

IN THE MATTER of a Civil Appeal

BETWEEN **JAMES ARTHUR ROSE**

Appellant

AND **KAREN DIANE ROSE**

Respondent

Hearing 15 October 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel CR Carruthers QC and M Radich for Appellant
A Hinton QC and A J Hughes for Respondent

CIVIL APPEAL

10.04am

Elias CJ Thank you.

Carruthers May it please Your Honours I appear with Miss Radich for the appellant.

Elias CJ Thank you Mr Carruthers, Miss Radich.

Hinton May it please Your Honours I appear with Miss Hughes for the respondent.

Elias CJ Thank you Mrs Hinton, Miss Hughes. Yes Mr Carruthers.

Carruthers Yes may it please Your Honours. Your Honours I handed in an extract from the Property Relationships Act of the relevant sections to which reference is made.

Elias CJ Thank you.

Carruthers The concept was that it would be a working copy for you.

Elias CJ Thank you, that's helpful.

Carruthers Your Honours the structure of my oral argument is this. It's in three sections and I want to deal first with the scope of the argument in relation to the property which is an issue, that is just identifying what the property is. Secondly I want to deal with the scheme and purpose of the legislation in relation to separate property, and thirdly I want to develop my argument on those statutory provisions really by way of a critique of the Court of Appeal judgment, and I think that will leave two residual questions in the questions on which leave was given that I can deal with quite shortly. So let me begin by just looking at the scope of the property in issue and it's this that immediately prior to marriage in 1979, the appellant had two pieces of what on any view was separate property. The first piece was his interest in A W Rose & Sons, in partnership with by this time his father and his brother Peter. Your Honours I don't need to take you to the development of the partnership to that point, it's dealt with in the Court of Appeal's judgment at paras.4, 5 and 6 which are on pages 105 to 106 of the case on appeal. That is the position as at 1979 and the appellant's interest in the partnership dated from the early 1970s when he came into partnership with at that time his father only.

Tipping J Do we have any sort of balance sheet or anything in the Partnership Accounts as at that date?

Carruthers No, because the accounting records were not in a state that could be reconstructed. I think Mr Lesley was instructed in 1989

Tipping J I just wanted to know one way or the other, I don't mind why.

Carruthers No.

Elias CJ Where do we find Mr Lesley's – just the reference? It doesn't matter, you can give it to me later.

Carruthers I do come to deal with that because I'm going to just direct your attention to all of the accounts that are in question.

Elias CJ Thank you.

Carruthers So that's the first piece of separate property as at 1979. The second piece is the land known as Cloverlea, which was bought by the appellant in 1968, so that was his sole property from 1968, and he owned that as at the date of marriage. The third piece of property arises not at the date of marriage but a little later and that's a half interest in the property known as Poplars, just leaving aside the house and an area of curtilage which on the death of the appellant's father, went to the appellant's sister. The other half interest in Poplars went to the appellant's brother Peter with whom he was in partnership. So Poplars had been owned by Mr Rose Senior. On his death it relevantly came to appellant and Peter as tenants in common in equal shares. So that was in inherited property on the death of the father in 1995 and that's separate property because it was property acquired by succession. So they are the three pieces on any view was separate property at the time of the marriage and in relation to Poplars in 1995. Now can I come to the second part of my oral argument that deals with the scheme of the Act in relation to a separate property, and this will be to take Your Honours through the statutory provisions with some care in what I'm bound to say will not be an altogether entertaining way. The starting point in my submission is this, that as far as the scheme and purpose of the Act is concerned, the protection of separate property is much an integral part of that scheme and purpose as is the division of relationship property, and I suppose that can be tested very easily that there would be no point in providing in any way for separate property unless it were intended that that was part of the scheme and purpose of the Act. If it were otherwise, the Act would simply provide that all property on marriage or a qualifying relationship became relationship property. So the starting point is prior to marriage the interest of the appellant in A W Rose & Sons and in Cloverlea were separate property, and that arises by a combination of s.9(1) and that is simply a negative way of putting it that all property that is not relationship property is separate property, and under s.8(1) relationship property is defined quite extensively but in a way that at the date of marriage makes it clear that the interest in the partnership and in Cloverlea were separate property. Now after marriage Poplars became separate property by s.10(1)(a)(i), so that is the section applies to the following property. Property that a spouse acquires from a third party by succession and then there's a question in the subsequent provisions as to the way in which the property is dealt with, but as at succession, that is in 1995, the appellant's half interest in Poplars was separate property. Now subject to exceptions which I come to in just a moment, separate property remains separate property. Under s.9(2), and I'll deal with the qualifications in just a moment, all property acquired out of separate

property, and there's no need to deal with the proceeds – all property acquired out of separate property, is separate property. So the development of the appellant's interests in A W Rose & Sons, that I'll conveniently just refer to as the partnership, Cloverlea and Poplars is separate property. Now that is subject as you'll see in s.9(2) to 8(1)(ee), 9A(3) and 10. Now I think 9A(3) and 10 can be cleared away. They've never featured in the case and I think they're sidelined properly by the Court of Appeal. The issue arises

Elias CJ Sorry, 9A(3) is irrelevant?

Carruthers Yes, as is 10, so the focus

Elias CJ Well wouldn't one have to consider 9A(3) if one accepted your submission?

Carruthers No because there was never a question of express or implied consent or improvement.

Elias CJ Alright, yes.

Carruthers I think Your Honour can safely leave point aside.

Elias CJ Yes that's fine thank you.

Carruthers The examination that needs to be made is on the scope of s.8(1)(ee).

Tipping J Is there not an implicit exception in the sense that 9(2) refers to property acquired out of and so on, but it doesn't apply to increase in value of separate property, which has a special regime under 9A?

Carruthers Yes, yes that's right. Just let me develop the argument incrementally. Your Honour's right that it's separate property under 9(1). If you acquire out of separate property it remains separate property and increases in value remain separate property subject to 9A.

Tipping J Yes.

Carruthers Yes.

Tipping J And that's the crunch isn't it in this case?

Carruthers 9A only.

Tipping J Well the claim is to increase in value, it's not to the underlying property.

Carruthers No, that's right Your Honour, but Your Honour's got to get to that point. Your Honour's got to get to the relationship property point before you can start looking at 9A(1) and (2).

Tipping J Yes well that's fine.

Carruthers Yes. So looking now at the scope of s.8(1)(ee), you will see that that provision is subject to sections 9(3) to (6), 9A and 10. Now for the purposes of developing the analysis of 8(1)(ee), one doesn't need to be concerned about 9(3) to (6), 9A and 10 for this reason, that 9(3) to (6) and 9A broadly deal with increases in value and 10 deals really with intermingling and gifts, so just in terms of 8(1)(ee) I can deal with that in a self-contained way for the moment. Now what 8(1)(ee) does in relation to separate property is provide this, that all property acquired after the marriage for the common use or common benefit of both spouses, if the property was acquired out of property owned by either spouse before marriage, or the property was acquired out of the proceeds of any disposition of any property owned by either spouse before the marriage. So what one has to look at is what property was acquired in relation to the three categories that I've identified for the common use or common benefit of both spouses? And if the property was acquired out of property owned before marriage. Now I can just pause there to signal what the appellant's argument is. The way in which the case has been argued is that the property acquired after marriage was the debt of the partnership of A W Rose & Sons, and the property was acquired by the partnership for the development of the partnership business, including the development of the vineyards on Cloverlea and Poplars. Now the argument runs that it was in no sense acquired for the common use or common benefit of both spouses. What it was acquired for, if one can regard a debt as being property acquired in this way. What it was acquired for was to enable the partnership to develop Cloverlea and Poplars and as the evidence shows, the respondent had never participated in any way in the business – in fact it was that factor that led to some of the troubles later on. So the submission is that the appellant's interests remain separate property to this point because s.8(1)(ee) does not bite. Now it's probably appropriate at this point to clear away an issue on which the Court of Appeal has relied, and that's before I come to do the analysis which I have said I'd proposed. The Court of Appeal and the respondent have relied on s.8(1)(e), the previous subsection 8(1)(e) as the starting point for the analysis leading to the conclusion that the appellant had a partnership interest in the debt of A W Rose which was acquired after marriage and therefore the debt and any property acquired with it is relationship property. Now that analysis overlooks the wording of s.8(1)(e), and let me just deal with that. You'll see that 8(1)(e) is subject to sections 9(2) to (6), unlike (ee), which is 9(3) to (6), so subject to 9(2), which will be the relevant one that I'll come to, and for the purposes of this argument you don't need to consider 9A and

10 - I'll come to those later. 8(1)(e) is subject to 9(2) and subject to that all property acquired by either spouse after their marriage is relationship property, but that is subject to 9(2), and let me take you back to that. Substantively and relevantly that provides that all property acquired out of separate property is separate property. Now let me deal with s.9(3), and this really takes up the point that Your Honour Justice Tipping made to me. Section 9(3), subject to 9A which I come to, provides that any increase in the value of separate property, and any income or gains derived from separate property are separate property. So that analysis gets to this point in my submission, that the appellant's three interests are, and this is subject to s.9A, any increase in value, and any income or gains derived are separate property. I should probably just clear away s.9(4)(a) which refers to property acquired while the marriage partners are not living together. That section, although referred to in the Court of Appeal judgment, and that's as a result of the submissions that were made, is probably unnecessary because it deals with any issue about property after separation, but if I'm right in the way in which I've analysed it was separate property to start with, and it remains separate property. So Your Honours that does bring me to s.9A(1), and this part of the case, 9A(1), relates to Poplars, and 9A(1) provides if any increase in the value of separate property, and I think I can probably stop there in terms of the question of increases, because the claim is for an increase in value of the property, was attributable wholly or in part to the application of relationship property, then the increase in value is relationship property, so that's why I answered Your Honour Justice Tipping that what it requires is an application of relationship property. Now the appellant's argument is that there was no application of relationship property on the analysis made so far. What there was, was an application of the separate property, because it was the application of the debt of A W Rose & Son's that was applied to the development of the vineyards. Now let me just pause there because it's not altogether clear from the evidence that the whole of the development of the vineyards was debt-funded. There's some evidence that on the sale of part of Poplars, some part of the Poplars' money was applied to development of the vineyard, but it doesn't matter in my analysis, and I'm content to face the respondent's argument about the debt-funding, so

Tipping J If part of Poplars was sold to help fund the development, Poplars on your argument is separate property, so it wasn't the application of relationship property?

Carruthers That's right, that's right.

Tipping J On your argument.

Carruthers Yes that's right.

Tipping J So even if it were so, it's not going to effect the position on your argument?

Carruthers No, and the key to it in looking at the analysis that the respondent makes, is to identify what is the relationship property that was applied so that the increase in value was attributable to the application of that property, and as Your Honours' noted, on my argument because of the constructive s.9(1), (2) and (3), it is the money that was applied. The property that was applied was always separate property. Now the final section that I want to deal with before I come to the third part of my argument, that is the critique of the Court of Appeal judgment

Elias CJ Sorry, you said that s.9A(1) applies to Poplars

Carruthers Yes.

Elias CJ If you're right in that argument, is there still nevertheless a live issue that s.9A(2) applies to Poplars?

Carruthers No, that's certainly not the way the case is being argued.

Elias CJ Well is that because of the application of s.8(1)(ee)?

Carruthers No, I'll take you just forward to where I'm going.

Elias CJ Yes.

Carruthers In 9A(2) you will see that the increase in value must be attributable to the actions of the other spouse

Elias CJ Yes.

Carruthers And of course in relation to Poplars, which was the father's property, devolved on the two sons as tenants in common, the respondent had no connection with that at all.

Elias CJ But that is not necessarily determinative.

Carruthers Well it's a matter then of identifying the actions, her actions, which provided the causal nexus that was more than trivial contributing to the increase in value.

Tipping J Has it been argued at any of the Courts below that 9A(2) helps the wife in relation to Poplars?

Carruthers My instructions are that it was argued in the Family Court and the High Court but not in the Court of Appeal, and of course the High Court dismissed the argument. So the key to it will be the absence of any causal nexus that's more than trivial the actions of the other spouse.

Tipping J So the point that separates the parties on Poplars is this debt, this funding really?

Carruthers The categorisation of the funding?

Tipping J Yes.

Carruthers Yes. See, the respondent's argument has to be that the debt is relationship property and that's why

Tipping J That can be property can't it?

Carruthers Yes it can.

Tipping J Peculiarly in a sense.

Carruthers Peculiarly, yes. But that's why I have gone so carefully through the way in which the Act protects separate property to illustrate that on any view the debt used by the partnership to develop the vineyards was separate property by the combination of the sections I've taken to you and there is no basis for saying that that debt was relationship property. So on the argument, on the analysis I have made, the Court doesn't get to 9A(1) or 9A(2).

Blanchard J Mr Carruthers I may be being picky here, and forgive me if I am, but I don't find it helpful to talk about applying a debt. You do it borrowing. That gives you cash. It's the cash. It's a partnership asset that's applied.

Carruthers Yes.

Blanchard J But I understand the argument you have been making.

Carruthers No, no, Your Honour's right to stop me on that.

Blanchard J It helps the clarity I think.

Carruthers Thank you Sir. Now I was coming to deal with 9A(2), which is the section relied on in relation to the claim on the increase in Cloverlea, and you will see that under 9A(2), if any increase in the value of separate property was attributable wholly or in part and whether directly or indirectly to the actions of the other spouse then the increase in value is relationship

property, but the share of each spouse in that relationship property is to be determined in accordance with the contribution of each spouse to the increase in value. Now the argument that I shall develop in relation to the Court of Appeal's judgment is that there's no causal nexus between the actions of the respondent relied on by the Court of Appeal, and the increase in Cloverlea. The increase in Cloverlea was probably, if one analysed it, a combination of inflationary trends and property values which of course are unconnected with the respondent, and the development of the vineyard.

Blanchard J Well there's a third element isn't there, over and above normal inflation, there is the increase in value of vineyard land. Land with potential for vineyard. That must be a very significant part of the increase in relation to land of this kind.

Carruthers Yes, I put the combination of inflationary trends in one category and then I was just on the point of submitting the development of the vineyard

Blanchard J But that's a third element.

Carruthers Oh I see.

Blanchard J You could take all land in Marlborough, some of which is suitable for vineyard or not, it will all have gone up since 1979 because of inflation.

Carruthers Yes.

Blanchard J Vineyard land – land that is recognised as potential for vineyard – will have gone up particularly.

Carruthers Yes I accept that.

Blanchard J And I don't think you would describe that as pure inflation. It's a recognition that it can be used in a way that other land can't, and then there's the increase which is caused by the planting of the vines so that you have a business on the land.

Carruthers Yes I can personally vouch for all of that analysis Your Honour. So I accept that there are the three categories Your Honour's identified.

Blanchard J But we presumably don't have evaluations which split things up nicely.

Carruthers No, and Your Honour I think it was the Court of Appeal that noted that in the way in which the case has developed, the evidentiary base that's now necessary is simply not there.

