

BETWEEN

CHRISTINE HAMILTON THOMPSON

Appellant

AND

MICHAEL LEITH THOMPSON

Respondent

Hearing: 4 December 2014

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: A E Hinton QC and S H Ambler for the Appellant
D A T Chambers QC for the Respondent

CIVIL APPEAL

MS HINTON QC:

May it please Your Honour. I appear for the appellant, Ms Hinton speaking, and Ms Ambler is my junior.

ELIAS CJ:

Yes, thank you Ms Hinton, Ms Ambler.

MS CHAMBERS QC:

May it please Your Honours. Lady Chambers appearing for the respondent Mr Thompson.

ELIAS CJ:

Yes, Ms Hinton?

MS HINTON QC:

Your Honours, I prepared a three page roadmap, having had pointed out to me a couple of days ago a paper that Justice Glazebrook wrote some time ago saying it's helpful. I can't say it's the best roadmap in the world –

ELIAS CJ:

Any roadmap is helpful.

MS HINTON QC:

It just gives you an abbreviated version of the submission and it's basically what I'm going to work through until you interrupt me.

ELIAS CJ:

Yes.

MS HINTON QC:

So in the appellant's submission this is actually a very simple case, just about whether a restraint of trade is relationship property, which is whether it's property and if so it was property acquired during the relationship, that's all that's required under section 8 and no more. There's a huge amount of other material which arises because of arguments by the respondent which have, obviously, met with some favour in the Court of Appeal and so there are a lot of sections in that judgment which, in my submission, are not relevant and I'll come to that. There are very important principles at stake in this case. It has significant effect, it's not a case, and that's obvious I guess because you granted leave, but it is not a case that turns on its own facts. It is a case that has real application and is having effect already because every sale of a business will be subject to this decision and people will be trying to work out what it means and how they can structure the sale to best effect, or worst effect as the case may be. In my submission the judgment seriously undermines and

cuts across the principle that stood for 25 years from *Z v Z (No 1)* [1989] 3 NZLR 413, [1990] NZFLR 85, (1989) 5 FRNZ 297 (CA).

WILLIAM YOUNG J:

When you say it's a simple case, you're saying we should look through the trust structure and look through in a sense the company structure and just treat this as a business sold by Mr and Mrs Thompson.

MS HINTON QC:

No. I accept that that part of a business that's owned by Nutra-Life, and they've sold, is trust property and it was agreed that that would be divided equally. But then the restraint of trade payment that Mr Thompson received separately –

WILLIAM YOUNG J:

No, I understand that, what I'm –

MS HINTON QC:

Yes.

WILLIAM YOUNG J:

In the Family Court and the Court of Appeal a lot of focus was placed on the position of the trust on the basis that the underlying assets were not relationship property. Now what I just really want to understand is are you saying we should effectively look through that on the basis if necessary a section 9(4) and equal agreement, but the trust assets should be treated as if they were relationship property?

MS HINTON QC:

If it comes to section 9(4) that is absolutely my submission but in terms of section 8 you don't need to look through the trust because the payment, the restraint of code covenant and the payment for it are relationship property and stand alone and you don't need to look through the trust to make that determination. They are received by Mr Thompson but they have always been owned by him.

WILLIAM YOUNG J:

But isn't it easier to look at it in the way in which the *Z v Z* and *Brownie* looked at it, in terms of effectively a sale of relationship property, in order to get the best price for the relationship property a covenant and restraint of trade is a necessary component

and isn't that the simplest way of looking at it instead of this sort of intangible idea of him having an asset represented by what he covenants not to do.

MS HINTON QC:

Yes well you can look at it either way and perhaps you're right, perhaps the second simpler.

ELIAS CJ:

It can be looked through either lens really I would have thought.

MS HINTON QC:

Yes.

ELIAS CJ:

But I thought the reason you are saying that this is a simple case really does rest on the agreement between the parties that the assets are to be divided equally. In a footnote the respondent, in the respondent's submissions takes issue with that characterisation. It does seem to me that that may be a matter of some moment which when you come to it I'd invite you to address because if your characterisation is right then the case is really the simple one that you postulated but there may be more complexity if that starting point is not accepted.

MS HINTON QC:

Mmm, shall I take you now to that?

ELIAS CJ:

No well perhaps just do it when is most convenient to you but I just want to flag that point.

MS HINTON QC:

Mmm.

