IN THE SUPREME COURT OF NEW ZEALAND SC 40/2009

BETWEEN **CHRISTOPHER BEDE WARD**
Appellant

AND **DIANE MARY WARD**
Respondent

Hearing:	03 November 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	MEJ Macfarlane for the Appellant R H Grayson for the Respondents

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CIVIL APPEAL

MR MACFARLANE:

May it please the Court, counsel's name is Macfarlane, I appear for the appellant Mr Ward.

ELIAS CJ:

Thank you Mr Macfarlane.

MR GRAYSON:

May it please the Court, my name is Grayson and I appear for Mrs Ward.

ELIAS CJ:

Thank you Mr Grayson. Yes Mr Macfarlane?

MR MACFARLANE:

The Court might have noticed that in the Court of Appeal Mr Matheson appears with me and -

ELIAS CJ:

Sorry could you pause Mr Grayson. The sound system is not particularly good. If you could pull the microphone a little bit towards your mouth. Thank you.

MR MACFARLANE:

In the Court of Appeal I am recorded as appearing with Mr Matheson, In Mr Matheson's defence he was in fact counsel for the children.

ELIAS CJ:

Yes.

MR MACFARLANE:

He is not here. His only function was to file a memorandum which formed part of the case on appeal. To reflect the interests of the children at this stage in these proceedings.

ELIAS CJ:

Thank you.

MR MACFARLANE:

I have handed out an outline of oral articles which has a supplement which I have outlined. I want to start by briefly talking about the parties' circumstances at the time of the hearing and as they are now. As I say as they are now, with some latitude as to the meaning of now because I am basing that on two later affidavits which were filed for the Court of Appeal hearing on behalf of Mr and Mrs Ward, respectively.

ELIAS CJ:

Mr Macfarlane, how are we going to be assisted in this appeal by hearing about the circumstances of the parties? It seems to raise a fairly, or two fairly narrow points which are points of law.

MR MACFARLANE:

It does. The reason for referring to the circumstances of the parties is that at least in some of the cases at least where the question of the exercise of the discretion of section 182 is considered, changes in circumstance at particular points in time are regarded as being an important factor as to how the Court should apply the section. That raises mixed questions of fact and law and in this particular case I want to discern, make something of the fact that in that area that there is not as great a change in circumstances as might otherwise be thought to be the case. My friend will give more focus to that, as he refers to in his submissions. I am not going to dwell on it for much more than two minutes.

ELIAS CJ:

So this is by way of response to what you anticipate Mr Grayson is going to say in relation to change of circumstances. You take the view that there aren't change of circumstances, is that right?

MR MACFARLANE:

There are limited changes of circumstances.

McGRATH J:

Am I right that no one has – or Mr Grayson is not intending to – or sorry the case is one of hardship or unfair advantage?

MR MACFARLANE:

He appears not to be. My understanding of the way the case originally was that it was a straight justice based on property relationship.

ELIAS CJ:

Would we be able to get into that though? I mean if there’s been an error of approach in the Family Court, then isn't it the case, wouldn’t the case have to go back to be determined correctly?

MR MACFARLANE:

That presently is my view, but you need to perhaps understand that in the Court of Appeal, being pragmatists, Mr Grayson and I hoped that the Court might, if it felt it was able to do so, make its own decision.

TIPPING J:

Provided it directed itself correctly in law.

MR MACFARLANE:

Continued to do so and –

TIPPING J:

That's your case, once you've got past the bar, if we go past the bar, that they've completely misdirected themselves as to the purpose of this section. Now I agree with the Chief Justice, I can't see how we can simply tee off as a first instance Court on the papers, on the correct approach.

MR MACFARLANE:

Well in that event, I won't trouble you further with the case –

ELIAS CJ:

Well if it becomes relevant we'll, of course, allow you to raise it but at the moment I can't see that it is going to assist us and it may be best for you to directly address the first point of interpretation.

MR MACFARLANE:

Yes. Do you mean by that the –

ELIAS CJ:

The 182(6) point.

MR MACFARLANE:

All right, I'll go straight into that. In my outline I started off at paragraph 3 –

ELIAS CJ:

I see that you have intended to take us to the documents. It maybe useful for you – I didn't mean to preclude your doing that.

MR MACFARLANE:

I understand, of course. I'll concentrate only on three of the documents. For the purposes of introducing section 182(6) argument, obviously the Matrimonial Property Act settlement in itself is important and appears in the document in the appellant's volume at page 87.

TIPPING J:

Which volume is that?

MR MACFARLANE:

That's in volume C.

ELIAS CJ:

At 47?

MR MACFARLANE:

87.

ELIAS CJ:

Thank you.

MR MACFARLANE:

In the written submissions, judgments various of the provisions to this document and highlighted in the written submissions. I don't want to do anything –

McGRATH J:

Sorry, can you just say to me which volume we're in at page 87, again?

MR MACFARLANE:

Section C, the document, exhibit 1.

McGRATH J:

Thank you.

MR MACFARLANE:

Section C appears in the middle of the front page. And of course there's A and B on the other side. So I'm, simply, I identify where the document is in the record. I'm not going to refer to the particular content of it that is mentioned in the written submissions. I want it to be noted simply that the date of this document was 29 June 2007. And I'm going to do the same thing to the next document in the bundle which starts at page 94, that's the deed of trust, the Cahirdean trust, which the case is about. I'd ask you to note on page 96, that it's dated the 29th of June 2000.

TIPPING J:

Is there any express linkage between these two documents?

MR MACFARLANE:

Yes, and I'll come to that.

TIPPING J:

Thank you.

MR MACFARLANE:

And although something is make also of the particular content of this document in the written submissions, for example, which are included in the beneficiary section. I'm going to leave that and take you now to page 153, which you'll see is a letter from David McCallum to Mr and Mrs Ward. And it's this letter, which, amongst other things, because there was evidence on this point as well, explains how to, so all the transactions with which this case is concerned, can be treated as part of an overall agreement or transaction as I argued for on the appellant's appeal on this point. The letter you'll see is dated the 8th of June 2000 so it precedes obviously the documents as they came to be executed and dated. The very first line reads, "I have now prepared the documentation relating to the family trust." And that documentation is then described in full and the first of the items you'll see is the document that we first

looked at which is the matrimonial property agreement itself. Second is the independent trust. Third is the agreement for the sale of the shares. The shares of course in the company my friend and I are calling LPL and the acknowledgement of the debt for the respective sales of the shares and then following that other documents which are incidental to the overall agreement the parties have reached. For example, the deed of lease is referred to as item 7 on page 154. The partnership agreement is referred to, as is the memorandum. I don't intend to refer to any of those documents as mentioned beyond the two I've referred to so far. My point is as my written submissions made it clear, that the parties plainly set out with a goal in mind and overall agreement that covered that goal through the solicitor's advice as anticipated in that letter, the matrimonial property agreement being a necessary part of that overall agreement or transaction.

BLANCHARD J:

But that doesn't make the other documents part of the matrimonial property agreement?

MR MACFARLANE:

No. They aren't referred to directly in the matrimonial property agreement, nor do those documents themselves refer back to the matrimonial property agreement.

TIPPING J:

I thought you said earlier in answer to me that there was an express linkage?

MR MACFARLANE:

Yes, that letter.

TIPPING J:

Oh, no I mean in the document.

MR MACFARLANE:

I didn't mean that, if that's what Your Honour meant.

TIPPING J:

I did.

MR MACFARLANE:

I didn't mean that.

MCGRATH J:

What is the basis on which you are inviting us to take the letter in account, the legal basis?

MR MACFARLANE:

Because its evidence is to parties' intention and evidence is their overall agreement which was that we will do all these things to achieve this particular outcome. And one of those things they agreed to do is a necessary component of it, was to enter into the matrimonial property agreement itself. Without the matrimonial property agreement the shares which Mr Ward held in LPL could not have been put in terms today to then be able to be sold with a gift pack and a doubled-up gifting programme.

MCGRATH J:

So you're suggesting we could look at this letter to interpret the other three documents?

MR MACFARLANE:

You don't need the letter to interpret the matrimonial property agreement by itself. My argument calls upon it only to establish that there is an overall agreement, the matrimonial property agreement being one necessary component of that.

BLANCHARD J:

Where does that take you?

MR MACFARLANE:

It takes me to the argument that in my written submissions I put, to be synoptic about it, at section 182(6) should be interpreted in an expansive way which enables the whole of the parties' agreement to be taken into account when considering this specifically mentioned agreement in section 182(6). So that if the overall agreement is to be varied or defeated then, necessarily, the matrimonial property agreement

has a component part, would, with all the other documents be thereby defeated as well. It's exactly –

TIPPING J:
That there's no incorporation by reference?

MR MACFARLANE:
No, there isn't.

TIPPING J:
No, as I think perhaps I should have put it more precisely in those terms, yes.

MR MACFARLANE:
In conventional contracts –

TIPPING J:
Terms.

MR MACFARLANE:
The only linking, apart from the narrative evidence from the parties and what you take into correspondence, in particular the letter I've referred to, there is no –

TIPPING J:
And putting it more precisely still, the matrimonial property agreement did not create an obligation to enter into the trust.

MR MACFARLANE:
No, if we think that through, then let's say Mr Ward decided at that point, I'm not now going to sign the trust and I'm not going to venture into these other things that we agreed we would do. So the matrimonial property agreement is not by itself contain a clause by which Mrs Ward would have then been able to enforce those obligations. She would have to have said, there was a contract, which is that when we entered into this overall plan, we were going to do each of these things. Some of them contemporaneously. The documents are all signed at the same time, but some of them necessarily chronologically, because you couldn't say that shares got into the

trust until you first take one moment in time, transfer them to Mrs Ward under the matrimonial property agreement, then –

TIPPING J:

Are you really saying that in contract, there was an implied obligation to look into the subsequent transaction?

MR MACFARLANE:

Yes, yes. And the letter assists, the letter I referred to specifically, assists you in showing exactly what it is the parties agreed that they would do.

WILSON J:

Now, looking at page 19 of Volume C, the receivee certificate from the solicitors, I've seen first that Mr Walker was from a firm other than Baker McCullen.

MR MACFARLANE:

That's correct.

WILSON J:

Is there any evidence as to whether or not Mr Walker advised Mrs Ward as to the trust documents, if I can put it that way?

MR MACFARLANE:

I believe not.

McGRATH J:

Your argument, really, is, you said, focuses on the purposes, or as you put it, a stance of interpretation of section 182(6)?

MR MACFARLANE:

I do.

McGRATH J:

It leaves me wondering whether, how much we need to get into the exact nature of whether there was an obligation related, or there's a looser form of arrangement in relation to execution of each of the documents, the focus on that position.

MR MACFARLANE:

I agree. It probably it is not necessary to do that. But it is necessary to give the overall agreement, or overall transaction, as I put it, some status more than a loose connection of –

BLANCHARD J:

Well, either it's part of the matrimonial property agreement or it's not. The variation of the trust could only defeat the matrimonial property agreement if it is part of the matrimonial property agreement.

MR MACFARLANE:

I can see that if that is the way this issue is determined, that is, if only the matrimonial property agreement itself is to be considered, then Mr Ward's argument must fail. And my outline concedes that in paragraph 2.

ELIAS CJ:

Is it, really, though, a question of interpretation, or is it not simply a question of ascertaining whether the invocation of section 182(6) does overthrow the matrimonial property agreement, because that would seem to be a question of fact. I mean, it may have been part of the composite arrangement that was being entered into, but you still have to convince us that it overthrew the matrimonial property agreement.

MR MACFARLANE:

Yes.

ELIAS CJ:

So I'm not sure that I understand why you say it's a question of an expanse of interpretation of the section.

MR MACFARLANE:

The argument can only succeed if the matrimonial property agreement is, if you like, bound to the other documents that formed the –

ELIAS CJ:

Which would mean that the overthrowing of the trust by itself is an overthrowing of the matrimonial property agreement? I see.

MR MACFARLANE:

That's the argument.

ELIAS CJ:

Yes.

BLANCHARD J:

But if that was the case, surely it would have to be read as part of the matrimonial property agreement.

MR MACFARLANE:

Literally, if the section is read literally, there's no room for any other document than an agreement which complies with the formalities that are set out elsewhere in the Property Relationship Act, or presumably one that is approved by a higher Court despite the lack of –

TIPPING J:

Once you read it expansively, are you not setting up difficult questions of degree? This case may well be at one end of the scale, but that's, in part, what's worrying me.

MR MACFARLANE:

Yes, I accept that you may find that if that door is opened, there will be attempts to link all manner of things to a matrimonial property agreement.

TIPPING J:

Oh, well, we did this and we sort of had in mind, and then we did it three months later, or five months later.

MR MACFARLANE:

Correct.

TIPPING J:

It's a bit of a slippery slope, isn't it?

MR MACFARLANE:

No, because the thing that would prevent that from being of concern would be a proper explanation and testing of the facts in the documents. The reason why this kind of case is different, and I think you may have gathered from the leave application documents, or other matters, is that this is a very common structure in New Zealand. Many husbands and wives and now, presumably, civil union partners will do the same thing.

McGRATH J:

It's common, I take it, because there are fiscal advantages, given the government programme that could be involved and in the income of the partnership for tax purposes.

MR MACFARLANE:

Those are the two principal reasons. There is a firm which isn't always common to this common set up, which is that it enables a different disposition to different forms of generational variance. So here, there could have been two trusts. Mrs Ward might have set up one trust, and Mr Ward may have set up a different trust. It would have had the same fiscal bearing, both by way of income tax and avoidance, legitimate avoidance.

McGRATH J:

Yes, I'm not worried about that.

MR MACFARLANE:

It is a danger.

ELIAS CJ:

Well, not in these proceedings.

MR MACFARLANE:

In my outline, if I –

TIPPING J:

Can I just – before you go on. Is it fair to say that in order for it to vary the matrimonial property – vary the Trust being in effect, a variation of the matrimonial property agreement, the Trust must be a term of the matrimonial property agreement, by some means or another.

MR MACFARLANE:

That it is to come into being perhaps, not just that it is a term –

ELIAS CJ:

Well you have to go further don't you? You have to say that it's a term of the matrimonial property agreement, because otherwise it's not thwarted.

MR MACFARLANE:

I'm happy to go that far, because it's another way of saying, making my submission, which is that the parties agree of all these things were happening.

BLANCHARD J:

If it was a term of the matrimonial property agreement, where is the compliance with section 21 in relation to that term?

MR MACFARLANE:

On the face of it it couldn't be, because it must be in writing, whereas here you have compliance.

BLANCHARD J:

Yes, so isn't it then a situation where maybe the trust is void in terms of section 21?

MR MACFARLANE:

Well –

BLANCHARD J:

I just don't know where this argument of yours is taking us. Except that it seems to me it's into mighty murky waters.

MR MACFARLANE:

Not for this particular structure.

BLANCHARD J:

Well never mind the particular structure, I'm concerned more about the general principle.

MR MACFARLANE:

Well can I deal with the objection at the technical level first? Yes, an implied term of necessity not getting written will not be capable of meeting the formality requirements of the Act. It would require that the Court, when it came to deal with the question, using the discretion that it has, to approve an agreement that does not need all the formal requirements of the Act well, it has that power. It occasionally exercises it on appropriate cases. So here, if that point was taken it would be necessary for the Court to make a ruling under the appropriate section which, I don't remember it off-hand now, it's one of the company of section 21, that permits the Court to conclude that lack of formality is of no disadvantage to, nor does it prejudice the way –

BLANCHARD J:

But if we went along with your argument, aren't we going to be throwing a whole lot of arrangements, which are not in contest at the moment, into potential future contest?

MR MACFARLANE:

I'm not sure I understand sir.

BLANCHARD J:

Well you say that this is a generally used formulation. Presumably, no one else has thought to have all the ancillary documents certified and explained. So we're casting a shadow over lots and lots of situations by adopting an extended meaning to section 182 sub-section 6.

MR MACFARLANE:

If that's the outcome in this case, then no doubt practitioners around the country will have to include courses being a matrimonial property agreement -

BLANCHARD J:

But what about all those that are already in place?

MR MACFARLANE:

Well they won't be able to be amended unless parties have –

BLANCHARD J:

Well there may be problems about their validity.

TIPPING J:

We can't say it's part of it for one purpose, but not part of it for another, that would be very tricky country.

BLANCHARD J:

I just have the feeling that the implications of this argument haven't been thought through.

MR MACFARLANE:

The way that you're asking the questions puts in mind what happened in *Bellamy v Townshend [2004] 2 NZLR 692* in the Court of Appeal where the jurisdiction bar under 182(6) was held to apply. The argument there concerned whether or not an attempt to variance in the clause within what presented as a matrimonial property agreement would be a variation or defeat of that privilege. A particular clause was a maintenance clause, so it wasn't, strictly speaking, a property clause as such. The attempt to vary that clause was held to bar under section 182(6). If it is necessary to find the summary at that point in *Bellamy and Townshend* it's in that position at paragraph 41. I'm referring to that only because the Court of Appeal at least has been prepared to recognise that there might be a different form of agreement associated with the outlay of property agreement, to which section 182(6) will provide a bar. Because the particular clause that was in question was within the matrimonial property agreement so it was expressed. It was still a maintenance clause, a maintenance agreement, and not a property agreement.

ELIAS CJ:

Do you say that the will too was part of the matrimonial property agreement? Because if this argument has to apply to all the documents that were – all the transactions that were entered into at the same time doesn't it?

MR MACFARLANE:

No, the only aspect of incorporation as far as the Will is concerned would be that there had been a mutual agreement by the parties to make particular kinds of Wills. The Will itself wouldn't be varied but the agreement to make the Will is what would be part of the overall agreement or transaction.

BLANCHARD J:

Well what about the agreement to make the trust? Wouldn't the same argument apply to that?

MR MACFARLANE:

Yes. I was anticipating that the Will, having been created, the Chief Justice would be concerned to see any amendment to the Will, or a new Will later. But that might happen and have some consequence to my argument.

TIPPING J:

It's only the settlement in the sense that the settlement trust, that is susceptible to variation under section 182. That probably heads off some of the concern that that –

BLANCHARD J:

Yes, but they've all got to be treated as the same way as part of the –

ELIAS CJ:

The matrimonial agreement.

TIPPING J:

That is a valid point.

WILSON J:

Indeed Mr Macfarlane, going back to the letter at page 153, doesn't the first line of that letter make clear that all the documents enumerated as 1 to 9, are part of the arrangement?

MR MACFARLANE:

That's true. Look, it's perhaps helpful, to revisit how the Family Court and indeed both appellate Courts came as what was the settlement, and I know there's been no leave granted on this and I'm not going to go into that subject beyond this point, that it was the agreement for sale of purchase of the shares which Judge Robinson, as he was, focussed on the Family Court, mostly, and both in the High Court and Court of Appeal it was thought as well that that agreement had significance as a settlement as opposed to the Trust itself. In the Court of Appeal, was clear that it was the Trust that was treated primarily as the settlement of the agreement for sale of purchase of shares seemed, in the language of the Court of appeal, to be treated as a settlement as well.

TIPPING J:

But that's not quite right. The transfer of the shares was the vehicle by which assets were transferred to the settlement trust. It was not the settlement itself. That was the deed of settlement trust.

MR MACFARLANE:

That was an argument that I raised.

TIPPING J:

Well, so be it. But I think we're on a real difficult one here, Mr Macfarlane, because of the consequences of this expanse of interpretation. It becomes much more controllable if one takes a narrow interpretation, and frankly, the interpretation is the natural language of the section.

McGRATH J:

I wonder whether we in fact we shouldn't hear this argument out before we start worrying about the consequences. I mean it is the possible reading in my view, of section 182(6), I didn't say anything –

ELIAS CJ:

All right Mr Macfarlane, by all means expand. I need to flag that, as I have already mentioned, I don't see this as an interpretation point of – in respect of section 182 at all. I see your argument rather as whether there has been incorporation in the matrimonial property agreement of the other agreements so that the effect of invoking section 186 is to overset the matrimonial property agreement and I think it's that second aspect, that Judges have been suggesting to you, is a bit difficult to maintain, but I think Justice McGrath is still bothered by the interpretation point.

McGRATH J:

Well, I'm just conscious that in the High Court, this argument succeeded.

MR MACFARLANE:

Justice Heath accepted the argument, as I put it to him, that –

TIPPING J:

Do you want to take us through his judgment with a view to supporting it?

MR MACFARLANE:

I would prefer to leave it to read as it is.

BLANCHARD J:

Well, in my view, it doesn't read very well. You probably need to come to the Judge's rescue.

