment, as I've said, ie to address the shortfall or gap deliberately excluded from the first respondent's management order by reason of his conflict. My submission on this is that there are two major problems with that assertion, as to whether there's been a breach, and the first is that in my submission there's a curious attention inherent in the appellant's case in that in the written submissions, and I've given the references there at paragraphs [80] and [81], addressing the claim against the second respondent, Deem & Shearer, is an acknowledgement that the appellant continued to have legal capacity in matters not covered by the orders. That's both in law and that's referred to in [80], subparagraph (a), and in section 4. Section 4, we probably don't need to go to it. but it's the section that says where things aren't covered by the order then competence is refulgent so to speak. That concept. And also in fact, and that's covered in paragraph [81]. In the context of the claim against

–

ELIAS CJ:
Sorry, the matter excluded was the ability to enter into an agreement as to matrimonial property?

MR FOWLER QC:
Or to seek orders I think Your Honour.

ELIAS CJ:
Or to seek orders?

MR FOWLER QC:
Or to seek orders.

ELIAS CJ:
Thank you, yes.

MR FOWLER QC:
In the context of the claim against Deem & Shearer the appellant asserts that he had ability to give instructions or directions and if that is so there was no incapacity gap for the first respondent to step into or address. So in short what the argument here is, is that the appellant can't have it both ways, that is competent for the purposes of pursuing Deem & Shearer, and also expect Mr Shearer to fill an incompetence gap. Now I don't know if there's an election point there that needs to be addressed or what but certainly it does appear to be an inherent tension in the appellant's position.

Then the second matter, which has already been touched on in exchanges between Bench and Bar this morning, was this issue of the first respondent's conflict. I probably don't need to walk the Court through 18, that's the obvious point that at the moment that Mr Shearer was compromised by reason of having double loyalties advancing the position on one side of the fence was disadvantaging the other side of the fence and so on. What was raised, as I understood from my learned friend Mr Carruthers, is that somehow Mr Shearer had waived the conflict position in some particular way. I think in terms of responding to that I need to take the Court to a couple of case on appeal references and they will be in volume 4, which is green. The first one that I draw the Court's attention to is at 859 and first of all that is a memorandum of counsel that's been signed by, I think, Ms Harrop, who at that stage

was solicitor for the subject person. She didn't continue in that role but she was, was signing as solicitor for subject person at that point in time, and this is, of course, the first application that is made.

ELIAS CJ:
Sorry, what page?

MR FOWLER QC:
Page 859.

WILLIAM YOUNG J:
It's Mr Shearer isn't it?

MR FOWLER QC:
I'm sorry it's Mr Shearer - Mr Schurr, is it? Shearer, Mr Shearer. It's from Deem & Shearer. If you look at page 859, paragraph 7, very, very clearly it's signalled that the conflict is signalled there. If I could give the Court a moment to digest that. Then going over to the document that starts at page 861, which is the memorandum filed on behalf of Mr Johnston, it's signed off at 866. This time I think it is Ms Harrop. That's August 1999. If you go back to page 862, look at paragraph 8, there's a clear reference to the powers relating to matrimonial property issues being set to one side. Then progressing forward, the next one is interesting –

GLAZEBROOK J:
Was Ms Harrop from Deem & Shearer?

MR FOWLER QC:
Yes.

GLAZEBROOK J:
So that's just –

MR FOWLER QC:
Yes. The next thing is interesting, it starts at 872, and just jumping to 875 you can see that this has now been signed off by counsel appointed, Mr Gifford, it's no longer being run out of Deem & Shearer's office in terms of particular representation of the affected person. So that's from Mr Gifford, and if you look at 874, Mr Shearer has

alerted the Family Court to the possibility that – sorry, "Mr Shearer has alerted the Family Court to the possibility that Mr C F Schurr may have a conflict of interest in his capacity as property manager. If that appointment were made on a permanent basis. I support Mr Schurr's appointment in a temporary capacity to alleviate problems relating to the administration of the farm and partnership assets."

Then if you go forward to –

ELIAS CJ:
Sorry, what are you – are you going to make any submission?

MR FOWLER QC:
Yes, yes, I am.

ELIAS CJ:
Later, yes, that's fine.

MR FOWLER QC:
Yes. If you go forward to 882, the joint counsel, and that's been signed I think both by Ms Harrop and by also by Mr Gifford and at page 883, and this is dated the end of 1999, the memorandum is dated the 10th of December 1999, there is a clear reference there to the exclusion and the reason why.

GLAZEBROOK J:
Sorry, whereabouts?

MR FOWLER QC:
That's paragraph [11], Your Honour, on page 883. Then finally at page 893, this is an application dated the 3rd of August 2000, you can see that from 894, and this is signed by the first respondent himself. I draw the Court's attention to paragraphs [8] and [9]. So in my submission the point you reach there, that is by August 2000, is that the conflict has been very clearly recognised and my submission is that certainly counsel for the first respondent is unaware of any post-order conduct, or pre-order conduct for that matter, which is effectively partisan or waives that issue of conflict such that Mr Schurr is placed on one side of the fence or the other, and indeed I'd go the further step and suggest that once you're conflicted in a situation like that, even if you had taken some sort of step that was partisan or tantamount to a waiver, that

wouldn't necessarily cleanse you. In fact it probably wouldn't cleanse you at all. You'd remain in conflict.

The interesting thing about 893, since the criticism here is that Mr Shearer did nothing about raising the issue of augmentation at addressing that, the question I raise is doesn't paragraphs [8] and [9] do that? The attention of the Court is drawn to the gap. He's actually raised the issue. Not only that it's clearly a position that counsel for the subject person is aware of the memorandum's address to him as well self-evidently.

So in my submission the most that can flow from such a conflict position is a duty for the conflicted individual to encourage or arrange for independent advice, but the appellant had independent advice. I'm not even necessarily sure, Your Honour, that it would necessarily follow that there was an obligation to so refer. Even that might have been seen as disadvantageous to Ms Johnston.

GLAZEBROOK J:
Who was the independent, who do you say the independent advice came from, sorry, was that Deem & Shearer –

MR FOWLER QC:
Yes.

GLAZEBROOK J:
– and counsel appointed?

MR FOWLER QC:
Yes. Now I hadn't intended, if the Court pleases, to originally address causation but as a result of some of the exchanges this morning there are a couple of provisions where here also I think I need to also draw the Court's attention to a couple of matters. First of all this timing issue that had been raised earlier is interesting. In my submission it's a somewhat narrower window than might have been otherwise assumed. If I could take the Court in the first instance to volume 1, that's the red volume, page 60 and in fact the paragraph I want to refer to in terms of the judgment of the Court of appeal starts at page 59. It's paragraph 69 at the bottom of that page. "In argument Mr Carruthers confirms that Mr Johnston does not allege a breach of duty before Mr Schurr's appointment. Further, he accepts that it was reasonable to

defer settling relationship property during Mr Schurr's initial three-month appointment." In other words, the alleged breach of duty begins with the application that led to Mr Schurr's reappointment on 8 February 2000, so in other words we have a kick-off point of 8 February 2000.

Now if I now take the Court to page 543, and this is the blue volume this time, this is volume 3. And of course I interpolate in here that none of this is the subject of evidential findings so we, this particular aspect, and that is when did Ms Johnston come to a point where she said, "Well, I'm no longer interested in the old deal," we simply don't have findings on that. But in terms of evidence, at page 543, this is a note by Ms Harrop, and perhaps if I give the – it's reasonably legible – I'll give the Court an opportunity to look at that. And obviously the particular part that is significant, "Doesn't want to do anything about matrimonial property until sharemilking agreement expires, and that's dated the 14th of June 2000. So that signals a change of position by Ms Johnston. At worst you've got a window that starts in February and finishes in June. Again, it's probably nothing more than an illustration of the difficulties we have here in terms of trying to backfill eventual or factual matters without findings by the High Court.