ELIAS CJ:

Because subject to what the respondent says on that my inclination is that it is simple and that we just can look at whether this is properly – whether the restraint of trade payment, the way the parties chose to structure the sale is immaterial in the – or is arguably immaterial and that that's the point that we really need to focus on but there

may be a little bit more complexity in getting to that simple starting point, if the point made in footnote 15 and then referring also the Deloitte's memorandum and footnote 18 is accepted.

MS HINTON QC:

I think the point from memory that was made in – I may as well deal with this now, the point that was made in footnote 15 I think related to whether the trustees had reached that agreement.

ELIAS CJ:

Yes.

MS HINTON QC:

And I gather Mr Ellwood said they hadn't but certainly Mr Thompson and Mrs Thompson did and that's all that matters.

ELIAS CJ:

Yes I understand that.

MS HINTON QC:

And Mr Thompson's own evidence is that they did and his evidence is in the chronology that we filed.

ELIAS CJ:

Yes.

MS HINTON QC:

We've referenced that at the bottom of page 4 where we've said – so we've said there, "Mr and Mrs Thompson agree that the assets of the M L Thompson Family Trust are to be treated as in effect relationship property and divided equally between Mr and Mrs Thompson." And we've referenced Mr Thompson's affidavit volume 2, page 50 at paragraph 6.

ELIAS CJ:

I'd just like to turn that up just for a moment, sorry to bother you on that.

MS HINTON QC:

I see actually in that paragraph, this becomes a matter of semantics, that he's claiming he didn't agree that the assets were to be treated as in effect relationship property. Well actually he doesn't really – he says that he didn't agree they relationship property, we don't say that, the agreement was that they be treated as in effect relationship property. The Judge in the High Court judgment –

ELIAS CJ:

Sorry what paragraph are you referring to, paragraph 6 on that page?

MS HINTON QC:

Yes paragraph 6.

ELIAS CJ:

Right.

MS HINTON QC:

So –

ELIAS CJ:

But this is the paragraph you're relying on is it?

WILLIAM YOUNG J:

What did Mrs Thompson say?

MS HINTON QC:

Mrs Thompson, oh where's her evidence? There is actually a memorandum on this, I don't know whether it's in the record.

WILLIAM YOUNG J:

Wasn't this something to do with some section 44 proceedings?

MS HINTON QC:

Yes so we issued proceedings and settled them on the basis of agreement which recorded actually in writing, which hopefully is in the casebook.

ELIAS CJ:

I'd like to see it if it is because it probably – it may well be a complete answer and therefore supports your simple starting point. I mean your argument is, in any event, that what the trustees are saying is simply a technical point that the assets were trust assets and that they don't acknowledge that they're relationship property but that's as you would, I think, contend probably irrelevant.

MRS HINTON QC:

Correct.

ELIAS CJ:

Yes because the scheme of the Act is that you don't look at the form in which assets are held.

MRS HINTON QC:

And this is a matter between Mr and Mrs Thompson so it's a matter of what they agreed in any event.

ELIAS CJ:

Yes, yes. I think the agreement might be the most helpful thing.

MRS HINTON QC:

It wasn't a formal –

ELIAS CJ:

It maybe that it's not really in contention.

MRS HINTON QC:

It wasn't a formal agreement. There was a memorandum that was filed at the time recording that the – I'll just see if I can find it. The High Court Judge, I don't know whether Your Honours have picked up on this, at paragraph 8 records that the parties have also agreed that the assets of the M L Thompson Family Trust were to be treated as, in effect, relationship property.

WILLIAM YOUNG J:

Well that's what I'm relying on but it's all secondary sources at the moment, there must be a primary source somewhere.

GLAZEBROOK J:

Well the paragraph 6 says that despite them not being relationship property they're to be divided equally which is probably why it says "in effect relationship property" because he says they're not relationship property but if they're to be divided equally and there's an agreement they're to be divided equally then in effect they are being treated as relationship property. Is that how you would –

MRS HINTON QC:

The actual agreement was as recorded in paragraph 8 of the High Court judgment so it went beyond being divided equally and said they were to be treated as, in effect, relationship property. I agree with you, it comes down to the same thing, but there is a memorandum that records that.

WILLIAM YOUNG J:

Well is the memorandum in the case on appeal?