MR MACFARLANE:

I would have emphasised more than Justice Heath did, as I do in my written submissions, before we get on to this question of section 182, the section is to be dealt with in a generous and a liberal way to make sure that the Court is not impeded. Section 182(6) supports the document in the same way, and it should apply of benefit to both the defending and the appellant parties, consistent with the way in which the Courts have dealt with the balance of the section. And that is not a rescue of Justice Heath's reasoning, I accept that, because he doesn't quote (inaudible) and I'm not sure that I would identify that argument –

ELIAS CJ:

Does that mean that you don't rely on Justice Heath's reasoning for your argument, and will develop a different argument?

MR MACFARLANE:

No, this can sit on top of what Justice Heath said.

ELIAS CJ:

I see. What sits on top of it? I'm just trying to understand your argument on this.

MR MACFARLANE:

Section 182 should be approached in a generous fashion, without impairment to the achievement of the justice of law. Whatever relief the Court considers is appropriate.

And that is the approach, overall, to section 182, for subsection 1 and subsection 3, is the Court's observation as to the discretion of the section. And that approach should also apply when we come to consider how to deal with parties as an effective part of section 182(6).

BLANCHARD J:

But later on, are you going to urge us to take a generous interpretation of section 182(1)?

MR MACFARLANE:

Yes, I am.

ELIAS CJ:

But I don't think that you'd have any difficulty with this Court in urging a generous interpretation. It's what you say is a generous interpretation of the section that I still don't quite understand.

MR MACFARLANE:

The generosity comes from the argument that when the parties have an overall agreement, which is intended to form one transaction with component parts, then for that to be disturbed, defeated or varied will defeat all of its component parts, necessarily, including, therefore, a matrimonial property agreement which will therefore trigger section 182(6). I propose, unless there are further questions around 182(6), to move on to the second question.

TIPPING J:

I do have to ask you about two paragraphs in Justice Heath's reasons, Mr Macfarlane. I'd just like your help, if you can, with paragraphs 87 and 89. I just find the conclusory sentencing paragraph 87, "In those circumstances, if the terms of settlement are varied, it would necessarily defeat the terms of the matrimonial property agreement" very hard to, at least at first reading, and you may be able to assist, very hard to accept.

MR MACFARLANE:

Justice Heath is dealing here with the overall transaction and the argument as part of the judgment. I'm not dealing specifically with the sentencing issue. I agree that if you read what he has written, it's quite difficult to find a specific term in the matrimonial property agreement itself.

TIPPING J:

Well, it's not only that. It's that the conclusion doesn't seem to follow from the premises which have gone before, that is to say, in paragraph 87. She's not been deprived of her 50 percent by the proposed variation.

MR MACFARLANE:

Well, that preamble, I think the Judge must be having in mind that it doesn't matter whether you look at this matter through Mr Ward or Mrs Ward's eyes. Once you change anything –

TIPPING J:

Yes, well, I don't want to press you on it, because I think it's quite a difficult paragraph. And the other one is, just in case you're able to assist, is 89, where the question raised there seems to be a question of the validity of the matrimonial property agreement, and again, I find that hard to work into the reasoning process that says that section 186(2) binds.

MR MACFARLANE:

I have a question mark of my own beside the last sentence in paragraph 89, because it doesn't seem to me to make sense, and I've tried to think how the Judge might have intended that that should have been read.

TIPPING J:

I think the word "that" is missing before "precludes", but even if you put that in, it helps grammatically, but it doesn't help substantively, at least, unless you can explain to me how it does.

MR MACFARLANE:

No, because I'm not concerned in my argument with the validity of the matrimonial property agreement.

McGRATH J:

Mr Macfarlane, if we go back to 87, are you really saying that that last sentence can't be read literally as the terms of the matrimonial property agreement? It's really rather the, it would defeat the overall success of the planned transactions, to use the phrase at the beginning?

MR MACFARLANE:

Yes.

McGRATH J:

To which the matrimonial property agreement was pivotal?

MR MACFARLANE:

Yes, I'm sure that's what the learned Judge had in mind, because that's, effectively, as he found, as you put it.

McGRATH J:

So it's a purpose of the matrimonial property agreement that gets defeated?

MR MACFARLANE:

Yes. The wrong word in the sentence is "terms".

McGRATH J:

That is a significant change, but it seems to me that it must be what he's getting at.

TIPPING J:

I still don't understand it, frankly, even with that. Because on the premise that the variation is a good, is a sound one in law, she's still getting, in effect, a 50 – in effect, she's better off than the matrimonial property agreement, because she's got the subdivided trust.

BLANCHARD J:

It's completely inconsistent with the sentence that says once Mrs Ward owned those shares, it was for her to deal with them as she chose. I just don't understand what the Judge was saying. It's the sentence in the middle of paragraph 87.

TIPPING J:

It just doesn't hang together, with great respect. And forget about the word "terms". Anyway, you've done your best to assist, and I wouldn't wish you to be troubled with it any further, unless you see an immediate daylight, Mr Macfarlane.

MR MACFARLANE:

No, I was trying to remember that I or Mr Grayson had said that might have led the Judge into a poor way of expressing a point, but I don't recall it that way. And I think that my answer has to be the same as I gave to Justice McGrath.

TIPPING J:

Yes, thank you.

ELIAS CJ:

Mr Macfarlane, just going back to the meaning of section 182, is it your contention that power under section 182 (1) or the discretion under 182 (1) can never be exercised where the settlement is contemporaneous with a matrimonial property agreement?

MR MACFARLANE:

No, I'm not saying that at all. It would only be if there was a defeat or variation that was triggered by the facts, which would then lead to 182 (6) applying, and in that event, the first inquiry would normally be as to the interests of the children.

ELIAS CJ:

But in this case, there's no provision, there's no express provision of the matrimonial property agreement, which is defeated. So it's the fact that they were

contemporaneous that you rely on to say that it defeats the matrimonial property arrangement?

MR MACFARLANE:

And the parties' intentions, as the evidence covers in the letter I pointed to.

BLANCHARD J:

But wouldn't that mean, as the Chief Justice says, that any variation would then defeat the matrimonial property agreement? How do you distinguish between the various terms of the deed of trust, in order to be able to say, well, yes, fearing that one defeats the matrimonial property agreement, but with others, it doesn't.

ELIAS CJ:

I suppose the test would be one of substance.

BLANCHARD J:

Well, it's very difficult to establish what the substance is if the only linkage is contemporaneity.

MR MACFARLANE:

And the parties' intentions.

BLANCHARD J:

Well, the parties' intentions are as expressed in the deed of trust.

MR MACFARLANE:

Within a context which has them saying we are doing all these things together to achieve one purpose.

BLANCHARD J:

Well, where's the purpose? The purpose is partly in the deed of trust itself.

MR MACFARLANE:

The deed of trust is one of the main end points of what they've agreed by way of their component parts of their overall agreement to achieve. So they start out with some shares owned by Mr Ward, and they hope to end up with a trust owning those shares with debts back to Mr Ward.

BLANCHARD J:

But the trust's only assets in this case are these shares.

MR MACFARLANE:

Yes.

BLANCHARD J:

So anything you do is related to those shares.

MR MACFARLANE:

For this particular case, yes.

TIPPING J:

But what is not allowed is defeating or varying.

MR MACFARLANE:

That's right.

TIPPING J:

Now, if a trust is part of a matrimonial property agreement, you can't vary it, because you can't vary a matrimonial property agreement, whatever the variation might be.

McGRATH J:

Well, you can read vary in an ejusdem generis sense, can't you? Covered by the word defeat.

BLANCHARD J:

How do you know what's defeating? Any change defeats the matrimonial property agreement if the trust is part of the matrimonial property agreement.

MR MACFARLANE:

Well, I would suggest, with respect, that a substantive approach to that would be necessary. I mean, if you take it that Justice Ingram, a single word is changed to the document, then that's a variation. And that therefore section 182 (6) is triggered.

BLANCHARD J:

Could the Court, for example, replace the trustees?

MR MACFARLANE:

It's not a variation of the settlement or the trust.

BLANCHARD J:

Well, if they were the trustees selected contemporaneously with the matrimonial property agreement, maybe, arguably, it does defeat the matrimonial property agreement, if those trustees were particularly chosen.

MR MACFARLANE:

In this case, no, because they weren't. Well, not in the sense that I would have thought that they were a contractual requirement. But yes, in a hypothetical case, I accept there may be, it may even have been recorded, that the whole of this overall transaction is designed to end up with Mr X and Mrs Y as the trustees who are going to do what we've asked in our memorandum of intention. Necessarily, that must be subject to the law, and the law permits that they be sometimes removed, on other occasions be allowed to retire and be replaced, and depending on the wording of the relevant documents, be replaced by the action of the appointers or the set laws, who would, here, be Mr and Mrs Ward. And, indeed, I seem to recall that here there might be such a power in the guiding trust. I'd have to check that. But multiple trusts would be the same on that point. But I wouldn't have thought, with respect, that the mechanical replacement of trustees in the general run of things could, in any way, in any sense, treated as a defeat or a variation of anything.

TIPPING J:

What, from the point of view of one party, may be a beneficial variation, may, from the point of view of the other party, be a partial defeating.

MR MACFARLANE:

Yes.

TIPPING J:

That's the conundrum we've got.

MR MACFARLANE:

Well, that would be a question of fact, would it not, the Chief Justice's point there would apply, and the Court would have to –

TIPPING J:

But if it's wholly benign to both parties, there's not likely to be a row about it.

MR MACFARLANE:

No. But equally then, with respect, it's unlikely, in fact, to be a variation. It would be something that they would have contemplated occurring from time to time, if we're now talking about replacement of trustees.

TIPPING J:

Oh yes, I'm not talking about replacing the trustee. All right.

MR MACFARLANE:

Shall I move on?

WILSON J:

Just before you do so, Mr Macfarlane, can you help me by making clear to me, what is your response to the earlier point that Justice Blanchard put to you, which, as I understood it, was that if the trust documents are part of the overall agreement for

the purposes of section 182 (6), doesn't it follow that because there was no independent advice as to those documents, they are void?

MR MACFARLANE:

Yes, if they're part of the matrimonial property agreement. Yes. That raises the interesting question, which neither of us have written about. Well, Mr Grayson a little. On whether or not, if you incorporate, let me call it a non-relationship property agreement within your matrimonial property agreement, that it nonetheless has the status of a matrimonial property agreement for the family section of the Act. And there is controversy about that, I believe, in the profession, with the consequence that some practitioners will not allow collateral documents to be contained within the matrimonial property agreements, and others do. And others bet both ways, and attach copies of the documents to the matrimonial property agreement, saying this is what we're going to do. But they're different and separate documents. If it's at any assistance at all, in my submission, the deed of trust is simply not a matrimonial property agreement, as section 21 would require it to be. I'm much more comfortable with the argument which goes that the parties can have an overall agreement, which includes the matrimonial property agreement to which particular formalities are required, but those collateral or component parts outside the matrimonial property agreement do not require to be the subject of independent advice or witnessing.

WILSON J:

Doesn't that approach severely undermine of the effectiveness of the certification regime?

MR MACFARLANE:

Well, there's certainly no policy reason why spouses who enter into deeds of trusts or agreements for sale and purchase of shares should necessarily receive certificated, independent advice each time they do those things. It's only once it becomes, with respect, able to be categorised as a matrimonial or a relationship property agreement as it is now under the Act, that those formalities specifically arise.

BLANCHARD J:

But if these component parts form a whole, then it isn't open to one of the parties, having received property under the matrimonial property agreement, then immediately to balk can immediately say, I'm not going ahead with the rest of it. There would undoubtedly be an argument, well, yes, you have to, you're bound to do so, because you said you would.

MR MACFARLANE:

Yes.

BLANCHARD J:

That's a dealing with property, just as much as the properties being dealt with by the matrimonial property agreement. So if the whole thing is regarded as a component whole, arguably, the whole thing as to be certified. It's not a conclusion that I'm very happy to come to, but we may be being driven to it by the argument you're putting up on section 182 (6).

MR MACFARLANE:

If you are driven to it and wish to say anything about it in your judgment or judgments, then there is, as I say, and I have not come here prepared to argue it with authority or references, otherwise as to the extent to which collateral agreements or documents can or cannot be included in matrimonial property agreements, and require or do not require certification. For what it is worth, I submit that a deed of trust does not require certification, nor do the other documents. If it's an overall agreement, which means that sequentially once the matrimonial property agreement is in its executed state, so Mrs Ward now holds the shares in terms of that agreement, what she does with them after that isn't the matrimonial property agreement, or a relationship property agreement in terms of the Act. So from the perspective of the certification requirements of the Act, and the point of it, which is, obviously, to protect rights and make sure that they are not inappropriately subverted or weak parties are somehow forced into agreements they might not otherwise had been, if they had independent advice. At that point, that doesn't apply, I mean, the policy driver for certification wouldn't apply once you got to the point of well, what's

this person going to do with those shares or with that item of property, or, is that person going to enter into a partnership agreement, which, as it happens –

BLANCHARD J:

Well, I don't really see why the policy driver doesn't apply, because the transfer of the property absolutely was conditional. In other words, you weren't being given absolute property. You were being given fettered property, because you were obliged, then, to deal with it in a particular way.

MR MACFARLANE:

Yes, I accept there's an argument to that effect.

BLANCHARD J:

And it's difficult to see why that should be separated out from the transfer of the property.

MR MACFARLANE:

May I suggest that the way that the Courts would deal with that, if it came to be necessary to consider it in this way, would to apply the sections dealing with lack of formality in the Act. If someone truly did require protection from an agreement for sale and purchase of shares, or a partnership, or a lease, then the checkpoint, the gateway here would, if what you have asserted or proposed was the case, would be the Court's decision not to grant a validity to the agreement, on account of the lack of formality. Alternatively, where plainly the parties are not prejudiced, and where they intended what happened to happen, then for the Court to overcome that lack of formality by making the appropriate order. So there is a check for that.

ELIAS CJ:

Mr Macfarlane, can I just take you back to the facts. How does the variation of the settlement here affect the disposition of their separately and jointly owned property through the matrimonial property agreement? Because yes, it envisaged the further settlement, in which they were both beneficiaries, that was implemented. The question is whether that settlement, or the terms of that settlement, have been overtaken by what's happened since to this family, which is really what section 182 is

about. I just don't see how the variation of settlement because the circumstances of the settlement have changed here affects the matrimonial property adjustment which preceded it. Even accepting it's part of a package, where's the prejudice?

MR MACFARLANE:

To address that, I have to take you to the point where the order is in place, and now Mrs Ward has her own trust, and she, with her co-trustee, controls 50 percent of the shares in the company. As the Courts have openly accepted in, I think, at least two of them, anyway, the immediate consequence is that, all things being equal, for Companies Act purposes, Mrs Ward would be able to find a way of forcing the sale of the farm, because she's a 50 percent holder in what might, then, might be an openly deadlocked company, where no questions would arise as to the appropriateness or otherwise of trustee decision making. The current control is appropriateness of trustee decision making. And there are remedies that flow from lack of that appropriateness in trustee cases. But no-one can force the sale of the farm, and no-one can change the way that these parties decided they should set up this asset for the long term, currently.

ELIAS CJ:

When they settled it, they envisaged carrying on into the future in harmony. That's not the position any more, so the circumstances have changed utterly from what they envisaged. Isn't that exactly where section 182 comes into effect, and, really, your answer to me seems to be directed more at the straitjacket of the trust form that they adopted, rather than that changing it affects their matrimonial property settlement. Because that simply dealt with the property that they owned.

MR MACFARLANE:

Yes. Look, I accept there's a change of circumstance.

ELIAS CJ:

Yes.

MR MACFARLANE:

My written submissions make clear –

ELIAS CJ:

Yes.

MR MACFARLANE:

- that, in fact, I regard that as an important part of how the section should be used with the restraints about relationship property rights we'll come to. But, with respect, here, these parties, while they may not, in 2000, have thought that as early as 2003 they would be separated, the documents nonetheless contemplate the possibility of significant change. Indeed, the matrimonial property agreement itself refers to dissolution, separation, and so on and so forth. So in my submission, it cannot be said, on the face of the documents, that these parties somehow or other naively entered into these arrangements as if there would be no separation or dissolution of their marriage. There are express references to those matters in the very document we're now considering.

ELIAS CJ:

Well, how do you say that it defeats the matrimonial property settlement element of the overall package to vary this trust?

MR MACFARLANE:

The matrimonial property agreement itself?

ELIAS CJ:

Yes.

MR MACFARLANE:

If that was all we were talking about –

ELIAS CJ:

Oh, it's the expanded, yes, thank you. Yes, yes, I'm sorry.

MR MACFARLANE:

I could see the point if it was a literal interpretation.

ELIAS CJ:

Yes, yes, thank you.

MR MACFARLANE:

If we move on, then, to the second question. In my outline, the first bullet point I have is a history of the section. Now, I'm going to address this in much more detail when I come to look at the 2001 Amendment Act. But the first point I want to make when we're looking at how we approach this section, is to submit that there is a lack of reference to any relationship property rights, as a factor which should drive a section 182 decision. It's not in the section, it's never been in any of the predecessor sections. Now, that goes back at least as far as, on my research, the 1928 Act, and I'm sure beforehand as well. And I'm going to be submitting that that is a deliberate position taken by the legislature, and I'll develop that argument a little further when I come on to what I call the 2001 Amendment Act bullet point below. That's an introduction, however, to the second point, which I've called "Cases on need and change of circumstance", and you'll see that I've got there "Refer supplement". And with the paper I handed up, there's a supplement which you'll see is entitled, "Oral submission outline supplement, need and circumstances of the parties". And I, in light of a question that was put to me earlier about relying to my friend's submissions in advance, I need to tell you now that what he submitted prompted this paper, because he was critical of the lack of authority referred to in my written submissions as to need and change of circumstances, the driver for the exercise of the section 182 discretion. I can address this now, conveniently, or later in reply, if you wish. But what I've done –

ELIAS CJ:

I think address it now.

MR MACFARLANE:

Yes, thank you, Ma'am. What I've done is go back and try and filter out of all of the cases under the 1928 Act and subsequently, to find whether or not, beyond the

repeated references there are, all the cases, to the breadth of the discretion, at a general level, particular approaches to need and circumstance change which support my argument. And so I've started by looking at **(inaudible Coetze and Coetze?? 11.01.43)** under the 1928 Act, which you'll see concerned an attempt by the husband in that case to reduce a weekly sum payable under a post-nuptial settlement to his wife. On account of the divorce and the possibility of remarriage, which, at that point, was hypothetical. Ahead of which, hypothetical marriage, and to facilitate it, he sought adjustment of his financial obligations. The case refers to English authority as to the legislative objective of giving the parties the same benefit as they would have had if conjugal relations had continued, and the question of substantial change and the relative positions of the parties refers to sufficient means and earning prospects and one party's prospects of later receiving capital from estate, or not. And the purpose of the section in one of the judgments was declared to be to prevent unfair hardship. So that is the first of the cases which I say when you get below the general statement, this is a wide power in a section for the general discretion. To get into the nitty-gritty of what that actually means, here is a case which supports what I'm saying about need and change of circumstance and, perhaps for 1928, no surprise there. 1948, I'm sorry. The next case also in the Court of Appeal was *Preston v Preston [1960] NZLR 385*. That equally referred to English authority in respect of the taking into account of all the relevant circumstances, the time of the hearing, particularly any changed circumstance of either party and their relevant financial positions. And I've submitted that that case is notable for the Court's recognition of the sometimes composite nature of agreements, the settlement there under review being described as a composite arrangement. When I came to the 1963 Act, I, surprisingly, found less authority than I expected. So before I refer to –

TIPPING J:

Isn't that because under the 1963 Act, we now have a discretionary matrimonial property regime, which is likely, in part, at least, to overcome the need that was otherwise inherent in the '28 Act?

MR MACFARLANE:

That's quite likely to be so, I'd suspect, although you'd need a statistician to work all that out.

TIPPING J:

But conceptually, that seems to be the probable –

MR MACFARLANE:

Conceptually so. What I can say is that many of the cases which applied section 79 were applications to vary separate agreements and, effectively, were arguments about maintenance, and not about property. Anyway, I had a look at Bromley and Webb's old textbook, *Family Law*, it's the 1974 book, to check that [Bromley P M and Webb PRH (1974) *Family Law* Wellington: Butterworths] and I had no reason to change the submission that I've just made. But it was interesting to read in the learned authors' paragraphs close to dealing with the question of how you exercise this discretion, a paragraph that can be found from 709 to 712, it's at, where they said, "One can only conclude by saying that it would have been of assistance had the legislature given some explicit guidance as to the principles on which it expected the Courts to act". And I suspect, if I'm asked at the end of my submissions, whether that might not still be true, I'd say likely yes.