The second aspect in terms of causation that I wanted to draw the Court's attention to is this issue of occupation of the farm and its interface with the availability of cash to settle with Ms Johnston or otherwise. There was evidence on that – there weren't findings but there was evidence on that – and if I can draw the Court's attention to this time the yellow volume, which is volume 2, pages 301 to 302, and this is an extract of Mr Schurr's evidence. It's quite a long passage so I'm not going to read it all out, but the passage of interest starts around about line 13 on page 301 and goes through to 302, about halfway down, where Mr Schurr winds up with the observation, "You would go broke, in my opinion, if you carried on on that basis," and that's a passage about what would have happened with regard to the cash flow issue and the interface of that with the cashing up of the insurance policies.

And just, if I can make the point that this is not, the exercise that he's done there is not something that he, it's not reference to a document that he's done at the time, he has worked up an exercise over the weekend prior to giving his evidence, no doubt in response to evidence that he's seen. And, finally, whilst we've got that open, because it moves nicely to the last topic under "causation" that I wanted to raise, and that's to respond to, and that's this question of price rises. At page 304 starting at

line 5 there is evidence of Mr Schurr on that issue of addressing the possibility of increasing prices, increasing farm prices, which is expressed in what would appear, with respect, to be fairly firm terms. So there was evidence on that, and you'll see from that passage at 304, line 5 down to line 20, he reaches the view, within the ambit of his expertise, they would be quite wrong to try and take into account the possibility of farm prices rising in any exercise like that.

I intend to move next to the issue of the pleading amendment, perhaps starting with the pleading itself. If I can go to the red volume, page 209, just looking at exactly the terms of the pleading. And obviously I'm keeping very much front of mind the suggestion that this is a pleading that could be read both ways, ambidextrous so to speak. So, looking at paragraph 18, I draw the Court's attention to the opening words, "Pursuant to the provisions of the Act, the first defendant was," and then it is, then there's a whole series of statutory references. And then going over to page 111, paragraph 22, the first defendant as the plaintiff's property manager, "Breached the duties which he owed under the Act," the particulars of which are set out in 23, and if you go to 23 those are referable to, one is the failure to appoint a co-manager, the second is the same thing but to take proceedings, and the third surrendering the insurance policies. Now, in my submission, whilst you can look at that pleading and run a negligence lens across and say, "Oh, well, it could also dance as a negligence pleading," in my submission the reality is, when you look at it and you look at it in those terms, it's pointing firmly – forgetting about what happened in Court – it's pointing firmly towards breach of statutory duty. However, then one needs to consider what actually happened, and in my submission you can see that quite clearly in the same volume, if you go back to page 18 and look at paragraph 36 – and before I start on this piece my submission is, in terms of what actually happened at the coal face, is that this was run evidentially and in every other, and argued as a breach of statutory duty, not as a negligence claim. That was the claim that the first respondent faced, a claim for breach of –

WILLIAM YOUNG J:

It's sort of funny as a breach of statutory duty claim, because normally statutory duty claims would be advanced on the basis of a duty to not do something or a duty to bring a particular result about, for instance to fence machinery. Now, this is not a duty to do anything in particular, say for certain reporting formalities, it's rather a function that's imposed by the legislation. And the duty really is to perform the function which was performed. Now this point I'm making cuts both ways. It does

seem to me that it's a very unusual statutory claim, but it's a very ordinary negligence claim.

MR FOWLER QC:
I walk with you, Your Honour, on all of that, save for the wee piece about function. My submission is that there is no function to augment that you can find in the PPPR Act.

WILLIAM YOUNG J:
The function is to manage the property, having regard to the best interests of the persons and the independence of the protected person?

MR FOWLER QC:
Yes.

WILLIAM YOUNG J:
So that's the function. It's really a function that's imposed rather than a duty that's imposed.

MR FOWLER QC:
And to draw a common law duty you've got to do it against a backdrop of that function, you don't find the duty in the statute.

WILLIAM YOUNG J:
No.

MR FOWLER QC:
Returning to this other issue in terms of what happened at the coalface, paragraph 36, absolutely evidence that this was argued and proceeded as I said as a breach of statutory duty claim, not as a negligence claim and you can see what Her Honour says there. And then were one seeking reinforcement of that, page 31, paragraph 69 –

ELIAS CJ:
This is all sheeted home though to the second amended statement of claim.

MR FOWLER QC:

Yes.

ELIAS CJ:

There's nothing about how the case was run or anything like that further. It really does read like a strikeout judgment, there's almost no reference to all these days of evidence.

MR FOWLER QC:

No Your Honour that's true that the judgment focuses on the availability or not of the breached statutory duty, but I still maintain the submission that this was presented and faced as a breach of statutory duty claim and indeed you can see at 69 again this is a separate issue and the second amended statement of claim does not raise it, so whatever the views of this Court as to the ambidexterity of the amended statement of claim, if you then face the issue of prejudice, the way the claim actually was run at coalface level, there was –

ELIAS CJ:

Well you have to take us into that, aren't you? You're going to, I'm just making the point that this paragraph is wholly, in wholly terms on the way the claim was expressed, and the fact that it makes no reference to common law negligence. Well it doesn't have to make reference in so many words if the elements are there.

MR FOWLER QC:

No Your Honour, but certainly if it is argued that way and the evidence is presented that way –

ELIAS CJ:

Well that's the "if" isn't it?

MR FOWLER QC:

Yes.

ELIAS CJ:

And you're going to talk about why you/'re prejudiced if it had been treated as a common law negligence claim.

MR FOWLER QC:

Yes, well my submission on that Your Honour would be that the differences are these. That if you're facing a breach of statutory duty and those duties are pleaded as they apparently were here, then your defendant is able to cut to the chase, those are the particular duties that are pleaded, those are the breaches he or she faces. If you're facing a standard of care, sorry a negligence proceeding, common law negligence proceeding, you've got a preceding issue of proximity and with an issue –

GLAZEBROOK J:
Well you can't –

MR FOWLER QC:
I'm going to concede prox - I'm not saying this is proximity difference here.

GLAZEBROOK J:
So there wouldn't have been any difference in how it was run because clearly there was, sorry in relation to that point.

MR FOWLER QC:
Not in relation to proximity Your Honour I'm just starting down the track.

ELIAS CJ:
It was in relation to duty of care affectively.

MR FOWLER QC:
Not in relation to the existence of a duty of care which obviously early in the day I've already conceded that in terms –

ELIAS CJ:
So is breach your point?

MR FOWLER QC:
It's breach. It's standard of care issues.

WILLIAM YOUNG J:
Well standard of care is simple, because the standard of care would be to take, exercise reasonable care. The question is would be breach.

MR FOWLER QC:

Yes, well that's right, where just the threshold that standard of care threshold sit, these are the asserted breaches here. What would a reasonable manager, property manager have done in those circumstances.

GLAZEBROOK J:

Well why would he do that on the – sorry.

WILLIAM YOUNG J:

That's all right. Wasn't that on the table anyway, because –

MR FOWLER QC:

No, in my submission it wasn't.

GLAZEBROOK J:

Well why not?