MRS HINTON QC:

Apparently not. Because it's in the High Court judgment, and I didn't understand it to be disputed that Mr Thompson agreed that that was the language, it was as if, in effect, relationship property and treated equally and I think technically –

WILLIAM YOUNG J:

Well it is an issue because looking at footnote 15 of the respondent's submissions, "This is not correct although it is an assertion by Mrs Thompson." Page 4.

GLAZEBROOK J:

You'd understood that, had you, as just saying the trustees hadn't agreed rather than Mr Thompson hadn't agreed?

MS HINTON QC:

Yes, I did.

ELIAS CJ:

That may well be all it is. That's all right. We've established that there is a memorandum which supported the withdrawal of the section 44 application. It's not currently before the Court. If it becomes material, no doubt, we can obtain it but otherwise it looks as though we can rely on paragraph 8 of the High Court judgment.

ARNOLD J:

Paragraph 8 did you say?

ELIAS CJ:

Was it paragraph 8?

MS HINTON QC:

Paragraph 8. Paragraph 8 of the High Court judgment.

ARNOLD J:

I think it's 13, isn't it?

MS HINTON QC:

My apologies, I'm looking at the Family Court judgment, which is where we actually put all this material in.

ELIAS CJ:

I see.

MS HINTON QC:

That's where the memorandum and so on was before the Court, so at paragraph 8 of the Family Court judgment, so that's volume 1, page 12, "The parties have also agreed that the assets of the trust were to be treated as 'in effect relationship property' and divided equally, although I note that both respondents has emphasised that agreeing to treat the assets as if they were relationship property doesn't mean accepted they were. So that's been the – so I read this footnote 15, which is only based on what Mr Ellwood says, as saying that the trustees now say that they didn't agree that.

ELIAS CJ:

I see. Well look it probably isn't material. All I was trying to find out, whether it was necessary for you to go into more detail or whether you could simply proceed on the assumption that this was in effect treated by the parties as relationship property and we can move on to the legal point which does seem to be the crux of the case, leaving you to respond if necessary to any development of a more nuanced approach.

MS HINTON QC:

And the business about whether Mrs Thompson was advantaged by the sale or Mr Thompson was disadvantaged and so on.

ELIAS CJ:

Yes, yes. But maybe I should just check with my colleagues.

WILLIAM YOUNG J:

I would like to see the memorandum at some stage.

ELIAS CJ:

Yes.

MS HINTON QC:

But it's unfortunate because this material was before the Family Court but I didn't understand, because it's recorded –

WILLIAM YOUNG J:

It doesn't matter what way or where for but presumably it's available.

MS HINTON QC:

Yes, oh yes we will be able to find it. Won't be able to find it today I suspect though. I'll try to.

ELIAS CJ:

Yes that would be helpful if you can, thank you.

MS HINTON QC:

Right –

GLAZEBROOK J:

Can I say I'm not probably picking up on your earlier point. I'm not sure why it matters what the status of the trust property was because all we're looking at, isn't it, is the status of the restraint of trade, that was your initial point.

MS HINTON QC:

Yes.

GLAZEBROOK J:

And if the restraint of trade is property and arose out of the time of the marriage then that's the end of it.

MS HINTON QC:

Yes.

GLAZEBROOK J:

Is that the simple submission you're making?

MS HINTON QC:

Well I think both submissions are reasonably simple.

GLAZEBROOK J:

Mmm.

MS HINTON QC:

And I think the point that Your Honours have raised is, I mean initially in the Family Court the argument was quite simply, based on the memorandum and that agreement, that really under section 8L as in *Brownie v Brownie* (1997) 16 FRNZ 54 (FC), this was just simply part of the proceeds of sale of relationship property because we'd agreed to treat it as in effect relationship property, it must be the same thing and if it's not then section 9(4) must kick in because why should it be any different. But I then developed this because it seemed to me I didn't have to rely on that anyway because in essence, although neither of the Courts has specifically had to deal with the point in *Z v Z (No 1)* or *Brownie* but in essence as Justice Richardson said in *Z v Z (No 1)* the restraint of trade covenant or – I mean it gets terrible difficult the language but it's in essence an element of goodwill. Now it's not goodwill belonging to the business.

ELIAS CJ:

It's protection of goodwill.

MS HINTON QC:

It's protection of goodwill, that's a better way. I realise that's what it is.

WILLIAM YOUNG J:

Protection of the business is goodwill.

MS HINTON QC:

Yes.

ELIAS CJ:

That's true.

WILLIAM YOUNG J:

Because without such a restraint of trade you don't get much for the business.