ELIAS CJ:

Sorry, I'm just thinking about what you said then about a distinction between property and maintenance. Really, this settlement was about maintenance, about maintaining the family, and the reason that it's been thought by the lower Courts to be necessary to vary it is because the wife, who was an intended beneficiary, can't obtain income from this settlement, because it's not capable, the farm is not capable of supporting two families. I'm just really wondering about whether it is right to regard it as a property settlement. Maybe that doesn't matter at all.

MR MACFARLANE:

Well, I was going to address that in part at the beginning when I was going to refer to the circumstances of the parties, and you persuaded me I shouldn't, and I agreed, and I'm not going to go back on that. With respect, the –

ELIAS CJ:

No, I'm just thinking, within the parameters of what was achieved by the settlement.

MR MACFARLANE:

Yes. Well, plainly the parties expected that the property would continue to be available and provide the benefits that come with that. Some of those are occupation of the home, notwithstanding you've got to pay a rent for it. The rent was, and still is, paid. The use of the farm, notwithstanding that rent was, and still is, paid for it. But nonetheless, there is a benefit in being able to live in a particular place that you know, and with friendly landlords.

ELIAS CJ:

But the wife, because of the separation, is excluded from those benefits, contrary to the expectation of the parties at the time of the settlement, and contrary to the intention of the settlement.

MR MACFARLANE:

Yes. If you follow that through, and I don't disagree with that when I come to deal with that in need and change of circumstance, because the right way of addressing that is to say not let's give you 50 percent of your relationship property rights as if they were still available for disposition –

ELIAS CJ:

Yes.

MR MACFARLANE:

- but to look at what she actually needs.

ELIAS CJ:

Yes.

MR MACFARLANE:

- and meet that.

ELIAS CJ:

Well, not necessarily, because it could be what she was entitled to expect, what benefits she was entitled to expect under the settlement that was made. But I agree, that's not necessarily a matrimonial property-type inquiry.

MR MACFARLANE:

No, it's not, that's right. And there are different ways at which you can come at valuing that for the purpose of quantifying relief, or shaping how relief might be focused.

ELIAS CJ:

Yes, yes.

MR MACFARLANE:

My constant theme here is, it cannot be the relationship property principles, nor that Act.

ELIAS CJ:

Yes, I understand that.

TIPPING J:

Mr Macfarlane, I've had a look at some of these older cases, and I'm trying to go back in my mind to practice in the days before the '76 Act. What would you say of this proposition as to the purpose of section 182, that it was designed to make proper provision for a spouse in capital and/or income terms on dissolution, where other resources were not available or sufficient?

MR MACFARLANE:

That's consistent with my argument.

TIPPING J:

Well, that's always been my understanding of the purview of this section, that you make available, out of the trust, capital and/or income because the spouse, in the

changed circumstances, has, in the broadest of senses, a need, and that is the only way of adequately satisfying the need brought about by the change in circumstances.

MR MACFARLANE:

I don't disagree with that, at all. In fact, I regard that, with respect, as consistent with the way I present my argument.

TIPPING J:

Now, where did this quasi-matrimonial property approach first come in?

MR MACFARLANE:

It appears to have gained some momentum after the 2001 Amendment Act incorporated the principles section 1 (n) and thereabouts in the Act. As far as I can tell, the only cases prior to that time which dwelt on rights relevant to relationship property that might otherwise have been lost by the settlement of a trust focus on the, what I call the need component. So, for example, in *Chrystall v Chrystall [1993] 10 FRNZ 441*, which is one of the earlier cases that refers to relationship property –

ELIAS CJ:

So where do you get, the emphasis on need may arise in the case law. But where does it come out of the statute? There's no reference to need there. It's just what the Court thinks fit.

MR MACFARLANE:

It's implicit in 182(3) because of the reference to changed circumstances.

ELIAS CJ:

Well …

MR MACFARLANE:

That can only mean, well, what do I need as a result of the change, can't it?

ELIAS CJ:

Yes, yes. But it need not be a reference to needs, in the sense that someone must show that they're in necessitous circumstances, or anything like that.

MR MACFARLANE:

But there must be some justification for it.

ELIAS CJ:

Yes, yes, I understand that. Thank you.

MR MACFARLANE:

There's a twin, need and change of circumstance.

ELIAS CJ:

Yes.

MR MACFARLANE:

It's just a change of circumstance, the way that I approach the case is usually going to be covered by need, and I'm arguing it can't be 50/50 splitting up of trusts as if it were relationship property. I'm not trying to exclude other examples of changing circumstance that might drive an award.

TIPPING J:

It's, in a sense, substituting the benefit that the party might have got from the trust with another benefit, matched in the broadest of senses with need or justification, as a result of the fact that the circumstances have changed, and they're not now going to get the benefit from the trust. Or not likely to.

MR MACFARLANE:

In a general sense, I, again, don't have difficulty with that. It's just that ultimately begs the question of how you quantify that.

TIPPING J:

But when the lower Courts have talked about fair and just, the essential question, surely, is fair and just for what purpose?

MR MACFARLANE:

Correct, and to both parties. Not just for the appellant.

TIPPING J:

Just to talk amorphously in terms of fairness and justice doesn't actually get you very far.

MR MACFARLANE:

No, which is why I keep saying that once you get below the general expression of the discretion, you have to start working out how do you actually apply this? And my argument is that with taking the point about no reference to need, with the way in which section 182(3) is framed, and the history of the section and its application in the past, that the right way is not let's divide the trust 50/50 and send these parties away. Because that, in my submission, is not what the legislature has set up.

ELIAS CJ:

Although what is fair and just must evolve with changing expectations in society, and the matrimonial property regime is an indication of social expectations. Now, that's not to say that you're right, that you don't look at it as a question of just a 50/50 split of the capital in considering what benefit should be afforded to the wife because of the changed circumstances. But it does mean that in assessing what is fair, some account, the view that 50 percent of the capital that the parties have should be available for the benefit of the wife must be some sort of touchstone.

MR MACFARLANE:

Yes, after you've considered how the relationship property legislation, in fact, works, according to how the legislature has written it for us. I'll come on to deal with that a little further, because what they've written for us is section 44 (c)

ELIAS CJ:

I'm not disagreeing with the submission that you're putting to us, very effectively, that you just can't pull over the matrimonial property regime and impose it on a trust when we're using section 182. But I wouldn't want you to think that the matrimonial property regime is irrelevant as an indication of a touchstone for what's fair and just.

MR MACFARLANE:

Yes, I accept that this ambulatory approach to the assessment and interpretation of value judgment words must be accepted, so that, yes, it's not only relevant to consider how the legislature wants us to think about fair and just in the way that you've put it. It's also relevant to look at what the actual outcome of the rights of the individual claimant was under the Relationship Property Act, because that's the starting point. It demonstrates the resource available to that party at that time. I've been awarded this much money by the Court under the Property Relationships Act. I have these other resources of my own over here which were separate property, and I have these expectations for the future derived either from my abilities, because I'm clever at something and I can get a good job, or my family is going to be giving me money

ELIAS CJ:

Yes, but that seems to me to be going, I'm not sure that I can go along with that, because that really is to look at a much wider canvass, and to bring in the sort of assessment that might be appropriate if you were doing a fresh matrimonial property division. But in this case, surely, you look to the settlement itself, and relevant in that may well be things like the interests of the children. It may even be the notion, which the parties clearly did share at one stage, that the property, if possible, should be preserved for another generation. So that's part of what comes into making the assessment of how you deal with this changed circumstance in a way that's fair and just. But I'm not sure that it's valid to go much wider than that, and to look at what other resources this wife has, or what other resources this husband has. You'll need to persuade me about that.

MR MACFARLANE:

That's the approach that seems to have commended itself to the Court of Appeal and *X v X and Anor CA239/2007*. That there are cases where there are sufficient resources or sufficient relationship property for it to become inappropriate or unnecessary to use section 182.

ELIAS CJ:

Well, if you were doing a matrimonial property split-up, and there were some trust assets that had been settled, you might make an adjustment to the share of matrimonial property assets so that you didn't have to achieve a division of the settled property. You could make that sort of adjustment. I don't have a problem with that. It's simply the idea that one has to come up with some notion of what the parties deserts are in relation to this element of property. Because there hasn't been a corresponding adjustment here. I mean, it's not being done in a big wash-up.

MR MACFARLANE:

No, no. Because Mrs Ward's present rights remain as an object of a discretionary trust, and as a creditor of that trust. Well, we may return to that argument towards the end of my presentation, when I look more closely at what happened with the Wards. But is it appropriate for me now to return to the paper?

ELIAS CJ:

Yes.

MR MACFARLANE:

I referred to *Broome v Broome [1983] 40 Mass. App. Ct. 148* as one of the section 79 cases. It's not actually a very good authority, in the sense that its focus is more on the matrimonial home under section 58 as it was then dealt with than the equivalent of section 182 now. But it nonetheless records that the focus was on the financial circumstances of the parties. The *Goudie v Goudie [1980] 3 MPC 67* case I'm not going to address further, because it's dealt with in my written submissions, but I've given cross-references for it. I come on to the 1980 Act. The same submission is made in respect of *Polkinghorn Trust* and I've give the cross-references for that. *Chrystall* probably bears greater mention, because of its great

significance in the development of the section 182 jurisprudence, and because it's one of the triumvirate of cases that the late Judge Inglis QC decided changing the landscape in respect of farming families and trusts at the time. I want to make a particular reference to the way that that Judge, His Honour, wrote about the purpose of the Act, at least, as he perceived it to be at that time. That's found in the judgment on page 782 of *Chrystall*. *Chrystall* is in the casebook at 108. The passage I had in mind is that which commences from the beginning of the first whole paragraph a quarter of the way down the page. "It is helpful to return to the wording of the section, then the parties must obviously be the parties to the marriage which has been dissolved". It's on page 113 of the casebook at 782 of the case itself, so when you open the page it's on the left-hand side, a quarter of the way down, after the opening words "It is helpful". "The parties must obviously be the parties to the marriage which has been dissolved, and the whole purpose of section 182 is to enable the Court, if necessary, to adjust the terms of the settlement to meet the new circumstance brought about by the dissolution of marriage". There is no reference there to some kind of re-writing of the parties set-up or terms of relationship property rights. The only reference in *Chrystall* to those relationship property rights are dealt with elsewhere, and concern the need to provide the particular applicant, the wife, in that case, with a home and some money. Nothing like a significant proportion of the value of the trust property in question.

TIPPING J:

Where's that reference, Mr Macfarlane? Because I thought the Judge did discuss, to some extent, this somewhat expanded concept of need. It's not sort of necessitous.

ELIAS CJ:

Justification.

TIPPING J:

Justification, yes.

MR MACFARLANE:

Yes. The need references I've gone past. In the outline paper, I've referred to them in the written submissions, and I've given the references in my written submissions.

TIPPING J:

Because he awarded here, or got the trust to buy a home for her, didn't he?

MR MACFARLANE:

That's right.

TIPPING J:

With the trust paying the outgoings?

MR MACFARLANE:

Yes.

TIPPING J:

That was the main relief.

MR MACFARLANE:

The identification of what was needed for the particular applicant in her circumstances at the time. Not 50 percent of a trust. Not 50 percent of a farm. Enough for a good home and some money. *Williamson v Williamson [1998] 16 FRNZ 586*, I've given the cross-references to that as well. *Williamson* was five years, I think, after *Chrystall*. And then finally, *Bell-Booth v Bell-Booth [2001] NZFLR 128*, which was another couple or three years after that, and I've given the cross-references to those cases in my written submissions, as well, and I've made the observation, as it appears in my written submissions, that those cases are mentioned in *X v X*. And I've given the cross-references for those. So, finally, what happened after –

McGRATH J:

Just before we got to the 2001 legislation. There was a Court of Appeal decision that was mentioned, *Bishop v Bishop [1980] 1 NZLR 9 CA*. Is that helpful in that matters as all?

MR MACFARLANE:

I know of the case. I haven't included it, and I don't recall it as being helpful, but I can check.

McGRATH J:

There was some reference to Justice Richmond, and I think Justice Cook also, if it's the case I'm thinking of.

MR MACFARLANE:

I'll look it up in the break. For 2001, I've referred to *Ord v Ord [2002] NZFLR 1078*. There are two decisions here . Judge Robinson decided that at first instance, and was overturned on certain aspects of his decision. He used need as the basis for an order benefitting the children in that case, and no order made for the wife in the absence of evidence of such need. Justice Smellie dealt with the section 182 part of that case, still approached the exercise upon a need and change of circumstance basis, as it applied not only to the children, but, in that instance, to the husband, whose circumstances, on account of a proposed orders and outcomes, needed to be taken into account as well. And then *B v F [2009] CIV-2008-470-590*, where the first mixture, and chronologically, since *Chrystall* at least, the first mixture of need and loss of relationship property entitlement appeared.

TIPPING J:

Is that in the casebook?

MR MACFARLANE:

No.

TIPPING J:

It's reported, I see.

MR MACFARLANE:

Yes, it's reported. Incidentally, *Ord* in the High Court is not reported, so if I have a couple or three copies of that.

TIPPING J:

For myself, I think it would be helpful.

ELIAS CJ:

Yes, it would be helpful.

MR MACFARLANE:

I'll provide that at the break as well. Now, I've set out those two post-2001 cases without making further references to the key. Let's take account of the relationship property rights and quite expressly, so cases of *Fielding v Burrell [2005] NZFLR 715 (PC)* and *Cooper v Cooper HBC VIC 2007-442-241 13.07.07 Wild J*, because they are dealt with in the written submissions, and they are both in the case book.

TIPPING J:

Although I'm not inviting you to go back to subsection 6, I wonder whether the purpose of 182 as a whole is, in some way, illuminated by subsection 6, in a negative sense, if you like, that the jurisdiction is not to be used to as to interfere with matrimonial property agreements.

MR MACFARLANE:

Yes, that is a way of looking at it. To look at it that way defeats my section 182(6) argument, but helps my section 182 –

TIPPING J:

Yes, well, you may be on a better wicket, on your second innings, Mr Macfarlane.

MR MACFARLANE:

Yes, indeed, sir. So that's the supplementary material, and if I go back now to the outline, I've asserted that the express introduction of a 50 percent as a PRA-rights based assessment into section 182 comes with the cases of *Fielding* and *Cooper*, and I've written that that's to be compared to assessing section 182 based on what property the parties actually hold. And I intended that to mean not only in their own right, but as a result of the expression of their relationship property rights, either in an agreement or by way of a Court order.

TIPPING J:

Cooper's Justice Wild, in the High Court, *Fielding* is?

MR MACFARLANE:

Justice Keane. Both of those are in the casebook.

ELIAS CJ:

Can you just tell me what tab they are?

MR MACFARLANE:

The first of the decisions, *Cooper*, is at page 118 of the casebook, and *Fielding v Burrell* is at 136. And the last matter that I might refer to, if you intend to break at 11.30 –

ELIAS CJ:

Yes, thank you.

MR MACFARLANE:

- concerns what I've called the significance of section 182(5), and the reason that I've placed emphasis on that section is that it fulfils a function which is consistent with a needs and change of circumstance approach to the overall use of section 182. It's there in my submission, not only as a catch-all, in case there's error, or some unforeseen problem arises with the Court order, but it is also there because it may well be that there is a change of circumstance, which, assuming the settlement, the trust, in this case, is still going –

TIPPING J:

What's the best place to find 182(5)? I just want to have it – it's not cited in the Court of Appeal.

MR MACFARLANE:

It's set out in the submission on page 9. "Any order made under the section may, from time to time, be reviewed by the Court on the application by the party to the marriage, or of either party's personal representative", so after they're either dead or they've lost capacity.

ELIAS CJ:

That's significant.

TIPPING J:

Yes, it is significant.

MR MACFARLANE:

And its significance is, well, why would you have it there unless you needed to do something about a need circumstance, or a change of circumstance associated with need? It's not there for another go at fairness and justice, as the Chief Justice was putting it to me, I suggest. It's there consistently with my submissions.

TIPPING J:

Well, it means that you can't foresee the future entirely, and you just say, well, this ought to do for the moment, but you can come back if things change again.

MR MACFARLANE:

Correct. That's right. But why would you come back other than to meet a need or a change of circumstance that would associated with need? Unless there's some unusual set of circumstances, something left-field that 182(5) could also be used for. So I was going to move on after the break to the 2001 Amendment Act.

ELIAS CJ:

Yes, thank you. Yes, we'll take the adjournment now, for 15 minutes.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.52 AM

MR MACFARLANE:

Yes Your Honour Bishop v Bishop is cited in Fielding's case and it's in the case book. That is the citation of it is in the case book at page 139 and it's mentioned as well in Fisher from para 6.13. And it does deal with the discretion, it makes the kind of general, this is a wide discretion statement that I've referred to.

TIPPING J:

That passage from Fisher on your argument –

ELIAS CJ:

Sorry which page?

TIPPING J:

139 of the case book.

ELIAS CJ:

Thank you.

TIPPING J:

565 of Fielding, where the Judge, Justice Wild – anyway para 42 the citation from Fisher, if your argument is correct, that is too widely expressed isn't it?

MR MACFARLANE:

Yes it is. Indeed Fisher is, I should've have said this earlier, although I was then only going through the cases that Fisher perhaps has some responsibility for prompting some of the Judges to think that a point had been established, which perhaps had not, earlier.

McGRATH J:

That's as far as you can take Bishop, that's as far as Bishop helped us.

MR MACFARLANE:

In my submission my friend and I had a discussion about it, he contends that it helps him because it's authority for the section being so wide as to accommodate just about anything you like and isn't a restrictive need and circumstance-type case. So I come now to the 2001 Amendment Act and I said when I introduced this section of my outline that I would look at some of the history here and I want to start with the 1988 report of the working group on matrimonial property and family protection. It's mentioned in a number of the decisions. My recollection is that it's mentioned in Ward v Ward, indeed in the Court of Appeal and I'm pretty sure it's mentioned in X v X and the Chief Justice might recall it because of her role as a consultant to the group.

ELIAS CJ:

Yes, I only vaguely recall that period, but yes. It's a long time ago.

MR MACFARLANE:

Well in the report the consultants include Bill Atkins, Your Honour as a Law Commissioner, now His Honour Justice Gendall and Margaret Wilkinson. That report in 1988 had as its purpose the advancement of the government social policy reform programme at that time and was ultimately reported to Cabinet and it advocated some changes to the law as it then was and of course at that point section 182 was in existence as was the Property Relationship Act as we now know it, but without section 44(c) and page 79 of that report dealt specifically –

ELIAS CJ:

Where do we find it?

MR MACFARLANE:

The report? I haven't included it in the bundle.

ELIAS CJ:

Oh I see, yes I see.

MR MACFARLANE:

I'll leave my copy behind. I don't have any additional copies of the report, but the reference is to page 79, where this appears. "If a disposition of matrimonial property to a Trust or a company has the effect of defeating the interests of the non-owner spouse, the Court should have power to (a) Order a compensatory or equalising payment out of the other spouse's share of matrimonial property or out of separate property, which is a forerunner to section 44(c). (b) Order payment of income from a discretionary Trust in part payment of the matrimonial property share, which is partly in anticipation of section 44(c). (c) Order distribution of Trust or company capital, which was not and has never been adopted and (d) Allocate specific items of property owned by a Trust or company to the non-owner spouse if this power can be exercised without prejudicing the interests of a third party who has acted in good faith and for valuable consideration. Now that section of the report concludes with this, "The existing powers of the Courts to restrain or set aside dispositions made or about to be made to defeat the rights or claims of any person under the Act should be strengthened." Now although that – those recommendations were not adopted in full, the next time that, from the perspective of the development of the law in this area, at least legislatively, occurred, was in 1999. This is in the case book in the materials, from page 47 and I'm here first referring to the 1999 reports of Select Committees which you'll find at page 70 of the case book. This was the Select Committee's report upon examination of the then Matrimonial Property Amendment Bill, which ultimately became the 2001 amendment and within this report there are references expressly to Family Trusts which can be found in the case book at page 76, it's page 265 of the Select Committee report itself and –

ELIAS CJ:

Sorry, page 76.