- Tipping J What is the total increase in value? Is that common ground or is that not common ground?
- Carruthers No Sir it's not common ground because of the way in which the respondent puts her argument which says the land at the beginning was worth X on the best valuation we've got, now there is this piece of land left and that's worth Y, and you do the calculation that way. But as we've submitted, or drawn attention to it in the written submissions, what is left is significantly different from what was started with and even on the remaining land the percentage that is vineyard land is significantly different, so we are nowhere near agreement on it to the point where one of the submissions that we made in the Court of Appeal was that because of the state of the evidence on valuation, the only course that was open was that the case ought to be remitted back for evidence on that so that that issue could be decided, unless it was possible to reach agreement in the meantime.
- Elias CJ Why does it matter alteration in the size of the land if a nexus can be established, just in terms of working out what is the increase attributable to inflation and what to effort and what to the intrinsic value of the vineyard land?
- Carruthers The difficulty is that you don't really have a starting point for the lesser area of land at the time that the various parcels were sold off.
- Tipping J Is it your argument that what you should compare is what was left valued at the beginning with what was left at the end?
- Carruthers Yes.
- Elias CJ Why can't a valuer undertake that. I mean it would be rough and ready but
- Carruthers Well the difficulty with that is that this analysis didn't really arise until we were in the Court of Appeal and when it was looked back at what evidence there was, it wasn't sufficient to get that analysis out of the various valuation.
- Tipping J Not possible to do a proportion of the value at the beginning that we know for the whole and simply divide it by the amount that was gone.
- Carruthers That analysis presupposes that the land is all exactly the same character.
- Tipping J Right.

Carruthers I mean I think I'm just bound to submit to you that the valuation position is unsatisfactory, not through any fault really of the parties. It's really a reflection of the way the case has developed.

Elias CJ So you're really seeking some statement of principle which the parties can get valuation evidence on if necessary or resolve the matter?

Carruthers That's right Your Honour, although my case is that it doesn't get to that point.

Elias CJ I'm bothered – you'll probably come back to it – about why if you are right in your contention in relation to Poplars, you're not into s.9A(2). If that was as I think you've said, something that was addressed in the lower Courts, it may well have been overtaken by the view taken in the Court of Appeal but you might come back to that.

Carruthers Yes, let me come back to that please. Your Honour I will come back to it but I should answer you now. It was not argued in the Court of Appeal and as I understand the submissions, it's not argued here, and the reason is that the evidence is such that it's simply not possible to say that there was any causal nexus at all in the actions of the respondent in relation to Poplars. Unlike Cloverlea, where the position is arguable because that property was where the appellant and respondent lived.

Elias CJ They lived.

Carruthers Yes. But the

Elias CJ But if one looks at the matter, and I appreciate this may not be the way it's been argued and that we will be limited by that, but thinking more generally about the principle, if one looks at the position of these parties, the husband worked on these two blocks of land and through the vehicle of the partnership to generate income and wealth which went back into the partnership or which accumulated in the land to the extent he didn't extract it through wages or something like that, enterprises such as this seems quite different from cases where you have separate property which doesn't provide a vehicle for the effort of the husband or other spouse in the marriage. I mean if he'd gone out to work and earned wages and brought those home, they would all have been relationship property. I have some anxiety that effectively that's what you've got here.

Carruthers No, no Your Honour shouldn't have that anxiety because what in fact happened was that there were drawings

Elias CJ Oh I understand that, I understand all of that

Carruthers And that was on a regular basis, so you

Elias CJ I understand that.

Carruthers Yes.

Elias CJ But to the extent that there is wealth left in the partnership or the development on the land, that is wealth that has accrued through the effort in part of the husband which hasn't been accessible in the marriage partnership.

Carruthers Yes, but Your Honour it is important to appreciate that the husband brought the land to the marriage

Elias CJ Oh no I understand that. I understand all of that, yes.

Carruthers But that's where the wealth is generated from and that's the protection that's offered and that's why it's important to be analytical and clinical in a reasonable way.

Elias CJ Well that's why the legislation requires you to abstract from what can become relationship property, the underlying value he brought into the relationship and to adjust it at least in so far as the increase in value is attributable simply to the asset, but when you have effort applied by one of the spouses it is I would have thought arguable to the extent that his separate property has increased because he hasn't abstracted that to the benefit of the family from the vehicle he's used, then it comes into the relationship property if the wife has foregone for example a higher standard of living and all of those sort of things. I'm just not sure about the emphasis you're placing on the inviolability in circumstances where the husband has made this his major working effort during the marriage.

Carruthers There are two issues. One is the facts of this case where overall the partnership at all times was seriously in debt. That what had been taken out had been applied in really a handsome way to the marriage, and if one looks at the overall position of the partnership, it was in a debt position. The second issue Your Honour is a matter of principle how it is approached, and what arises from that is that the balances that as partnerships for example distribute from earnings to each of the partners, and that becomes the partner's own property and if that's applied then that's relationship property. But

Elias CJ It's their choice though what to take out.

Carruthers Well unless it is taken out, I mean I think one must look at it in the sense of practical financial affairs in the practical manner of business, but there's

no advantage in simply allowing an accumulation on property, and there's no suggestion in this case that this was in any way a device or anything like that to stop a property devolving

Elias CJ No, no.

Carruthers And I think that all that has happened in the legislation is that as a matter of policy, as a matter of a policy decision, that the legislation has drawn a line as to what was separate and remain separate and puts in place a mechanism that converts separate to relationship, and on the other side has purely relationship and not separate, and Your Honour the words of the section actually support that. If we deal with 9A(1) first; what it has to be is an application of relationship property, so the increase has to be attributable to the application of relationship property, so in this case the Court has to identify what was the relationship property that was applied so as to increase the value of Poplars.

Elias CJ Yes, my question was directed at ss.2.

Carruthers At 9A(2). The answer there is to examine, and the test even confirmed by the Court of Appeal, is that there has to be a causal nexus between the actions of the spouse and the increase in value, and as I come to with a catalogue of contribution that the Court of Appeal has relied on under 9A(2), is not a contribution to the increase in value, it is a contribution to the marriage which is actually a rather one-sided analysis because it rather assumes the husband wasn't participating as a husband and father, which is a long way from the facts. So that's why some care has been put in the submissions in drawing attention to the way in which the cases have developed, and really insisted that there is some real tangible connection that the actions of the other spouse have to illustrate and demonstrate that they relate in a causal way to the increase in value.

Tipping J It's interesting that ss.2 uses the expression 'directly or indirectly' whereas that is not present in 1. That may partly be on account of the subject matter of the two subsections, but where I think the difficulties really lie Mr Carruthers is in what constitutes an indirect contribution through action. A direct contribution is getting on the farm and putting in the fence posts and so on, but an indirect contribution in my experience of this legislation is I think it used to be the same in this respect through the case law, it's the indirect contributions that are the problem for working out where the boundaries lie.

Carruthers Yes.

- Tipping J And I imagine what the argument is that it's not going on the land and putting in fence posts, but it's a more subtle contribution if you like than that.
- Blanchard J Doesn't it allow somebody's effective subsidisation of development of separate property to be taken into account. Take an example which is far removed from this case. Assume that the wife had a very significant income and she effectively paid all the household expenses and school fees and so on, as well as making non-financial contributions – I'm not trying to down-play them – and assume that the husband had not taken any drawings out of the vineyard business at all, but it had all been ploughed back into development of the partnership assets, surely then the wife is making an indirect contribution to the increase in value of the partnership assets on that hypothetical example.
- Carruthers Well what the wife is doing is by her contribution to the marriage, allowing the husband to continue in business dealing with his separate property in the way in which he did before. The difficulty that you always come back to Your Honour with respect is looking at how that tension that you identified so graphically is resolved as a matter of policy under the Act, and that's why I started the submissions by saying that it is much a part of the policy, much a part of the scheme and purpose of the Act that separate properties
- Blanchard J But what are we to make of the words 'directly or indirectly'?
- Carruthers Well Your Honour if I can just
- Blanchard J Weren't they put in there to negate *Hight v Hight* where the wife's claim under the equivalent section in relation to the Company failed because she couldn't show that she'd actually worked on the farm, and as I understand it the legislature, and I agree with the legislature, thought that that was an unfair result.
- Carruthers Well if I can just take up your example and take it away from 9A(2) for a moment, it's not that 9A(2) defeats any claim. I mean that's a matter of looking at what the whole of the legislation provides, which is why Justice Wild expressed concern about the outcome and pointed the parties in the direction of s.17 and then made the order. So
- Blanchard J But s.17 was used in *Hight v Hight*, and there's a limit to how much you can use it. I've always understood that this language in 9A(2) was to get rid of the impediment in *Hight v Hight*, and effectively to endorse in general terms anyway the approach of the Chief Justice who was the High Court Judge, and Justice Thomas, who was the dissenting Judge.

- Elias CJ And just further to that if in that case it was a company farm, I can't see that it's suddenly different because it's a partnership vehicle that's used here. It seems the same sort of idea.
- Carruthers Well I certainly accept that there is a category of action that could not properly be described as direct; that can be categorised as indirect; but there's another step, and that is the step that says there must be a causal nexus between the actions of the spouse and the increase in value, and it is identifying the quality of the actions in order to get to the point that the Court can be satisfied that those actions increase the value of the property.
- Blanchard J Can you give me an example of an indirect action which wouldn't be effectively a subsidy? I can think of one or two very strained examples, but I don't think the legislature was thinking of them. Also you may want to reflect on an answer to that question that have you looked at the legislative history of s.9A(2) to see whether it confirms my view that it is directed at *Hight v Hight*.
- Carruthers Your Honour I certainly know that's formed part of my learned friend's submissions and with respect I agree that the legislative history does support that conclusion. But it still doesn't take the argument to its conclusion but I'm bound I think to just reflect and try and give Your Honour some examples of the sort of conduct that would be properly described as indirect, but would have no contribution to the value of the property.
- Blanchard J I think she worked around the farm, but she hadn't actually done any of the development work. I haven't read the case for years.
- Carruthers Oh I see, in *Hight*, I'm sorry, yes, I think that
- Blanchard J And that's why she missed out.
- Tipping J Another part of the legislative history, or the backbone to this is I think we got following *Hight v Hight* to the rather curious state of affairs that under the legislation the contributions had to be very direct, whereas under the earlier de facto regime of the approach of equity like *Gillies v Keogh*, the Courts were taking a more liberal approach, so you ended up with a rather odd and counter-intuitive if you like difference between the two, because *Lankow v Rose* I remember there was some discussion about the nexus if you like between the contributions and whatever it was, and it was made quite clear that that they could be indirect.
- Carruthers Yes, but Your Honour those cases were talking about what by analogy was, I mean they were equivalent of marriage relationships, so they were

actually looking at the property that one would regard as relationship property.

Tipping J But the point is Mr Carruthers, that you do better under the common law approach than under *Hight v Hight*, and that's another reason I think why Parliament stepped in and levelled the playing field.

Carruthers Yes, I accept the analysis to that point, and indirect indirect actions are plainly matters that can be taken into account if this is a necessary connection. So my argument is that they still must have that quality.

Tipping J Well I don't think anyone would doubt that you can't have an indirect contribution that hasn't got some nexus.

Elias CJ But you were making the criticism of the Court of Appeal identification of contributions that did have a causal nexus. Were those the ones in paras.75 and 76?

Carruthers 75 and 76, yes. 75.

Elias CJ But you see they refer in 76 to Justice Wild's conclusion that but for the appellant's contributions the enterprise would have been in jeopardy.

Carruthers No Your Honour in my submission that section and analysis is really not altogether fair to the appellant's argument. See what was said was that well Justice Wild make a finding that the enterprise would be in jeopardy and that that finding hasn't been challenged on appeal. Well that finding has to be read against the background that Justice Wild had considered the claim under s.9a(2) and dismissed it. This is in the second judgment when he was looking at the scope of the respondent's actions in relation to s.17 and the sustenance of the property.

Elias CJ But it's a factual determination and is legal analysis may have been wrong as the Court of Appeal thought it was. It's the fact that matters for their purpose.

Carruthers But what the Court of Appeal is doing is taking a conclusion in relation to one section and a statutory provision that is quite different because is talks about sustenance of the property, and then just transposing that and saying well those actions were causative of the increase in value. If I could give the examples in para.75 in answer to Justice Blanchard, they are examples of the contribution to the relationship or actions in the relationship that cannot have any bearing indirectly on the increase in value of Cloverlea.

- Elias CJ Well he might have had to sell more land, or he might have had to extract more income if she hadn't been taking those. It's the subsidy point that Justice Blanchard referred to.
- Blanchard J And the subsidy point may go back to the beginning of the marriage. If her subsidy was effectively occurring shall we say during the 1980s, and it appears to have least started in 1985 in financial terms, there's an argument for saying that some of the inflationary value was subsidised by her because otherwise they wouldn't have been able to hang on to the property. I mean we may not have factual findings that we're able to make that kind of determination, but I've got to flag that as a potential argument against you.
- Carruthers But Your Honour that cannot be an indirect action of hers
- Blanchard J Why
- Carruthers Well there was an inflationary trend therefore that's an indirect
- Blanchard J No, no, no, you haven't understood the argument. The argument is that her action was her contributions which subsidised the partnership, because he didn't have to draw as much out of the partnership and therefore was able to leave money in it which meant that they could hang on to the land. They were in enough pressure already from the banks at various stages. But for the subsidy the argument would go. They would have lost all or part of the land and therefore would never have gained the benefit of the inflation which occurred subsequent of that time
- Carruthers Your Honour certainly on the cases since the amendment of the section there has been an emphasis on some demonstrable and evident causal nexus, and I expect that that's where the argument will ultimately turn.
- Anderson J Having regard to sections 1M and 1N which are the fundamental philosophies of the Act, one really needs to take a very broad and non conventional common law view of causation, wouldn't you say.
- Carruthers Yes provided your broad view of causation recognises that it is as fundamental to the scheme and purpose of the Act that separate property is protected as it is to the proper division of relationship property.
- McGrath J It's really perhaps section 1M(b) in particular though as to whether that assists in deciding what will be indirectly attributed to an increase in value.
- Carruthers Oh Your Honour I don't cavil with that for a moment. I accept that plainly it's all forms, but where the argument is really getting to is whether the actions that were found in this case provide a sufficient causal connection

to the increase in value in Poplars, which if one looks at it from the factual position in Cloverlea, the way in which the increase in value occurred was that the money borrowed by the partnership was actually applied by the partnership to the development of the vineyard. Now that's as clear a causal nexus as one could imagine.

McGrath J But there were indirect underlying features of the marriage that enabled that to be done, or it supported that being done.

Carruthers Well yes Your Honour, but in my submission you have to distinguish between contributions that were made to the relationship itself as opposed to actions that cause the increase in value.