MR FOWLER QC:

Because particular, apprehended as a breach of statutory duty there were particular, as I took you to a moment ago, particular duties that were specifically pleaded, so the –

GLAZEBROOK J:

But as long as they were performed not negligently there was no cause of action under section 49. So the issue of whether they were performed negligently was clearly on the table, wasn't it?

MR FOWLER QC:

Well, no, what the defendant was facing was specific assertions of particular breaches of the statute. Particular duties, not a general obligation of negligence, and the issue then being whether in terms of standard of care what happened breached those standards. So there's a – it's the difference between a general starting point and a specific allegation that's been pleaded.

WILLIAM YOUNG J:

But they must have, your client must have maintained the position that he had acted with reasonable care?

MR FOWLER QC:

Yes. But what he didn't do was realise that he was facing a claim in terms of the general obligation such that overall he could get any sense that a particular standard, or particular breach was perfectly excusable in the context of what a reasonable property manager would do.

GLAZEBROOK J:

There were a whole lot of breaches that were indicated and the defence to all of those breaches was that they were conducted with reasonable care, wasn't it?

MR FOWLER QC:

Well the particular –

GLAZEBROOK J:

Defence is not, that's not quite the right word.

MR FOWLER QC:

Well, the particular breaches that were asserted were defended, yes. Contested.

GLAZEBROOK J:

Well what else has been asserted now because wouldn't the pleading be exactly the same, you'd just say it's in negligence, and then your client –

ELIAS CJ:

Well you wouldn't say it.

MR FOWLER QC:

Well, no, what Mr Shearer –

GLAZEBROOK J:

Well, no, that's what's been asked to happen.

MR FOWLER QC:

What Mr Shearer might have been able to do was to call him suitably qualified and experienced property managers to say, in the overall context of what at common law

you would expect a reasonable standard of care to be, the particular breaches asserted here are trivial or benign or whatever.

GLAZEBROOK J:

But surely that would be the same thing that you'd do under this statement of claim. Call someone to say, none of these – that the standard of care was met and a reasonable property manager would have done all of the things that Mr Schurr did.

MR FOWLER QC:

No, Your Honour, because Mr Schurr was facing what he thought were specific assertions of particular statutory breaches and he addressed those.

GLAZEBROOK J:

But you usually do in any sort of claim. They say these are the things you've done wrong. In conveyancing these are the things you've done wrong. You call someone to say, no, those were fine.

MR FOWLER QC:

I would turn it round the other way Your Honour. In your ordinary breach of statutory duty type proceeding you wouldn't call standard of care evidence.

GLAZEBROOK J:

Well no because ordinary breach of statutory duty is usually statutory duty simplicter –

MR FOWLER QC:

Yes.

GLAZEBROOK J:

– with no overlay of duty of care but there clearly was under this statute.

MR FOWLER QC:

Well that, I suppose, gets back to the Lord Browne-Wilkinson dicta and –

GLAZEBROOK J:

Well then have a –

MR FOWLER QC:

– whether there exists a –

GLAZEBROOK J:

– strike-out application to say this isn't this.

MR FOWLER QC:

It's certainly my submission that what Mr Schurr thought he was facing was these particular breaches which he had sought to answer. He didn't know that he was facing a broad based negligence case against which these particular allegations were being made, so he didn't call standard of care evidence.

GLAZEBROOK J:

Well it might have been at his peril really.

MR FOWLER QC:

Well that's –

GLAZEBROOK J:

Because I would have thought given section 49 that's the very thing you'd want to call.

MR FOWLER QC:

We don't know Ma'am. We don't know. That's the point, we don't know. He's missed the bus.

Unless there's anything else on that issue I was going to take you to the last one.

GLAZEBROOK J:

You can't possibly say there'd be policy issues arising given you've accepted there's a duty of care, can you?

MR FOWLER QC:

No. I accept that.

GLAZEBROOK J:

Right, so we just scrub that?

MR FOWLER QC:

Yes. I'll move now to the insurance issue. Obviously it becomes –

ELIAS CJ:

Is 19, just looking again at this, is 19.2 a subset of 19.1 effectively?

MR FOWLER QC:

Yes, Your Honour. So in terms of the surrender of insurance policies, obviously the first point is that's redundant, depending on the outcome of the – well, it might be redundant depending on the outcome of the first issue. The next point, you won't be at all surprised to hear, that the first respondent would submit that section 37(6) makes pursuit of this particular issue by a proceeding something for the Public Trustee to pursue. But in any event, in terms of the actual nature of this issue, the first respondent endorses the findings of the Court of Appeal of this. The observation – I put the reference there in my paragraph 22 – that this was a matter falling within the first respondent's expertise and as conceded by the appellant's expert the merit of retaining the policies as investments depended on one's view of the risk and that was a view that was entirely open to Mr Schurr, the first respondent.

GLAZEBROOK J:

And we've got the references, have we, in the main submissions?

MR FOWLER QC:

Yes you have but I do want to supplement those in terms of points that were made.

ELIAS CJ:

Who was the expert and what was the scope of his evidence? Was it simply directed at the insurance policies?

MR FOWLER QC:

I think that particular expert gave evidence on more than just the insurance policies but on that issue he –

ELIAS CJ:

Did he give evidence on what a reasonable manager would have done?

MR FOWLER QC:

No, I don't think – well, I wasn't at the trial so I can't – I'll come back to Your Honour on that.

ELIAS CJ:

It's just there are no references to any of this evidence in the – or does the Court of Appeal mention it in that paragraph?

MR FOWLER QC:

Yes, the Court of Appeal does, Your Honour, I recall make some reference to it. Paragraph 105 at page 71. With respect to insurances, the claim would almost certainly fail. Mr Schurr did evaluate the policies as investments. The plaintiff's witness agreed that their merit as such depended on one's view of the risk and at the time it was not thought that Mr Johnston would recover sufficiently to buy the farm. The claim is informed by hindsight. I can find references for the Court if you want.

ELIAS CJ:

I don't need the references, I'd just really like – because I haven't gone through the evidence of the witnesses, I just wondered who gave expert evidence.

GLAZEBROOK J:

Is this Mr Bunn?

MR FOWLER QC:

No, Mr Dobson.

GLAZEBROOK J:

And so where is he?

MR FOWLER QC:

My learned friend Mr Carruthers is pointing out that he wasn't an insurance expert. He was a chartered accountant. Mr Carruthers is also telling me that an insurance expert was called.

GLAZEBROOK J:

And that was Mr Bunn, was it?

MR FOWLER QC:
That was Mr Bunn.

GLAZEBROOK J:
Which is page 200.

MR FOWLER QC:
We just don't have findings on any of this, so it's backfilling at its worst.

ELIAS CJ:
We don't have findings because of the view that was taken at the outset that they were in the wrong game.

MR FOWLER QC:
Yes. I wanted to draw the Court's attention just to two further references. At the yellow volume, volume 2, page 293, this is the evidence-in-chief of the first respondent himself. At page 293, if you look at paragraph 69, you can see that, in fact, Mr Schurr, at least on that evidence, he says that he did consult Mr Johnston, so the suggestion otherwise –

ELIAS CJ:
Sorry, where are you looking?

MR FOWLER QC:
I'm down at paragraph 69, Your Honour, on page 293 of the evidence-in-chief of the first respondent.

ELIAS CJ:
I don't have a para 69.

MR FOWLER QC:
Page 293, this is yellow volume.

ELIAS CJ:
Oh sorry, I'm looking at the wrong – yes thank you.