MS HINTON QC:

Exactly.

O'REGAN J:

But *Z v Z* assumed that the consideration for the restraint of trade was actually the purchase price. It was valuing, whereas here it's separate isn't it?

MS HINTON QC:

Yes.

O'REGAN J:

That's the difference. I mean here you've got a vendor and then someone else giving a restraint of trade. In *Z v Z* the vendor was giving the restraint of trade and the reward was a better purchase price.

MS HINTON QC:

Correct.

O'REGAN J:

So it's more direct in *Z v Z* isn't it?

MS HINTON QC:

Correct and then in *Brownie* the vendor was the company and Mr Brownie was giving the restraint of trade, so again there was a separation.

WILLIAM YOUNG J:

Well they both gave a restraint of trade actually but his was of more significance than Mrs Brownie's and he was the one who got, well the the retainer.

MS HINTON QC:

Yes I can see Your Honour has read these judgments.

WILLIAM YOUNG J:

Well I delivered them.

O'REGAN J:

He wrote that one.

WILLIAM YOUNG J:

I wrote that one.

MS HINTON QC:

Oh yes you did too, you did too. It's still stayed with you has it?

WILLIAM YOUNG J:

No actually I'd forgotten about it.

ELIAS CJ:

So easy to do that. So you accept that *Z v Z* and *Brownie* are more direct cases but you simply say the principle applies equally?

MS HINTON QC:

Yes and they didn't need to get into this point that I then endeavour to, of trying to categorise what the actual asset is that Mr Thompson is assigning when he enters into the restraint of trade covenant and it is, as you say, protection of the goodwill but in a way it's like goodwill that he has but it –

WILLIAM YOUNG J:

I mean it's his ability – it's the inability of a purchaser to capture the value of the business if he is free to set up a new company that's in competition with it.

MS HINTON QC:

Mmm, and it's his ability to require the payment so that he doesn't do that, turning it round the other way.

WILLIAM YOUNG J:

Well yes but in *Z v Z* I don't think the Court of Appeal would've seen the case differently if Mr Z had proposed the sale of his practice on the basis that he gets \$25,000 for the sale of the business and \$55,000 for a covenant in restraint of trade, I think the Court of Appeal would still have seen the 80,000 as relationship property.

MS HINTON QC:

Absolutely.

WILLIAM YOUNG J:

They wouldn't have been troubled by the structure.

MS HINTON QC:

That's my submission and it would be a ludicrous thing if it were otherwise. Ludicrous. And indeed in *Brownie*, as Your Honour found, there was an actual sale, there was an actual separate payment, and the Court said, no, there's no question, we're bound by *Z v Z (No 1)*. It's an authoritative case.

ELIAS CJ:

We are being invited to decide if *Brownie* was wrong, effectively.

MS HINTON QC:

By my friend?

ELIAS CJ:

Yes.

MS HINTON QC:

Mmm.

ELIAS CJ:

Well it's just flagging that you can't say that *Brownie* is the answer.

MS HINTON QC:

The Court of Appeal didn't say it was wrong. No one has actually said that either *Z v Z* or *Brownie* were wrong.

ELIAS CJ:

But they just say they don't apply to the circumstances of this case.

MS HINTON QC:

Well they say they can be distinguished –

ELIAS CJ:

Yes.

MS HINTON QC:

– on grounds which I say they can't possibly be because they're cases that deal with matters of principle and I think *Brownie* makes that quite clear. *Z v Z* makes it clear. The statement that Justice Bisson made in the last judgment, but *Brownie* makes it resoundingly clear.

O'REGAN J:

Well *Z v Z* could be interpreted as saying the greater purchase price obtainable because the restraint of trade was given, is what *Z v Z* was dealing with, and that's the difference in this case between the value of the fixed assets and the purchase price, which represents the goodwill, that they wouldn't have got that otherwise and that that's what your client's entitled a share in, not the eight million which was paid in order to get the 50 million value of additional purchase price.

MS HINTON QC:

Well that's, no, with respect, I think that's wrong. What *Z v Z* says is, as you know, that you need to include the value of the restraint of trade in the value of the business.

O'REGAN J:

But the value of the restraint of trade in *Z v Z* was the value of the business.

MS HINTON QC:

No, there was other value as well.