Tipping J I think the legislation clearly anticipates a conceptual division between causing increase in value and sustaining property, because that's the essential difference between 9A and 17, so on the margins you are going to have quite tricky issues as to whether the actions of the wife usually, or whichever spouse it is, have actually caused an increase in value or sustained the property to enable the fruits to be enjoyed by both parties, and one of the tricky issues in this field that I've always thought, was that divide, and what I think you're saying is that the wife in this case may well have sustained indirectly the property to enable it to be there at the end of the day, but she hasn't caused the increase in value, and I think that is really what it comes down to. It's one or the other.

Carruthers Yes.

Tipping J Clearly she must get something for what she's done, but what's the right analytical box to put it in?

Anderson J They might merge.

Tipping J Or as my brother says, they may tend to merge at the margins

Blanchard J And should produce a similar result.

Tipping J And should produce broadly speaking, a similar result, yes.

Carruthers Well because of that analysis that emerged from the judgment of Justice Wild there was no appeal from his

Tipping J But the amount of the sustaining award was demonstrably lower than the amount of the increased award in the Court of Appeal, and that's a troubling feature. I flag that as a troubling feature.

Carruthers But that analysis that Your Honour's just made begs the question as to whether the analysis made are value in the Court of Appeal

Tipping J Oh yes, yes. I'm certainly to some extent, and I don't know to what extent, I'm with you

Carruthers Yes I understand that.

Tipping J Because we mustn't merge in an undisciplined way sustaining and causing increase, but if it's the same

Elias CJ Contributing to the increase.

Tipping J Well contributing to the increase, yes.

Carruthers Attributable.

Elias CJ And yes the award then is limited to the extend to which it's attributable.

Carruthers Yes, I understand Your Honour.

Tipping J So you share out the pure inflation and the fortuity of the land increasing in value because it was suitable for vineyards and you try and isolate the sharable increase in value if you go down that line, or if you go down the other line you work out perhaps on similar methodology, if you're factoring in a sustaining award but it has actually not only sustained, but indirectly you must recognise the increase in value that's been sustained, so that the two concepts are not wholly different, but I think it's quite important methodologically to be careful which one one is adopting.

Carruthers There's another consideration arising from Justice Blanchard's analysis and that is that one could get to the point that because of s.9A there would never be a protection of the increase in value of separate property which is really turning the coin over, because on Your Honour's analysis indirect actions of spouse providing that the subsidy analysis, that is likely to always be the case.

Blanchard J It may be in relationships between people who are not hugely wealthy, but there'd come a point where you'd say there's effectively no subsidy at all.

Carruthers Well in your example that you gave me where the wife was substantially wealthy, if I can use those terms

Blanchard J I stacked that example to make a point.

- Carruthers I know Your Honour did, but that may be the situation where there is no subsidy.
- Anderson J Could you have an act of sustaining which is also an indirect contribution to increased in value? Because once it's sustained and then increases in value, it does so because it's been sustained, so you comply with both sections. Suppose you dash into the house to save your Rembrandt, then it increases in value by several billion, your acting of sustaining is also the reason why it's worth \$100 million at the end of the relationship.
- Carruthers So Your Honour's analysis would be that directly or indirectly, the action of the wife racing into the house to rescue the painting was attributable to the increase in value of the separate property?
- Anderson J Yes.
- Carruthers Well Your Honour with respect that in my submission is not the concept that the section has in mind.
- Anderson J You'd go under s.9A rather than s.17 in that situation. The same conduct could meet both sections.
- Carruthers Well I accept that proposition, but one must be careful to ensure that there is a proper causal nexus between the actions and the increase in value. You see in this case there is a very easy and obvious analysis as to why the value of Cloverlea increased. It increased because the partnership borrowed and used the funds to plant the vineyard. Now if one wanted a classic example of a causal nexus, that is there, that is obvious.
- Blanchard J But what if she helped them borrow because she made financial contributions which enabled him to leave more money in the partnership which he'd otherwise have had to pull out for the household, and if he had pulled them out the banks wouldn't have lent because the position of the partnership was relatively precarious?
- Carruthers Your Honour the question is where you draw the line so that increases in value of separate property which on their face remains separate property, where do you draw the line to protect that part of the statutory scheme as opposed to allowing an award for the actions of the other spouse in relation to the increase in value? Now Your Honour 9(3) is subject to 9A. I accept that, but there has to be a recognition that the starting point is that increases in value of separate property remains separate property, and it really comes back to the proposition I put a moment ago on the analysis that Your Honour made if there was separate property, and predictably there would be increases in value of separate property at least until probably our recent financial calamity, and really almost axiomatically

Your Honour is saying that there would be an entitlement to an award under 9A(2), and in my submission that can't be right.

Blanchard J Well you'd have to be able to show that there was effectively a subsidisation. One has to be realistic about that.

Carruthers Well Your Honour one could say that in this case let's take the more conventional example of the wife working. Any working wife in employment would on your analysis be providing a subsidy at some level.

Blanchard J Not necessarily.

Carruthers Well.

Elias CJ They might be depending on the facts. I drew probably quite wrongly in *Hight v Hight*, certainly the Court of Appeal thought so, a distinction between the position where the separate property is an enterprise for the working effort of the husband, because otherwise what's attractive in that is otherwise there's a quite different result according to whether you're self-employed through a company form for example or whether you go out and you get a wage. That wage will be matrimonial property or relationship property under the Act. Why should your decision to reinvest what you could have taken as wage in a company for example, be treated so clinically distinct? I would have thought that the paradigm of a relationship is that both parties do what they can. Now it may be that you have a situation where in addition to that day-to-day effort, one or other of the spouses is lucky enough to have a passive investment I described it in that case, but an investment which the spouse may sustain in some small way, but it's not really central to their working life together and it may be entirely appropriate for that to be kept totally out of the reckoning between the parties, but it's a bit difficult to see that someone who gets a substantial salary should be treated very differently from somebody who puts his working effort into a partnership or a company.

Blanchard J To a Barrister a vineyard is safe.

Elias CJ Perhaps. Depends how hard you work at it.

Carruthers I can promise you. Yes, Your Honour's putting that at a high level of principle

Elias CJ Yes.

Carruthers And it actually does have to be brought back into the statutory framework, so the only way into that

Elias CJ Well it's indirect.

Carruthers Yes.

Elias CJ But I suppose I was also using those two different scenarios of the vehicle for working effort and the more passive investment as a means of suggesting there may be a difference between the s.17 consideration, and the indirect contribution that the statute contemplates under s.9A(2).

Blanchard J On your argument would *Mrs Hight* still lose?

Elias CJ She would.

Carruthers I thought the answer to that question would be no that she wouldn't because she was actually working in and around

Blanchard J Yes but she didn't do anything which directly increased the value of the farm. She did things which sustained it, but she didn't for example build a new barn or put in the fencing.

Carruthers Can I just look at *Hight* for a moment.

Blanchard J As I recall.

Elias CJ No, I read it last night, and there was a finding that it didn't increase the value of the property. Her work around the property didn't increase the value. It was you know moving a bit of stock here and there, that sort of thing.

Carruthers Well on my argument if there was nothing that provided a causal nexus, then yes she would lose.

Blanchard J So Parliament has misfired?

Carruthers No I don't think that for a moment. What Parliament in the report picked up was that there was an issue about that in the sense that indirect contributions were not indirect actions

Blanchard J But she, on your argument, she didn't make any indirect contributions.

Carruthers No, that's right, but it doesn't follow that because the legislation was changed, that it was designed to in a sense reverse the result in *Hight v Hight*.

Elias CJ That's the question though.

Carruthers *Hight v Hight* threw up a problem and the legislation was revisited.

Blanchard J Have we got any of the Parliamentary materials?

Carruthers The answer to that is no Your Honour.

Elias CJ It's quite a modest redirection really because it is limited to an award in accordance with contribution. It's not as if it becomes relationship property, so it's not

Tipping J It's not automatically 50/50.

Elias CJ No, it's not as if it's a huge relaxation.

Carruthers No I accept that but it needs to be principled because it has to have a working basis for other cases, which is the criticism that's made in the commentary on the case in the Court of Appeal that we've referred to in our written submissions.

Tipping J Are you proposing later Mr Carruthers to analyse this debt business more closely or are you going to wait until you hear Mrs Hinton and then respond, because it seems quite clear that at least as far as Poplars is concerned, that's going to be a crunch issue, and you've also just said that the value of Cloverlea increased because the partnership borrowed and improved the property, so this is a very very important point in the whole case isn't it, this, if I can call it for short, the debt, the borrowings point?

Carruthers Yes.

Tipping J Because if you're not there's one or two questions that I would like to ask, but that can be left until after the adjournment. Just so that I can get it straight in my mind the sort of conceptual basis on which you're arguing the fact that it wasn't the application of relationship property. Leave it until after the adjournment.

Carruthers No, no Your Honour, one has to identify as I submitted earlier what the relationship property is of being applied, because what was being applied for the vineyards that were constructed on the land of Poplars and Cloverlea, that was money provided by the partnership.

Tipping J The two brothers as partners

Carruthers Yes.

Tipping J Borrowed the money?

Carruthers Yes.

Tipping J The money was then presumably, although it wasn't done technically this way, advanced to the husband, your client, to enable him to

Carruthers No, no, no Your Honour, we've just been dealing with it in really a conceptual and rather imprecise way

Tipping J Yes, well that's why

Carruthers The money was borrowed by the partnership, and the partnership constructed the vineyards on Poplars and Cloverlea, and part of our argument is that the Court of Appeal was wrong but the vineyard, the vineyard planting and the vines and the trellises are owned by the partnership.

Tipping J And are notionally severable from the realty?

Carruthers Well it's really a conventional way as *Lindley and Banks* really point out in the passages that we've adopted in our written submissions, that what has happened is that the owners of the land here have agreed with the partnership that the partnership can construct and develop the vineyards on the land that the owners own.

Blanchard J Test it this way. If your man were to sell Cloverlea, he presumably would have to account to the partnership for the portion of the price which was attributable to the vineyard. Not the underlying land, but the vineyard development.

Carruthers Yes that's right, and in the same way if Poplars which is jointly owned, there would be an issue if one or other wanted to sell.

Blanchard J Yes. One of the things that has made this complicated is that the partnership has no doubt for good reason chosen not to re-value the vineyards. It's carrying the vineyards at their cost.

Carruthers And depreciating.

Blanchard J Yes.

Carruthers Yes.

Tipping J Alright, well thank you, that helps. I'll be looking forward to hearing what Mrs Hinton says about that.

Carruthers Yes and I've got some more to say about that also.

Elias CJ Well take the adjournment now.

Carruthers Thank you.

11.32am Court Adjourned

11.53am Court Resumed

Elias CJ Thank you.

Carruthers Can I just take up the issue of subsidy again by reference to the facts in this case. If I can take you to volume 2 of the case on appeal, at page 252 is the affidavit of Mr Leslie to which I shall return, but at 254 at para.12

Elias CJ Sorry, what volume?

Carruthers Volume 2 Your Honour and page 252 is the start of the affidavit, and I've taken you to 254 at para.12, and I want to go to 12 and 14. The essence of those two paragraphs is that the drawings over the period that Mr Leslie has dealt with the accounts, and that's from 1989 onwards, he refers to a total of \$954,000 odd, \$955,000 on the basis that that is a contribution of a taxable salary of approximately \$90,000 a year for those years, and that's his contribution from his drawings from A W Rose. And in para.14

Elias CJ Sorry taxable, you mean gross, sorry I wasn't looking at the

Carruthers Well yes.

Elias CJ Yes, it's not tax paid, thank you.

Carruthers No, no, tax paid, that figure's dealt with as well. \$63,660 is the figure

Elias CJ Yes.

Carruthers And in para.14 for the period from 1996 onwards Mrs Rose received on average a salary of approximately \$30,000 gross. Now I want to just identify how the funds that the appellant brought to the marriage were applied, and this table is gathered in several places. It's probably convenient if I take you to the written submissions for the appellant on page 5 in para.21, and you will see from the quality of the payments made from the \$960 odd thousand is found in the two judgments, personal expenses of the appellant and family; private school fees; life insurance; house electricity; house costs; vehicle running costs; vehicle loan repayments; personal debt repayments; other person debt repayments;

payments to a son and to the respondent; and all I'm drawing attention to is where does the issue of subsidy fall in circumstances where a substantial amount of income on any view is brought to the family on an annual basis and the wife also works and contributes a sum significantly less than the husband, and the issue that arises is at what point does the subsidy arise and Your Honour Justice Blanchard is that line that I invited to be drawn between, or reconciling s.9(3) on increases being separate property as opposed to 9A(2) where one has to look at the way in which actions of the spouse were attributable, or the increase at value was attributable to the actions of the spouse. And we start to get into a relativity exercise as to where a subsidy arises in circumstances like these.

Blanchard J I suppose one would have to look at what was occurring in relation to the application of her income and what was going on within the partnership in order to determine whether there was truly an element of subsidy.

Carruthers Well I think that

Blanchard J In other words what was the partnership being enabled to do by virtue of the fact that her income was being used for household expenses etc. Now I don't know what the answer to this is

Carruthers No.

Blanchard J I'm really dealing with it in hypothetical terms.

Carruthers I understand that. Although we can identify that the partnership borrowed so that the appellant could continue to provide drawings at the level he did throughout the period.

Tipping J They were effectively living off capital.

Carruthers Well

Tipping J Well no in whole, and I'm not saying who that's for or against, I'm saying they were spending a lot more than they were earning.

Carruthers Yes, well that's right, yes.

Tipping J And I don't know what effect that has. I mean this must have been consensual. There's no suggestion that she didn't know that this was going on presumably.

Elias CJ There's evidence that she didn't like the fact that he was putting all his effort into the partnership.

Carruthers She did not like the partnership arrangement, and that was on the evidence plainly a source of friction between them.

Tipping J Was that a financial concern or just

Carruthers No it was much more of a marriage relationship concern. Just excuse me a moment. Your Honour Justice Blanchard I was just trying to find out whether we do have any analysis of how the \$30,000 was applied, but I think the answer to that is no.

Elias CJ Well did she end up with assets of her own?

Carruthers On separation?

Elias CJ Separate assets of her own?

Carruthers No, no.

Elias CJ So the inference can be drawn that they were applied to the purposes of the family as a whole.

Carruthers Oh I think that that's fair

Elias CJ Yes.

Carruthers I think it's fair to say that because of the analysis that I made they were probably, well if I can put it this way without sounding accusatory in any way, they were probably in the luxury category in the sense that they provided additional funding to the marriage. I'm coming now to the third aspect of the oral argument I want to make and I do want to take you through the Court of Appeal judgment and in doing it this way I'm really capturing orally the written argument that we have made, so I'm inviting you to rely still on the written argument but I want to tie that more closely into the Court of Appeal judgment, and can I just start in dealing with the way in which the Court of Appeal has dealt with the statutory scheme, and I'm at page 112 of volume 1 of the case.

Tipping J I've got the Court of Appeal judgment separately. What paragraph is it in that Mr Carruthers please?