MR MACFARLANE:

Page 76 of the case book. If you go to the right hand side and go towards the bottom you will see that there were particular submissions made to the Select Committee, this is right at the bottom, to empower the Court to order compensation for matrimonial property disposed of to a Trust and/or company and to a submission from the Law Society, which is just over the top of the next page, in

argument that new provisions in Bill as it then was, not going far enough. The Law Society argued for greater power in respect of property that had gone into Trusts beyond the then present sections 48, 44(a) to 44(f) as contained in the Bill, that of course included section 44(c). And then further on page 80 of the case book, the question of Family Trusts was returned to, under the heading "Minority View of Labour Members", where towards the bottom of the page on the left hand side you'll see under "Family Trusts", "The Labour members of the committee remained concerned that the changes to the legislation, with respect to Family Trusts may not go far enough. This is a very complex issue and we recommend that further work be undertaken by the incoming government to assess the appropriate response." So at that point such efforts as were being made by way of submission of consideration by the government of the day, to extend the intrusion if you like, of the Courts' powers into Trusts and Trust property was being rejected. Section 44(c) being regarded as the appropriate response at the time and that then brings us to the supplementary order paper itself, which you'll find starting at page 47. The supplementary order paper deals with the question of Trusts and indeed any changes that might be required to the Family Proceedings Act in a broader sense in various paces, but the first of which I want to draw attention to appears on page 48 where the Family Proceedings Act is specifically referred to, you'll see under little f, towards the bottom where the proposed – only then proposed amendments to the Bill concerned provisions in the Family Proceedings Act 1980, not concerning section 182 or expanding the settlement variation jurisdiction, but dealing only with maintenance. Somewhat further on in the supplementary order paper the spousal maintenance –

ELIAS CJ:

What page are you at now?

MR MACFARLANE:

I was at 48 and I'm now moving on to 56.

ELIAS CJ:

Thank you.

MR MACFARLANE:

Where consistent with the earlier reference to what might be done with the Family Proceedings Act, the references are to spousal maintenance, which you'll see on the right hand side of page 56 as you look at it and without reference again to variation of settlements, or section 182. Then finally the question of what might be done about Trusts in companies, is dealt with on page 59 and once again you'll find that on the right hand side of the page and there – turning over the page, there is reference to the very point that we were talking about this morning about the necessity for independent legal advice before the transfer of relationship property to a Trust or a company, or by perhaps not at the point at which we were discussing it this morning, but perhaps prior to the matrimonial property agreement itself. In any event, if you turn the page over to page 60 you'll then see that all that the supplementary audit paper is prepared to do, as far as it goes, is to confirm what was currently proposed in respect of Trusts, which is of course to section 44(c), so that's just at the top of the page in the first whole paragraph where it reads, "Proposed new section 44(c) provides compensatory measures where relationship property is transferred to a Trust and the transfer has the effect of defeating the partner's rights, even though at the time of the transfer there was no intention to defeat those rights. There are analogist provisions for companies." I found nothing else in my reading of either the select committee report or the supplementary audit paper that merited mention that what is signalled about each of those documents is the lack of any extension of the legislation, be it the Family Proceedings Act or the Property Relationships Act as it was to become, that is either beyond section 44(c) or by way of amendment of section 182. And as we know, after the report back, and its consideration, the Bill had its third reading on the 29th of March 2001 and the legislature then presented New Zealand with the law as it stood in respect of relationship property rights and Trusts in section 44(c) without any amendment to section 182 material to variation. It is in my submission, very difficult to gainsay the proposition that the legislature deliberately turned its mind and decision away from making any alteration to section 182 on account of relationship property matters or rights, be they as to equal division as to the importation of the principles inserted into the Property Relationships Act by the 2001 amendment or otherwise and I would submit that the legislature is declaring its position to be as it were, that relationship property matters in respect of Trusts, apart from the existing section 182 jurisdiction,

are to be dealt with only by section 44(c) and that section 182 is referable to relation property matters only on account of section 182(6) . In this case of course Mrs Ward did apply under section 44(c) and in my submission the Court could easily have made an order in her favour under that section. It didn't and Mrs Ward chose not to appeal that because she got the maximum possible best result under section 182. Under section 44(c) she was obliged to concede that Mr Ward should have credit for his separate property of 16.7 percent of the shares. Under section 182 he lost those and its little wonder that Mrs Ward wishes to maintain the section 182 judgment and did not appeal section 44(c). In my submission that shows a stark contrast inappropriate outcome.

ELIAS CJ:

Did the Family Court Judge deal with the section 44(c) I can't remember?

MR MACFARLANE:

Yes, yes he did.

ELIAS CJ:

He did. But with what effect?

MR MACFARLANE:

He rejected the application.

ELIAS CJ:

On what basis?

MR MACFARLANE:

On remedial, discretionary remedial grounds. That's how he put it. I read the judgment as being, Mrs Ward can do better under section 182, so we'll give her relief there instead. In fact by going there he was able to give her 50 percent according to his way of looking at the case, and not have to give Mr Ward credit for a separate property of 16.7 percent and he specifically says as much when dealing with section – with both section 44(c), "Here I would have to give credit for the 16.7 percent of separate property under 182, here I don't have to give credit for that." My next bullet

point if I may is to pose what is intended to be a rhetorical question, is there a hierarchy and the submission there is intended to display the legislative answer to matters relating to spousal rights, including with reference to Trust property. Those rights are essentially in the nature of maintenance under the Family Proceedings Act, property under the Property Relationships Act with a restricted and limited intrusion into Trusts and companies on account of a code in section 44(c) and section 44(f) and then only and as ancillary relief, restricted access to Trust property under section 182. That hierarchy in my submission, means that the legislature expects the substantive rights and outcomes to be dealt with under the maintenance and property rights that spouses have, and does not intend that section 182 should by a backdoor, become the mechanism for you giving the equivalent of relationship property rights, and in fact in this case more that relationship property rights because of the 16.7 percent to claimant spouses. So my concluding submission on that aspect is that with the greatest of respect to the High Court Judges who have said otherwise in Fielding v Burrell and in Cooper and with respect of course to the learned authors of Fisher, it is wrong and with respect the Court of Appeal was wrong to equate relationship property rights supposedly lost into a Trust, whether inclusive of that 16.7 percent or not, into the section 182 discretion. It provides a gloss on the section which in my submission is contrary to the legislative history and has been deliberately excluded by the legislature and so therefore the Court of Appeal was wrong to treat the matter in the way that it did in its decision, even though it purported to allow the 50-50 percent at the same time as using the language of fairness, because it did refer to the relationship property rights and 50-50 as being significant. The passage is relevant to the way that the Court of Appeal dealt with that, as indeed those relevant to X v X as set out in the written submissions. In the next section of my argument, I go on to deal with section 182, 1 and 3 in terms of fairness and justice to both parties and that is intended to address the way in which the discretion was exercised and if Your Honours earlier indications are that I should be more carefully restricting myself to matters of law and not dealing with the facts, then I am admittedly here, dealing with facts, but I suggest that it's helpful to look at those facts to test the rightness or not, of the way in which the Court of Appeal and indeed the Family Court thought it right to include relevance to relationship property rights.

TIPPING J:

Do you oppose it going back if we find for you on the point of law, or are you in effect asking us to conduct a factual assessment in this Court?

MR MACFARLANE:

No. No we had that discussion earlier, although my friend and I had hoped that the Court of Appeal, if it upheld the appeal on the discretion, might have been able to deal with it at that level, my view now is that it would have to go back.

TIPPING J:

So, you're just referring to these facts as illustratively of how this has gone astray are you?

MR MACFARLANE:

Yes I am, and attempting to answer some of the points that are sometimes made in these circumstances. For example the third bullet point, perhaps if I could just address that briefly, where it is sometimes said that if you make your bed by entering into matrimonial property agreements, well I'm sorry you're going to have to lie in it and I've cited Cox v Cox, I think Justice McGeechan wrote that to give a case reference for it. Of course it doesn't stand in the way of the immediate repost which is, "Yes, but here's the Court busy remaking the bed and changing the sheets and removing the pillows", in which event the bed analogy is rather unhelpful. The other matters I accept directly factual and are illustrative as Justice Tipping indicated. So that brings me to the end of my oral presentation, unless there are any other matters you wish me to address.

ELIAS CJ:

No, thank you Mr Macfarlane. Yes Mr Grayson.

MR GRAYSON:

Your Honours, this started out as a relatively simple case in the Family Court, which has become extremely complicated by the time it's reached this level.

ELIAS CJ:

Yes I think all of us have huge sympathy for the parties. It happens, I'm afraid, when they get caught up in a case which raises some significant points of principle but I'm sure they didn't hope to be in the Supreme Court on it.

MR GRAYSON:

Thank you Your Honour. I just wanted to address Your Honours, the matter of section 182(6) and the history of section 182. Because in my submission to you there's a relatively simple explanation for why section 182(6) appeared and why it is termed in the way it is termed. In the 1963 Matrimonial Property Act there was no provision for any section 21 type of agreement. So the 1963 Matrimonial Proceedings Act had no equivalent of section 182(6) at that point in time. The legislation was then changed to bring in the 1976 Act which introduced section 21 agreements and if one looked at the position at that point in time, clearly –

ELIAS CJ:

When was that? Seventy-six?

MR GRAYSON:

This was in 1976 when the Matrimonial Proceedings Act first came in, they introduced section 21 agreements at that point in time, so that if you were looking at the legislation as it stood at that point in time, you would have maybe had the opportunity of applying to vary a section 21 agreement under section 79 or 182 as it is now, because 182 does apply to agreements between parties relating to their property, so clearly I think that was appreciated by the legislatures and so they added section 79(5) which meant that anyone applying under section 182(1) to vary an agreement between parties relating to their property, would not be able to obtain orders which varied a section 21 agreement and that was I think self evident in the fact that they wanted to restrict the ability to amend section 21 agreements to section 21 under the Matrimonial Property Act 1976.

TIPPING J:

Was that done contemporaneously with the '76 Act or a little later?

MR GRAYSON:

As I understand it was Your Honour, it was done at the time that the Matrimonial Property Act 1976 –

TIPPING J:

That was my recollection but I wasn't certain whether it was contemporaneous.

MR GRAYSON:

So that was – it seems to be quite clear that it was appreciated there may be a –

ELIAS CJ:

I'm sorry, section 79(5) variations, were they under the Matrimonial Proceedings Act?

MR GRAYSON:

Yes.

ELIAS CJ:

Yes, I see sorry, yes I see, yes.

MR GRAYSON:

Yes section 795) was the predecessor of section 182(6). So I think there was, it would appear at least on the surface a relatively simple explanation of why section 182(6) was there, it was really to restrict the ability for the Court to make orders under section 182, which might be contradictory to a section 21 agreement.

BLANCHARD J:

So if you wanted to vary the section 21 agreement, you had to do that under the now, Property Relationships Act?

MR GRAYSON:

Exactly Your Honour and in fact there's quite a high barrier which has been made even higher by the recent legislation which it's now seriously unjust, so that clearly there would've been an opportunity for lawyers looking at section 182 thinking, "Well

if we can apply to change the agreement under that section with a wide discretion, that's going to be a lot easier route", so I think that was appreciated by the legislature, and so sect6ion 79(5) was added and that's now become section 182(6). It's in that regard Your Honours that really the submissions I've made about whether the section 182(6) extension that Mr Macfarlane's urged on you, should be made, are rejected by the respondent. It's got a relatively easy explanation and that is why the section is there. It was never intended to want to try and stop people extending the meaning of section 21 beyond the way it reads.

ELIAS CJ:

I'm sorry, so your argument is that if you look at the legislative history, you don't incorporate the settlement into the matrimonial property agreement because what the legislature did in enacting subsection 6 was to make it clear that there were two regimes. If you were within the matrimonial property agreement regime you applied under that legislation and you couldn't use section 182 for it.

MR GRAYSON:

So you couldn't go – if you were wanting to set aside a matrimonial property agreement you had to go through the Matrimonial Property Act?

ELIAS CJ:

Yes.

TIPPING J:

There is a logical impossibility in a sense, because if you do treat the settlement trust as part of the matrimonial property settlement, it's then a matrimonial property agreement which you can't vary, so you're damnifying the jurisdiction.

MR GRAYSON:

Your Honour I heard those remarks earlier that if in fact you treat it as a one composite agreement, you could never in fact vary a Trust. Section 182 where there was a matrimonial property agreement would be incapable of use to vary a Trust, because every time you varied the Trust you'd vary the matrimonial property agreement, so the section would be –

TIPPING J:

It would be rendered almost meaningless.

MR GRAYSON:

Yes.

ELIAS CJ:

Well it's only in the context of contemporaneous –

MR GRAYSON:

Matrimonial property agreement?

ELIAS CJ:

Yes, so it doesn't render it totally.

TIPPING J:

Oh no, but it would mean that if the appellant's argument is correct, the appellant can't – there could be no variation, which can't be what parliament is intending.

MR GRAYSON:

No, and that's exactly the point I wish to make Your Honour. If that extended definition was given to 182(6) then eventually it will, if then section 182(1) becomes virtually meaningless if there's a matrimonial property agreement involved. And the other matter I just wish to address on that is that Mr Macfarlane urged on you that if the Courts have taken a liberal approach to section 182(1), why shouldn't they take a liberal approach to section 182(6). The response to that is simply that they would achieve conflicting purposes. If you're applying section 182(1) liberally, which is what the Courts have urged is to happen, then that is to catch as many agreements, as many settlements as possible, so that they can be changed or varied to meet the changes of circumstances on dissolution of marriage. So they're looking to increase the number of settlements that are coming before the Courts to be assessed for possible variation. If you increase, or if you give a liberal interpretation to section 182(6) in the way that Mr Macfarlane's urging you to, then that would mean there

would be more agreements treated as matrimonial property agreements coming into the equation, which of course would be an exclusionary thing, because if section 182(6) applies, then there are going to be less settlements that are capable of variation, so in fact if you do adopt a liberal interpretation to 182(6), you would find that the purpose of 182(1) as being impinged and I think in my submissions Your Honour I –

ELIAS CJ:

Well it would simply mean that you would have to deal with it under the matrimonial property regime wouldn't it? It would just direct you to another method and a different standard. I hadn't thought about the standard, what is it? Unjust or –

MR GRAYSON:

Seriously unjust.

TIPPING J:

Seriously unjust.

ELIAS CJ:

Seriously unjust.

TIPPING J:

It's always been intended to be a high threshold because you don't want to have these agreements varied too easily, otherwise there's little point in entering in them.

MR GRAYSON:

My point really is, just to answer Mr Macfarlane's point about being liberal and interpretation of subsection 1 you should be liberal interpretation of section 1 – of 6 – but if that happens then there are going to be less cases or less settlements coming before the Courts, because it's likely they'll be excluded under subsection 6's matrimonial property agreements.

ELIAS CJ:

And in any event you'd actually be avoiding a useful remedial provision because you would be forcing everything into a matrimonial property lens, whereas this provision is more about dealing with the altered circumstances and doing the fair thing in that context.

MR GRAYSON:

Your Honours I think, just to repeat – there's a very, very helpful citation from the decision, House of Lords decision in Brooks, and it was in fact – if Your Honours would just excuse me – it was Justice Heath's decision in the High Court and really highlights the purpose of section 182.

ELIAS CJ:

We don't have the report, is that right?

MR GRAYSON:

Of?

ELIAS CJ:

Brooks?

MR GRAYSON:

No, no Your Honours, but it was cited at some length –

BLANCHARD J:

Is that page 61, volume 1? Sorry 67, volume 1?

ELIAS CJ:

This is Heath J is it?

MR GRAYSON:

And he was dealing with it Your Honours under the –

BLANCHARD J:

There's a length quotation from Lord Nicholls.

MR GRAYSON:

Yes, that's right and he was dealing with the submission about whether or not there was a settlement and it was referable to that. It was very helpful in the sense that it highlights the reason people want to rely on section 182(1).

BLANCHARD J:

Is this the passage starting, "Financial provision it is appropriate so long as the parties are married"?

MR GRAYSON:

Yes, yes Your Honour.

BLANCHARD J:

And that's not often ceased to be appropriate when the marriage ends.

MR GRAYSON:

Yes it's in my submission Your Honour. To the extent that that does highlight the usefulness of section 182(1), it's very important, because there is a suggestion, in fact stronger than that, in the High Court judgment that in fact you can't, once the decision had be made by Mrs Ward to transfer her shares to the one Trust, that was the end of the matter, but she was then going to be incapable of revisiting under section 182(1). But clearly if there's been a change of circumstance, then that is going to be necessary under section 182(1). The reason the Mrs Ward has brought this, her application, is because the Trust is virtually operating to the benefit, the exclusive benefit of Mr Ward at the moment and I just wanted to just address that, because in the case on appeal section C documents that you have before you, you'll see Your Honours at page 229, or yes 228 of section C documents, these are the financial statements for Lang Park Limited and they are for the year ending 30th of June 2007 and you'll see about a third of the way down the page, shareholders' current accounts 150,789 and if you go over the page, on page 229, you'll see that the income being received by Lang Park Limited, which effectively is the Trust, is

from rent paid for, by Mr Ward, for his use of the farm land and then for his use of the dwelling in which he lives, which total $29,425. There are then expenses offset against that, leaving a net profit of $21,027.95 and that is then being charged and taken by Mr Ward entirely as a management fee. So this will be taken from, essentially the company, this is over and above what he might be using, or getting by way of profit from his farming operations.

BLANCHARD J:

Is he getting the equivalent of a salary out of the farming operations?

MR GRAYSON:

Well Your Honour he is now operating the farm himself. When the partnership was in fact dissolved in 2005, so that since that point in time he has operated the farm entirely himself. The partnership is no longer in existence. So he gets his profit from the use of the farmland if you like for his farming purposes, but this is a fee which is taken on top of that.

BLANCHARD J:

Do we know what sort of farming profits there have been?

MR GRAYSON:

All we know Your Honour is that in the Family Court when it first started, it was agreed by Mr Ward's own expert that the farm was not a viable unit. It should've had, to be viable, it should've had about 3000 stock units and it was operating with about 21 or 22,000.

BLANCHARD J:

But you don't know what money he was taking out of it.

MR GRAYSON:

We did, I think there were – back then Your Honours there was evidence of the income, but it was certainly so small it was just not viable, that was why the experts, the expert who gave evidence suggested that if it was being operated by an estate or a Trust I think, it would have to be sold because it wasn't producing an income which

would justify continuation and that has some relevance of course for the point that the memorandum of intention, which I don't know if Your Honours have been able to read that, but that especially made provision for the sale of the farm, if in fact it was not, if circumstances demanded that.

BLANCHARD J:

He's getting a management fee, but what's he doing for his management fee?

MR GRAYSON:

Well in my respectful submission Your Honour, there is no justification for it, but I suppose more importantly the –

TIPPING J:

Are we moving more now into the fact that the discretion was used – exercised properly, because I have some difficulty seeing what this has got to do with section 182(6).

BLANCHARD J:

I assumed we had moved on.

MR GRAYSON:

Yes, I'm sorry, well I probably leapt ahead a bit in the sense that I've left 182(6) –

BLANCHARD J:

So we've left 182(6) now?

MR GRAYSON:

All I can say about, just to finish 182(6) Your Honours, I'm sorry that I did leap ahead there. Just to finish that. The important point about this argument that there are more documents than just the matrimonial property agreement, is that if Mrs Ward was to be bound by her decision to transfer her shares to the Trust, as Justice Heath in fact said, she should be bound by that, she didn't receive any independent legal advice on that. All she received was independent legal advice on the matrimonial property agreement, and the matrimonial property agreement simply transferred the

shares into two equal lots. But the transfer, and just to mention that, in the bundle Your Honours the transfer is on page 26. Section (c) and I think it's page 26. Yes. Because on page 1 you have the list of the various documents, then it's hidden in (b), "Declaration of Trust for the CahirdeanTrust, agreement for sale of shares" so that's actually at page 26, but the point that I wish to make about that, is that it has been signed by Mr Ward and Mrs Ward in front of the same solicitor, Mr John F Baker from Baker McCallum. There's no independent clause, there's no indication whatsoever that it's going to be binding and so if section 182(6) a matrimonial property agreement was deemed to include an agreement for sale of shares, the independent legal advice certification binding, all lacking totally in this document. So in my submission it would be quite untoward to extend the definition and there's no need for it.

TIPPING J:

The proposition that the vendors were tenants in common and equal shares, paragraph 1 of the background.

MR GRAYSON:

Yes, Your Honour.

TIPPING J:

That looks a bit odd. But it's probably got nothing to do with the – was that the effect of the matrimonial property agreement, to make them tenants in common and equal shares of the total shareholding?

MR GRAYSON:

Yes. Strange language, I submit.

TIPPING J:

Anyway, it's probably quite irrelevant, Mr Grayson. It just caught my eye.

MR GRAYSON:

Effectively, what they were doing was that they were transferring the shares that they each held under the matrimonial property agreement in equal amounts to the trust.

So, essentially, anyway, the point, the first issue is, really, if you're going to extend the meaning of a matrimonial property agreement to include the agreement for shares, there's no independent advice . There's no reference to section 21. There's no reference to certification from a solicitor. There's absolutely nothing in there that would give Mrs Ward any indication that she won't be bound by her decision to transfer to the trust, and it would never be capable of variation if Mr Macfarlane's interpretation of the 182 is accepted.

WILSON J:

Mr Grayson, just going back to the earlier discussion, I see at page 33 the farm working account for the year ending 30 June 2003 that appears to show a net profit of some 30 thousand after 11 thousand depreciation.