O'REGAN J:

That there was no payment in *Z v Z*. It was a valuation issue, how much is the business worth if there's a restraint of trade, how much is it worth if there isn't one, but it didn't contemplate the idea that the person giving the restraint of trade was going to get some separate payment for it. It was, the underlying assumption was the value of the restraint of trade was represented by the additional purchase price, or the additional value of the law firm.

MS HINTON QC:

Well what Mr Simmons, who valued the restraint of trade, the basis on which he valued it was that the value of the business, in terms of the future maintainable earnings, was 80.3 million, but it would go down to 72 million, or whatever the exact figure was, if Mr Thompson were free to compete. So based on its earnings and what Next was prepared to pay as a multiple, the business was worth 80.3 and the eight million gets carved off the top, quite legitimately paid to Mr Thompson, and that reduces what the business gets, and that's – so it's exactly the same thing. I mean you have to include the restraint of trade –

O'REGAN J:

Well that's not the case you're being asked to answer though. The case you're being asked to answer is the goodwill of the business is the difference between 22 and 72, they had to pay eight million to get that to Mr Thompson in order to get, so that the trust got the 50 million difference.

MS HINTON QC:

Well, with respect, I don't think that's correct. I think the goodwill of the business was, brought the total value of the business up to 80.3 and then they said, if Mr Thompson competed, he would reduce the value of the business down to 72 and so –

WILLIAM YOUNG J:

No, but that's not true is it?

ARNOLD J:

Well below, no, it would be below that.

O'REGAN J:

Yes, I don't think that's right.

MS HINTON QC:

Well that's what Mr Simmons says in his valuation, that's how – can I take you to –

ARNOLD J:

But effectively there would be very little goodwill in the business without this restraint of trade covenant and indeed the restraint of trade itself is quite explicit about this, if you look at volume 3B of 227, clause 1.8(b) there's an acknowledgement that the restrictions extend no further in any respect than is reasonably necessary and is solely for the protection of the purchaser in respect of the goodwill of the business.

MS HINTON QC:

Mhm.

ARNOLD J:

At least as I see it at the moment what Justice Young said earlier has an appeal to me. You have to look at the substance of what's happening, the way the parties choose to structure it can't provide you with the answer because there's all sorts of ways of structuring these things.

ELIAS CJ:

And indeed the legislation makes it clear that structure is not determinative and may be required for other purposes.

WILLIAM YOUNG J:

It does seem to be the easy way of looking at it, is that the purchasers were prepared to pay \$80 million for the business.

MS HINTON QC:

Correct.

WILLIAM YOUNG J:

Only if they could be ensured that they would get, you know, as much future maintainable profit as possible, that they wouldn't be competed against by Mr Thompson and it's a matter of indifference to the purchaser how they split up the

80 million and it's essentially filling a business for the purchase of a business and, I mean I can't see for instance in *Z v Z* it would've made a difference if Mr Z had said well there had been a sale and he'd structured it in sort of two different parts, 25,000 for the hard assets, say 25,000 for business goodwill and 30,000 for personal goodwill, it still would've been a business worth \$80,000.

MS HINTON QC:

I totally agree, I totally agree. You've got to look at the substance of the thing. Next were prepared to pay 80.3 million for what they were buying and that got split, eight million to Mr Thompson, so that he didn't compete and takeaway what they were buying and there's absolutely no doubt that the whole lot just simply forms part of the sale price. It's just that it gets split so that part of it goes to Mr Thompson and I also completely agree with Your Honour Justice Arnold that the real value of the restraint of trade could arguably be a great deal higher. I mean Mr Simmons valued it for the trustees, nothing to do with Mrs Thompson. His evidence is put in by Mr Thompson. He valued it at eight million and that was probably a lucky thing because you could, in many cases, value a great deal higher and basically, as you say, you could say listen this business is of no value to anyone unless I, as the person who has built it up and have all the contacts, agree not to compete and so the value of my covenant is huge. It would be very hard to argue against that and indeed in *Brownie* and in *Z v Z (No 1)* the value of the restraint of trade was far more than 50% of the total value of the business. That would be non uncommon. So that just illustrates the potential ramifications and the structuring point that is really hugely at issue here and why it's quite important that this not remain as per the Court of Appeal decision.

ELIAS CJ:

So where do you say the Court of Appeal went wrong?

MS HINTON QC:

Well I've tried to summarise that in the road map.

ELIAS CJ:

Yes.