Carruthers I'm at paras.30 through to 38 dealing with the statutory scheme

Tipping J Thank you.

Carruthers But I want to deal specifically with para.35. You will see the structure of it that the Court of Appeal's gone through the various sections and at 33,

just to take you back, the last sentence, s9(2) is subject to 8(1)(ee), 9A(3) and 10. I've dealt with that already. Then at 35 the Court of Appeal again in the last sentence notes that s.8(1)(e) is subject to 9(2) to (6), 9A and 10, as I've explained already. But what the Court of Appeal has overlooked and has not done is to examine in any way the consequences of s.8(1)(e) being subject to 9(2), and I'll explain why that is by looking now at the next section of the judgment beginning at page 114 and it begins at para.39 for Your Honour Justice Tipping, and I want to go to just pick out the analysis that begins at para.48 on 115 where the Court deals with the effect of *Maw* is that each partner in the partnership has a beneficial interest in the assets of the partnership. Accordingly, in terms of s.8(1)(e) of the Act, a partner's interest in a partnership asset acquired after marriage will be relationship property. Now that in my submission is wrong, and the analysis that I had made already is that by s.9(1), the appellant's interest in the partnership Cloverlea and Poplars are separate property. By 9(2) the property, that is the funds that I've referred to as the debt, acquired out of the partnership, A W Rose & Sons is separate property, and by s.9(3), subject to 9A, increases in value in gains are separate property. So what that analysis does is to overlook that s.8(1)(e) is subject to 9(2) and it does not have the effect that the Court of Appeal poses. So it reaches its conclusion on this part of the argument under para.50 where it says 'we do not accept that the partnership property is property acquired after the marriage out of separate property in terms of s.9(2) because applying *Maw*, the partnership interest per se is not an asset. Rather, each partner has a beneficial interest in the individual assets of the partnership. Section 9(4)(a)' you'll remember that's the property after separate 'does not detract from this approach for the same reason. Standing back and looking at the matter in the round, the conclusion here is appropriate given the direction of the respondent's efforts towards the partnership throughout the parties' marriage'. Well that with respect doesn't follow at all because it was separate property. It remained separated property and s.8(1)(e) does not affect the analysis at all.

Blanchard J What do they mean by the first sentence in para.51?

Elias CJ I've got a big question mark by that.

Carruthers In para.51?

Blanchard J Yes, what does that mean?

Carruthers Well that's where they go on to do the analysis, the proper analysis in fact, because s.9(2) is subject to 8(1)(ee), and Your Honour all I can say is that they are wrong about that in the preceding paragraphs, because it is not in accord with the statutory provisions. But what's being said will if we're

not right that it becomes relationship property by s.8(1)(e), then we're saying that s.8(1)(ee) applies.

Blanchard J So they're not talking about debts, they're talking about assets, partnership assets?

Carruthers Yes, yes, that's right.

Elias CJ Does *Maw* really say the partnership interest per se is not an asset?

Carruthers No, no I don't think so for a moment Your Honour, but there's a rather easier way through it and that is that the Court has simply not construed s.92 correctly, has not construed s.8(1)(e) correctly because it's subject to 9(2), which means that it was separate property and not relationship property.

Anderson J Could I take you Mr Carruthers to the second sentence of para.48 which is crucial? Accordingly, in terms of s.8(1)(e) of the Act a partner's interest in a partnership asset acquired after marriage may be relationship property depending how it's acquired. Because if it's acquired from separate property – if it's derived from separate property, it's separate property, but there may be situations where partnership property conceivably is acquired, but not out of separate property, in which case it might then become relationship property.

Carruthers Yes.

Anderson J And then the next crucial issue in this case is was the debt treating it as an asset? Was the debt acquired out of partnership property or was it acquired out of something else? Because it would say to you if it's acquired out of the separate property will itself be separate property, and if it's acquired out of something else it will be relationship property.

Carruthers I understand that and the only options here are that some of the money may have been acquired from the sale of part of Poplars but there is not enough evidence to identify how much of that sale went to retire debt and how much, if any, was left over, so as I explained earlier, we have treated the case as being a debt that as Justice Blanchard corrected the position properly, that is borrowings by the partnership and application of those borrowings to development of the vineyards on each of the two properties.

Anderson J Yes I understand that. I'm just struggling with the idea of whether the borrowing with which I treated here as property, whether the borrowings are required out of separate property or out of something else. I mean the partnership assumed the liability for the debt, but how was it acquired?

Carruthers Well the partnership borrowed it from the bank and the interest in the partnership, the appellant and his brother.

Anderson J But in terms of more and more, even though it may be a partnership debt, it may be a partner's individual interest in the debt.

Carruthers It doesn't really matter how the analysis goes because on any view it remains separate property. It starts off that way, it remains that way.

Tipping J Well here's a pool of money that is borrowed from the bank

Carruthers Yes.

Tipping J The question is, the simplest question is that money at that point separate property or relationship property?

Carruthers No, it has to be separate property. It's borrowed by

Tipping J Yes I know you say it's separate property but the issue is what it's classification is as borrowed money.

Carruthers Yes.

Tipping J Now there are case aren't there where people have borrowed money using separate property as the security and I think the decisions are that if that's the case it's separate property, the borrowed money.

Carruthers Yes.

Tipping J But there may be other cases where the money is borrowed in the circumstances where you can't say it's classification is separate property because there's some relationship property connotation in it. Either it's secured against relationship property or whatever, but here your argument is that the sole genesis of this borrowed money was separate property, therefore the borrowed money is separate property and its application creates separate property.

Carruthers Yes.

Blanchard J It was presumably borrowed to acquire a partnership

Carruthers Yes that's right.

Blanchard J And presumably secured over partnership assets and the land which was you say separate property.

- Tipping J How does the Court of Appeal treat it, assuming though they had their minds focused on the borrowed money when they were speaking in para.48, they've treated it as relationship property you say erroneously by not reminding themselves that 8(1)(e) is subject to 9(2).
- Carruthers That's right, yes, that's the only way they could get to that analysis.
- Tipping J But are there cases that would be helpful? Is it self-evident that if you borrow money using separate property as the security, that therefore the borrowed money must be separate property?
- Carruthers Your Honour there's nothing that we have found that's entirely in point, but let's test the proposition by asking what could there possibly be that would make the borrowing relationship property in the circumstances of this case? And I'm talking just for the moment about 8(1)(e).
- Tipping J Well it's property acquired by one spouse in part after the marriage, but then comes the subject to 9(2).
- Carruthers 9(2), yes, and s.9 is the section that deals in code form with separate property. So just coming to para.51 and Your Honour Justice Blanchard's question, if we're wrong about this, which does rather suggest some uncertainty about the conclusion, but in my submission the Court's demonstrably wrong about it. We are satisfied that the debt should be treated as relationship property in terms of s.8(1)(ee). It said that the property is acquired after the marriage and it is arguably acquired for the common use or benefit. We say that because the partnership continued to borrow in order to provide for household expenses, at least in part. Well in my submission that analysis just does not follow and it needs to be dissected. The point is that the borrowing was not acquired for the common use or common benefit of both spouses. Relevantly or in a relevant sense it was borrowing acquired by the partnership to establish the vineyards on Poplars and Cloverlea. It had nothing to do with the common use or common benefit of both spouses. Now just in response to Your Honour Justice Tipping, this would be a situation where separate property can become relationship property because separate property has been used to acquire other property for common use or common benefit of both spouses, so you're looking at essentially what was the purpose of the borrower. Now one issue that does arise as something of a curiosity that I should draw attention to. Your Honours will see in s.8(1)(ee) that it is subject in particular to s.9(3) being within the range and 9A. Now 9(3) just to remind you is that increases remain separate property subject to 9A. So what 8(1)(e) looks at in terms of property seems to exclude increases in value or gains as being not within the concept of property acquired and fall to be dealt with under 9A or they remain separate property under 9(3). I don't think anything turns on that but it looks to be that increases are

treated separated. Now the next section of the judgment is at page 117, para.54 to 56 and my submission is that the error on the part of the Court is the very last sentence of para.56. There would need to be a specific contractual agreement with the landowner for the contrary to apply and there is no evidence of any such agreement. Your Honours' we've dealt with this at some length in paras.55 to 64 of the written submissions and I invite attention to those paragraphs, but the summary of the argument is this, that the vineyards in each case were paid for and planted by the partnership. They were assets of the partnership as recorded in the financial statements and I'm going to take you there, and plainly on any view there was agreement between the owners of the land, who were the partners, and agreement as partners in the partnership that the vineyard assets would be treated in this way. And just facing the Court of Appeal's analysis in para.56, a specific contractual agreement with the landowner in the sense of a formal agreement in writing is simply not required, and there is in my submission obvious evidence of the contractual arrangements between the owners and the partnership. Now let me just elaborate on some of that.

Anderson J Well the agreement only has to be that it won't form part of the land. That's all you need.

Blanchard J Well it would as a matter of law form part of the land. The statement in the first sentence is undoubtedly correct, until severed, but it would be ridiculous for them to have been contemplating severance. The implicit agreement no doubt was that whilst the vineyards would be technically part of the land, they could be treated by the partnership as partnership property and exploited for partnership purposes.

Carruthers Yes, and that's exactly what will happen which is not at all unusual or unconventional in areas apart from vineyards.

Anderson J They didn't cause the vineyards to be planted without their own knowledge and acquiescence for that particular purpose.

Carruthers Exactly

Blanchard J I mean it may be that if pressed they would have perhaps said that in some circumstances the partners would have the right to remove the vineyards, but it's an unlikely thing for them to have contemplated because it would destroy the asset.

Carruthers Yes that's right. Just so I can deal with this from an evidentiary point of view, let me take you to volume 2 again please at page 309. This is the affidavit of Mr Peter Rose who is the brother and the other partner in A W Rose & Sons Partnership, and at page 310 he deals with the history, and

then at para.5 he says from his point that they see things quite simply. Para.6, James has 30 acres of land. 11 of that is planted in grapes. I'm sorry we chop and change between acres and hectares, but this is Mr Peter Rose's evidence. I have in my name 52 acres and of that 30 acres is planted in grapes.

Blanchard J And they no doubt contemplated the severance of those.

Carruthers No Your Honour the

Blanchard J Well you can't make wine without severing the grapes.

Carruthers Oh no, I'm sorry Your Honour, it absolutely missed me. I should just add in relation to an analysis that Your Honour the Chief Justice made of what was being farmed by the partnership. There's also a property called Brentwood which is Mr Peter Rose's own property, but all three properties were being developed and had vineyards on each of them to a greater or lesser extent. And then he says we jointly own a separate block of 68 acres of which 12 acres is planted in grapes, and that's Poplars. The grapes that are growing on all three pieces of land are owned by the partnership whereas the land itself is owned in the individual entities as I have described. So there is evidence as to just exactly what was done between them. Staying in volume 2 and going back to Mr Leslie's affidavit that starts at page 252, and he is the chartered accountant who since 1989 has done the accounts for A W Rose & Sons and other members of the family, and he notes on page 253 at para.5 ' the land that both Peter and James owned is owned by them personally and not by the partnership. The crops on the land, mainly grapes, are owned by the partnership. I am not aware of any formal lease arrangements between the partnership and Peter and James Rose and to the best of my knowledge there has been no rental paid by the partnership to either Peter or James over the period since I have been involved with the partnership accounts. It would be possible from an accounting point of view to calculate the appropriate rental and include that in the accounts if that was required'. So that's the formal position as it exists. Their balance date is 30 June and there are accounts from 30 June 1990 through to 30 June 2001 and there are also accounts for 30 April 2003, which were plainly prepared for the purposes of determining the state of affairs at the date of separation, and also for 30 June 2003, and I'll just give you references to those and just show you the way in which they are structured. At para.230, sorry at page 230, still in volume 2, beginning at 230 and running through to page 239, are the accounts for 30 June 2003, and you can see from page, oh the depreciation schedule starts at page 233, and the references to the vineyard development at 235 through to 236. Now I'll just give you references to the other accounts. The April 2003 accounts that I mentioned immediately follow at pages 240 to 248 and then if I can go to volume 4 and beginning

at page are the accounts for 30 June 1990. I can give you the references globally unless Your Honours want me to take you separately to this. They run through to page 782 which are the accounts to 30 June 2001, and there are some references in the early accounts to some work on vineyard development, but it's not really until 1999, just let me check that, yes it's really 1999 that the significant vineyard developments occur, although there is some work in earlier years. Now I've taken you through to 203. In volume 5 at page 864 there are accounts for the year ended 30 June 2004. I think that the accounts for 2002 are not available but one can get a reference to those figures from the 2003 accounts. So my submission then is that analysis by the Court of Appeal on the vineyards is wrong. That the vineyards are owned by the partnership. Now then just coming to the claim under 9A(1), and this relates to Poplars and the paragraph that's relevant is para.57 and I'm on 117 of the case still where the Court decided 'once it is established that there has been an application of relationship property, the critical issues in terms of s.9A(1) claim are whether there has been an increase in value and so from what date and whether that increase is attributable at least in part to the application of relationship property. Now the issue that arises as I explained when I was taking you through the statutory scheme is that in terms of 9A(1) there has been no application of relationship property. The increase in value to Poplars was attributable to the application of the borrowings by A W Rose & Sons to finance their development of the vineyards on that property.

Tipping J Well this all turns on the borrowings being separate properties which we've already been

Carruthers Yes It does, yes it does.

Tipping J So if you're right on that then the premise of 57 is it goes.

Carruthers It does go. Probably the only issue that I have not dealt with in the written submissions is Your Honour Justice Blanchard's categories 1 to 3. I haven't dealt with 2, that is the increase in value of the land because it was recognised as having the potential for development as vineyards, but if it is separate property then that follows.

Tipping J Mr Carruthers let us assume against you for the moment that the borrowings were an application of relationship property, let's just assume that. I know you contest it. Is there anything which enables this Court or any Court at the moment to decide how much of the total increase in value relates to the planting of the vineyards and how much relates to the two other features that my brother has indicated, and I agree, relevant to the course of the increase in value?

Carruthers I think the answer to that is no the evidence is not in a sufficient state, and what I think the parties would be, well certainly from the appellant's point of view, what we would be looking for was the sort of approach that I understood the Chief Justice to formulate, that is that we would need to look at some principles of the Court established as a result.

Tipping J So we'd go back to the Family Court for each side to call evidence on the point?

Carruthers Well the case may have moved a distance since then but theoretically yes.

Tipping J Yes, it may be capable of resolution.

Carruthers It may be capable of resolution, yes.

Tipping J Is it said against you that analytically if any part of the increase is brought about by the application of relationship property, the whole of the increase becomes subject to division, or is it accepted that one has to do the severance if you like of the pauses of the increase that are not brought about either by application or conduct?

Carruthers Well under 9A(1) it is only the increase in

Tipping J No, I'm simply asking you is this an issue or is it accepted that it's only that part of the increase which has been brought about by the attribution or the conduct?