MR FOWLER QC:

Volume 2, page 293, paragraph 69. And finally Mr Schurr also under cross-examination at page 310, lines 4 to 19 it's the same volume you'll see, he gives evidence about the issue regarding the insurance in terms of where that sat in relation to farming debt servicing. My point being that there was evidence on those two topics, albeit that there weren't findings. It's not a situation where there's a complete evidential void on those topics, if that was what my learned friend was suggesting.

And finally on this insurance issue, in my submission it's just simply not an issue that is amenable to resolution, certainly not at this highest possible appétit level, what are the relative risk values around insurance, these are the other types of investment, or these are the, "what happened here", it's just not the sort of issue that one would expect.

ELIAS CJ:
What would we have to do, send it back?

MR FOWLER QC:
Well yes, because if the Court considered that there was merit in the point, it's in my submission simply not something that you would expect would be amenable to resolution here.

GLAZEBROOK J:
Or you could just argue there was a failure of evidence on it in respect of the plaintiff and therefore no proof.

MR FOWLER QC:
Yes if the – that would be another way to approach it. I mean obviously my starting point is that it's just one of those things that in terms of evidence the position that the Court of Appeal has taken is entirely defensible.

Now unless there are any other points in terms of the first respondent's position, if the Court pleases, those are my submissions.

ELIAS CJ:
I'm just not sure myself, because I haven't read the evidence, whether it's right to say that there's no evidential foundation. If it –

GLAZEBROOK J:

Sorry I was really meaning that there was not the financial calculations in terms of saying it would've been the – I think your point was that you would need to go back and have expert evidence on the merits of the different investments, and whether it would be a reasonable choice to do that. And there wasn't evidence as I understand it, that got to that stage.

MR FOWLER QC:

If you wanted to open that gate and go down there, that's what you'd have to do.

ELIAS CJ:

There clearly was some evidence on this.

MR FOWLER QC:

There was some evidence.

ELIAS CJ:

And yes, as to – just from the circumstance that there aren't any findings of fact, if there was evidence it might be that the matter would have to go back so that findings could be made I suppose.

MR FOWLER QC:

Unless the Court took the first view that I was –

ELIAS CJ:

Yes.

MR FOWLER QC:

Espousing?

ELIAS CJ:

Yes, thank you. Yes, Mr Morrison.

MR MORRISON:

If Your Honours please, my approach on this matter is to firstly submit that this is not a case where the claim is based on an assertion that a lawyer under an obligation to

do something did nothing, the case is really about a lawyer having a degree of responsibility has done something and the claim is that he should have done something else.

ELIAS CJ:
Or something more.

MR MORRISON:
Or something more, that is so, Your Honour. After the accident that impacted on Mr Neil Johnston and incapacitated, Deem & Shearer accepted the appropriateness of an ongoing role in respect of his affairs and acted on the instructions, first of the family, Ian Johnston, and later Mr Schurr, in the applications under the PPPR Act. In that context Deem & Shearer were plainly party to consideration of and decisions to defer relationship property resolution. My submission is that in so acting there was no conflict with its prior instructions from Mr Johnston because it reasonably believed it was acting in his best interests, and I instance five points in support of that. Firstly, Mr Schurr, who was the person competent to form such an opinion, being of the opinion that resolution of relationship property would put retention of the farm in jeopardy. My learned friend has raised issues of reliance. The broad response to the is that, taken as a whole, the evidence is clear that reliance on the expertise of Mr Schurr was implicit in everything that happened, and if we start with, not with the draft relationship property or matrimonial property agreement but with Mr Schurr's correspondence in July of 1998, which is to be found in volume 3 at page 441, Mr Schurr sets out in some detail the partnership's property position, it's in a letter to Mr Johnston and there was an identical letter to Ms Johnston, but there is no doubt that the origin of the information and expertise relating to the Johnston partnership's financial affairs rested with Mr Schurr in the first instance.

GLAZEBROOK J:
Is there anything in particular in that letter you want to draw our attention to, or is it just…

MR MORRISON:
No, Your Honour, it's just a response to my learned friend's submission that Deem & Shearer had expertise because they'd drafted an agreement, but the information comes in at an earlier point.

There are also some meeting notes to be found at page 478 of the same volume. Those are Mr Schurr's notes of a meeting in Deem & Shearer's office on the 9th of July 1999, which identified as, "Second item matrimonial position and deferment." This is a meeting which is referred to in the application that was subsequently made to the Family Court, and the reference to that is to be found at page 849 of volume 4, and some of the reference my learned friend, Mr Fowler, took Your Honours too also touch on it.

GLAZEBROOK J:
Sorry, what was the page number you gave us just then?

MR MORRISON:
The reference to the family meeting was at page 849 of volume 4, paragraph 11 on that page. There are other references to Mr Schurr's input at the accountant to the farming partnership, as I've just commented, some of which my learned friend, Mr Fowler, referred you to, so in my submission there is no room for argument that Mr Schurr was the person with expertise in the matter of assessing the farm viability, assessing the ability to retain it and, indeed, in the evidence which my learned friend, Mr Fowler, referred you to at page 301, which is in volume 2, the yellow volume, at page 301 line 3, in the passage immediately before the section that my learned friend referred Your Honours to, he said, "The viability of the farm was very much in question all the way through in any discussion at any point of time, even prior to the marriage split-up, so increasing and using up all the cash reserves would have affected the viability again.

ELIAS CJ:
Whose evidence is this again?

MR MORRISON:
That was Mr Schurr's evidence-in-chief.

ELIAS CJ:
Ah, yes.

GLAZEBROOK J:
Was he challenged on that?

MR MORRISON:

Yes, there was challenge by way of cross-examination, which is the section I think referred to in my learned friend, Mr Carruthers', submissions. But the point is, for present purposes and from my perspective, it doesn't actually matter whether Mr Schurr was right or wrong in his assessment, the submission is that the solicitors were reasonably entitled to rely upon his opinion because his was informed opinion rather than any substitute view they might have had. Mr Schurr was the business expert and brief.

The second point I respectfully make is that Deem & Shearer reasonably believed that retention of the farm was in Neil Johnston's best interests in terms of stability and in terms of his rehabilitation, in terms of having somewhere to life and to recover in, and as late as 2002 the same issue was still being attested to in the applications that were being made to the Family Court. And just as an instance of that there's the affidavit of Mr Schurr, to be found at page 908 of volume 4, the green volume. Over the page at 909 at paragraph 5 he points to, "Allowing Neil to remain living on the farm, which is very important to him on several levels," down at paragraph 6, "He becomes extremely upset and emotional if there is any suggestion that the farm might be sold and as a consequence of having to live elsewhere."

Now I accept that health professionals having a particular focus and in my submission a different focus from that which would be brought to bear by people such as the respondents having a responsibility for property and maintenance of tangible assets. It was reasonable for Deem & Shearer to believe that retention of the farm was in Neil Johnston's best interests. That was also the view of the family. The first application for orders under the PPPR Act were made on the instruction of Ian Johnston, who was the applicant, and it is quite clear that the terms of that sought retention of the farm. There was also the concurrence of Mr Gifford, independent counsel for Mr Johnston as the subject person under the PPPR Act, whose statutory responsibilities are set out in section 65, made it clear that he was to enquire including of the views of the subject person and had a responsibility to report on those and at each step in the proceeding before the Family Court he concurred in deferral in dealing with the matrimonial property and of course the Family Court by its orders endorsed deferral.

A deferral, in my submission, was not a matter of neglect or oversight, and I instance the answer in questions from Mr Gifford to be found at volume 2 at page 241. I'll just

turn to that, Your Honours, because Your Honours were asking a question as to what the counsel for the subject person's role was, and my learned friend referred you to section 65, but in the passage where he gives evidence as to what he, in fact, did relevantly starts, in my submission, at page 237, line 24, as to his consciousness of the powers of the property manager. His role vis a vis the Court. Over at page 240, line 11, as to his satisfaction with the steps being taken.