MS HINTON QC:

So I say, at paragraph 11 there I say they didn't question the authority of *Z v Z (No 1)* so by inference they accepted it was determinative but they then wrongly

distinguished it on three grounds, one being that an actual sale is different to a valuation, the second being that the shares were owned by the trustees and the third being that the restrictions were different.

WILLIAM YOUNG J:

Well I mean none of those, it's fair to say none of those impress me much.

MS HINTON QC:

No.

WILLIAM YOUNG J:

If this had been a case, and I mean the trust structure, as sort of a diversion let's treat the business as relationship property. If there'd been a dispute between Mr and Mrs Thompson as to the value of the business, it hadn't been sold, it had been valued at \$80 million, Mr Thompson said but, hey, it can't be sold for that because I'm not prepared to give a covenant in restraint of trade and therefore it's only worth, say, 20 million, *Z v Z* would say, tough luck.

MS HINTON QC:

Yes.

WILLIAM YOUNG J:

It's 80 million because that's what the value of the business is, sold on the only basis upon which can be sold, that is with a restraint of trade, that's what it's worth to you, so you either, that's the carrying value to you and it's the realisable value. The shares owned by the trustees, well we put that to one side, and the restrictions imposed are an entirely different character, well they're not, they're exactly the same, they are the restrictions that are necessary to ensure the sale of the business as a going concern.

MS HINTON QC:

Correct. So I don't accept that *Z v Z* and by implication the Court, if they hadn't distinguished it, would have considered that it did apply. They don't actually say so but I think it's a reasonable response. I mean several of their points of distinction were actually alive in *Brownie* of course and *Z v Z* was still applied. Then I make the point that they also distinguish *Brownie*, this is at paragraph 13, and they distinguish it on the basis that Mr Brownie didn't act in good faith and Mr Thompson did. Well,

parking all together to one side the accuracy of that as a matter of fact, because both of them were simply aiming to maximise their separate property, there is nothing in the ratio of *Brownie* to justify a distinction on that – I mean the Court scarcely refers to anything to do with good faith. Good faith has nothing to do or – nothing to do, really, with categorisation of an asset under section 8.

WILLIAM YOUNG J:

I didn't think there was a suggestion that Mr Brownie had been dishonest.

MS HINTON QC:

Pardon?

WILLIAM YOUNG J:

I didn't think there was a suggestion that Mr Brownie had been dishonest,

MS HINTON QC:

Well if he was it wasn't apparent to me in the judgment. I mean he obviously structured the deal the same way as has happened here, and anyone would do, why wouldn't you, give it a go.

O'REGAN J:

Well except in *Brownie* the purchase price was about 160 and the restraint of trade was 300. I mean it was, it's quite a bit different from a case where it's 72 and eight.

MS HINTON QC:

Well it is no different in principle. I mean if –

O'REGAN J:

Well it is different in the sense that you can imply that there has been some screwing of the scrum in *Brownie* to get, essentially, the whole of the purchase price diverted to him.

ELIAS CJ:

But not necessarily –

O'REGAN J:

Whereas that's not the case here.

ELIAS CJ:

– if the goodwill is the principal asset of the business I suppose.

WILLIAM YOUNG J:

In *Z v Z* the goodwill was 55,000 all of which was referable, could only be sold if Mr Z was prepared to give a covenant.

MS HINTON QC:

And that was 55 out of 80.

WILLIAM YOUNG J:

80.

MS HINTON QC:

So it was by far, that was the point I was making. So it wasn't actually that hugely different. I mean the percentage in *Brownie* was a chunk more than 50% but the percentage in *Z v Z* was –

O'REGAN J:

But in *Z v Z* it was part of the purchase price. That was the whole underlying assumption.

MS HINTON QC:

Well my point is it's all part of the purchase price.

O'REGAN J:

Well that's not what the agreement is saying.

ELIAS CJ:

Perhaps you need to take us to the provisions of the Property Relationships Act 1976 in terms of looking through.

GLAZEBROOK J:

Well you're saying it's in substance part of the purchase price –

MS HINTON QC:

Mmm.

GLAZEBROOK J:

– it's not that it is part of the purchase price because of course it's not, it's for a restraint of trade.

WILLIAM YOUNG J:

But you would say it's referable to relationship – a sale of relationship property. In other words he can't get \$8 million for restraint of trade unless the business is sold.