Carruthers Your Honour I understand the argument is that it is the whole lot. I've just conferred with my learned friend on that

Tipping J Alright. So that's another issue, that's another issue?

Carruthers That's another issue, yes.

Elias CJ That's really why presumably the respondent is relying on s.9A(1) rather than 9A(2) in relation to the Poplars.

Carruthers Yes that's right, because the actions are more remote than Cloverlea for the purposes of 9A(2).

Tipping J And presumably there is reliance on the fact that (2) has this distinction of contributions whereas 9A(1) doesn't.

Carruthers Yes, but the words of 9A, or a proper interpretation of 9A(1) must be in my submission that if there has been an application of relationship property, it's only the increase in value that's attributable to that

application that would fall within the last words, then the increase in value is relationship property.

Elias CJ But against that you'd have to, I mean I'm not sure it's as clear as that because against that there's the specific provision in 9A(2)(b) one would have thought that it would have been similarly spelt out if it was so limited.

Carruthers No

Tipping J 9A(1) brings the increase in his relationship property with all that involves for sharing. 9A(2) doesn't bring it in his relationship property, it brings it in for division according to contributions.

Carruthers Yes, with respect I agree. I think that's the distinction Your Honour.

Elias CJ Sorry, that's what I thought I was saying but maybe I didn't say it properly.

Carruthers I'm sorry.

Tipping J I equally apologise. I didn't think that's what you were saying but I'm not saying that's necessarily my view Mr Carruthers, because we haven't heard what Mrs Hinton is going to say about it, but that is a key distinction between the two.

Carruthers Yes.

Tipping J And that too must have been deliberate for some reason.

Elias CJ Particularly that 'but', because the consequence of the increase being relationship property is common to both subsections, but it's only in relation to two but they say 'but' it will be divided differently.

Tipping J Yes, so what I said wasn't precisely accurate.

Elias CJ Whereas what I thought I said was. Well that's sort of consistent because the intermingling provision is similar, so if you're applying relationship property, it all comes in as relationship property, but if you're applying some efforts which may increase the value then you take in the proportion to which your effort has worked.

Tipping J But what does the wholly or in part in 9A(1) signify?

Elias CJ That reinforces it.

Tipping J Well that rather suggests that once you've got yourself qualifying in part, the whole comes in.

Elias CJ That's what I say, yes.

Tipping J Well that's contrary to your submission Mr Carruthers.

Carruthers That is contrary to my submission, yes.

Tipping J That's why I'm raising it because I think this is quite an important point. It would make a big difference to the quantum.

Anderson J Your basic position is there's been no application of relationship

Elias CJ Yes.

Carruthers Oh yes that's right.

Tipping J Oh yes, this is all in the hypothesis that we're against you.

Carruthers I understand that you were inviting me to look

Tipping J You understand that, yes. Because it's an important point if we're against you.

Carruthers I'm just not clear whether we are in difference. The analysis that I make on the hypothesis that Your Honour Justice Tipping puts to me is that the borrowings are relationship property and they are applied to Poplars to develop the vineyard as a result of which the value of Poplars increases by the consequence of the vineyard trellises and vines, and that increase resulting from the trellises and vines

Elias CJ It may be more than that though. It may increase the value of the property more than the value of the trellises and vines.

Blanchard J It turns it into a business.

Elias CJ Yes.

Blanchard J And you wouldn't do it if you didn't get a gain over and above the cost of doing it. It would seem that all gains in relation to the property subsequent to the application of relationship property are brought in under 9A(1), including inflationary gains.

Tipping J Yes that seems to be the consequence of the wholly or in part, and the same applies in (2), again we've got wholly or in part, but it's different sharing perhaps.

Blanchard J Yes.

Tipping J You might have 50/50, you might have 40/60 as here or you might have anything else. There is earlier case law on this which made distinctions between whether, as you will remember Mr Carruthers, whether if you put your toe through the door you've got the whole prize, or whether you had to have actually created the whole prize, and they seem to have here opted for the latter, sorry, that you only have to show that you've made some contribution to increase, in which case you could share in the whole increase.

Carruthers So the concept is that the partnership borrows and develops the vineyard and the appellant and Peter who own the land – let me just take Peter out of it – the appellant who owns a half of the land is met with a claim for the all up increase – that is inflation, potential for development, and the vineyard – as a result of the partnership developing vineyards on Poplars.

Tipping J As a result of the application of relationship property which is responsible for some of the increase. That's on the hypothesis that we reject your

Carruthers Yes, I understand that.

Elias CJ I don't understand that about inflation though, because it's the increase in value attributable.

Carruthers What Justice Blanchard pointed out to me Your Honour is that or any income or gains derived from separate property, so what he's postulating is that gains derived are inflation, which I confess I never understood

Elias CJ I'm not sure that they would be.

Blanchard J I wasn't actually thinking that.

Carruthers Oh I'm sorry.

Blanchard J I was just concentrating on increase in value.

Elias CJ But increase in value has to be purposively assessed.

Blanchard J But the increase in value has to be only attributable in part to the application of relationship property.

Elias CJ Yes, yes.

Blanchard J Now here there would have been, on this hypothesis, an increase in value partly attributable to the use of the borrowings; partly attributable to inflation and perhaps partly attributable to other factors, but the whole of that increase becomes relationship property and then there's no qualification as there is in subsection (2).

Tipping J In subsection (2) the whole of the increase still becomes the subject matter of division. The question is what fraction division

Blanchard J You can start playing around with that.

Tipping J It's what comes into the pot without prejudice to division.

Carruthers Yes.

Tipping J That's what it seems to me also to say also Mr Carruthers, but I've always thought this is a very significant point in this case, because assuming your wrong on your first argument.

Blanchard J Forgetting about subsection (2) and the qualification there, what discretion, if any, does the Court have in relation to the apportionment of relationship property?

Tipping J Well it's only the exceptional circumstances isn't it? The old s.15 but clearly greater contribution and so on has gone hasn't it?

Carruthers Yes it has.

Blanchard J So it's 50/50.

Carruthers 50/50 yes. Well Your Honour Justice Tipping will understand from that exchange that I feel much more comfortable about my first argument that there was no application of relationship property.

Tipping J Well, you feel more comfortable about it, you'll feel more hopeful

Blanchard J You'll feel more need for comfort rather than feeling more comfortable.

Tipping J Because frankly I think if you lose that you're in for the lot, for a share of the lot, or a proportion of the share in (2).

Elias CJ What's the mingling provision? It might be useful to compare it.

- Tipping J It just basically says that if it's impracticable to disentangle it it's all matrimonial property, relationship property.
- Elias CJ Which would be consistent with the whole becoming matrimonial here?
- Anderson J But with the practical difficulties of dividing up.
- Tipping J Yes, and the philosophy that if you intermingle in that sort of way, you can't really say it stands aside.
- Anderson J The policy of the Act is normally directed to equal sharing. That's the underlying driver of it.
- Carruthers Well once you get to relationship property, yes that's so.
- Anderson J And it also influences attitudes to determining whether something comes into the pot or not doesn't it?
- Carruthers I thought that was an analytical approach to statutory interpretation to determine that Your Honour.
- Anderson J There's nothing un-analytical about that, just a different method of analysis.
- Carruthers I suppose we have the contrast between the paragraphs in this case about dealing with the matter in the round and the clinical approach that the Court advocated in *M v B* as we recorded it in our submissions. It's not altogether a facetious remark Your Honour, it does go back to
- Anderson J It advances an approach which are derived from the fundamental principles and purposes of the Act I think.
- Carruthers But that involves recognising that there are two distinct purposes to the Act. I mean there is a separate property purpose and there is a relationship property purpose. Well Your Honours I think all I can invite if this is an application of relationship property, is an interpretation of the Act which seemed at least at first blush to allow for the sharing of the increase in value, but I mean I don't think I can take the exchange any further than that and my primary submission is that there was on the facts of this case no application of relationship property. The valuation issue flowing from the Poplars finding is at paras.61 to 69 and in part that records the competing submissions and records the way in which the parties put material before the Court of Appeal on the basis of what was at that point in the evidence. We have in our submissions dealt with this valuation issue under 9A(1) at paras.65 to 68 and I don't want or need to say anything orally in addition to that. If I can just come to the claim under

9A(2), and that's dealt with at para.70 to 80 of our submissions, and Your Honours we may well have been through this in some detail. Let me just quickly deal with that again. The conclusion of the Court of Appeal in this section from paras.70 through to 82 is that the increase in value of Cloverlea was attributable to the actions of the respondent, and the submission for the appellant is that they were no so attributable and the exchange we had earlier was that the obvious and plain causal connection was the actions of the partnership A W Rose & Sons, in the same way as with Poplars. I've drawn attention to *Nation v Nation* and the passage that is picked up by the Court of Appeal in para.74 of the judgment, and then I've submitted that there was no causal connection between the matters relied on in para.75 and the increase in value of Cloverlea, and again we've been through that. So I think I've dealt orally with 9A(2) really in the exchanges and I just invite attention to the written argument. There are two residual questions on which leave was granted. One concerns the valuation dates, and I dealt with that in para.85 of the submissions and I don't need to say anything orally on that. And the second question that I haven't dealt with is s.17 and I have just submitted that there's no appeal from Justice Wild's decision. There was never an appeal from that, and the appellant accepts the position that Justice Wild reached and as you'll realise from the written submissions, that sum was paid some considerable time ago. Those are the oral submissions that I make in support of the appeal if Your Honours' please.

Elias CJ Thank you Mr Carruthers. We'll take the lunch adjournment now and resume at 2.15pm, thank you.

1.01pm Court Adjourned

2.16pm Court Resumed

Elias CJ Thank you. We'll resume. Yes Mrs Hinton.

Hinton Can I just begin by commenting on one of the matters that my friend raised towards the end of his submissions where he was being asked about whether if an increase is established, the whole of the increase becomes relationship property or only part of it, or just that particular increase?

Elias CJ Yes.

Hinton The law on that has been reasonably clear for some time. It was recorded as one of the principles that Justice Blanchard recorded in *Hight*, in the list of six or seven points, and it has been re-stated many times, including in *Brookers*, which my friend has in his authorities at tab 12. So at tab 12 of the appellant's authorities at page 2, if you look under PR9A(a), the

second paragraph on page 2, about four lines down, it says 'in such cases the whole of the increase, income or gains is classified as relationship property. There is no enquiry into the portion attributable to the application of relationship property'.

Elias CJ Sorry, can you just tell me again where it is?

Hinton Have you got the Brookers reference Your Honour?

Elias CJ No, oh yes I have it thank you.

Hinton At tab 12 of the appellant's authorities.

Elias CJ I have it thank you.

Hinton Page 2, under para.1, that second paragraph, well it's that whole paragraph, but in particular four lines down.

Elias CJ Yes.

Hinton A few other matters that were raised before I get on to the Poplars. There are in fact accounts. One of Your Honours asked whether there were accounts at the start of the relationship. They're not full accounts, but there are accounts. They're at volume 5. This is for the Rose Partnership. They're at volume 5, pages 919 and 920, and that shows the partners accounts for June 1979 and June 1980, and shows the debit balance that applies to both of the father and the son as at June 1980, and shows that even then the expenditure is exceeding any income. It is not correct to say that there is an insufficient evidentiary basis for valuing either Poplars or Cloverlea. There is actually a large volume of volume evidence that you have in the bundles before you, and the evidence that was put up and relied on by the Court of Appeal was all clearly supported by valuations. There is even at volume 5, page 993 an analysis of historical land values that covers the entire period from before 1979 up until the separation or later. In fact yes going right through up until the separation, and interestingly that analysis shows that the likely value of the properties in 1985 was lower than the value in 1979, so it would make no difference if for example with Cloverlea, which I'll come to, if the Court were to say well you only get the increase from 1985 which is not my position, it would make no difference. It might even make the position worse because it appears the value was lower. That's volume 5 at 993, and that graph that is there is explained in the valuer's report, how he's drawn it up. One of Your Honours asked whether the partnership re-valued the vineyards. They have done so. They re-value every second year and the re-valuation figures appear in the partnership accounts. So I come to the matter of

whether there has been an application of relationship property to Poplars, and in my submission

Elias CJ Sorry, are you going to give us at some stage – we haven't turned up this evidence – but you don't in your submissions do you identify the base value?

Hinton Of?

Elias CJ Of either the Poplars or the other place.

Hinton Cloverlea.

Elias CJ Cloverlea.

Hinton No, that material is recorded in the Court of Appeal's judgment

Elias CJ Right, alright, you're content with that?

Hinton Yes

Elias CJ Yes.

Hinton And I didn't understand those figures to be in any way disputed either. I mean they

Elias CJ No, there was just the substantiation of them which you say is contained in the materials

Hinton The valuations are there. I can find them and take you to them if I need to

Elias CJ That's alright.

Hinton But the values at relevant dates are all accurately recorded in the Court of Appeal's judgment and I had not understood there to be any issue over that.

Elias CJ Yes.

Hinton And the evidence is all there as part of the bundle. In my submission unlike a number of these cases, this is one where there actually is all of the evidence that the Court needed, which is why we've probably succeeded in the Court of Appeal. The problem that's been struck in a number of them is that they don't provide valuations at relevant dates. So if I might I'll come to the question of whether there's been an application of relationship property to Poplars. The judgment in the Court of Appeal in my

submission reasonably accurately reflected the arguments of both sides in the Court of Appeal and in my submission is a reasonably accurate judgment. There are one or two comments that one can make about it which Your Honours have. So for example when the Court talks at para.51 about being satisfied that debts should be treated as relationship property, they must have meant the funds borrowed, they can't have meant debts. I think it's just a shorthand way of putting it and I agree that it shouldn't have been expressed in that way. But basically the position is this, that the monies that are the flip-side of the loan, the cash that comes into the partnership accounts, Mr Rose's interest in that is relationship property prima facie property under s.8(1)(e), just as with any asset that is acquired during a relationship. It is only not relationship property if it's been acquired solely out of separate property. Now the argument that was run by the appellant in the Court of Appeal was it necessarily followed that anything that had anything to do with the A W Rose partnership was separate property. That's incorrect, and that's *Maw v Maw*. Any asset that is acquired by the partnership during the relationship is prima facie or the partners interest in it is prima facie relationship property, including income; any asset, money coming into the account, whatever it might be. New equipment, etc. So when the partnership receives that money Mr Rose's interest in it is prima facie relationship property unless Mr Rose demonstrates that that relationship property, the otherwise relationship property is derived solely out of separate property to come under s.9(2), and I've referred in my submission to *Watson v Watson*, which is a Court of Appeal decision, where it was accepted that there was an onus on the person alleging that something was separate property, to prove that it was separate property, and the Court commented on that and said that seemed an entirely appropriate test, and *Watson* is in the authorities, i.e., that there is an onus on the person alleging that something has been acquired solely out of separate property to demonstrate that. Obviously no one else can demonstrate it. It's out of the hands of the other spouse.