McGRATH J:
Sorry what page is that, 244 is it?

MR MORRISON:
Page 240, line 11, in that section he acknowledges the currency of the information that sale of the farm would be required if a property settlement with Ms Johnston was required, that's a common theme. Over on page 241, immediately before the brief extract that I've put into my summary, he volunteered at line 21, "He had raised with Margaret Harrop whether we needed to be looking at the property matters and her response was…" and so on.

If I could take you also over to page 242, line 30, "If Mr Johnston had expressed to you a wish to have matrimonial property matters resolved, would not in terms of section 65 and best practice conveyed those wishes to the Court?" "Yes." "And I think we can say, without having to go back and look at each one of them, one of the memorandum conveyed any such wishes to the Court did they?" "No." So I'm not going to take Your Honours through all of that evidence but there is a considerable volume of evidence as to what Mr Gifford did and the discharge of his responsibilities under section 65 and although ascertaining the wishes of the subject person was part of it, and although there is no reason to believe that is not what he did, notwithstanding the submissions made for the appellant today, the evidence of Mr Gifford was that at no stage did he express a wish that the relationship or matrimonial property matters be resolved, and there is every indication that his concern was to stay on the farm.

So that leads to my submission that deferral of matrimonial property resolution was a considered strategy, it was duly recorded in the contemporaneous documents along with the reasons, it was fully disclosed in the applications to the Family Court to the extent that it was a matter for Deem & Shearer, there is no basis in my submission for contending it did not involve the exercise of professional judgment and advice

given in real time, having regard to the facts and circumstances as then known or reasonably believed. Against that Your Honours there was no evidence adduced that a normally competent lawyer in the position of Deem & Shearer would or should've acted otherwise than it did, or in a way that would support the claim that Mr Johnston has brought to the Court.

I've given some thought to the nature of any such evidence and what it would have needed to address if it had been adduced, and in my submission there are 10 questions that can be hypothesised as to what evidence would need to have been brought and in a number of instances there is no clear answer as to what would've happened then.

But the first issue that any such evidence would have to have addressed would be why Deem & Shearer was wrong in the circumstances which I summarised in the five bullet points in paragraph 2.

Second question is what other circumstances existed at the time which obliged Deem & Shearer to act differently.

The third question is what Deem & Shearer should've done by way of advice to advance resolution of relationship property notwithstanding the opinion of Mr Schurr and the wishes of the family. I can posit an answer to that one which would've been to advise the appointment of a manager with power to deal with matrimonial property.

But that leads to the fourth question as to insofar as that advice was given, how would the family and/or Mr Schurr as recipients of that advice, have responded to it. Conceivably in my submission they would've rejected the advice because it would be counterproductive to what they sought for Mr Johnston which was retention of the farm.

But, and this leads to the fifth question, insofar as the family or Mr Schurr might have instructed appointment of a manager, with power to resolve matrimonial property, how would the manager have acted, and particularly having regard to Mr Schurr's opinion. Conceivably after inquiry a manger, having the power would decide not to pursue resolution of matrimonial property because there is nothing inherent in granting somebody a power a requirement that would be exercised in a particular way.

Then we get to further uncertainties because the sixth and ponderable in my submission is insofar as a manager so appointed decided to advance resolution how would Ms Johnston have responded to that? Your Honours have been directed to the passage in the High Court judgment where the learned Judge opined that in 1999 if somebody had pushed the issue, it was possible that a settlement would have been achieved. The Court of Appeal took a somewhat different view at paragraph 113 of its judgment. If I take you to that, it's in volume 1 and it's at page 73. Starting with the second sentence, "After 6 January 1999, she had no need to defer to Mr Johnston and she was soon better informed about the partnership's financial affairs," and so on through to the end of that paragraph. But even if in answer to the sixth question I've posited Ms Johnston was prepared to entertain a matrimonial property settlement, we are completely uninformed as to what it would have been. That led to the seventh question, "Insofar as resolution required recourse to Court proceedings, what would the outcome of those have been?" Conceivably, they would have been somewhat different from the 60/40 split which had been earlier contemplated and almost certainly they would need to have been supported by full and proper valuations.

The eighth question is the time or times it is contended Deem & Shearer could and should have acted as I have posited above and when any resultant resolution was likely to have been effected. It would be one thing in 2000 to raise and pursue resolution of matrimonial property. It's an entirely different thing to posit that it would be resolved instantly. Potentially it would take time.

The ninth question is the consequences of any such resolution in terms of ability to retain the farm, retention of which is critical to the calculation of loss. It is the calculation of loss assert that there was an early opportunity for division which would have enabled Neil Johnston to retain the farm and thus benefit from the increase in its value over a period of some five years, but if Mr Schurr's advice or opinion was correct and the settlement would mean that the farm could not be retained, the settlement, if there had been one, would have involved the sale, so we would have then had a different scenario to deal with in terms of trying to calculate loss.

The final question I've posited is, Mr Johnston's position vis-à-vis Deem & Shearer in the event that resolution had been achieved and the file not retained and he had been presented with a situation where hypothetically a resolution in 2001 had

deprived him of the farm, which had continued to increase in value due his period of incapacity, and he would then have turned around and said to Deem & Shearer, "Why did you let that happen when Mr Schurr warned you that the farm couldn't be retained?"

My submission after those questions, Your Honours, is, absent such evidence to establish the nature and extent of duty owed by Deem & Shearer and any related breach in consequences, the claim simply relies on hindsight assertions that all of those questions can and should be answered favourably to the appellant. And my submission is that in the High Court the burden of proof was not attempted, let alone discharged. Those submissions really focus on the issue of breach, Your Honours. There is the further issue of causation, but I just rest on the submission, the written submissions that I've put in in that regard.

Is there anything I can assist you with further?

ELIAS CJ:
No, thank you, Mr Morrison.

MR MORRISON:
Thank you, Your Honours.

ELIAS CJ:
Yes, Mr Carruthers.

MR CARRUTHERS:
If I can begin with this issue of review that my learned friend, Mr Fowler, referred to. He drew your attention to section 87(2). When I submitted to you various of the sections pointed to the duty, I drew attention to section 31(8) that required the manager to deal with the issue of review as part of the order. Section 87(2) is made specifically subject to section 31(8), so the issue of review is required.

The next submission I make in reply is that in fact the application specifically referred to the prospect of review because of the need for further directions in relation to the matrimonial property issue, and I'm referring to the material in volume 4 at page 858. Your Honours, might I just give you the references to this material, because there are several references I need to give you and in the time I've got available, taking you

through them may prove problematic. But my learned friend referred to the application in volume 4 at 858, and paragraph 8 specifically raises the question of if further directions were needed Mr Schurr would come back for them, and of course the matrimonial property issue was an issue that was recognised as being outstanding on that temporary basis.

My next submission deals with Mr Gifford's role, and if I can take you to his evidence in volume 2 at 233 and 234, in paragraph 8 he deals with the usual case, and I'll just leave you – it rather confirms the analysis that Your Honour Justice McGrath made that the appointments do relate to assistance for the purposes of the application in relation to the various matters that section 65 refers to, and they then come to an end. And then in page 234, paragraph 12 sets out the basis that he saw as his scope for dealing with matters. In my submissions in support of the appeal at paragraph 94 I dealt with Mr Gifford's appointment in relation to the Deem & Shearer position, and it applies equally in relation to Mr Schurr. I've submitted that it doesn't affect the duties and, as he stated, his instructions were limited, and then I've –

WILLIAM YOUNG J:
Sorry, pause there. Are you going correlate that to what Mr Gifford said in his letter at page 904?