MR GRAYSON:

Yes, you're perfectly right, Your Honour.

WILSON J:

That's split two ways.

MR GRAYSON:

The partnership accounts are in there. I think the reason that His Honour dealt with the matter in the way that he did was he thought that the farm should be sold, and he was looking at the profit, and he was looking at the fact that Mr Ward was taking entirely the benefit of the use of the farmland, the use of the farmhouse –

TIPPING J:

Are you saying he so constructed it, in other words, in order to if not encourage, almost require sale?

MR GRAYSON:

Yes, yes, Your Honour. Because I think the position had been reached where Mrs Ward clearly wanted the farm sold. Mr Ward didn't want it sold.

TIPPING J:

Well, that, of course, immediately raises whether that's within the proper purview of 182(1). But that's a very candid appraisal of what the Judge was about.

MR GRAYSON:

And the Judge appreciated that, because the farm was, in fact, owned by a company with shares, so that he couldn't direct the sale of the farm. But he gave Mrs Ward the wherewithal to achieve it. I believe simply because the farm was not viable. It wasn't making sufficient profit. And it was providing, through the Trust, exclusive benefit for Mr Ward. So that was the course chosen by the Family Court Judge. Just before I leave that Family Court hearing, Mr Macfarlane did lay some emphasis on the fact that the Judge did not choose to use section 44(c). To put that comment in context, it was appreciated by Mrs Ward's solicitors that section 44(c) would probably be absolutely no use to her for any award that she might attempt to get, because there was no real income that could be used under the Property Relationship Act. And as Your Honours know, section 44(c) only allows, in certain circumstance, for an order to be made against trustees out of income, but not capital. So it was appreciated that the –

ELIAS CJ:

Do we have section 44(c)? I just can't remember its terms.

MR GRAYSON:

It was the section that Mr Macfarlane was discussing.

ELIAS CJ:

Yes.

MR GRAYSON:

About the intrusion. Section 44(c) reads, Your Honour, "This section applies if the Court is satisfied that since the marriage or the de facto relationship began, either or both spouses or de facto partners have disposed of relationship property to a trust, and that disposition has the effect of defeating the claim or rights of one of the

spouses or de facto partners, and the disposition is not one to which section 44 applies". It's a deliberate disposition.

ELIAS CJ:

Yes.

MR GRAYSON:

And then subsection 3 of that section reads, "The Court must not make an order under subsection 2(c)", which is against the Trust, "if an order under subsection 2(a) or (b) would compensate", and that's orders from relationship property or separate property, "or a third person has, in good faith, altered that person's position, et cetera". But the orders under 2(c) which are against the Trust, the trustees, are, "An order requiring the trustees or the Trust to pay to one spouse or de facto partner the whole or part of the income of the Trust, either for a specified period, or until a specified amount has been paid". It was appreciated that if Mrs Ward was going to seek anything more than a nominal award under section 182, that payment from the income of the Trust would be absolutely futile for her, because it would take years, if ever, for her to be paid out.

TIPPING J:

But wasn't there an earlier problem that, if I understood what you read correctly, that there has to be an effect of defeating?

MR GRAYSON:

Yes. Defeating the claim of all rights of one of the spouses.

TIPPING J:

Well, that could hardly be said here.

MR GRAYSON:

I think what was actually being said was that the operation of the Trust, the way it was being operated, was defeating her rights in relation to –

TIPPING J:

Her rights in relation to matrimonial relationship property?

MR GRAYSON:

Yes. But what had been formerly relationship property. But all in all, there was a practical decision made, Your Honours, that we wouldn't go that way, because the income was never going to be anything like sufficient.

TIPPING J:

All right, all right.

ELIAS CJ:

Your point is that it wasn't because it was thought that it would be more advantageous to use section 182 because there would not be bringing into account the 16 percent that the husband had brought in.

MR GRAYSON:

The argument more, Your Honours, was that simply 182(1) allowed orders to be made by the Court affecting Trust corpus. That was the real point.

TIPPING J:

Yes. I would have thought, with respect, you were forced to use 182(1). I mean, I don't think there's anything pejorative against you for invoking it.

MR GRAYSON:

No. Well, it was really forced in the sense that there was no relationship property of any substance, and the value of the farm, if I recall, was about ten times greater than the value of all the relationship property. So there would be nothing to be gained by using 44(c). It was literally abandoned at the hearing, because section 182(1) was the one that really was, gave the power to affect the corpus, which is really what Mrs Ward was after. So in that respect, I believe that point was appreciated by the Family Court Judge, Judge Robinson, and it wasn't pursued with any vigour. I now just wanted to address the position, Your Honours, of the second issue, which is whether 50/50 was appropriate. And they begin in my submissions at page 17. It's

not expressly mentioned there, Your Honours, and probably because you'll be very familiar with the decision. But this does affect the exercise of a discretion by both the Family Court Judge and the Court of Appeal in adopting it, so that my friend will need to show that there has either been the Court acting on a wrong principle –

TIPPING J:

Well, that's what he seeks to show.

MR GRAYSON:

Yes. Well, in that respect, Your Honour, it is still the exercise of a discretion.

TIPPING J:

Yes, but if it's been exercised on a wrong principle, which is really his argument, that's the end of it.

MR GRAYSON:

I'm really just drawing it in the sense that it needs completeness, Your Honour.

ELIAS CJ:

If it has been exercised on a wrong principle, do you agree that it needs to go back?

MR GRAYSON:

No, Your Honour.

ELIAS CJ:

All right. You'll come on to explain why later. But first you'll deal with the aberration in principle.

MR GRAYSON:

Yes. And that you will have seen, Your Honours, in the Court of Appeal, was dealt with on the basis that there had to be good reason for interfering in the first – there was a two-stage process. And I think that starts at page 48 of the Court of Appeal judgment about the exercise of the discretion, where the Court simply said in the first instance, should we exercise our discretion, and if so, how do we do it? Without

repeating all of my submissions there, Your Honours, the main reason I believe the Court intervened was because it appreciated that the operation of the Trust was exclusively for Mr Ward's benefit, so if things were simply left, then Mrs Ward and the children were receiving no benefit at all.

TIPPING J:

The essence of the Court's reasoning as to when the discretion should be exercised seemed to me in the nutshell paragraph, 49.

MR GRAYSON:

Yes, where they say it has to be exercised with caution.

TIPPING J:

Yes. Only where, taking into account all relevant circumstances, it is necessary in the interests of fairness and justice to do so. Now that doesn't seem to me to incorporate any concept of the purpose for which you're exercising the discretion. That's a very, very general statement. What is the section designed to achieve?

MR GRAYSON:

Well, if you look at the Wards' circumstances, Your Honour, they had very little in the way of relationship property. So division of property between them, under the Property Relationship Act, was not going to achieve anything like a fair division, because the paucity of relationship property meant that Mrs Ward received only, was only dealing with one-tenth of the value of the farm. So I think the total relationship property, if I recall, was around $200,000.

TIPPING J:

You mean outside the property that was settled?

MR GRAYSON:

Yes, outside the Trust. There was about $200,000, and that was dealt with on the basis that Mrs Ward was given $100,000. And that was the reason for the dissolution of the partnership. But that still left the farm, and I think Judge Robinson appreciated that the farm really was not longer serving its initial purpose, which was

to provide benefits for the wife and the children and the husband. And in the interests of fairness and justice, he decided to intervene and deal with that property. Now, that didn't happen in *X v X,* Your Honours, because in that case, I think there was about seven million dollars' worth of relationship property, and just under two million dollars' worth of trust property. So in the interests of fairness and justice, the Court took the view that it didn't need to intervene, and they were quite happy with the way that the Trust was being operated.

McGRATH J:

But the Court, when it stated the principle, did qualify fairness and justice, didn't it?

MR GRAYSON:

Yes, it did, Your Honour.

McGRATH J:

That sort of principle had to have the element of hardship, unfair disadvantage.

MR GRAYSON:

And that was what Mr Macfarlane concentrated on. But if you read it in the context, they were still adopting an approach which required fairness and justice as the initial purpose, and then one of the ways that that might be invoked was if there was undue hardship, and I can't recall the other one.

TIPPING J:

Unfair disadvantage.

MR GRAYSON:

Yes. In my submission, anyway, Your Honours, they were both present in the Ward situation particularly, because of the way in which the Trust was being operated. Mrs Ward was getting, it was being operated, really, by Mr Ward. Totally unfair disadvantage to Mrs Ward. She was getting no benefit whatsoever. Nor were the children. And also in terms of the hardship, Mrs Ward does not have capital of her own. She had what she'd got from the Property Relationship Act award, and that

was it. She didn't have a house of her own, and she had a job as a farm shepherd. So that they could both be invoked, if you like, to justify intervening.

TIPPING J:

So is this a method, in your submission, of adjusting property division, or adding to an already-agreed property division, or subtracting from it, if there's undue hardship or unfair disadvantage?

MR GRAYSON:

In my submission, Your Honour, it's a case of looking at all of the circumstances of each individual case, which is very difficult to encompass in one principle, and I believe that's why it's been deliberately left as fairness and justice, so that the individual facts and circumstances can be looked at.

TIPPING J:

But it's really a re-visiting of the matrimonial property division that the parties have agreed on, is it, in the interests of ultimate fairness or avoiding –

MR GRAYSON:

Yes, Your Honour. I think what has happened is that there's been a large upsurge, in my submission, in the number of Trusts that are being formed, and relationship property lawyers are now dealing much more with Trusts than they would have been ten years ago. And section 182 wasn't really used much ten years ago. It's certainly now being used a lot more, simply because of the number of Trusts that are appearing. There are many, many examples of people transferring their house to a Trust. And, of course, that immediately takes it out of the Property Relationships Act, because the house doesn't produce any income, so you can't actually get an order against a Trust under the Property Relationships Act. There's no income from the Trust. Your only way, then, of attacking the house is to do it under section 182(1). And that is, in fact, what happened in *Fielding v Burrell, [2005] NZFLR 558*, where the home was, in fact, in Trust, and its equity was divided equally between the husband and the wife, and it happened in *Polkinghorn Trust (1988) 4 NZFLR 756*. I think my friend, in his submissions, suggested it didn't happen, but if one reads the case, the Court made an order for a division of one-half of the house in lieu of

section 11(3), which is where there was no relationship property, and then the rest made an order on top of that under section 182(1) for $40,000 from the Trust. So it is being used as an addendum, of, if you like, in conjunction with property relationship settlements. Because the Court has found it's hamstrung with just the Property Relationships Act, particularly as they relate to houses, because they don't produce any income.

TIPPING J:

Well, there are provisions, aren't there, to compensate for the lack of a matrimonial home, provided, of course, there are other assets that can be –

MR GRAYSON:

Yes, there has to be other relationship property.

TIPPING J:

Yes, that's the problem.

ELIAS CJ:

I'm just wondering, though, how far this can be taken, given the fact that the legislature didn't go further with section 43 – 44, sorry.

MR GRAYSON:

Well, that's covered, Your Honour, in the sense that it was covered in the Court of Appeal, because it was certainly brought up there. It was brought up first, I think, in *X v X,* that there was some concern that, I think, Judge Robertson in that case was saying that there had to be something taken out of the fact that the legislation was not amended to enable the Courts under property relationship settlements, to make orders affecting Trust capital. But the point was made in the Court of Appeal, no, they didn't. But they also left section 182 unchanged. It's always been there, and why not apply it?

TIPPING J:

But it's only very recently, it seems to me, that it started to be applied in this much wider sense than its historical –

MR GRAYSON:

And maybe, Your Honour, that's a reflection of the fact there is more property being put into trust now than might have been the case ten, 20 years ago.

TIPPING J:

I wonder if, after lunch, you could give at least me some assistance with *Chrystall v Chrystall (1993) 10 FRNZ 441*. Because at 784 in *Chrystall*, Judge Inglis seems to me to adopt what I would respectfully regard as a classic approach to this section.

MR GRAYSON:

I can say this immediately, Your Honour, that I believe there is a distinction to be drawn between trusts, which are set up by a couple during their marriage, affecting property that they have each, in their own way, created, and trusts which may date back years, which incorporate pretty well all inherited property.

TIPPING J:

You see, the Judge says that "since the purpose of section 182 is to provide ancillary relief on dissolution, it is also relevant to consider the limitations on spousal support following dissolution in section so-and-so, explained in Slater and Mackie". And then His Honour goes on, and carefully analyses the expectations that were present at the time the Trust was settled, and then how those expectations have not been fulfilled in the changed circumstances, and what is necessary to recognise that non-fulfilment. Now, that, if I may respectfully say so, is exactly the way I understood this section was designed to work. Not as a kind of revisiting of the matrimonial property arena.

MR GRAYSON:

Well, Your Honour, my response would be simply that times have changed, maybe since that –

TIPPING J:

You do recognise that there has been a significant change, do you, in the emphasis given, or the purport of this section in the more recent cases?

MR GRAYSON:

I certainly agree with that, Your Honour. I certainly agree with that, but in the sense that times move on.

TIPPING J:

Oh, of course. I'm not expressing a view one way or the other, Mr Grayson. I just wanted to get a feel for the fact there has been, as I rather instinctively thought, a significant change of approach to this section, as to its extent and purpose.

MR GRAYSON:

Which I think Your Honour has, really, almost followed the changes to the Matrimonial Property Act 1976.

TIPPING J:

I don't think it was co-incident with that enactment. I think it's aided, perhaps, by Fisher, and perhaps by the feeling that there is, now, the difficulty that you identified, that the Courts should expand, if you like, the traditional reach of 182.

MR GRAYSON:

In cases where fairness and justice were –

TIPPING J:

But there hasn't been any overt recognition, so it seems to me, that that's what the Courts have been doing. Justices Keane and Wild, founding substantially on Fisher, who himself doesn't precisely, you know, recognise this, we seem to have slid into this, if I may respectfully put it that way, rather than on a reasoned, conceptual basis.

ELIAS CJ:

But the big difference, of course, is that under the Matrimonial Property Act, one is talking about entitlement. Under 182, one is talking about discretion to do what is fair, which, as was discussed with Mr Macfarlane, must partly be an evolving contextual judgment. It may be that it's the emphasis that is the issue, rather than the substance of what is being tried to, what is being done, so that it is not irrelevant

for the Court in conserving what's fair and just in the context of a settlement which is not longer operating according to the intentions of the parties, to consider the matrimonial property regime as part of the context.

MR GRAYSON:

Yes, Your Honour, and I believe the Court of Appeal made it very clear that they did not accept that once you had crossed the threshold that the exercise of the discretion should be, that should take place, that you would immediately move to a 50/50 division. It made it very clear in their judgment that they did accept that. But one thing that certainly was very relevant, I believe, in the Family Court and in the Court of Appeal, was that the corpus of the Trust, the shares, had been owned by the parties 50/50 before they were transferred to the Trust. And the decision to make them 50/50 had been made by Mr Ward on independent legal advice certification. He had given away his 16.7 percent of those shares, and they had then been transferred to the Trust. So there's an interesting issue raised by this. If, in fact, the Court's being invited to make an award which is other than 50/50, does not section 182(6) come into play?

TIPPING J:

Well, exactly.

MR GRAYSON:

So the parties might, Mr Ward may have well bound himself to something, through executing the matrimonial property agreement on legal advice, that he can't try and overturn now using section 182.

ELIAS CJ:

But putting it rather more simply, isn't this a case where it might be said that a result which achieved a 50/50 division of the underlying capital was fair and just?

MR GRAYSON:

And I develop that at some length in my submissions, Your Honour. And I don't know if you want me to run through those, but I'm quite happy to if you wish.

TIPPING J:

I don't disagree with the Chief Justice at all, but I am just very uncomfortable with this sort of loose way in which the Court of Appeal has expressed it as sort of driving it all off fairness and reasonableness. It seems to me that, taken too literally, that's a sort of recipe for wholesale revision, if you like, of matrimonial property exercises.

BLANCHARD J:

I think one can, perhaps, temper that by bringing in the notion of an expectation. What reasonable expectation was there when the Trust in this case was established? And looking at the before and after situation, before and after the marriage got into trouble, what would the parties have expected before, what would they legitimately expect then in the new circumstances?

MR GRAYSON:

Yes, Your Honour.

BLANCHARD J:

And it might be vastly different where there's a situation of property which is sitting in a trust which has been there for years, and it's not property which is being, or has been used as a home. That would be a vastly different situation from something like this, where the farm is not just a farm, it's also a home, and it's the immediate source of the income for the family.

MR GRAYSON:

The other important point, Your Honour, if I might add, is that the way that the Courts are intervening at the moment is generally when there's been very little relationship property, so that the wife cannot expect anything under the equal share and property regime.

TIPPING J:

Well, that, again, seems to me to be a bit problematic. I mean, if the principle is to reflect the changed expectations, whether there's a lot or a little matrimonial property, I just wonder quite what force that has, other than pragmatically. I mean, I think we've got to try and articulate some sort of principle basis on which this section

is designed to operate, rather than some sort of unadorned concept of fairness and justice. Speaking purely for myself.

ELIAS CJ:

Except that the assessment of fairness and justice must be a contextual one.

TIPPING J:

I agree with that.

ELIAS CJ:

So it's really just a standard. The point is that one cannot simply import the reasons from the Matrimonial Property Act. One has to look at the Trust, in part in its own terms, and against the context.

MR GRAYSON:

And in my submission, these cases really all differ. They all have their own individual facts, they all have their own different circumstances. What Mr Macfarlane is really saying to Your Honours is that you can only apply section 182(1) where there is undue hardship or need, or change of circumstances. Need is not even mentioned in section 182(1). And so it's rejected that that is the basis upon which –

TIPPING J:

Well, the need is to reflect the changed circumstances in an appropriate way.

MR GRAYSON:

And as the Chief Justice mentioned, that might not necessarily equate to necessitous circumstances.

TIPPING J:

Oh, indeed.

ELIAS CJ:

I think Mr Macfarlane accepts that.

TIPPING J:

He accepts that.

ELIAS CJ:

We will take the luncheon adjournment now, and resume at 2.15.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 4.14 PM

ELIAS CJ:

Please, go on Mr Grayson.

MR GRAYSON:

Yes, Your Honour. We were dealing with the second issue, I believe, relating to the exercise of the discretion, and I think Mr Macfarlane's point is simply that the Court of Appeal and the Family Court acted on a wrong principle, particularly the Court of Appeal, in directing that it be dealt with on the basis of fairness and justice. Mr Macfarlane's point is that it should be dealt with, the principle that should be applied is need and change of circumstances. Your Honour, there is a reference to the background of the principle for justice to be applied and that goes way back, in my submissions, to the decision of *Blood v Blood [1902] P 78* which is actually cited in paragraph 16 of my submissions. That was an English case which dealt with the equivalent of section 182, if you like, in England in 1902, and you will notice that the citation from that case reports Justice Gorell Barnes as saying, "He was anxious that they should not, by any construction the Court may put upon them, be narrowed in any way," that's the words of the section. "To narrow the words would be undesirable because the various circumstances which come before the Court are so diverse that it is important that so far as possible the Court should have power to deal with all the cases that come before it and in dealing with them to meet the justice of the case." So the notions of dealing with cases under section 182 or its English equivalents on the basis of the justice of the case goes back many, many years, and in my submission to you the Court of Appeal's approach, which was simply to adopt the notions of fairness and justice, is in accordance with

English authority and New Zealand authority. Mr Macfarlane's urgings to you to adopt a construction which –

TIPPING J:

This, though, was in the context of the concept of settlement, wasn't it?

MR GRAYSON:

Yes, it did relate to settlement, but I believe the cases in both England and New Zealand have moved on to encourage to the greatest extent possible an interpretation of section 182(1), which deals with those cases in terms of the justice of the case. Because if you read that last sentence, Your Honour, "The Court should have the power to deal with all the case that come before it and in dealing with them to meet the justice of the case".

TIPPING J:

Yes, well, I understand your point, but it's not directly related to the – you say it directly spills over into the extent of the discretion.

MR GRAYSON:

Well, I believe that's the way it's been approached.

McGRATH J:

But isn't that really going to jurisdiction more than the test that should be applied if we have jurisdiction?