Elias CJ Well how would you demonstrate it here beyond by saying it was raised by the partnership for partnership purposes and presumably on the credit-worthiness of the partnership.

Hinton If you said for example this money was raised and you proved it, this money was raised solely against Poplars, then you might be able to say, you probably would be able to say, that asset is acquired solely out of separate property. There is no evidence here as to how it was raised and one can assume that it would have been raised against all of the partnership assets and no doubt against guarantees as well. That would not be an asset acquired solely out of separate property, because by that stage well into the relationship the partnership would have acquired a whole lot of different assets to the ones it had at the beginning. If you look at those accounts, at the beginning it had next to nothing, and then you look at the

accounts at the end, all of the partnership assets have actually been already taken into account by the Family Court and the Court of Appeal. So if money is raised against all of the partnership assets, that would not be separate property, because those assets are not all separate property. His interest in this is not all separate property. Only his interest in the partnership assets that actually existed right back in 1979, and there is absolutely no evidence of any distinction amongst those partnership assets. There's been no evidence to say which of them that was still in existence actually existed in 1979, so in effect the partnership, or at least all of its assets, Mr Rose's interest in them, had become relationship property, or was not proven to be other than that.

Elias CJ But hang on, apart from all the plant and so on, the only substantial assets were the Poplars which came by succession.

Hinton But that wasn't an asset of the partnership.

Elias CJ Oh no, that's right. Oh I see what you mean, yes. Yes, the land is outside.

Hinton That's right, so all their income; everything they're doing; money coming in; borrowings; the cash from borrowings; the equipment; stock; crops; anything; whatever they own; the vineyard development expenditure which appears as an asset in the partnership accounts; all of those things, his interest in them, would prima facie be relationship property. That's what *Maw* says, and only

Elias CJ I think you had better take us to *Maw* actually.

Hinton Have we got it in the authorities.

Anderson J Tab 1 in the appellant's authorities.

Hinton Right.

Anderson J Quite an eminent counsel I see for the appellant.

Tipping J It was probably a very poorly argued case.

Hinton It's a long time since I've looked at *Maw* I have to admit.

Elias CJ I just want the part that supports the proposition you're putting to us now.

Hinton Well I see it and I'm just trying to find the best part. I see at the foot of page 30 having talked about the different interests that a partner has in partnership property. If you look at the quote above from *Canny Gabriel Castle Jackson Advertising*. 'The nature of a partner's interest in the

partnership property has often been explained. The partner's share is not a title to specific property but a right to his proportion of the surplus. However, it has always been accepted that a partner has an interest in every asset of the partnership. This interest has been universally described as a beneficial interest, notwithstanding its peculiar character. The assets of a partnership, individually and collectively, are described as partnership property'. So then at the bottom, now who is this, Justice Richardson says 'for these brief reasons I am satisfied that the husband in this case had an interest in the partnership assets acquired subsequent to the date of the marriage and in existence at the date of separation and the hearing'. It's not necessary to explore the

Anderson J The difficulty I find with *Maw* is this, although this analysis by the President and Justice Richardson on the issue of whether the partnership assets are property within the meaning of the Act, there doesn't seem to be a cohesive connection or a leap from property to separate property, because there's areas here, the particular property, is arguably acquired by a pre-existing partnership. It just doesn't seem to be covered

Hinton Yes but the way I have read *Maw* and the way it has been applied, and it's been applied on a number of occasions, and is sighted in all the texts - I haven't put those references into the authorities, is on the basis that for relationship property purposes what you do with the partnership is you divide up the assets so that whatever the partnership owned at the time, at the beginning of the relationship is separate.

Anderson J I think that's the point because the point in issue is, is it the husband's property or is it the partnership's property, and for certain purposes it's the partnership's property, but in terms of the Matrimonial Property Act as it then was, it's the husband's property. But it doesn't resolve the issue of whether it's the husband's separate property, and that's the crucial point in this case isn't it?

Hinton But the point is at least it is his property

Anderson J Yes.

Hinton And therefore to be categorised under the Act, each individual item of property, each beneficial interest he has and each item of property of the partnership has to be categorised.

Anderson J Yes.

Hinton So if it's pre-relationship it's necessarily separate; if it's post-relationship, or during the relationship I should say, it will be prima facie relationship property under 8(1)(e) unless he proves that it has been acquired out of

separate property. If it were otherwise then you would if you were a smart person, form a partnership immediately before a relationship, and acquire everything and do all your business in the name of the partnership and you'd be scot-free.

Elias CJ Well would your argument also apply, I don't think it can, but would it also apply if your vehicle is a company?

Hinton It's a slightly different situation with a company, because the company you don't an interest in each of the assets of the company, you own the shares, so you then have to rely effectively on 9A or 17 or things of that nature. You can't say each asset that's acquired by the company has to be analysed, that's not correct. So it's just a different legal entity, but it has been widely accepted that that is the case; that's how partnership assets are approached under the Act.

McGrath J What I understand you're really saying is that had the husband been a sole trader and had plant and other assets at the beginning, certainly they would be separate property. The moment they started being turned over new ones acquired each one became relationship property. It's no different because it's a partnership, he has a beneficial interest in terms of more and more and you just apply what it would be if he had been a sole trader. Is that

Hinton That's correct, and similarly with the income that's being earned by the partners. His interest in that income is prima facie relationship property because it's not being acquired solely out of separate property, it's being acquired out of their efforts, so the ongoing vehicle as it goes along is basically becoming more and more relationship property.

McGrath J Is that complicated by the notion of drawings which are if you like an advance on entitlements to income?

Hinton Well I come to that

McGrath J I appreciate that

Hinton Perhaps if I deal with that point in connection with the cross appeal where I think it probably has the most relevance.

McGrath J Certainly, that's fine.

Hinton But I think we do need to touch on that issue.

Elias CJ Sorry, is there anything else you want to draw our attention to in *Maw* which was not of course dealing with, you may be entirely right in this

analysis, but it's not directly on point. Is there any other passage or is there any other authority you want to refer us to.

Hinton You're not quite satisfied with the passage that I took you to?

Elias CJ Well maybe, I'm just trying to think it through.

Blanchard J There is some similarity in that two further farm properties were purchased for the partnership by the brothers, and I suppose there's some analogy there with acquiring a vineyard as it were.

Elias CJ Yes there is.

Blanchard J I was going to ask is there any evidence about how the funding was secured, particularly in relation to Cloverlea. Was there a mortgage over Cloverlea and did it include a mortgage over the house?

Hinton For this particular deed. I don't know the answer.

Blanchard J For borrowing.

Elias CJ At any stage would be interesting.

Hinton There were

Blanchard J In other words were they using something that was undoubtedly relationship property as security?

Hinton I don't know the answer to it in connection with this advance, the advance that related to Poplars.

Blanchard J Well they presumably had an all monies obligations mortgaged to the bank and simply drew against that, but I'm interested in what that was secured against. Have we got the titles?

Hinton We do have a title to Cloverlea.

Elias CJ Yes.

Tipping J I would imagine the bank in this situation would have got every security it could possibly have laid its hands on.

Hinton That's what you'd expect. That's really my point

Tipping J Because these people were not exactly

Hinton No far from it.

Blanchard J If they were using the matrimonial property or the relationship property as it is now called as security it would be a bit rich to continue to claim that the partnership assets acquired as a result of the borrowings were separate property.

Hinton In the bundle, and the title is missing, and I've got my junior to bring it with her. It's missing from the bundle. It's referred to in a memorandum at volume 5, page 915 that was provided by the solicitor for Mr Rose, and in that memorandum he says the title to the property is attached, and it can be seen that as at 1980 there were five mortgages. The title isn't actually attached to that memorandum but I do have a copy of the title so perhaps you should see that because it demonstrates just how many mortgages there are and it might even give us the answer. Oh though this is issued as at 1989, so it will only give us the position up until then.

Tipping J Your principal point is that the onus was on the husband, but he hasn't excluded by sufficiently clear evidence the proposition that no relationship property was involved in the borrowings actually.

Hinton That's correct Your Honour, and Fisher at para.11.37, which is not in the authorities, says that for an asset to classified as separate property under s.92, it must be established to have been acquired wholly out of separate property. There is no room for apportionment, so there is pretty clearly some burden on the proponent of separate property under s.92 to establish that.

Elias CJ You cited an authority earlier for

Hinton *Watson v Watson*.

Elias CJ *Watson*, yes.

Hinton It's in the bundle and it's in my written submission Your Honour.

Elias CJ Yes.

Tipping J Well this shows that the title was whenever this date is mortgaged to both Pines and the ANZ Bank, both of who I recall were the financiers

Hinton Yes, there were three mortgages as at 1979 which is the date of marriages, and five mortgages as at 1980 the following year. That's the advice from the solicitor for Mr Rose in the memorandum that I referred to.

Tipping J Well half-way down the last page of this title, left-hand column there's a mortgage to the ANZ Bank registered in 1983 and on the front page there's a mortgage – or are these different properties are they or are they

Hinton No they're all Cloverlea.

Tipping J Cloverlea, and on the front page there's a mortgage to Pine I see in 1997. Because the evidence demonstrates doesn't it the financiers for this partnership were Pines and the ANZ Bank. They had two funding lines, both of whom appear to have taken mortgages over Cloverlea.

Blanchard J It would be very difficult to exclude the house from the mortgage. One the bank wouldn't agree I wouldn't imagine, but two, you'd need a subdivision to do that.

Anderson J What property was the matrimonial home on?

Hinton Cloverlea.

Anderson J And the homestead is undoubtedly matrimonial property, or relationship property I should say. It hasn't been divided off on a separate title but is subject to encumbrances that secure the partnerships, there's the benchmark.

Hinton Amongst other things, because any of the other assets that have been acquired by the partnership

Anderson J Well they have the same input.

Hinton Would be likewise.

Blanchard J They do appear at page 982 be some computer freehold registers. I'm not sure which property it is. Oh it looks as though this is Poplars. Pine Gould Guinness is a mortgagee, but the point I was making is relevant really in relation to Cloverlea.

Hinton But assuming as one could only do in the absence of any evidence that any borrowings would have been secured against absolutely everything, then the point is that it would be impossible to say that the money that was received was an asset acquired solely under separate property, and you would think I have to say that that would be an unlikely proposition. We're talking some years into a relationship with a large amount of money being borrowed and applied to put a vineyard.

Elias CJ Is there a timing issue in terms of when matrimonial property it would have been then, when it applies? Whether it's simply on determination of shares or whether it – I'm thinking in terms of the borrowings.

Hinton Right.

Elias CJ At the time of the borrowings and the security was this property

Hinton Relationship property

Elias CJ Yes.

Hinton Well you have to be able to do that analysis because that's what s.9A requires you to do doesn't it, so

Elias CJ Well no this is just simply for the purposes of determining whether matrimonial property was applied. That's all, I just have a query as to when the status attaches.

Hinton Yes well normally, I know why you're asking that because normally you don't say this car of mine if matrimonial property. It doesn't really apply until you separate.

Elias CJ Yes.

Hinton But once you separate you can go back and analyse at earlier times whether something was or was not at that time relationship property or separate property and you have to do that. S.9A requires you to do that. It's implicit in s.9A.

Elias CJ I understand that in terms of making the determination, but I'm just wondering in terms of the mortgage. That's alright I'll think it through.

Blanchard J Mrs Hinton I think you said this search copy was 1989. It's not actually, because it's got a mortgage to Pines endorsed on it in 2002. I think it was the title that was issued in 1989.

Hinton Yes you're quite right, I'm looking at the title. I'm not as good as reading certificates of title as Your Honour is.

Blanchard J Well I'm afraid I'm not very good with these new computer ones.

Hinton No, they're quite confusing aren't they.

Blanchard J But that does appear to indicate that Pines, who presumably were the funders of the partnership, had a mortgage over the whole of Cloverlea.

Hinton Shall I move on because there are other arguments that I think wrap this up anyway, quite apart from the point that we're just discussing. Another way of looking at it is the money that was received was then applied by the partnership to this assets, which they called the Vineyard Development Expenditure, so that was the actual construction, planting and so on of the vineyard. That asset was clearly not acquired solely out of separate property even if the funds were, because that asset also required effort. And that would have required effort on the part of the partners, and an asset acquired out of effort is not separate property either and I've referred to that as well in the submission.

Blanchard J What's the authority for that?

Hinton Again *Watson*, which is in the bundle.

Blanchard J Well perhaps we should look at *Watson*. That's in your bundle.

Hinton Yes.

Tipping J This derives from the whole concept. It's got to be derived wholly and if there's any tangibles other than de minimis.

Hinton Yes.

Tipping J Yes.

Hinton If you look at *Watson* under the headnote, para.1, the husband's earnings for services to the company were matrimonial property.

Tipping J You seek to take two points out of *Watson* as I understand it. First the wholly point

Hinton No, I don't rely on *Watson* for that

Tipping J Oh sorry.

Hinton That's the *Fisher* reference.

Tipping J *Fisher*. Oh I'm sorry, *Watson* doesn't support that or it's not to do with that.

Hinton Well it's not to do with that because in *Watson* the Court was actually able because there were bonus shares, they were able to sort of do a little bit of a division of shares, so *Watson* isn't authority for that point. So if you look at page 576, para.20, the husband put no accounting evidence before

the Court to establish that the bonus shares and other assets claimed to be separate property were attributable to his separate property in the company and not to funds which would otherwise have been distributed to him as earnings for his services. There is simply no evidence at all before the Court as to what proportion of the husband's receipts were reasonably attributable to his services, and what were reasonably attributable to his capital interest in the company.

Tipping J Well there's the word solely

Hinton It cannot be inferred the bonus issue was attributable solely, yes it is there, solely to the husband's separate property in the company as on its face with employees also sharing in it. It represented a reward for services to at least a substantial degree. So there has to obviously be a dividing line drawn between services, work done, payment for work done, or the work itself, and something that's actually acquired out of separate property. The next point I have and I'm still dealing with this issue as to whether there's been an application of relationship property, is, perhaps the best way to deal with it is to come on to s.8(1)(ee), because even if Your Honours concluded against my submissions that s.9(2) had been met and you couldn't say that there'd been an application of a relationship probably because you were satisfied that everything that had happened here was actually an application of wholly separate property. So let's say we're at that point, then nonetheless, and this is the Court of Appeal's fallback, s.8(1)(ee) is not subject to s.9(2), and I deal with this in the written submission at para.15. Section 8(1)(ee) provides that any property that is acquired for common use or benefit is relationship property. Now the vines, the vineyard development expenditure, as it's described in the partnership accounts were clearly acquired for common use or benefit, and in fact the evidence of Mr Rose

Elias CJ What benefit? Was it income?

Hinton Yes. Well Mrs Rose gives evidence in one of her affidavits that when she raised with James her concern about the first vineyard planting on Peter's land, that's the brother, he said, that is James' said we owned half of the grapes on the land and that's it, page 302 at para.36. So she says he told her that the two of them owned half of the grapes, this is on the Poplars land. In his subsequent affidavits in reply Mr Rose does not contradict that statement. Then in the notes of evidence at page 1016

Blanchard J Sorry I'm just finding that reference.