MR CARRUTHERS:
I've got another issue with…

WILLIAM YOUNG J:
That's in the green, volume 4.

MR CARRUTHERS:
Yes.

WILLIAM YOUNG J:
It's the last sentence of the third-to-last para. Because I don't think you really –

MR CARRUTHERS:
Well, that's, that section –

WILLIAM YOUNG J:

It's a bit odd.

MR CARRUTHERS:

Well, it's odd, but it's actually consistent with the deferral to the end of the sharemilking operation.

WILLIAM YOUNG J:

Oh, yes, of course.

MR CARRUTHERS:

It has its – sorry.

WILLIAM YOUNG J:

Yes, I understand that, but "all parties" doesn't seem to include Mr Johnston.

MR CARRUTHERS:

Well, I just don't think that's consistent with the other, with Mr Johnston's evidence or the other evidence.

WILLIAM YOUNG J:

Yes, I just don't, I don't think Mr Gifford really explained that –

MR CARRUTHERS:

No.

WILLIAM YOUNG J:

– in his own evidence, or if he did I may possibly –

MR CARRUTHERS:

No, I don't think he did, Your Honour, and –

O'REGAN J:

But he did say he consulted them.

GLAZEBROOK J:
He said he couldn't recall whether it had been discussed, but he thought not because he would have brought it up if it had been.

MR CARRUTHERS:
Yes.

WILLIAM YOUNG J:
But whether he discussed what he meant by "Agreement whereby Ms Johnston will defer the claim for two years."

MR CARRUTHERS:
And that, I don't think that is, and it's certainly inconsistent with the other evidence.

What is actually important about Mr Gifford's role, too, that I've referred to in paragraph 94, because there's this issue about retention of the farm, and my submission there is that really that is a non-issue, because Mr Schurr himself acknowledged that the settlement could have been made without the need to sell the farm. Deem & Shearer had evidence before them from their knowledge of the values of the property that that result could have been achieved. Now the reason I emphasise that again, and I think that I set that out and emphasise that in –

GLAZEBROOK J:
It doesn't mean though that you're wise to get rid of all your cash reserves though, does it? So even if you could have done it, it doesn't mean that it was a good idea to…

MR CARRUTHERS:
I –

GLAZEBROOK J:
Because if you're a farmer –

MR CARRUTHERS:
Yes.

GLAZEBROOK J:

– all you have to have is a drought or some difficulty – well, actually, they probably wouldn't have because they had a sharemilker on, but –

MR CARRUTHERS:

Well…

GLAZEBROOK J:

– if that sharemilker was going to have difficulty others would.

MR CARRUTHERS:

Right. I don't think it involved getting rid of all of the cash resource, but of course I accept the point that Your Honour's making to me. There was, there was of course access to borrowing in the event that that was a more efficient way of performing the settlement. My analysis is done on the basis that you didn't have to borrow at all. And the analysis that I've done is in paragraph 59 of the written submissions and that gives the evidence in support of it.

What's important in this context, because my learned friend, Mr Morrison, suggests that Mr Gifford agreed with what was proposed, but what Mr Gifford says is, in volume 2 at page 246, at lines 19 to 22, where Mr Gifford is being questioned by Her Honour, and he says, "If you had not been told that the family farm would need to be sold, would you have taken a different approach to how the matrimonial property resolution was being handled?"

GLAZEBROOK J:

Sorry I can't see that, what page was it again?

MR CARRUTHERS QC:

246.

GLAZEBROOK J:

What line?

MR CARRUTHERS QC:

Line 19. "I would've asked why aren't we sorting it out?" All right. So that puts quite a different perspective of Mr Morrison's argument. Now my learned friend, the next

submission I make concerns the material that my learned friend Mr Fowler referred to you, referred you to, in the various applications about deferral and Your Honour Justice O'Regan what my response to that really takes up the issue that you raise with me about Ms Johnston's position in relation to settlement.

Now, in Mr Schurr's material there are a series of interviews, notes of interviews, and over a substantial period from August 1999 to March 2002, those interviews, there are interviews with Christine Johnston that specifically discuss values and divisions of matrimonial property with her. If I can give you the dates and the references, the dates in sequence are these: 31 August 1999 at page 500, and I will give you the reference to the cross-examination of Mr Schurr on those notes. The reference there is volume 2 at 315 to 317. The next interview that deals with that issue of division of matrimonial property with Christine Johnston is 19 October 1999 at page 511. This is all in volume 3. The cross-examination is in volume 2 at pages 317 to 319. The next interview with her is 9 July 2001 at 591 volume 2, 365 to 366. The next interview is 27 May 2002 and that is at 615 and there is no relevant cross-examination on that particular interview. I'm sorry, the last interview is 12 November. I think I gave you March. It's 12 November 2002 and that's at page 632 and the cross-examination on that is volume 2 at 368 to 369.

Now, all I'm trying to emphasise there is that throughout this period the issue of matrimonial property was being discussed by Mr Schurr with Christine Johnston. Let me clear away a factual issue on that. In those passages of cross-examination that I referred you to, there is some debate in relation to some of them as to whether they were interviews with Mr Johnston or Ms Johnston, but that issue is actually dealt with by reference to the transcript and if I can just take you to this, because it's probably important to explain, at volume 2, page 299, at line 25 to 30, there is an issue which arose concerning the number of meetings that Mr Schurr had with Mr Neil Johnston and these were recorded in a diary and there was a question of the admissibility of that. But what was, you'll see at line 30 that what was accepted was that the occasions on which there, Mr Shearer attending meetings with Mr Johnston were five and they were on those occasions that are identified there. So over a period from the start of – from the time of Mr Schurr's appointment through to 2002 there were five occasions on which they met. Why those dates are important is because you will see that they don't coincide with the interviews that I've taken Your Honours to.

Now there's one more piece of evidence, just on this question of at what point did Christine Johnston say, if at any point, that she didn't want to complete matrimonial property, and if I can take you to volume 3 at page 607, you'll see that this is quite a long letter from Mr Schurr dated 29 January 2002 to Deem & Shearer about Neil Johnston. On page 609 her view conveyed by Mr Schurr is expressed, and I'm in the second to last substantive paragraph, and I'm just under half way down that paragraph. You've probably identified – you'll see the number 3 years, two lines further down, "She has stated that unless Neil wishes it, she does not wish to have a matrimonial property split at this stage." So we're talking about January 2002 and of course Mr Johnston's position is reflected in the evidence, was that he did want to have –

O'REGAN J:
But she says in the next sentence, that's because he would have to be thrown off the farm if –

MR CARRUTHERS QC:
Well, but Your Honour that actually goes back to the accuracy of that evidence and if you work through the financials and particularly –

O'REGAN J:
Well you're doing that with the benefit of hindsight, aren't you?

MR CARRUTHERS QC:
Pardon?

O'REGAN J:
You're doing that with the benefit of hindsight.

MR CARRUTHERS QC:
No, the financial position was known at the time, as they went along. It's actually reflected in the agreement, in the formal written agreement, it's reflected in the character letter. It's reflected in all of those interviews that Mr Schurr undertook. He was the accountant. He had and recorded the financial information and certainly I expect that the accounts reflect an annual position, but all of that information shows, and Mr Schurr actually conceded when it was put to him, that the deal could have been done without borrowing. So it's not with the benefit of hindsight. It's in reliance

on what was contemporary information available to Mr Schurr and which ought to have been – which was available in part to Deem & Shearer and otherwise could have been explored by them, and certainly –

O'REGAN J:
So you wouldn't expect the lawyers to second guess the accountant's view of accounts, would you?