MR GRAYSON:

I don't believe it's been approached in that way, Your Honour, because if one looks at the cases and one looks at the section, the words of the section, they've always been interpreted to be very wide, the discretion is very wide, so that the emphasis the Courts appear to be putting on section 182 cases is that you don't narrow the principles, if you like, too much that the – you leave as far as possible a discretion which is very wide to the Courts. I appreciate that that may cause some concerns in the sense that how do you guide fairness and justice, but I believe it is the approach of the Courts that the notion is to keep it as wide as possible so that all of the

differing circumstances that come before it can be dealt with, rather than narrow it. My friend wants to narrow it, in the sense that it's to need, but in my submission there's no legal basis for that whatsoever. When one looks at the application of PRA principles to these cases it, if I could explain it this way, there may be a distinction that Court is drawing in what is fair and just, to dealing with cases where relationship property has gone into a trust and cases where separate property or inherited property or things of that nature have gone into a trust. And so one might say that where there is evidence that relationship property has gone into a trust, notions of fairness and justice would mean that a 50/50 division might be one which is more palatable than some other division. But I don't believe the Courts are saying, in the way they apply the section, that once we found the discretion can be exercised we will then apply the provisions of the PRA. In this case, Your Honour, in Mr and Mrs Ward's case, it was very significant, I believe, in the Family Court and in the Court of Appeal, that Mr Ward had agreed to his 16.7 percent of shares going in to the matrimonial property as matrimonial property, as relationship property, so that he agreed then that 50 percent of all those shares would be owned by Mrs Ward and 50 percent by Mr Ward.

WILSON J:

But wasn't that on the premise that they would stay together, at least implicitly?

MR GRAYSON:

But, Your Honour, if one looks at the agreement, it's held to be binding in all circumstances, dissolution, separation, all things of that nature, so it's, when you –

TIPPING J:

But that has to work both ways.

MR GRAYSON:

It does work both ways, Your Honour. But, you see, what I understand Mr Ward to be saying through his counsel is that the Court in the some way in making its orders deprived him of 16.7 percent of the shares, by giving Mrs Ward 50 percent of a trust corpus. I believe that's overstating the position significantly in that the decision to get rid of 50 percent or to give 50 percent to Mrs Ward was made by Mr Ward

himself when he made the matrimonial property agreement, he gave them to his wife. I should –

TIPPING J:

But isn't that one of the expectations that has to be balanced, that he had an expectation at the time of doing so that they would stay together? Now, if you're going to adjust, when the wife's expectations are not fulfilled, should you not equally bear in mind, at least, that the husband's expectations have not been fulfilled?

MR GRAYSON:

They may not have been fulfilled, but he was aware that when he signed the matrimonial property deed it was going to be binding if they separated, so that any expectation he may have had that he would continue to own what he owned, would at least have been drawn to his attention by the s –

TIPPING J:

But the same would apply to the wife, on that sort of approach.

MR GRAYSON:

Mmm.

TIPPING J:

Why can she get out of it and not him, putting it very colloquially?

MR GRAYSON:

Get out of…

TIPPING J:

Why can she disavow, through section 182, the effects of the Settlement Trust in the changed circumstances, and not allow him some sort of a contra for what he would say would be a changed expectation motivating him to do what he did as part of the total package? That, I think, is the point that I'm finding a little bit troublesome, that it's simply off the radar.

MR GRAYSON:

The way that I am approaching it, Your Honour, is simply this, that there was the complaint that Mr Ward has had that he lost his shares through the order of the Court. The point I am attempting to make is simply that he lost his shares because he decided, as part of the matrimonial property agreement, the Settlement, that he would give Mrs Ward 50 percent of them, and then he is saying even though he is aware that in the matrimonial property agreement it refers to this decision of his to be binding, and it's to apply in the event of separation, divorce, dissolution, he's then saying, "Having made that decision, that I would be bound by the matrimonial property agreement, I want the Court now to give me back the 16.7 I gave away, is this the way I understand the approach."

WILSON J:

But isn't the whole foundation of section 182(1) the change of circumstances consequent upon the dissolution, which cuts both ways, to put it colloquially?

MR GRAYSON:

In the sense that Mrs – how is Mrs – if I might ask, Your Honour –

WILSON J:

Yes, yes.

MR GRAYSON:

How is Mrs Ward taking advantage of the situation?

WILSON J:

By making her application – I'm not saying this in any critical sense – by seeking to rely on section 182.

MR GRAYSON:

Well, I would say, Your Honour, she had no other choice, she had no other real choice. I mean, if she was to get anything from the matrimonial property that had by hers, that went into the Trust the only way –

ELIAS CJ:

I think it's by seeking 50 percent of the assets of the Trust –

WILSON J:

Yes.

ELIAS CJ:

– that Justice Wilson is raising with you.

MR GRAYSON:

Well, I expect in a sense, Your Honour, that of the shares I think 16.7 percent were the separate property of the base and the rest of them were relationship property, there's no argument about that. So there's at least 83 to 84 percent were relationship property and Mrs Ward would say, "Well, this is almost a 12-year marriage, any idea that Mr Ward's separate property should still be returned to him have been surpassed by what's been going on by my contributions during that period."

TIPPING J:

I suppose the partial answer to Justice Wilson's point, which I think is well made, is that anything less than 50 percent in relation to shares means that she hasn't overcome in real terms, practical terms, the disadvantage that she's complaining of.

ELIAS CJ:

Through the change.

TIPPING J:

Mmm, the deadlock.

BLANCHARD J:

Because she'd only have 34 percent. No, it's half of that, isn't it?

TIPPING J:

Yes, yes, 42.

BLANCHARD J:

Yes, well, she'd have less than 50 percent, so there wouldn't be a deadlock and she'd then have to rely on the oppression of the minority sections.

TIPPING J:

Which is harder to achieve than with just inequitable on a deadlock.

MR GRAYSON:

Which is one of the bases, Your Honours, I believe, that Justice Robertson operated on. But in my submission it would be quite incorrect for counsel, for Mr Ward to suggest it was as a result of the Court's decision that he lost, Mr Ward lost 16.7 percent, it was a result of Mr Ward's own decision, on legal advice, confirmed with independent certification, so that there is no real basis for complaint there, especially appreciating when he signed the matrimonial property agreement that it was to be binding in the event of dissolution and separation. So that if one is talking about expectations and that had been drawn to attention, then his expectations would have changed.

TIPPING J:

I suppose what's troubling me slightly, Mr Grayson, is that if she's asking for relief from the strict legal position, it does seem a bit tough not to give some credence to the other side's position in this respect.

MR GRAYSON:

From the strict legal position being –

TIPPING J:

Yes, because she is asking for relief from the strict legal position, isn't she? At the moment the strict legal position is the Trust. It's only because there is power in the Court to vary the Trust that she's invoking. Now, she's asking for relief from the strict legal position. Now, I just feel a little uncomfortable about fencing out entirely any considerations the other party might have for relief, if you like, from the strict legal position. I think the point about her not getting out of the problem is a good one, as

my brother Blanchard mentioned, but I just have a worry that if we're sort of fencing it out completely – it's just, your submission suggests it's completely irrelevant that he put in some separate property into this Trust.

BLANCHARD J:

Well, I suppose there wouldn't be much point in granting relief if it doesn't' actually do any in practical terms.

TIPPING J:

Well, that's the problem, but, just from the conceptual point of view, surely it can be taken into, should be taken into account. The end result may be that it's over-ridden, on account of –

BLANCHARD J:

It's hard to know how you'd take it into account and reach a practical result. I entirely agree with what my brother Tipping is saying, if it were not for –

TIPPING J:

Yes.

BLANCHARD J:

– the practical consequence.

TIPPING J:

Well –

BLANCHARD J:

And you're matching the practical consequence to the defeated expectation.

WILSON J:

But if, hypothetically, and I emphasise I'm speaking hypothetically, either the farm were to be sold and the proceeds allocated between the parties, or if Mr Ward were to buy out Mrs Ward, in that context wouldn't it be quite practicable to have regard to the 16.7 percent to whatever degree is appropriate.

BLANCHARD J:

That will require a degree of co-operation which the Court is not in a position to order.

TIPPING J:

I think, my only concern is that as a matter of principle we shouldn't fence it out, but we might be able to say that because of practicalities of this case it has to be over-ridden. That's – I'm looking at it not so much from the point of view of this case, but it just seems to me wrong as a matter of principle to say it's completely off the map. You may have a very good argument that it can't be given effect here because of the practicalities.

TIPPING J:

If there were not an interposed company this would be a lot easier, because you could do an unequal division of the property and then a Judge acting under the Property Law Act could, upon application, make an order for sale, but that can't happen here in order to unlock the capital. I suppose the real question is the extent to which we should allow ourselves to be guided by the consequences.

MR GRAYSON:

I can say, Your Honours, that to this extent anyway, because of the way that the accounts have been done since the parties separated in 2003, Mr Ward has had the benefit of all of the trust income which has mean that his current account with the company if you like, which is really the trust, his current account has increased from, I think at the time that the partnership was dissolved in 2005, it was about 120,000 and it's now 170,000 and that's because simply by taking the income from the trust and crediting it to him as the management salary, that has been credited to his current account with the company which accordingly has gone up and it's, I think, to 2008 was 170,000 and Mrs Ward has been advised that Mr Ward will be claiming interest on that sum as well so that to the extent that the farm, if it was sold, that current account debt would have to be repaid to Mr Ward before there would be a division of the proceeds anyway, so effectively there's going to be an unequal share, sharing of the farm proceeds if it goes that far.

ELIAS CJ:

But the Court has ample power to make such remedial orders as it thinks fit under section 182. I'm not sure what, I'm not sure that there is any insuperable difficulty if the first instance Court which would have to consider finally you know, what the outcome should be – then it's not left with the structure that the parties have because there is the power to actually require sale and settlement of the dispose – of the proceeds. I mean there's plenty of scope for adjusting the equities between the parties once you've got into the situation of deciding that section 182 should be invoked.

MR GRAYSON:

Well I'd certainly be inviting you Court, the Court to proceed in that fashion Your Honour because it is an issue which has been raised merely because Mr Ward has this money which by default in the sense that Mrs Ward hasn't had any control in, in the trust at all, that the money has simply come in and has been taken, unilaterally, so that her position is that she's had no real participation in whether or not Mr Ward's current account has increased. I know my friend will probably respond that Mrs Ward signed the financial statements, but there we get into factual issues, then about why she found – why she signed them, whether she was approving the taking of the, of the trust income or not or there are other reasons and I can go into those but it would be giving evidence from the Bar and I'm not –

TIPPING J:

But the corpus of the trust comprises the shares doesn't it?

MR GRAYSON:

Yes Your Honour.

TIPPING J:

So there's, the scope for varying the trust has to be focused on the shares as opposed to the underlying asset that the company owns.

ELIAS CJ:

No –

TIPPING J:

– is that not?

ELIAS CJ:

– they make any such orders with reference to the application of the whole law, any part of any property settled, or the variation of the terms of any such –

TIPPING J:

The settled property are the shares.

ELIAS CJ:

Yes, yes.

TIPPING J:

So you couldn't make a trust for sale like of the underlying farm could you, you can only alter the terms of the – on which the shares are held?

MR GRAYSON:

Yes, I mean the shares are held by a company and the company has –

TIPPING J:

The trustees hold the shares in the company –

MR GRAYSON:

– yes.

TIPPING J:

– on trust for the express purposes.

MR GRAYSON:

If the company shares were sold – if the, if the company was dissolved if you like, then the liabilities of the company would have to be satisfied, one of which is the current account.

TIPPING J:

But what I'm just feeling for is, the trust that – the corpus of the trust is the shares?

MR GRAYSON:

Yes Your Honour.

TIPPING J:

So what orders are going to be made at prepare of those shares to – that they be – the present order is that they be settled on two separate trusts, that's about as far as you can go isn't it?

MR GRAYSON:

And it –

ELIAS CJ:

Well you could make an order that they be transferred to a receiver for sale or something couldn't you – looking at our corporate expert here?

MR GRAYSON:

I mean it is without shadow of a doubt, there is, there is some concern that even if the Court of Appeal decision was upheld and Mrs Ward, her trust received a half of the shares, there's still another legal obstacle there to get over if there is no co-operation, so –

ELIAS CJ:

No, no I'm talking about the whole of the company shares being settled upon a trustee for sale or something like that. I just think that this is a level of specificity that I'm not sure that it's really necessary for us to get into although you say that we do need – you contrary to Mr – Mr Macfarlane accepts that the case would have to go back if we agree that a wrong principle has been adopted. You say we should determine it, so I suppose it's really for you to say how we could determine it.

MR GRAYSON:

I, at the very least Your Honour I would be looking to uphold the Court of Appeal decision because at least it does give the, Mrs Ward the ability then to force a sale of the farm, which you wouldn't have in an unequal distribution situation.

TIPPING J:

Well there's no application by cross notice or otherwise is there, to vary the Court of Appeal's or to vary the order of the Family Court in your client's favour. In other words, the best she can hope of winning this appeal is preserving the existing order, yes. But you've got to satisfy us that if Mr Macfarlane's right, it inevitably follows that the same order would be made, don't you?

MR GRAYSON:

That, that he, that the Family Court Judge acted on and the Court of Appeal acted on the wrong principle?

TIPPING J:

If they did and there is a different principle that we say should have been applied, the only thing you can say as I would see it, is that applying that different principle, the same result must inevitably follow.

MR GRAYSON:

Yes, that's exactly –

TIPPING J:

Otherwise it has to go back, surely?

MR GRAYSON:

Yes, yes exactly. And that would be my submission.

TIPPING J:

That is your submission.

MR GRAYSON:

Because really, if in fact Mr Macfarlane is correct is saying that the proper principle is one concentrating on need and change of circumstance, my submission would be

that Mrs Ward clearly is in a position of need, which would justify the 50 percent division that was made and she's clearly in a position where there's been a change of circumstance, she's no longer got any influence in the trust, whereas before the separation she certainly was enjoying all of its benefits, so that does it matter which principle you apply, she should be able to uphold all what was given to her.

TIPPING J:

What is wrong with the proposition that's raised against you, that on a proper application of principle, what was required was say a lump sum to enable to sell, set herself up separate, in a separate household and because we now, as I understand it, in the law a bias against continuing periodic maintenance, that lump sum would be inadequate – at an appropriate level would be inadequate response to the change of circumstances. A lump sum payment out of the trust – and it's over to the trustees how they raise it.

MR GRAYSON:

I have difficulties in this sense that I have never understood the basis upon which Mr Macfarlane argues that the least Mrs Ward can, the most Mrs Ward can expect is a lump sum of $300,000 I think was his proposal, and why Mr Ward should then be able to keep about 180,000.

TIPPING J:

Well it may be the wrong lump sum.

MR GRAYSON:

Yes.

TIPPING J:

But conceptually, what's wrong with that? And if they can't do it without selling the asset, they'll have to sell the asset.

MR GRAYSON:

Well my submission's simply that there would be no, there's no factual justification for Mr Ward keeping a much greater share.

TIPPING J:

Well it may not be a much greater share.

BLANCHARD J:

What's the property worth?

MR GRAYSON:

Two point one million Your Honour. Well that was at the time of the Family Court hearing in 2006.

BLANCHARD J:

Well it's hard to see that she wouldn't get at least 34 percent on any reckoning –

MR GRAYSON:

Where does the 34 –

BLANCHARD J:

– and it's going to be mighty difficult to do that without selling the farm.

WILSON J:

Probably 42 percent.

MR GRAYSON:

Forty two percent.

TIPPING J:

Forty two percent yes.

MR GRAYSON:

Half of the 84.

BLANCHARD J:

I mean I just wonder whether there's perhaps a degree of unrealism on the part of the appellant as to the ultimate outcome, on any basis.

MR GRAYSON:

Well in my submission at least Your Honour, I don't believe it's been spelled out exactly why the appellant should receive or should only have to part with $300,000 from the trust.

TIPPING J:

I'm looking at the methodology. Maybe in a slightly old fashioned way Mr Grayson, that I would see it as being much more conventional to say that the trust should pay Mrs Ward X $100,000, forget X for what it is for a moment, this is just conceptual not the ultimate figure. The separating these trusts into half, half each and then leaving the whole thing you know, in a continuingly difficult state where, somebody's got to take steps under the Companies Act then, my brother Blanchard would know more about that than I, but someone's got to get in there under a different regime haven't they, to make any progress in unravelling this unfortunate tangle. Now if the order were pay X, a proper amount, then they can either raise it or they may have to sell the property, it gives them the option, it gives your client the, an appropriate amount. It just seems to me to be much more conventional than dividing this trust in half and both per se and for what the end result of that will be, that there's still more trouble ahead.

BLANCHARD J:

There is of course, and we are perhaps overlooking it in this discussion, the interests of the children which have to be factored in so there may have to be a continuing trust of some kind. The question of, would then be, well, what's the asset of that trust?

ELIAS CJ:

In terms of the mechanics, one could vary the terms of the trust to require the trustees to hold on trust the property to pay to, the respondent a certain amount of money and then the trustees would have to sell but I agree that, and again it makes me think that it is necessary for a Judge if we are of the view that the approach adopted was wrong, to consider all interests in this before they arrive at what X should be and they would include the interests of the children. So I don't see that there's a problem with the mechanics and – but actually putting a figure on X is what

I don't think we're in a position to do. On the other hand it may be that if we get to that stage, the parties should really look very closely at what they're doing here because they're going to spend a lot of money if they have to go back for another round in the Family Court and one would have thought that some settlement if that is – if the principles are established, is the best way forward.

BLANCHARD J:

I entirely concur in that, if that's the route we take I imagine we would remit the matter and keep our fingers crossed that common sense prevailed and that there was then a settlement.

MR GRAYSON:

With respect Your Honour, I'm not sure that would prevail in the circumstances that have brought us here. The children's interests you see, were protected by the orders made by the Family Court and the Court of Appeal because by setting up two trusts with the children as beneficiaries in both, there interests would have been protected by an independent trustee with Mrs Ward who was to be nominated by the counsel for the child or for the children and –

TIPPING J:

There's to be two trustees in each trust?

MR GRAYSON:

Well from Mrs Ward's trust, I think the expectation was that she would retire which would lead Mr Ward with Mr Hildrith who's already there. That Mrs Ward would then have an independent trustee appointed by counsel for the child. And then the position would simply be that the children would be beneficiaries in both trusts and so that in the normal expectation, the children would take in exactly the same way from each parent.

TIPPING J:

And the beneficiaries would be wholly discretionary, would they, in each trust?

MR GRAYSON:

Exactly the same, exactly the same as for the Cahirdean Trust. There was – the terms were to be identical with the exception that the trustees were changed. The difficulty, I don't believe there would be huge difficulties with respect, if in fact the Court of Appeal orders were upheld in the sense that the realty of the matter would dictate, I think, that the, with these shares being held in equal numbers, that the, that the farm would have to be sold and the proceeds divided equally. It's as simple as that. There would be really other – no other, there would be no other outcome because Mr Ward is clearly not in a position to buy Mrs Ward out, so that would be the only other thing that could happen.

McGRATH J:

Are you concerned, as the matter goes back, the status quo may continue, prevail for some time?

MR GRAYSON:

Yes Your Honour and we've been, the parties have been at separated since the 1st of March 2003 and I think this is the fifth Court hearing, so they've had huge expense already Your Honours for – to take the matter this far. I think the idea that the matter would then be remitted to the Family Court and start again would be an extreme disappointment to them. And what it would leave happening of course, is Mr Ward would be – continue to enjoy the sole benefits of the trust, that as long as we –

TIPPING J:

Well that might have to be the answer and it just comes out in the wash that he has enjoyed the benefits for whatever length of time. You see we –

MR GRAYSON:

Your Honour that might be, that might be an answer to the 16.7 percent, I would, because –

ELIAS CJ:

Yes.

TIPPING J:

Yes. Exactly. The one might be a contra, one against the other.

MR GRAYSON:

Yes Your Honour.

TIPPING J:

So I mean, but what troubles me is that if it hasn't been done properly, I don't see how we can do it here on the information we've got.

MR GRAYSON:

If it hasn't been done properly Your Honours, that is a finding that Mr Mcfarlane is saying that the wrong principles have been applied.

TIPPING J:

That's what I mean.

MR GRAYSON:

Yes.

TIPPING J:

I don't mean it in any pejorative sense.

MR GRAYSON:

No. And in my submission that's not the case...

TIPPING J:

Well if that's not the case, you've got no problems.

MR GRAYSON:

Well I hopefully haven't.

TIPPING J:

But the question is, if it is the case –

MR GRAYSON:

Yes.

TIPPING J:

– then I remain unpersuaded that we could grasp the nettle here appropriately and balance all the competing interests with only the very limited material that's before us.

MR GRAYSON:

In this sense Your Honour, that if Mr Macfarlane was right, that's a matter of principle that it's need, that's if, that the Court has to concentrate on need, Mrs Ward is clearly in a situation of need. So whether you approach it on the fairness and justice basis or on the question of need, it would be my submission that she would qualify under both for the exact, exactly the same relief. The change, the difference in principle really would be –

TIPPING J:

So the difference is irrelevant?