Hinton Sorry, the first reference?

Blanchard J Yes.

Hinton Volume 2, page 302

McGrath J Paragraph?

Hinton Paragraph 36. So she says at para.35 'another factor which caused me much concern was the increasing expansion of grape plantings and all associated costs on Peter's land. I was never consulted about where the grapes were to be planted. The increasing inequity in the shareholdings on each property caused me concern. I saw it becoming much harder for Peter, James' brother to pay James out'. Because all of the grapes were planted on Poplars first. It was quite some years after that before grapes were planted on their property at Cloverlea. When I raised this with James he acknowledged it was Peter's land, but said that we owned half of the grapes on the land'. He doesn't then deny that and he's then questions about it at page 1016, which is volume 5. And at the top of the page – Ms Moran..'you will recall Karen being unhappy about that and raising it with you and you assuring her not to worry because the grapes you said 'we own half of them' meaning her and you.?. Mr Rose..'That's correct. Well my business owned it'. Ms Moran..'But you said to her "we own", don't worry Karen we own half'. Mr Rose..'Possibly. Well I don't recall but if that's the case'. Ms Moran..You accept that? Mr Rose.. 'Yep'. Ms Moran.. 'And she says that in her affidavit already and you accept that you said that'. Mr Rose..'Well I'll have to accept it'. Ms Moran..'You don't have to accept anything Mr Rose. I want to be totally fair to you'. Mr Rose..'That was the first planting', so this is at Poplars, 'that was on a separate title and that's why we had it mainly for the school fees for the kids'. Ms Moran.. 'And it was on Peter's land? Sorry my friend's just pointing out that was actually Brentwood, but the point I would make is tht if he was saying that grapes on Peter's land belonged to the two of them, then it would have to be accepted that the grapes generally, especially on their own land and on the land that was jointly owned by him and Peter, would have been intended for common use or benefit. It was intended that they would get income from them.

McGrath J I suppose that the point he was really trying to make though was that just because the grapes were on Peter's land, it didn't mean that they were all his.

Hinton No.

McGrath J You're putting quite a lot of weight on the use of 'we' in this context I suggest.

Elias CJ But the explanation that it was for the school fees for the kids is significant in terms of your submission that it was acquired for the purposes of the marriage.

Hinton Yes there is a couple of other references if I could take you to them. Still in volume 2 at page 323. This is at the top of the page where he talks about 'we' as if the operation is a joint one. He says we were not in a financial position that we could live a lifestyle that some of her friends were able to afford. We had a very good income. I was very proud of the farm that we were establishing but we did have a very high level of debt and that was becoming a major concern. His evidence is also that the debt, the whole of the debt at the time of separation was a relationship debt. He claimed that, and it's accepted I might add, but claimed his position was that the assets of the partnership were all separate but the debt was a relationship debt, and in that regard I would point you to volume 5. So this is again the notes of evidence at pages 1026 to 1027. At the bottom of 1026 Ms Moran..'And then you say the liabilities that need to be dealt with on an equal basis are (1) liability to AMP of \$9,400,00 and the second one is the \$538,000.00 owed to the farming partnership'. It's not actually owed to the farming partnership, it was owed to the bank. His share of the bank debt. And he says from Karen and I. Ms Moran..'And you hold to that don't you'? Mr Rose..'I do at the present time, yes'. Ms Moran..'Right, but the debt to the partnership of course includes all the improvements to the land doesn't it as well'? Mr Rose..'No'. Ms Moran..'What you are putting forward was a proposition which if you add up what you say should be shared equally and then deduct what you say Karen should be liable for, she leaves with a debt of \$93,000.00'. And he says 'so I'm expected to carry a half million dollar debt for the lot. So basically his position is that the debt to the bank is a relationship debt. Well you can hardly take that position and say that the vineyard that was being developed, and all the other stuff that was being done was not for common use or benefit.

Blanchard J Particularly if you've charged it over the asset, namely the house, which was undoubtedly relationship property, and she wouldn't be able to claim her share in that without dislodging the mortgage.

Hinton No, that's correct Your Honour.

Blanchard J And the Bank would have, or Pines would have priority.

Hinton Yes. It was also clear that the reason, and this will be self-evident, that they were planting these vineyards was to try to generate a better financial return because they were losing money with the cropping that they had been doing and there's evidence of that, but whether that really takes it any further I don't know. But in my submission it would be

Tipping J Well I think it does, because if the whole purpose of the enterprise was to include the family's financial he can't have been speaking of himself solely, then if you borrow money for that purpose it seemed to come fairly naturally within the (ee) sub-paragraph.

Hinton Yes Your Honour if you look at volume 2, page 330, this is Mr Leslie, Mr Rose's accountant, para.7. He says 'while the partnership was meeting private household costs and other necessary farming expenses, the debt level increased. It appeared to me that Peter and James were concerned about their financial position'. That was the case I have to say throughout. 'They at the same time decided to diversify into grapes rather than continuing growing potatoes. The grapes were thought to provide a better future financial return and would also increase the value of their land holdings'. So the position for the respondent is that either s.8(1) applies, or if it doesn't, then s.8(1)(ee) applies and that s.9(2) does not apply. And so you do have an application of relationship property as the Court of Appeal found.

McGrath J Do I gather that household expenses for the parties generally were being paid out of the partnership's trading account in effect

Hinton Both the partners operated through that.

McGrath J And it was just debited to current accounts.

Hinton Everything just ran through current accounts as far as I can discern.

Tipping J That's why the current accounts got into such a high deficit position, because there wasn't enough money being generated to fund it.

Hinton Well there was actually a net loss. The partnership never made any money over the whole period of the relationship, and that's in the Court of Appeal judgment. The farm ran at a loss. Neither partner got any income out of the farm whatsoever. They were making drawings

McGrath J Yes.

Hinton But the drawings were only against debt. I mean as Your Honours would appreciate, you can draw against anything, but at the end of the day it's meaningless. It's like if I draw a thousand dollars a week and just create a huge overdraft and then at the end of the relationship I say to my husband I've contributed hundreds and thousands of dollars of income because I drew that money but all I've done is create a vast debt, and by all means that's joint responsibility, but you can't possibly say that's income, it's not. This farm was until they planted the vineyards and got the vineyards

going, a complete disaster. They were making huge losses. That's why they had to sell the land. They were not making money out of it.

Tipping J The drawings were funded both by selling land and borrowing?

Hinton Correct. The land was sold. I should take you to this now shouldn't I since we were talking about it?

Tipping J I'm not sure it matters all that much.

Hinton Well it probably does a bit to the cross appeal, the argument that in this case

Tipping J I meant mattered for the point we're discussing.

Hinton No.

Tipping J It may have relevance later on.

Hinton Yes it does so shall we leave it and I'll come back to that.

Anderson J It's in all the judgments anyway that they had to sell land to meet debt because they were running a deficit from year dot.

Hinton Yes. But I think the Court of Appeal then falls into the error having recognised correctly in the judgment that the farm over the whole period of the relationship had run at a significant loss. Even for the good years it had run at a loss of something like \$130,000 or \$140,000 with no salary paid whatsoever to either partner. So they're getting no money out. They're not getting paid for all their work and the Court then when they talk about the respective contributions to the increase on Cloverlea, credit Mr Rose with income, but he had none. He contributed a loss. That was his contribution to the income. So it is relevant in that regard, anyway.

Tipping J So you of course say that should be 50/50?

Hinton I say it should be 50/50. I say on the cross appeal, and this is not a criticism this is just how it went, but at the end of the day the appellant only contributed the land, that was his only contribution to the relationship. He contributed no income. He contributed a loss. He made no contribution to non-financial matters whatsoever. There's no dispute about that. He made no income contribution, so why should there be anything other than a 50/50 division of the increase? And the submission I make on that is if this case is not a 50/50, then I'm hard-pressed to see a case that would be, and that can't be right. That can't have been the intention. They amended s.9A(2) to increase it on the one hand by

opening up the indirect attributed increase and then they were concerned obviously that that was going to possibly open the floodgates and have everybody coming in and saying thanks very much, I want 50% of the increase because this is going to be difficult to manage. So as before if you qualified under 9A(2) you automatically got 50% just like under 9A(1), they changed it to make it discretionary. To give some sort of policing power over it. That didn't mean and couldn't have meant that every case was going to be not 50/50, and I totally accept that there will be cases that will be other than 50% but do not accept that this is one. There were big mortgages on this property right at the outside. We have no idea what the quantum of those was. There was no evidence put up. Not even a guess put up by the appellant as to what the total quantum was. We know there were three, then there were five the following year. We know there were constant financial problems right from the outset of the relationship, so when all you're contributing is an asset that is heavily mortgaged, and you're running a losing farm operation and your wife is doing everything else, enabling you to go out there and work for no income. Going out and earning income herself and still doing all of the non-financial stuff as well as providing an income, unable to have any say at all in how the partnership runs and the debts that have been incurred, or even how money is being applied, then that is not a case where the division should be other than 50/50 under 9A(2)(b), and that's all set out in the written submissions. That just about deals with the cross appeal doesn't it?

Tipping J In a sense his so-called income contributions are artificial aren't they? They are simply borrowed money that had to be paid back.

Hinton Yes they are not income contributions. I mean you could call them income if he was going to be solely liable for the debt. You could say well that's fair enough. You could call that income, but you can't call it income when all you're doing is accruing a debt that you are both going to be meeting, and I think the Court of Appeal understood that but then fell into that sort of trap when they got right to the end.

McGrath J Are you saying that the losses each year were even without making any provision for wages or salary?

Hinton Correct, correct. The evidence of Mr Hadlee, which Justice Wild misinterpreted quite understandably – I'll take you to the schedule. It's at the back of volume 2, or right near the back. It's at page 359. So he records if you look at the column profit loss and if you look at the top of it profit is in brackets, so unusually, or by my reckoning unusually, he's showing profit figures in brackets and losses without the brackets, so Justice Wild understandably added up all of the what were actually losses and called them profits and thought that they'd operated overall at a profit,

but in fact when you add up that column, it's an overall loss, and that's for that period for which the accounts are available, and it's quite clear from the accounts there's been no salaries paid, it's not contended that there were. So that adds up to something like a \$143,000 overall loss and the evidence is quite clear that for the period for which there aren't accounts, which is right through the 1980s, there were huge losses suffered, and that's covered in a number of different places, but in particular in Peter Rose's affidavit. He deals with that. So we don't know what the extent of the loss was except that that's what caused them to primarily to have to make the sales.

Blanchard J When you say both were responsible, technically that isn't correct is it? None of the financiers could have come to her looking for her to personally make the payment, because she hadn't given any guarantee.

Hinton No, they couldn't as a matter of law they couldn't do that.

Blanchard J I think the most you can say is that her share of the matrimonial home was put at risk because there was a mortgage over it.

Hinton Yes, but in terms of relationship property, the position taken for Mrs Rose is that 50% of the debt at the end of the day her share of the debt was her liability, had to be taken into account. She had no legal liabilities to the best of my knowledge directly to the financiers.

Blanchard J You mean if she had made a property relationship claim at an earlier time before the land started increasing rapidly in value, she would have had to have factored in her share of the debt in order to claim her share of the assets, and there would have been a negative balance, is that what you're saying?

Hinton I'm trying to respond to a point that you raised with me.

Blanchard J Yes, I'm just trying to see how she is responsible for any of the debt.

Hinton Well the debt, the funding of the debt as they go along. The money that's being applied to meet that debt is relationship property because all the money that's coming in, or his share of it, any receipt that's coming into the partnership, and we can't call it income, partnership income, it's not individual income because there wasn't any, but any receipts they get, his share are relationship property, that money's all going to pay mortgages, so in effect of course she's responsible for it.

Blanchard J So this argument is in support of your proposition that she's entitled to 50%?

Hinton Yes.

Blanchard J Okay, I understand that.

Tipping J The Court of Appeal's disagreement with that proposition seems to have been based primarily, if not entirely, on the proposition that he contributed more income than her.

Hinton Well they certainly do rely on that, yes. So they say both of them had some income, which is incorrect because he didn't, he had a loss, and then they rely on his income as part of the reason – that's one of the points I make in my written submission, that is a surprising thing, and it shows yet again a Court falling into the trap of the sort of financial contributions and still thinking in terms of instinctively, presumably, the husband making a greater financial contribution.

Elias CJ He is however contributing capital which was his separate property originally.

Hinton The land?

Elias CJ Yes.

Hinton Yes, not the original value of it because of course that remains separate property.

Elias CJ Yes.

Hinton He does contribute the rest of it, but we don't know what that really means because we don't even know what the extent of the debt was. There's evidence that there were ongoing numbers of mortgages

Elias CJ No I'm talking about the drawings that he's taking.

Hinton Oh, sorry.

Elias CJ He is contributing capital.

Hinton No he's not because they are both liable for the debt that's been raised. As a matter of relationship property

Elias CJ But he's selling property and he's

Hinton But when he sells property that's still only

Elias CJ And the debt comes out of his property.

Hinton At the end of the day all he's providing is his property.

Elias CJ Yes.

Hinton I accept he's providing the property.

Elias CJ Yes.

Hinton He can't get a double credit for that.

Elias CJ No, no, I accept that.

Hinton So he provides the property but the property was heavily encumbered, we don't know how much, and that's all he's provided. Against that he's made a loss. The wife on the other hand has provided significant income. She's also provided some separate property that got lost of course. Her's didn't get preserved. Her \$10,000 and the furniture and so on. That just went into the mix. So really my proposition is if this is not a 50/50 case then I'm hard pressed to see – you could say it would be 40/60 if you had a profitable venture and a farm that at the outset maybe just had one mortgage on it. But that's not the case here. This was a struggle.

Tipping J But the very debt that he relies on that he's generated in order to pay the money in and between the two of them, she's liable to pay half of it.

Hinton Correct.

Tipping J So it does seem a little tough to say that you're liable for half the debt but only get 40% of the money.

Anderson J It's not liable in the strict sense is that she will suffer a diminution of her entitlement to that extent which is a little different from saying she's liable for it.

Hinton Correct, correct.

Tipping J Well she's not liable to the external credit.

Hinton No.

Tipping J But in the internal accounting between the domestic partners, she's liable to bring it to account.

Hinton And furthermore that's his clear position.

Tipping J Yes.

Hinton Now what else do I need to deal with?

Tipping J Do you want to say anything about this indirect

Hinton Cloverlea.

Tipping J Yes.

Hinton My submission on Cloverlea was very much along the lines of some of the discussion that the Court was having earlier this morning and I rely in particular on the full Court decision in *Nation*, because I think that that decision has some very good passages in it and it was the reasoning, the philosophy was fully concurred with by the Court of Appeal. The Court of Appeal set the decision aside because of the technical problem that half of the land is owned by a Trust and therefore there were issues like that, that they agreed wholly with the reasoning, and I take you in particular Your Honours to paras.50 right through to 75

Tipping J Is this of the full Court?