MR CARRUTHERS QC:
Well –

O'REGAN J:
Why would they? Why would the lawyers express any view about the accounts and why would they be expected to?

MR CARRUTHERS QC:
It's about the ability to do the settlement, do the matrimonial settlement –

O'REGAN J:
For someone they were no longer acting for? I mean –

MR CARRUTHERS QC:
Well, no –

O'REGAN J:
– this is just so in the realms of the, you know, abstract –

MR CARRUTHERS QC:
Well, you say –

O'REGAN J:
In the end, they, you've got Mr Schurr is actually the manager and he's telling them as the person who everyone acknowledged and knew most about the business that in his view that's what the position was. Why would they second guess that –

MR CARRUTHERS QC:
Well, for the –

O'REGAN J:

– what did you expect them to do, go and get another accountant to come and say he's wrong?

MR CARRUTHERS QC:

No, Your Honour, I, no, Your Honour, I'd expect them to read and, the information that they had in front of them and as for being –

O'REGAN J:

And to second guess his expert view on the accounts –

MR CARRUTHERS QC:

It's not second guessing –

O'REGAN J:

– well, why would a lawyer ever do that?

MR CARRUTHERS QC:

It's not second guessing his view and it's, and it would be fundamental to part of the –

O'REGAN J:

Well, you're saying they were negligent because they didn't act inconsistently with his expert accounting view, that's what your, that's what your claim is.

MR CARRUTHERS QC:

No, my claim isn't that. My claim is that they did not use the information that they had in front of them to evaluate performance of the agreement which they had drafted in which they had the figures that demonstrated that what they were being told by Mr Schurr was not right.

O'REGAN J:

So would you expect Mr Schurr to second guess their legal opinion as well?

MR CARRUTHERS QC:

No, Your Honour, no, Your Honour, no.

O'REGAN J:
I mean it's just it doesn't make sense. Why do you do that?

MR CARRUTHERS QC:
It's – they are not –

O'REGAN J:
They each have their role and that was his role.

MR CARRUTHERS QC:
They are not – you're not, no, you're not putting an equivalent position to me. It isn't questioning any, any specific speciality expertise of the accountant. It is questioning their, the fact that they did not use the information that they had in front of them.

GLAZEBROOK J:
But what you're saying is that they should have said, "Well, just on a purely arithmetical basis you wouldn't have to sell the farm," but without knowing about whether there are capital matters that have to be dealt with, whether the cash flow is going to be sufficient to cover. I mean you're saying they knew that there was cash in the bank basically that could've been used, but for all they knew it was actually no longer cash in the bank or, alternatively, was needed or going to be needed in the very near future or needed to be there as a contingency just in case there was something disastrous that happened and especially with an incapacitated farmer at that stage.

MR CARRUTHERS QC:
Well, I'm saying that an objective look at the assets that were available certainly allowed the settlement as proposed to go ahead, yes, I am saying that.

The next issue that was raised was the question of causation and my learned friend, Mr Fowler, referred to paragraph 69 of the judgment of the Court of Appeal saying, drawing the conclusion that there's a very narrow window. The conclusion that the Court of Appeal drew really doesn't follow from the acknowledgement that was made. What was, what was accepted was that it was reasonable to defer settling relationship property during Mr Schurr's initial three month appointment, but what was not, what was not reasonable was to do nothing during that period when that,

when that temporary, when that temporary order was in place because it recognised that at the end of that order there needed to be some mechanism put in place to deal with matrimonial property, so it's, it's not a matter of not taking any steps to ultimately put in place something when the temporary order expired and it doesn't follow, it doesn't follow that the alleged breach begins with the application that led to his reappointment. It's actually pleaded that the, that the, the duty existed between August 1999 and May 2002, so that is actually the period that, that is covered by the, by the allegation.

O'REGAN J:

But the Court of Appeal wasn't talking about what he or, what Mr Schurr did, they were talking about whether Ms Johnston would have agreed to settle if that deal had have been put to her outside that window. That's a different issue. And the evidence was that she was asked whether she, well, the Judge said she would have settled in 1999 and she was never asked whether she would have settled after that.

MR CARRUTHERS QC:

Well, we're going to go over similar ground –

O'REGAN J:

She was there, she was in Court and nobody asked her the questions.

MR CARRUTHERS QC:

– but the reason that I drew your attention to all of those interview notes and –

O'REGAN J:

Yes, but the primary evidence would've been her evidence. She should've been asked.

WILLIAM YOUNG J:

She was – they were put to her those notes.

MR CARRUTHERS QC:

No, no, they were Mr Schurr's notes and he was cross-examined on them. I –

WILLIAM YOUNG J:

Yes, but I think they were, I thought they were put –

MR CARRUTHERS QC:

– yes.

WILLIAM YOUNG J:

I think they were put to Ms Johnston too.

MR CARRUTHERS QC:

Yes, they, yes.

WILLIAM YOUNG J:

I think a $408,000 figure, I remember that being put and I think the others were put.

MR CARRUTHERS QC:

Yes, that's right, yes, yes. In answer to Your Honour Justice O'Regan, the way the case is put is that between 1999 and 2002, the obligation was on Mr Schurr to adopt a course of conduct that allowed the issue of matrimonial property to be resolved and it, I accept that the, that there is no direct evidence that, as to what Ms Christine Johnston's position would have been in relation to accepting a settlement, but what I do submit is that the independent documentary evidence does point to the fact that she was still considering settlement in discussion with Mr Schurr in very much the same proportions that existed in the initial draft and the Carrington, and in the Carrington letter.

The next issue that I wanted to deal with concerned occupation of the farm and please just let me check a reference as to whether I've covered that already. Yes, I just wanted to cover the passage about Mr Schurr's knowledge of the ability to settle, and it's at volume 2 at page 347, it's at the top of the page. It does go back to the proposal contained in his initial letter which was carried forward into Deem & Shearer's draft agreement. And he was asked, "Would you accept that – "

WILLIAM YOUNG J:

Sorry, what page is that?

MR CARRUTHERS QC:

Page 347 Your Honour. "Would you accept that at the time that proposal was put there was sufficient cash or cash equivalent, resources or assets by which Christine

could have been paid out without the need for Neil to go and borrow further funds." And said, "Yes I do." So that's in the context of those proposals that were on foot at that time. Now on the question of the, I suppose this –

ELIAS CJ:
Sorry, I can't find that?

O'REGAN J:
It's right at the top, line 5, 347.

MR CARRUTHERS QC:
Right at the top of 347 Your Honour.

O'REGAN J:
But that's in 1999 though, isn't it?

MR CARRUTHERS QC:
Yes but it, well it's actually a 1998 letter, but it is the 1999, it is the – they are the figures that were carried forward into the 1999 agreement and they're not dissimilar to the Carrington letter position.

O'REGAN J:
But was he asked about whether they could have settled in 2000 or 2001 or 2002 without borrowing and without selling?