MR GRAYSON:

It is. For a woman, Your Honour, who is without a home, she is renting and who is in a reasonably low paid employment, she is in need. So whether we apply the – Mr Mcfarlane's principle or not –

TIPPING J:

I don't think there could be any doubt whatever that there has to be some variation. But the question is, as the Chief Justice put it, what should actually that I find very difficult to do, justice on the –

MR GRAYSON:

I would not be inviting Your Honours to –

TIPPING J:

I know you wouldn't, but frankly I –

MR GRAYSON:

– because there would be very little Your Honours could go on, essentially.

TIPPING J:

That's the problem.

ELIAS CJ:

So you do accept that if we get to a point of thinking that the trust must be varied on a basis other than that adopted by the Family Court, it has to go to the Family Court for determination that we don't have sufficient information to make the determination. I mean what do we know about the children's situation for example?

MR GRAYSON:

There's evidence, there was evidence of their situation in the Court proceedings to date Your Honour, they have – they are both attending boarding school, private schools, that they live week-about with their parents, that they don't have any special needs, health or medical needs. Beyond that there doesn't seem to anything that really would stand out as being a consideration of significance for them.

TIPPING J:

But shouldn't we have counsel for the children involved in this exercise?

MR GRAYSON:

He did have the –

TIPPING J:

But if it's – to be done on a new basis, shouldn't counsel for the children be involved in that new basis?

MR GRAYSON:

If it was to be dealt with right from the word go, I imagine counsel would be re-introduced.

WILSON J:

But as I read the submissions, there may be some dispute as to what the attitude of the children is as to the retention of the farm for example.

MR GRAYSON:

They're young, they're young children. But to the extent there's no-one actually in a position now who wants to step forward and be the farmer, that's, there's certainly no suggestion of that. But the difficulty we have this Your Honour is that, is as I've mentioned in the submissions, Mr Ward has been saying that he wants to preserve

the farm for the children, when it was very clear in the Family Court that on a viability issue, it couldn't happen and Mr Ward was suggesting that in fact, even with the viability of the farm being what it was with all the land, he would then subdivide off some land and sell that and then meet the payment to Mrs Ward from that which would reduce the viability even further –

BLANCHARD J:
But was that a payment of $300,000?

MR GRAYSON:
Yes.

BLANCHARD J:
Yes well that's optimistic.

MR GRAYSON:
So that would reduce the viability further so that there would inevitably have had to be a sale and that, and this is in the evidence, Mrs Ward said in her affidavit that Mr Ward has been telling her that he will sell the farm, wants to sell the farm, so that the instructions that Mr Ward is giving his counsel and the advice that he's giving his wife differ. But one would have to say, objectively looking at it, it would be, it would not be sensible in a trust sense to continue with the farm as it is at present, it's simply not viable. It's not producing an income for the beneficiaries who were the parents of course, and the children, whereas Judge Robinson pointed out that if in fact it was sold, for $2,000,000 then that would enable Mr and Mrs Ward to each then get the benefits from the trust, which they're not enjoying at the moment, only Mr Ward is enjoying those benefits.

If I can express it this way Your Honour, I – that if there is a difference in principle, it's my submission that Your Honours could still deal with the matter today without having to remit it back to the Family Court because the principle would still enable Mrs Ward to claim what she has been awarded on the basis of the change of principle that Mr Macfarlane's urged on you.

Now in my submissions I've addressed a whole lot of reasons why a 50/50 division was appropriate. I don't know if Your Honours want me to go back and deal with all those, but they start on page 17. I think the major reason that, one of the reasons that the 50/50 division was justified was because of the matrimonial property agreement but there is the fact that, if it was other than 50/50 – what has happened is under the Cahirdean Trust, when the property was transferred to the, when the shares were transferred to the trust, there was a debt back of 540,000 and that was then halved so that it was 270,000 each and both parties have been forgiving their side of that debt over the years since the trust was formed and so that each party now owes, I think it's $189,000 is owed by the trust.

ELIAS CJ:

Is owed?

MR GRAYSON:

Mmm, is owed by the trust. And so that the order made by the Family Court Judge required that that debt be transferred to the trust to be set up for Mrs Ward so that her trust then owed her the sum of 189 and applies equally to the situation with Mr Ward. So they both have the same liability or they both had the same asset but if you made anything other than a, an unequal division, that would distort the situation with the debt. And of course they've been, those appropriate documents have been filed and gifts of 27,000 per annum have been claimed.

TIPPING J:

Well the debt represents the value at the time of the transaction?

MR GRAYSON:

Yes Your Honour.

TIPPING J:

The uplift has increased since then presumably?

MR GRAYSON:

Well it's just a debt that has been forgiven over time so that essentially the shares –

TIPPING J:

Well the 540,000 was presumably a value without gift?

MR GRAYSON:

That was the value that was determined for the shares.

TIPPING J:

– and the difference between that and the 2.1 million is the increase in value since then?

MR GRAYSON:

Absolutely Your Honour.

TIPPING J:

That may possibly have some relevance in the ultimate assessment too, which you might call the base line as against the off lift. I'm not sure Mr Grayson, I'm just thinking aloud.

ELIAS CJ:

Can you summarise for us the points which you say support an approach which achieves equal division without applying the presumption of equality in the Matrimonial and Property Act, what are the factors? Because I am concerned about a rather arid or formalistic return if the outcome can only be something around an equal division. It would seem a very expensive way to proceed.

MR GRAYSON:

They're all summarised Your Honour from page 22, but I'll do my best to summarise in the –

ELIAS CJ:

No, if they're, let me just –

MR GRAYSON:

Well if we start at fourth paragraph 42(b) on page 22 of my submission, the Family Court orders effectively returned the parties to the position they were in before they transferred their shares to the trust, each had 50 percent. Then the one I've been discussing now sir, there were Your Honours there were no differing –

ELIAS CJ:

I'm not sure that these are – I'm just kind of querying whether these are – I'm just trying to think of the principles that would be applied if you were applying s182 here and the – it's the variation that justifies, the variation and circumstances that justify invoking the powers under s182 which suggests that the expectations of the parties, so far as possible, should be considered. Applying that I would have thought that there are arguments such as it's a clear, it was a clear purpose of this arrangement that the husband and wife would have the prior claim on the income and that it would be for their joint benefit. That suggests, but with the children taking second place in terms of the income during the lifetime of the parents, I would have thought all this could be, if actuarially assessed, would really indicate a position very close to equal sharing if it was followed through.

MR GRAYSON:

The memorandum of intention Your Honours, did provide for the parents to be first, have the first priority.

ELIAS CJ:

Yes.

MR GRAYSON:

So that was consistent with what Your Honour has indicated, and it can be said, obviously, when they were living on the farm, before separation, they were both enjoying to an equal extent the benefits of the farm –

ELIAS CJ:

Yes.

MR GRAYSON:

– the income from the farm. Everything was shared in that sense and what has happened is really with the separation that's been altered, the expectations have altered, Mrs Ward no longer has an expectation to be able to share equally in the benefits which the farm confer.

TIPPING J:

Is it possible to put your point this way, that at the time this was set up there was a general expectation of equality that must be translated across to the changed circumstances, so she still has a general expectation of equality and the order must reflect that.

MR GRAYSON:

I'd agree entirely with that, Your Honour.

TIPPING J:

That's your case reduced to the simplest possible level, I think.

MR GRAYSON:

In it's simplest possible terms, yes.

BLANCHARD J:

And presumably you would also say that if you don't proceed on that basis, there's a contravention of section 182(6)?

MR GRAYSON:

That's mentioned as well, Your Honour, in K on page 23, I mention that any other division could possibly lead to a defeat or variation of the MPA, which gave each of them 50 percent, so that if you then set up a trust and gave 60 percent to Mr – sorry, only 40 percent to Mrs Ward, that might then contravene the MPA and bring into effect section 182(6).

McGRATH J:

Then do you finally say in your paragraph N that if need were to be the test, he actually needs 50 percent of the shares, bearing in mind their total value and what her situation is?

MR GRAYSON:

Yes, Your Honour.

TIPPING J:

But what is wrong is to suggest that there is an underpinning of the exercise of the discretion, will be the principles of equal sharing, as per Fisher. It's not that as an underpinning, it is the actual expectations, which these parties have manifested through the documents in the circumstances of this case. That may be the reconciliation, if you like, of the outcome with the proposition that Fisher's analysis isn't quite right. It's not a sort of presumptive thing, it's a fact-based thing, and according to this case that expectation of equality must be respected in the changed circumstances.

MR GRAYSON:

Yes, Your Honour, I believe that's entirely accurate, in the sense that it may have been that Justice Fisher, and *Fielding v Burrell* was another case, what they were dealing with is the trust corpus, was the family home, that had been the family home, so that when you talk of the underpinning of the PRA principles you're looking at what property has actually gone into the Trust, and in those particular circumstances you may be saying, "Well, we should look at what the PRA would have given her had it not gone into the Trust", which would have been 50 percent. But there is a distinction in the sense that in other trusts you can have property which goes into the trust which is clearly separate property, inherited property, and I would say that then the suggestion that underpinning a division of that property should be the PRA, that would be wrong, Your Honour. I don't think I – I would have no hesitation in saying that because it's my submission, really, that the reason 50/50 should be looked at is to go back and see how that property might have been dealt with if it hadn't gone into trust.

WILSON J:

Is it also part of your argument, Mr Grayson, in this part of the case, that as it happens the difference between a notional 58-42 percent allocation, to the extent that that might be relevant, is largely offset by the benefits that Mr Ward has obtained through his occupation of the farm?

MR GRAYSON:

Absolutely, Your Honour, I mention that as being – they are post-separation benefits, which have been quite significant, so that if Mr Ward's concern is that he's lost the 16.7 percent, weighed against that is the fact for six and a half years he has had the sole and exclusive benefits of –

TIPPING J:

He's actually only lost half of 16.7 percent, because he's retained half of it in his own right.

MR GRAYSON:

Yes, Your Honour.

TIPPING J:

So that, as it were, sort of lessens that apparent starkness of it.

WILSON J:

Well, in round terms, if one took 8 percent of two million that's, what, 160,000, which you say, as it happens, is close to the benefit of the current account.

MR GRAYSON:

Yes, Your Honour, and I've mentioned that in M, on page 24, I say, "Not only is Mr Ward enjoying exclusively the use of the C Trust assets and income, he is doing so relatively cheaply. The L P Limited accounts show that the sole income is from Mr Ward for his use of the farm and for the dwelling on it. For the 2007 year that income totalled $29,425. Of that Mr Ward recovered $21,027.95 as a management fee. The net cost to him of using the farm and dwelling was therefore $8397.05 or $161.48 per week for a property which is 200.65 hectares in size," so that has been –

TIPPING J:

Well, we're never going to achieve precision, but for present purposes there seems to be a fairly equivalence, if you like.

MR GRAYSON:

Yes, Your Honour.

McGRATH J:

And –

MR GRAYSON:

But certainly that has been –

McGRATH J:

Sorry, I was going to say that and at separation, is at, the case that there was, he had his current account – no, sorry, it was 2005 his current account was $120,000, wasn't it?

MR GRAYSON:

Up to $120,000 at the, that was in 2005, and it's grown now to 170 and, as I've indicated, Mr Ward is actually also wanting interest at 12.75 –

TIPPING J:

Well, he's also had some intangible benefits too, from the security and, you know, consistency of being able to live there.

MR GRAYSON:

Yes, Your Honour.

TIPPING J:

So…

MR GRAYSON:

So, I've just at the end, Your Honours, I've just dealt with the trust-busting notion that section 182 has been used as a trust-buster which, in my respectful submission, has a degree of hysteria about it, because the case is seen to indicate that it's not being used to bust trusts at all in the sense that property is being taken from trusts and distributed to the parties, the trust structure is being retained and so the decision in

Ward's case was simply that there was the retention of the trust structures, and there's been a case, Your Honours, which I've referred you to, *Williams,* that was also another case where, this is more recently, in the High Court, where there was a trust which was changed so that 55 percent of the corpus went to the wife, 45 percent went to the husband and 10 percent went to the children *(sic – adds to 110 percent).*

TIPPING J:

What was the name of that case, *Williams*?

MR GRAYSON:

Williams, in my – *Williams v Williams (2007) 5 NZFLJ 311*, it's in my respondent's bundle. It's a decision in the High Court of Christchurch and pages 1 to 12. But, Your Honour, as I indicated at the outset, all of these case really have to be looked at on their own facts, and the factual situation in *Williams* was very different to the *Ward* situation. And I'll just briefly mention that in the Australian jurisdiction the approach of the legislation there, which is the equivalent of section 182, it expressly mentions that, "The Court is empowered to make such orders as it considers just and equitable." So that's actually specifically in their section. So what is different with New Zealand is simply that those words don't appear in the section.

TIPPING J:

But there's no doubt that the Court must make a just and equitable order in our regime, it's for what purpose that is critical. And you're saying that the purpose, even if it is slightly adjusted according with Mr Macfarlane's, is equally achieved through the order that was made.

MR GRAYSON:

Yes, Your Honour. And finally, and I don't know if I need to deal with this at any length, but there was, there has been some suggestion that maybe the Trustee Act 1956 should be used for these cases, rather than section 182. Now clearly if section 182(6) applied that would then have to follow.

TIPPING J:

You mean, what used to be sections 40 and 40(a) or 30 – whatever they were, the general variation of trusts sections.

MR GRAYSON:

Yes, and I think there's mention in the Court of Appeal's decision that the Act, that Act, was really set up for a different purpose, not for dealing –

TIPPING J:

A completely different purpose.

MR GRAYSON:

– not for dealing with rela – well, property.

TIPPING J:

It wasn't – no, for my part, I wouldn't have thought there was any parallel at all.

MR GRAYSON:

Well, if 182(6) applied, obviously that would be the only –

TIPPING J:

Yes.

MR GRAYSON:

– recourse.

TIPPING J:

The jurisprudence under those sections is entirely different, and differently focused from the jurisprudence under this section.

MR GRAYSON:

And there would be a practical problem in the sense that Family Court, being matters which dealt with the Property Relationships Act, would have to be filed in the Family Court as they are.

TIPPING J:

Well, from my point of view I don't think you need trouble yourself, it's just, it's just not on.

MR GRAYSON:

So, unless Your Honours have any other questions?

ELIAS CJ:

There are two matters that you can help us with. The first is that the Court of Appeal made an order under section 35 limiting publication. If there's anything you want to address to us, any submission you want to address to us on that matter, I should say that it is not the practice of this Court to make such orders in respect of litigation before this Court, in matrimonial property cases and similar cases.

MR GRAYSON:

I've read a lot of the literature, Your Honour, and the names are being used anyway, it's funny that it's been drawn to my attention. Everyone knows who the parties are now already, so, I don't believe that would be a problem or an issue.

ELIAS CJ:

Thank you. And then the other question is that the parties have sought to reserve the question of costs. We would want to hear submissions at this stage, so that we can deal with costs in the principal judgment, so if you want to be heard on that you'll have to address us now.

MR GRAYSON:

Yes, Your Honour. The question of costs has been a very interesting one in the sense that there was a decision in the Family Court and that was left on the basis that the Family Court would await the decision of the High Court and then the High Court then decided to await the decision of the Court of Appeal. So at the moment everything hangs on what happens in the Supreme Court.

ELIAS CJ:

The Court of Appeal said that you were to have, the respondent was to have costs in the lower Courts, didn't it? That was my…

MR GRAYSON:

I don't believe the Court of Appeal was –

ELIAS CJ:

Oh, I might be thinking of the case we heard earlier.

MR GRAYSON:

I don't believe the Court of Appeal, Your Honour, was aware of what actually, the history. The reason it all happened was because Judge Robinson has not ruled on the issue of costs before he was elevated to the High Court, so by the time the matter was referred to him it was too late.

BLANCHARD J:

The Court of Appeal made a costs order –

ELIAS CJ:

Yes.

BLANCHARD J:

– in relation to costs in that Court, in paragraph 72.

MR GRAYSON:

Ah, well, that – I'm sorry, I hadn't considered that in detail because at the, no longer, as soon as the Court of Appeal had come out –

BLANCHARD J:

What this Court normally does is we have what is effectively our own scale, and the winner gets that, normally, and if necessary the Court of Appeal order is reversed or some order substituted, and we usually then direct that the High Court and Family

Court shall fix the costs themselves, for those Courts, in light of what's happened above.

MR GRAYSON:

Well, that would be consistent with what has happened to date, in the sense that –

BLANCHARD J:

I mean, we're not in a position to fix costs for the Family Court or the High Court, we'd have no idea what they should be.

MR GRAYSON:

The difficulty we've had to date, Your Honours, is that in the Family Court Mrs Ward would consider that the order completely favoured her, in the sense that she got what she wanted, and that costs should have been awarded to her. But the difficulty arose of course that Judge Robinson couldn't rule on those. By the time –

ELIAS CJ:

Did you make an application for costs?

MR GRAYSON:

Yes, yes, Your Honour, and it hadn't been dealt with. So then it came back, and by the time it came back, then was being dealt with at the Family Court level, the High Court appeal had been filed, and so the Family Court Judge then didn't want to deal with it because he wasn't familiar with the facts, so th –

BLANCHARD J:

But what choice have we got really, but to let costs be determined in the lower Courts?

MR GRAYSON:

Well they've made their orders already Your Honour in the sense that they have said it will wait the outcome of – it was –

BLANCHARD J:

Well that's only an interim position, clearly they are anticipating that at some point they may have to fix costs.

MR GRAYSON:

Yes Your Honour, they will, that would be in the Family Court and the High Court as Your Honour –

TIPPING J:

If you succeed in holding your present order or anything like it, then obviously you're entitled to costs in this cost and prima facie below, but as to quantum, it would be very difficult for us to fix the costs below the Court of Appeal, isn't that the sort of broad reality of it –

MR GRAYSON:

Yes and that is the way –

TIPPING J:

– if you don't succeed in holding your order, then that might introduce rather more difficult issues.

ELIAS CJ:

Well then we would proceed in our normal way in this Court. We would reverse the costs ordered to you in the Court of Appeal which are quantifiable because they've specified their band 2 or whatever it is and we would have to, we would say that the appellant is entitled to costs in the High Court and the Family Court, to be set by those Courts.

MR GRAYSON:

There is a difficulty in the Court of Appeal Your Honour, in the sense that in the Court of Appeal, the – Mrs Ward relied solely on the issue which is the s182 whether she was entitled to an award under s182, Mr Mcfarlane cross appealed and there were two of the three questions that were dealt with in the Court of Appeal, were in fact on the cross appeal.

TIPPING J:

You won on two points but lost on the third didn't you?

MR GRAYSON:

We lost, we won the whole three Your Honour, that's the, that's where it becomes complicated because we had only –

BLANCHARD J:

Well didn't you get the maximum that you could have got?

MR GRAYSON:

It hasn't been dealt with Your Honour because –

BLANCHARD J:

Are you wanting us to refer the costs back to the Court of Appeal?

ELIAS CJ:

I think he is saying that a reversal will not meet the –

MR GRAYSON:

No, no.

TIPPING J:

The fact that you've won on two points?

ELIAS CJ:

Yes, yes.

BLANCHARD J:

Well we'd have to refer it back to the Court of Appeal.

ELIAS CJ:

Yes we'd have to refer it back to the Court of Appeal.

MR GRAYSON:

So it gets a little complicated in the sense that the one issue which has proceeded through all three Courts, has been the s182(6) issue.

TIPPING J:

You've won on that throughout?

MR GRAYSON:

No we didn't win in the High Court, Your Honour.

TIPPING J:

Not in the High Court.

MR GRAYSON:

That is the only one we've ever appealed, that's the only we ever appealed which was in the High Court. In the Family Court we never appealed any of the orders or cross appealed any of the orders.

BLANCHARD J:

Well it's no use going on with your complaints about this Mr Grayson if we can't cure the problem. Either you have to be prepared to have us just reverse the costs in that event or in that event we'd have to refer the matter back to the Court of Appeal, now which do you want?

MR GRAYSON:

It's very difficult to predict in the sense that Your Honour that – may I hear what my friend has to say about this? Because I can see in a practical sense that is going to be, there is going to be some problems and I would like to give it some thought Your Honour, if I could just give him the opportunity later of addressing the issue of the costs?

ELIAS CJ:

I'm sorry, when – later today – after?

MR GRAYSON:

Well Mr Macfarlane's obviously going to be given his opportunity of saying, because of the difficulty in the factual background with the award of the costs, I would like to hear what Mr Macfarlane says and then possibly respond.

ELIAS CJ:

Yes all right, thank you.