Hinton This is of the full Court of the High Court, yes.

Tipping J Your tab 4.

Hinton Yes. I'm actually referring to the bundle from the Court of Appeal which I had already marked. It is in the bundle though isn't it? I asked for it to be.

Tipping J Yes, tab 4.

Hinton Yes it is at tab 4 Your Honour. And it's quite a helpful discussion. It makes a lot of the points that were made this morning. It confirms that for example what was intended was to deal with the *Hight v Hight* problem.

Blanchard J What's been quoted from in para.50? Is that *Fisher*?

Hinton It looks like it. Just note the point which had actually escaped my attention for some time. At the top of the next page. So this is para.50 over the page where the Court says 'accordingly under s.9(3), the increase had to be directly attributable to the actions of the non-owner. It is not the actions that are direct or indirect but rather whether their connection to the increase in value is attributable directly or indirectly'.

Blanchard J Sorry, where were you reading from?

Hinton Paragraph 50

Blanchard J Oh I see.

Hinton Sub para.(a).

Elias CJ What is that? Is that the Family Court?

Blanchard J That's the bit I was asking about.

Hinton So you can rely on direct or indirect actions anyway. I think that was probably already the case, but what the section did was then say look even if the increase in value is indirectly attributable to your actions – in other words you don't need to have a valuer say – and they go on to say this further down I see that action, I tell you this is the increase in value. It's sufficient for you to stand at the end of the relationship and say is it fair to say that this person's actions direct or indirect have had some direct or indirect consequence on the increase in value? And at para.51 'it can be seen that these changes are intended to deal with the anomalies identified by *Fisher*. The clearest illustration of this arises in the case of separate property farms. In only rare cases has a farmer's wife ever succeeded in establishing an increase in value was partly attributable to her actions. Nor have husbands fared any better in the attempt to show that indirect or modest assistance justified invoking a second limb. See also *Atkin & Parker*, where the authors observe that difficulties in proving a causal link meant that property that might more fairly belong in the common pool remained the separate property of the owner spouse. 53. 'The new approach, that mandated by s.9A appears to be that reflected in the minority judgment of Thomas J in *Hight*.

Tipping J And at first instance.

Hinton And at first instance I agree. In fact most of what he was doing in that very lengthy judgment was reciting paragraphs from the first instance judgment and saying how much he agreed with them.

Tipping J As he was one to do.

Hinton Yes. The other bit that I quite liked was he said at the risk of over-labouring the point or something, and I think that was at about page 50. I think it's a lot quicker to read the full Court decision in *Nation* to be honest with you.

Tipping J Well of course His Honour didn't always confine himself to the complimentary either.

Hinton No I appreciate that.

Tipping J Some of us received the opposite.

Hinton I can well appreciate that. And if you come over to paras.59 and 60, I think very significant, and similarly paras. 66 to 68. So 59, concepts of a formal legal onus may not be altogether helpful when dealing with matters such as these. In the end the Court has to be satisfied the wife's case is made out. There is an onus but it is not as difficult to overcome or achieve. Whereas here, and in my submission this is exactly the Rose case, there has been a marriage of considerable duration in which the parties have operated the farm and their household in reality as a joint enterprise despite the form of ownership, pooling their resources, it is going to be difficult if not impossible for a valuer looking back over the 20 plus years to provide evidence on the impact of the wife's contributions. After this length of time the effect of actions will be difficult to quantify so as to amount to proof in the sense envisaged by the Family Court. Yet the Family Court says it is incumbent on the wife to provide some general indication from a valuer as to the likely impact of actions or value. Why is that so? In determining whether gains are indirectly attributable to the actions of the non-owner spouse it must be inevitable that inferences have to be drawn from all of the facts and surrounding circumstances. A Court has to be able to say that the actions of one spouse has indirectly led to an increase in value. Obviously a causal connection which is more than trivial will be required. It will be necessary to look at matters in their totality. And then over the page they talk about

Elias CJ I think that 'more than trivial' comes from *French* actually.

Hinton Yes, and also *Hight*, I think it's referred to. I think 'more than trivial' has been generally.

Elias CJ Yes.

Hinton And then they talk a bit about various applications of relationship property which isn't the point we're dealing with, and then down at 66, similarly, the conclusion must be that the wife's actions have led, at least indirectly, in part to the increase in value. What the Court of Appeal in *Hight* saw as necessary was that the increased value contained a factor attributable to the non-owner's actions which was recognisable. Valuation evidence of the nature envisaged by the Family Court was not necessary for the Court to be so satisfied looking at the totality of the circumstances in this case. In the end the Court is compelled to conclude that a part of the increase in value must be attributable to the application of relationship property and/or is directly or indirectly attribution in part to the actions of the wife. This is the effect of the evidence as a whole. Any other conclusion given the facts

of this case would not achieve the stated purposes of the Act. And then to deal with my friend's concern, which is that Rose leaves no separate property unturned. Particular features of this case limit its application as Thomas J observed in *Hight*, there will be a difference, and I think this might have been your language also Chief Justice. There will be a difference between separate property which is a passive investment and separate property like the farm in this case which is the vehicle for the business enterprise of one or both of the parties to a marriage. Indeed here it has been the focal point for the parties. Further, the actions of a wife which might otherwise lack a sufficient link with the increase in value, may become sufficiently causative if carried out over a longer period of time as here. And that is very much what I say is the case in Rose. In fact in my submission the facts in Rose are somewhat stronger because of all of the financial difficulties that were incurred and because of the extent of debt on the property at the outset, and significantly in *Nation*, the Court did divide the increase under 9A(2)(b) equally – para.74. That decision as I already made claim was overturned for other reasons but the Court of Appeal made very plain they said in about five places that they endorsed all of that reasoning. They didn't refer specifically I must be clear. They didn't make any specific reference to the 9a(2)(b) point, but they made it clear they agreed with all of the philosophy of the full Court. So coming back to Rose, in my submission the farm has been the focal point for the parties in a slightly different way to *Nation* because the wife didn't work on the farm. She was employed off the farm, but that was a fortuitous thing because had she worked on the farm that would have meant two people working for no income, so the position would have been worse. It would be a nonsense to say that she should be in any way disadvantaged by not having worked on the farm. So I endorse what the Court of Appeal found in terms of Cloverlea. When they list the contributions that they rely on, the list is too short and I've set that out in my written submissions because there were immediate contributions. The contributions went right back to the start with for example the immediate application of \$10,000, which at the time was plainly a lot of money. A house full of furniture, immediate taking on of responsibility for meeting debts because whatever the debt payments were, was coming out of relationship property. So really there was a continuum. It wasn't something that started at 1985 when she started to work. And to say 1985 would also be to ignore the non-financial contributions which have not really come into play at all at this point, but must not be ignored. I mean that's what 9A(2) is all about. Do I need to comment on the business of the claimed separation of ownership between the vineyards and the land or is that something that I can leave alone?

Elias CJ No, you wouldn't address that.

Hinton Just a further brief comment on

Blanchard J It would either come in via the partnership or via the land and it's the same thing.

Hinton Yes, well I think Your Honour's point earlier was something that I think is in my written submission. The question of whether the partnership debt should be valued at the same time as the land, the appellant says well the Court of Appeal has valued the land as at 2005, but they've taken the debt at the level that it was at separation, the large partnership debt, and so my friend says the debt should be updated to 2005. Clearly that wouldn't be so with regard to any principle, because any further sum that's been borrowed is not a matter for someone who's no longer in a relationship. I would not I have to say as I've said in my written submission, it would not generally be the case at all. The debts normally are taken as at the date of separation and assets are normally valued as at the date of hearing, and here there is no reason why it should be other than that because in fact the accounts to June 2004, so for the year post the separation, show a profit of \$130,000, so for the first time having made quite a big loss the year before, because the vineyards are all coming on-stream. Cloverlea came on-stream that year, so if you look at volume 5, page 872, the 2004 accounts are there. We don't have any later accounts. There's been no offer on the part of the appellant to share income received post-separation and in my submission there should be no question about that. The debt sits at the figure that it was at separation. If you look at 872 of volume 5, that shows the loss in 2003, which was the final year of the relationship of \$180,000 and then shows a profit of \$133,000 the following year. And there is also evidence from the valuer if you just note this at volume 2, page 207, that the Cloverlea Vineyard is now coming into production, so that was timed with these accounts and it would be reasonable to assume that things would only pick up from there. I wasn't proposing to address you on the s.17 point. I'm not quite sure really where that sits. No one's arguing it because

Elias CJ Well there's nothing between you as I understand if we're driven to that.

Hinton Well except that I don't say it should be \$75,000, I say that if you're driven to that it should be at the same level as the awards that the Court has made because they're quite fair awards in the context of the dollar outcomes in this case as the Court of Appeal records in its judgment. At 2005 there was about \$2.4 million I think total property and as the Court of Appeal, ah I've got so many bundles here, where is it. The Court of Appeal recorded the dollar effect at the beginning of its judgment of the Family Court decision and the High Court decisions, so at page 109 of volume 1 the Court of Appeal says under the Family Court judgment the appellant received just over \$970,000 and the respondent approximately \$1.4 million.

Tipping J What paragraph is that?

Hinton Paragraph 19 Your Honour.

Tipping J Thank you.

Hinton And then at para.29, page 111, the overall effect of the High Court judgements was that the appellant received about \$238,000 and the respondent some \$2.16 million. And if you look at the front of the Court of Appeal judgment you will see that the appellant under the Court of Appeal judgment receives about just under \$600,000. She also has I think close to \$200,000 from other sources, so she would have a total of around about \$800,000 with \$1.6 million being left for Mr Rose, and I would just suggest that that sort of outcome is a pretty fair outcome and so if you're driven to s.17 there would be no reason not to make an award that led to the same result. I think that the Courts have made a mistake in a number of instances in the sorts of awards they have made under s.17 and interestingly if you look at *French*, which is the case most often cited in connection with s.17

Elias CJ It's very old now isn't it really?

Hinton Well it's very old but the award there was 25% and it was a three and a half year relationship, so you know I think the Courts are being far too miserable with some of these s.17 awards. Right are there any matters that Your Honours are concerned that I have not covered. I've lost track.

Elias CJ No thank you Mrs Hinton

Hinton You've had enough of me.

Elias CJ Excellent thank you. Yes Mr Carruthers.

Carruthers Your Honours I must begin with an apology on that issue about increase in value and it's no reflection on my junior who drew it to my attention during the luncheon adjournment. It's the passage under tab 12, on page 2

Blanchard J Sorry, tab 12 of what?

Carruthers I'm sorry tab 12 of my authorities Your Honour. The appellant's authorities, and under Arabic numeral 1 in brackets – separate property classified as relationship property – that plainly is the legal position as Your Honours put to me, and that was on the hypothesis that we were dealing with relationship property and I think as I made clear, my argument is that this was separate property. I suppose what I can call in

aid is the comment that because of the consequences for property, the approach to evidence demands caution and I can rely on that and looking at the analysis that I've made.

Tipping J I don't know that that sort of blanket sort of observation really helps much.

Carruthers No, no, and Your Honour I accept that and I remember the note on which I ended that exchange and that is I was content to put my argument on the basis that we were dealing with separate property and not relationship property. And Your Honours I think the next submission I want to make concerns this issue of onus, that is that I must satisfy or demonstrate that what was involved here was an application of separate property, but the difference between my learned friend and I is a proper analysis of the statutory provisions. She has once again gone to *Maw* but *Maw* was under a different statutory regime. What is now s.8(1)(e) was not subject to s.9(2) at the time *Maw* was decided, and we're talking about a different regime and it's the regime that I identified for you quite carefully this morning, that is that this was the partnership interest, Cloverlea and Poplars were separate property and they remained separate property in terms of s.9(1), (2) and (3). I don't want to go over the analysis that I made but if my learned friend is right, a partnership interest can never be separate property. If my friend is right that after marriage every asset that is acquired, that is every asset that's replaced and when the photocopier is replaced, or some piece of equipment is replaced, it becomes relationship property because the separate property owner is now married. That is a proposition that in my submission cannot be right. It is a matter of looking at what the origin of the property was; how the additional property was acquired, and in this case it's clear that the way in which the additional property was acquired throughout was by borrowing, by the partnership borrowing, and by the partnership applying the money to land in which the appellant had an interest. Now the analysis on s.8(1)(ee), that is common use or common benefit. My learned friend has gone to the evidence, but I can say that the way in which the case was run certainly in the Court of Appeal and the way in which I run it in this Court is that the partnership debt is not a relationship debt. It's never been part of the appellant's case that the respondent has to contribute to the debt. That analysis is the consequence of my learned friend's argument where she asserts that all of this was relationship property and therefore the debt would have to be relationship debt. That analysis just in my submission is not right. The proper analysis is that there was separate property in the way in which I've analysed and that the liability for the debt is the legal obligation of the partnership and it is itself separate property for which the appellant is liable for his share and for which the respondent is not liable. The next analysis concerns this issue of contribution. It's simply not correct on the evidence for my learned friend to submit that the appellant didn't participate in the full way that a husband and father would in the

household. That's simply not consistent with the evidence, and one can see in financial terms that he did contribute handsomely. This is where we are in difference, because my learned friend said well really he didn't contribute anything, it's sophistry. But it's not at all. What has happened is that the partnership has borrowed; the partners have drawn in really an extraordinary way, I accept that, but the partners have drawn and in the case of the appellant his drawings have gone into the family accounts in the way in which I have submitted. So again when one comes from that analysis down to 9A(1), my argument is still that the respondent cannot point to evidence that relationship property has been attributable to the increase in value of Poplars, and under 9A(2), in the indirect sense, there is still a significant issue as to the strength of evidence required. I relied on *Nation* in the Court of Appeal, as did the Court of Appeal in this case, that a causal connection which is more than trivial is required, matters must be looked at in totality, and I accept that. And of course one of the criticisms of *Nation* at first instance, one of the reasons that the appeal was allowed by the Court of Appeal was that the evidence was not sufficient to allow the conclusions to be drawn that the Court did draw and that's in and I can give you a reference to para.80 of *Nation*, and *Nation* is under tab 7 in my bundle and I don't need to take you to it. The passage relied on by the Court of Appeal that I've used is at para.71 in *Nation*. So my argument is in relation to 9A(1), no relationship property applied. My argument in relation to 9A(2) is that the factors that the Court of Appeal has relied on are not factors that establish a causal nexus in the way in which *Nation* requires, and we have had that exchange as to whether there was a subsidy or not and I've taken you to the evidence to illustrate that in my submission there was none. Now unless Your Honours have any questions of me those are my submissions in reply.

Elias CJ Thank you Mr Carruthers. Thank you counsel, all of you. We will reserve our decision in this matter. Thank you very much for your argument.

3.52pm Court Adjourned