MR CARRUTHERS QC:
No, I don't think, no, Your Honour, I don't think that's so. Now the next issue that my learned friend Mr Fowler raised was probably the causation issue and the issue of increase in value and the basis on which that argument is put is that, and in my submission as far as the appellant needs to take it, is this, that it was a foreseeable risk that there would be an increase in value. Now there might have been other risks as well but the foreseeable risk that we rely on is that increase in value which would have led to a difference in the settlement basis. Your Honour Justice Glazebrook asked me about that, and I said I'd wait until I heard the argument, but which it didn't illuminate it, but I recall the reason that I hesitated is that the initial agreement was on the basis of definable shares against assets. The final agreement really couldn't be decided in that way because there was a division of assets but there were also

adjustments for payments that had been made before, that made it difficult to really say without some further analysis of what the basis was. So I expect that I do come back to the principle that there was an anticipated and known potential change, or forthcoming change, in the legislation that was in the hands of Deem & Shearer.

GLAZEBROOK J:
Yes, although if that didn't change the basis of settlement, so I didn't understand what you said before –

MR CARRUTHERS QC:
I'm sorry.

GLAZEBROOK J:
– so I've no idea whether it changed it or not.

MR CARRUTHERS QC:
Well the answer is that I don't know without further analysis as to whether there was a change because – but it is certainly not apparent on the face of the documents as they stand. They can't actually be compared one with the other and –

GLAZEBROOK J:
But the percentages were the same. I don't see why the adjustments changed the percentages.

MR CARRUTHERS QC:
Well, but the percentages – as I understand Your Honour, you're referring to the overall percentage shares but if you looked at the sharing of the assets, that was actually calculated on a different basis and there were then adjustments for payments that had been made, which mean that if you just look at the bare figures it looks to be the same, but it isn't because of the –

GLAZEBROOK J:
Well because of the effluxion of time and the fact payments have been made but you'd have to show more than that, wouldn't you? You'd have to show that the change in legislation meant that the differential shares were no longer possible under the new legislation and as a result there was a difference in the percentage shares?

MR CARRUTHERS QC:

Yes I would and that's what I understand that I can show but that is – I must say that I rather thought that was an issue that I would be facing if I got to a loss hearing and that maybe my mistake, but certainly it is part of the argument on causation that the legislation made a difference in the approach to the ultimate settlement. Dealing with the question of amendment…

GLAZEBROOK J:

Well I would have thought that should have been led…
1620
1620sp
…Dealing with the question of amendment –

GLAZEBROOK J:

Well, I would have thought that she have been led, that evidence, because it wasn't a split – I mean, I know we're not doing it now –

MR CARRUTHERS:

No.

GLAZEBROOK J:

– but the evidence should be there, because it wasn't a split liability loss hearing in the High Court.

MR CARRUTHERS:

No.

GLAZEBROOK J:

So if the evidence isn't there, it can't be manufactured later, can it? The submissions may be, but you'd have to be able to –

MR CARRUTHERS:

Yes.

GLAZEBROOK J:

– show us on the evidence.

MR CARRUTHERS:
Well, I guess I expect, I expect Your Honour's right that I have to – I mean, let me come at it in the way in which I last put it. If I'm dealing with a loss hearing I've got to deal with a loss hearing on the basis of the evidence –

GLAZEBROOK J:
All right.

MR CARRUTHERS:
– that's there.

GLAZEBROOK J:
But, as you just say, you can't do it at the moment.

MR CARRUTHERS:
Yes. No, I can't, no.

Well, Your Honour, I think I'm going to be in the position where, on my feet now, I cannot point to evidence that supports the position that a different result was reached because of the change in the legislation.

The next issue I wanted to deal with was the question of amendment, and my learned friend, Mr Fowler's, analysis of the amended statement of claim suggesting that it wasn't a negligence pleading actually overlooks the various paragraphs when he moved from paragraph 18 to 22 – and I'm in volume 1 at 109 through to 111. Paragraph 19 on page 110 is a pleading of knowledge, paragraph 20 is a pleading of assumption of responsibility and paragraph 21 is a pleading of proximity. So it actually does have all the ingredients of a negligence pleading.

If I come to the issue of prejudice, in my submission there can be no possible argument about prejudice. If the evidence of an expert manager was relevant to a negligence claim, it was equally relevant to the issue that arises under section 49 to the issue without reasonable care.

Can I deal now with the insurance issue? The argument and the evidence concerning insurance is set out in the written submissions at paragraph 62 to 72 –

WILLIAM YOUNG J:

Can I just ask, is Mrs Johnston dead?

MR CARRUTHERS:

Sorry?

WILLIAM YOUNG J:

Is the appellant's mother dead? I take it she is.

MR CARRUTHERS:

Yes, she is.

WILLIAM YOUNG J:

When did she die? About 2004…

MR CARRUTHERS:

2011, Your Honour.

WILLIAM YOUNG J:

Okay. that was the maturity date of the policy, wasn't it?

MR CARRUTHERS:

Oh, it's in that…

WILLIAM YOUNG J:

Okay, thank you. Sorry, you were referring to your submissions.

MR CARRUTHERS:

I was just emphasising that I have actually analysed that insurance issue. The additional material that I want to refer you to – and I'll just give you the references – the evidence of Mr Johnston is in volume 2 at paragraph 158(j). Mr Bunn, who was the insurance expert is –

GLAZEBROOK J:

He was an interested expert, wasn't he?

MR CARRUTHERS:

Well, yes, he was.

GLAZEBROOK J:

Because he was actually the broker getting commission on these insurance policies, something that concerned Mrs Johnston, as I understand it.

MR CARRUTHERS:

Yes, but I mean, if one's looking at someone who actually had knowledge of what the, or how the insurance policies worked and what their value was, he was the witness who gave evidence on that. He's at volume 2 at pages 200 to 204. Mr Dobson, who gave, who was the expert who gave evidence about the damages calculation but who was asked about the insurance issue, is at volume 2 at page 216 – just let me check that – 216 paragraph 28, and he was cross-examined in volume 2 at pages 225 to 227.

Coming to my learned friend, Mr Morrison's, submissions – and the outline that I handed up in fact answered most of the issues there – I emphasised that despite his submission there's no evidence of reliance on Mr Schurr, and I've dealt with the issue of retention of the farm. Now my submission is this in relation to the deferral question, and that is, my submission's this, that Deem & Shearer could not reasonably believe that a deferral was in Mr Johnston's interests after the meeting in April 2011 and at which the carer said it needed to be resolved, and that's the meeting at which Mr Geoff Shearer said he would take over and deal with the matrimonial property issue, and that's an issue that is referred to and dealt with at paragraph 9 of the written submissions. My learned friend, Mr Morrison, refers in his outline to deferral being the view of, or retention of the farm, and the issue of deferral being the view of the family. My submission is that there's no evidence to that effect.

Your Honours, those are my submissions in reply on the appeal.

GLAZEBROOK J:

On that I think Mrs Johnston said it was view of the family, in terms of there being no evidence.

MR CARRUTHERS:

Yes.

GLAZEBROOK J:

So her impression was certainly that the family wanted her to defer.

MR CARRUTHERS:

Yes. I'm not sure who she includes in that.

GLAZEBROOK J:

I'm not sure either –

MR CARRUTHERS:

No.

GLAZEBROOK J:

– but she did, that explains she had meetings with Mr Schurr and, Ian?

MR CARRUTHERS:

Yes, yes.

ELIAS CJ:

And didn't the psychiatrist refer to some of that, those family meeting, too?

O'REGAN J:

The carer.

MR CARRUTHERS:

Well, the April 2000 was a meeting with the carers.

ELIAS CJ:

Yes, yes.

MR CARRUTHERS:

Those are my submissions.

ELIAS CJ:

Yes, thank you, Mr Carruthers. Well, thank you counsel for your submissions, we will reserve our decision in the matter.

COURT ADJOURNS: 4.29 PM