MR MACFARLANE:

Perhaps if I deal with that first then. By preliminary observation, Judge Robinson when he addressed costs, offered the view that they should lie where they fell. And he did so because there'd been success for some of the arguments in favour of Mr Ward and vice versa for Mrs Ward. The question of costs to be fixed in that Court only arose because Mrs Ward disagreed with the Judge's indication and made an application. That is outstanding. As to the procedure that should be followed here, I would have suggested with respect, that the normal course which has been articulated from the bench is the one that ought to be followed. If my friend considers that there is subtlety around how the questions for the Court of Appeal were won or lost on a proportionate basis as to importance or otherwise, then with respect he has to persuade you that it should be sent back there for that Court to deal with the matter again, if the normal course, as I have suggested, would be appropriate here was not followed.

On section 35 I accept what you said about the Court's normal practice and I can confirm what my friend said about how widely reported the names of *W v W* are in various publications. They may be interesting for lawyers to have read and to that extent, the publicity relatively limited, but there has been publicity.

BLANCHARD J:

But this is not a case where there's anything scandalous involved –

MR MACFARLANE:

Not at all.

BLANCHARD J:

– and the facts of that over which there is a dispute and it certainly is that our normal practice as a Chief Justice said in such cases to not suppress publication of the names. It would be different if there were other aspects, but there aren't in this case.

MR MACFARLANE:

No, there are no reputational aspects and why the argument continued, I was thinking back to whether or not a wider publication which will no doubt follow this Court's Judgment, would have an adverse impact on the children – to have their

parents and their family farm in trusts published and the subject, no doubt, of some debate, probably again amongst lawyers and perhaps academics, gave me pause to reflect that perhaps the Court's normal practice might be, might be given some –

TIPPING J:

But the facts here are pretty anodyne, I mean there's nothing –

MR MACFARLANE:

They are anodyne so it would only be the fact that the children's matters were in the public –

TIPPING J:

– but sadly in today's world there's nothing particularly unusual about – I'm not insensitive to these issues of children Mr Mcfarlane, far from it, but you know if we were to do it here, we'd have to do it in almost every case.

MR MACFARLANE:

I'm not urging that upon you as an opposition to publication –

TIPPING J:

Yes, all right thank you.

MR MACFARLANE:

– but I'm reflecting my own concerns that that was a matter that probably ought to have been given some thought. By way of reply, the position amongst or between these parties, was once the jurisdiction issues are put aside, what the X was and there was an opening shot from Mr Ward, you've heard it at around $300,000, that's now some years ago. And Mrs Ward's position was always 50 percent, so they had a very large gap to try and breach for settlement purposes and that really was the deadlock point, that's why issues around the trustees not being able to agree come up, because if it's 50 percent, I agree with Justice Blanchard, that unless Mr Ward has a fairy godmother or some investor or new partner or family member who's prepared to fund the payment out to Mrs Ward that the Court would likely make if it's significantly above $300,000, the farm would have to be sold to achieve that. And I'll return briefly to deal with the question of mechanism around the interposition of the

company with this selling of the shares necessary to achieve the obtaining of proceeds from the value of the farm – I'll deal with that later.

I noted that the debate with my friend moved from the principle issue going one way and the case going back to the Family Court to a discussion about whether or not there was enough to justify the order that the Court of Appeal made on some other basis – that is a basis other than the Court of Appeal's principle involving the application of the relationship property regime. I have to say that I have real concern about that. The very first reason for that real concern, is I don't yet know what this Court's replacement will be. So I can make no submissions based on the facts as they were, now, nearly three years ago, at the hearing before Judge Robinson, in applying that replacement to those facts and I have a grave concern that without full updating of the position of the parties, which is what would happen in a Family Court hearing if this matter was remitted, and full argument on that principle, then to say now that the result should be the same is inherently risky.

I'm going to say a little more about that later because it's easy to say, well if we gather this little lot of facts from three years ago to fit the Court of Appeal order on some other basis, that the result ought to be that Mrs Ward gets the same thing, but what you're talking about there is an amount in excess of $1,000,000, over and above what she already has, which I've outlined in a chart form in my submissions at page 5. It's perhaps worth just reminding ourselves what that was. Minor items which it is agreed were worth $20,000, her share of the partnership which she's been paid of over $103,000 and a debt owed to her by the trust, so even before section 182 relief comes to her aid, she's got over $300,000 in assets available to her as a result of her relationship property interests already. In those circumstances and given all the factors that must be taken into account in a section 182 case, with whatever emphasis this Court decides they should have, how can we get to $1,000,000 more, which is effectively what you'd have to do to equate the 50 percent outcome if you like, from the Court of Appeal's order. And I know that Mr Ward would echo those concerns and I would no doubt have, if I thought I had to get instructions from me to have said that, have given them to me.

That's a good introduction to my concern, my second concern about this case which is this. When I opened my oral argument I was going to talk briefly about some of the factual matters and properly I was invited not to continue that. My friend has gone into that extensively, the facts and part of that has been as a result of invitation from the bench and questions from the bench. So there is currently very little in the way of submission to you from Mr Ward's side on how the facts should be considered and indeed, whether or not they have been accurately presented to you. And I don't – I'm not being critical about the way my friend put it, it's, it is easy to present facts in a particular way that from an advocacy point of view, points you in a particular direction. But there are two advocates in the case and you've only heard from one. And I'd like to test that with you briefly and I'm not going to go over everything by way of the facts that were raised by my friend or by the bench with my friend. But he says and some of this is picked up in one of the Judgments at least, that the trust has been virtually run for the exclusive benefit of Mr Ward. Well, point one about that, there are arguments about that as to the facts but think on it for a little. The Court order was that Mr Ward should take over the partnership interests. Well one of those was the lease of the farm. So he was entitled as a consequence of the Court orders to the lease of the farm. And for that he had to pay rent. One of the other consequences was that he was able to live in the home. But for that he had to pay rent. There was then suggestion that he ought not to have obtained for his own benefit by way of management fees, the amount that was accrued to the company LPL and Justice Tipping rightly asked, what was he doing for that? Well the answer is that if you go back to the Family Court record here, you won't find very much evidence on that subject for or against it. So this Court, the highest appellant Court in New Zealand, would have to be doing some guessing. And with respect, that would not be appropriate. Then there was a question raised about the viability of the farm and whether or not there was any point to it being retained and Justice Blanchard rightly raised questions about whether or not its viability would impact on an ability to service the loans that would be necessary to pay out money on account of its retention. Well that also was controversial. My friend is right to refer to the Family Court hearing and the evidence that there put that viability question in issue. But the Court of Appeal let in updating affidavits which are in the case on appeal, in which Mr Ward said that the farm was viable, that he had managed to make it viable and that that continues to be so, so there's – and of course there was no

cross-examination in the Court of Appeal and so that didn't come to be tested. My friend, Mr Grayson, might have made some inroads into that, if there'd been a proper hearing about it. But that –

ELIAS CJ:

But really, Mr Macfarlane, you don't, I think, need to convince us that we can't get into, that if orders of such specificity are ultimately required, we aren't in a position to make them. The question really that Mr Grayson was asked to address is, "What are the points that suggest that an approach based on roughly equal sharing is not appropriate in any event"? Because what the Court has to be concerned about, although it may be that we can do nothing to help the parties in this matter, is wasted litigation. So what we would want to do is provide as much assistance as we can, if we get to this point, so that you're not starting at square one again. Now, if you want to start at square one again, that's fine.

MR MACFARLANE:

Absolutely not.

ELIAS CJ:

No, so –

MR MACFARLANE:

The way I heard the –

ELIAS CJ:

So help us with what you say are the reasons why in fact it does have to be, the whole merits have to be gone into, because it's really arguable that the equal sharing approach would never be reached in the Family Court.

MR MACFARLANE:

That's why I was replying as you heard me, because I had the impression from the way that the matter was developing, with my friend, that the Court was thinking of not returning the matter to the Family Court because it could, somehow or other, draw from the facts as it had before them, sufficient –

ELIAS CJ:

We could only do that if counsel were agreed that we had the information.

MR MACFARLANE:

Well, you've heard my view of that already, it is that the matter should go back.

ELIAS CJ:

Well, I know, but that's an assertion. I'm asking you to indicate the reasons why there are – there's a different approach that's available. This against the background of arrangements between the parties that did look at equal sharing of benefits under this arrangement.

MR MACFARLANE:

Yes. What I can say about that is that first of all there's the 16.7 percent –

ELIAS CJ:

Yes.

MR MACFARLANE:

– plainly, and secondly there is the absence of, in my submission, any or sufficient evidence to establish for Mrs Ward on the basis outlined, particularly by Justice Tipping, as to change of circumstance and accommodating in consequence my arguments around need as well.

ELIAS CJ:

What, of her change of circumstance?

MR MACFARLANE:

Of her change of circumstance, that gets you anywhere near a million dollars, which is the equivalent of the 50 percent, roughly, that comes out of the property in the Trust once the place is sold.

TIPPING J:

Are you saying there's an absence of sufficient evidence as to the consequences for her of the change of circumstances?

MR MACFARLANE:

Correct. Because until her updating affidavit was filed in the Court of Appeal, she in fact didn't make a case based on, "This is what I need as a result of the change of circumstance." It was very much focused on, "I had 50 percent of these shares, they went into the Trust, therefore I should get them back."

ELIAS CJ:

But why does she need to show what she needs, as a result of the change of circumstances? Is Mr Ward also going to have to show how his needs have changed?

MR MACFARLANE:

Ah…

ELIAS CJ:

I'm just not sure that any of this, in the wash, is going to matter at all.

MR MACFARLANE:

Well, in my submission, it plainly would, because once you get rid of the 50/50, the relationship property notion is the determinant here, there has to be a measurable, logical and consistent basis upon which you can set out why it is that in any given case any particular individual should get any particular relief under section 182.

ELIAS CJ:

Why not that the expectation of the parties under which they entered into this settlement was of joint sharing in the benefits of this property?

MR MACFARLANE:

And one of those expectations in Mr Ward's case, in my submission, was that his 16.7 percent was given up on account of the continuation of that.

ELIAS CJ:

Well, you've mentioned the 16.7 percent, I've got that point.

MR MACFARLANE:

It's worth $365,000, Ma'am.

ELIAS CJ:

Yes, no, I'm not minimising it, I'm just trying to get a feel for –

BLANCHARD J:

Well, if it's worth half of that…

MR MACFARLANE:

Yes, well, that's true, it ends up being worth half of that.

BLANCHARD J:

So, you know, I do have a horrible feeling that this, there's been a fixation on this 16.7 percent, which in reality is 8.35 percent.

MR MACFARLANE:

Well, it's 58/42 if you sell the farm, as to what each of them gets. Mr Ward, and I put it in my submissions, felt a strong sense of – I think I wrote, "rolly justice," instead of, as it should have read, "injustice," in my written submissions at 127, about the fact that not only did his 16.7 percent get swept away, but the fact that all of his potential expectation for inheritance or provision from his family, benefit from his family, had gone, whereas none of that for Mrs Ward had been brought to account whatsoever, and that is a factor that –

ELIAS CJ:

But how could it be?

MR MACFARLANE:

Well –

ELIAS CJ:

We don't have a system of bringing into account hopes of future gain.

MR MACFARLANE:

No, but it's a factor that has been taken into account and it's, I accept, not something that can be valued as an absolute or vested interest, plainly not. For example, her interests in the discretionary trust for her family, which is worth a significant amount, they are contingent, she is an object only, not a beneficiary who must take, as I understand it, and she will have to share, one would expect, unless something unusual happened with her two siblings.

BLANCHARD J:

But how can the Family Court bring that into account? Nobody knows what interest she may get in the future, and it may be none.

MR MACFARLANE:

Well, that's one of the reasons why section 182(5) is in the Act.

ELIAS CJ:

Well, how would it be taken into account in a section 182 assessment?

MR MACFARLANE:

Well, I would submit that in considering what was fair to both parties here, on account of the circumstances they've then found each other, they found themselves in, that the Court would, without quantifying it necessarily, make as a waiting factor the loss of any expectation for Mr Ward and the 16.7 percent gone, and nothing of that on Mrs Ward's side, who still had those hopes and, with respect, probably expectations, without them being legal, to come. That's how I –

TIPPING J:

Subject to the 16.7, or half of it, percent point, how do you answer the proposition that there was, on the settlement of the Trust, a general expectation of equality?

And the same general expectation should be carried forward to the change, so in the same circumstances and reflected in the order.

MR MACFARLANE:

Well it's, with respect, it isn't, because the expectation which is relevant here is as to the continuation of the Trust, not a trust that's divided in two, split up.

TIPPING J:

No, but the change in circumstances has demonstrated that the continuation of the Trust is problematical, to say the least. Now, whatever orders are made, why should there, subject as I say to the 16.7 point, why should there be a departure from the expectation of equality that earlier prevailed?

MR MACFARLANE:

Apart from the 16.7 percent?

TIPPING J:

Apart from that point. What conceptual, any other type of basis, should there be for such a departure?

MR MACFARLANE:

Oh, on a change –

TIPPING J:

Because I think that was really the end point that Mr Grayson reached, with perhaps a little bit of help from up here.

MR MACFARLANE:

Yes, yes, indeed. On a changed circumstances approach, when you are looking at what the parties themselves did, that's probably right, and I suggest that Courts should probably take that into account.

TIPPING J:

Well, I'm particularly struck by the approach of Judge Inglis, as you recommended to us, and he very carefully analysed the difference, types of expectation and how they should be reflected in the assessment. But ultimately, if the expectation is for equality, it's very hard to see the principal basis for departing from it.

MR MACFARLANE:

If that is drawn out of the facts of the particular case with which a Court is dealing at any given time, that must be one of the changed circumstance factors that would weigh heavily with the Courts.

TIPPING J:

But what the Court is trying to do is to reach a different type of equality from that which was envisaged at the settlement date, reflecting the changed circumstances, but not departing from the conceptual basis of equality, subject always to the 16.7 in this case.

MR MACFARLANE:

Yes. I'm comfortable with that as a factor. What troubles me is to ready a preparedness to simply treat that as a mathematical outcome for the purposes of a section 182 order.

TIPPING J:

I'm with you to the point of saying that you don't impose a presumption on the parties. You look to see what the reality is of these parties' expectations. But if you find that they actually are for equality, without resort to any external presumption or other regime, why does one not reflect that in the order, is really the point I'm looking for some help on, because if there is no satisfactory answer to that, then Mr Grayson is quite a long way towards establishing that it's not going to make any difference if one, as it were, alters the emphasis from one of presumption to one of factual assessment.

MR MACFARLANE:

I'm happy to accept that that would be a factor which would weigh with the Court. What I'm not prepared to accept is that it would not, after it had heard the case on all the other factors, find for a different outcome mathematically.

ELIAS CJ:

Such as? What other factors?

MR MACFARLANE:

The interests of the children, to begin with.

BLANCHARD J:

Why would that lead to a different mathematical outcome?

MR MACFARLANE:

Well, it may be that there is, the maths do not permit, if you retain enough for both spouses, for a sufficient, practically sufficient corpus to be held back for the children.

BLANCHARD J:

But they're going to be beneficiaries on both sides.

MR MACFARLANE:

If the trust model, if the divided trust model that is the one that is to be talked about. If we're talking more now about how the Court might advise these cases should be dealt with in the future, the two trust model won't be the only model with which section 182 orders would be concerned. It may well be that it will, instead, order a sale to permit a payment out to one or, indeed, possibly both of the spouses, but leave the Trust running, only of the purpose of benefitting the children, and with both spouses written out of that. I mean, the maths around that may not necessarily lead the Court to impose a mathematically consistent outcome, as that which Justice Tipping was putting to me, should flow on from the expectation approach that he spoke of.

ELIAS CJ:

It does seem to me that it is unrealistic for parties to come to the Court only with problems, and that there must be some sensible solutions here. If this Trust fund was a sum of money which was invested, the answer to keep perfect faith, leaving other considerations out of it, with the expectations of the parties, would be to direct that the income from the Trust be apportioned between the husband and wife for their lives, because that is the priority that was given under the Trust deed, with the children having, you know, whatever was left. Now, surely the parties in those situations would quickly then agree, it's much better if we get our hands on the capital, let's actuarially assess what the children's present interests in the residual estate is, and we'll set something aside for them. It would be fixed. Now, the reason for all the complications here is that your case is that there is a property which cannot be used to generate that amount of income, and cannot be sold.

MR MACFARLANE:

It certainly, present, is not capable of generating the kind of income that would have met the kind of order that you described earlier. It can be sold, because I agree with your comments earlier as to the mechanisms that could be utilised for the purpose of ensuring that that happened.

BLANCHARD J:

Well, there's a very simple method of ensuring it. Put it on the market.

MR MACFARLANE:

Yes, but if – the environment within which that was being discussed earlier was that, as I understood it, that there was concern over whether or not there would be jurisdiction to effect a sale of the farm so as to produce money to enable payment out to Mr and Mrs Ward, and Your Honour considered the section –

ELIAS CJ:

You'd re-settle it on trustees, and identify, well, it seems to me you might, the proportions in which it was held for each party.

MR MACFARLANE:

For what it's worth, I didn't see an obstacle to bring about the effective sale of the farm through the shares by way of orders made by the Court under section 182(1). And I'm not sure why it was, in the end, that Judge Robinson decided he had to use the two Trust mechanism to achieve what he plainly intended, which was the sale of the farm. I'm not sure that I addressed the point that we started off discussing, before we got on to the mechanism.

ELIAS CJ:

Sorry. What was that? I'm lost.

McGRATH J:

You say you're not sure why the Family Court ordered two Trusts to be created, and to use that mechanism?

MR MACFARLANE:

Yes.

McGRATH J:

I mean, wasn't that, I thought that was clear that that was, in part, to separate Mrs Ward's affairs, but also to provide for the children's security in the way that he thought was appropriate, and to have decision making mechanisms that wouldn't end up in stalemate.

MR MACFARLANE:

Yes, those points are accepted, but my friend Mr Grayson suggested that the reason he set up the two Trusts order as he did was to bring about a situation which would effectively result in the sale of the farm, eventually, through, if the parties didn't agree, Companies Act-type litigation.

McGRATH J:

Well, what was another fact which can be achieved, as you say, in other ways.

MR MACFARLANE:

Yes, much more directly, I would have thought, with respect.

McGRATH J:

Yes.

MR MACFARLANE:

So at one point, there was a concern in discussion amongst the Bench and with counsel about whether or not such an order would be possible, and I'm suggesting that plainly it would be.

ELIAS CJ:

Yes.

MR MACFARLANE:

Yes, so that deals with –

TIPPING J:

Is it naive to say that it's pretty obvious that your client doesn't want the farm sold?

MR MACFARLANE:

He hasn't wanted the farm to be sold, obviously, and there are reasons peculiar to him for that. But equally, the children are recorded as not wanting the farm to be sold, and there's evidence to that effect, and their counsel has filed a memorandum to that effect. So there has been, if you like, a familial resistance to the outcome of this litigation involving the sale of the farm. And that's in the papers. And the difference between $300,000 and a million dollars is a pretty big gap to bridge for settlement purposes, when you want to try and hang on to the farm. So being entirely transparent about it –

ELIAS CJ:

Yes.

MR MACFARLANE:

It's easy to see how the problem comes about for this couple.

TIPPING J:

A question is how much that should impact on the wife's application. It's a factor.

MR MACFARLANE:

It's a factor, absolutely. The interests of the children are plainly regarded as being a significant factor, and you can see arguments on both sides of that in this case, that it's better for the parents to end their litigation and go their separate ways with their separate amounts of money or different Trusts. But on the other hand, if it's possible, somehow, to find a way of keeping the farm, then, ultimately, that is in their interests. So there's a weighing process involved in that, which any Court would, I think, in most cases would have to go through, before it was satisfied, perhaps not necessarily as to the quantum of the order it made, but as to the form the order took.

BLANCHARD J:

How old are the children?

ELIAS CJ:

Must be about 13 and 15, or something. They're at secondary school.

MR MACFARLANE:

In the narrative of facts, they are referred to as Caitlin, who was born in 1994, and Stephen, who was born in 1995.

TIPPING J:

13 and 12. *(sic – children would be 15 and 14 respectively).*

BLANCHARD J:

Whether their views would weigh very heavily, I doubt. I can understand their sentimental attachment, but it may not be in their best interests in the long run for the farm to be retained.

MR MACFARLANE:

No, that may be right. For what it is worth, Stephen expressed the view that he would want to go on to be a farmer, and that that partly, no doubt, informed his young view of the future. I think I've covered the matters that I thought I should reply to. Can I help the Court without anything else?

ELIAS CJ:

Did you want to be heard further on costs? Mr Grayson, was there anything further arising out of that?

MR GRAYSON:

Just simply, Your Honour, thank you for the opportunity to reflect on the issue of the costs. I would be happy to have them dealt with in exactly the same way as Mr Macfarlane has suggested.

ELIAS CJ:

Yes, thank you, counsel, for your helpful submissions. We will take time to consider our decision on this matter.

COURT ADJOURNS: 3.51 PM