MS HINTON QC:

No, that's right. Well nor can the business actually realised all of the goodwill that it got unless it sells it. But I do, if you dig down one level below all of this, I do say that what Mr Thompson sold, and what anyone sells when they give a restraint, I know sale is an awkward expression, is actually itself a property right anyway. So you, if you accept that, which in my submission you must do, or should do, then you don't even need to really get into all of this because it's a right, it's a right that he had at the time of separation, well before, in fact, as this business had been going for years and years and years.

ELIAS CJ:

But a right attributable to – a right derived from matrimonial property?

MS HINTON QC:

Correct.

ELIAS CJ:

Yes.

MS HINTON QC:

Correct.

ELIAS CJ:

Or relationship property.

MS HINTON QC:

So it is itself a property right.

ARNOLD J:

So what exactly is the property right? The right to enter into a restraint of trade?

MS HINTON QC:

Yes, the right to call for a restraint of trade or it's an intangible, and Mr Simmons says it's an intangible – he says the restraint of trade, which he's valuing, is an intangible asset.

ARNOLD J:

Yes he described it as an intangible asset.

GLAZEBROOK J:

So would you say that if somebody had been an employee and was leaving the employ of a company, so there was no sale of asset, and gave a restraint of trade, that that would be relationship property, because that's the extension –

ELIAS CJ:

Payment made.

GLAZEBROOK J:

Sorry?

ELIAS CJ:

Any payment made.

GLAZEBROOK J:

Any payment made for the restraint of trade because I must say that has some attraction in the sense that if you've built up your contacts, even as an employee over that period, and then you give a restraint of trade, I mean maybe you were selling your company, or you're leaving your company, still keeping as a shareholder, but are leaving it to the management to run or something of that nature, which is a – or your children to run of some nature that you're getting a restraint of trade payment so that you don't go out and compete. And if so is there authority for that proposition?

MS HINTON QC:

I don't think there is because I don't think that point has actually been, has arisen in a case.

GLAZEBROOK J:

Are there any cases on – well it certainly seemed to be capital under the *Henwood* decision for income tax purposes, it's no longer, but it has been seen as a capital asset.

MS HINTON QC:

So, yes, well that's, I mean that's the same with any payment that you, or used to be, didn't it –

GLAZEBROOK J:

Yes.

MS HINTON QC:

– the law has changed, I gather, on that.

GLAZEBROOK J:

Yes it has but it was – those cases might have some indication as to what type of asset it is.

MS HINTON QC:

I think it, it's a very good question, I think it would be treated as a property right, because it would be a right that had arisen – it would depend a bit, because it would be connected to an employment contract. You'd have to go back and look at *Z v Z (No 2)* [1997] 2 NZLR 258, (1996) 15 FRNZ 88, [1997] NZFLR 241 (CA), which raised the possibility that even an employment contract, or rights received under it, could be relationship property. But the point hasn't actually arisen. But in my submission a restraint of trade such as this, which is connected to a business that these people actually owned themselves, and there's just the sheer coincidence of that having been transferred to a trust. I mean if that hadn't, all of this, if that hadn't happened, it would be so obvious the answer here. But anyway I think drilling it down, what he had, because he, there's no question, is there, that at the time of separation, if they had sold that business a month before, he'd have still had the ability to call for a payment. He'd have still been able to say, this is something I

have, this is a property right of mine, and it stands outside of what Next, what Nutra-Life owns.

WILLIAM YOUNG J:

I find this extraordinarily elusive –

MS HINTON QC:

Mmm.

WILLIAM YOUNG J:

– and artificial. I find it very difficult to see how his right, ability to make an income, his earning capacity, can be treated as an asset and to do that in a way that is consistent with *Z v Z (No 2)* and it follows –

ELIAS CJ:

Not a decision of this Court.

WILLIAM YOUNG J:

No but – well, true, true, but unless you treat earning capacity as an asset, I can't see how his ability to sell that, or agree to forgo it, can be treated as giving rise to a capital asset. Well, anyway I've probably said it all. I do see a far more easy orthodox way through this case is simply to treat it as a part of the purchase price of – for the assets, the business assets.

MS HINTON QC:

Yes, I totally agree with you, but can I just respond to your thing about the earning capacity?

WILLIAM YOUNG J:

Yes.

MS HINTON QC:

Because it's not. I understand that that can be part of the effect of a restraint of trade but what you're actually doing is you're covenanting not to compete with the business you've sold. You're not actually transferring your earning capacity. Your earning capacity remains. No one really knows quite what's going to happen to that. You're just covenanting not to take back what you've sold...

[inaudible] ... remains, no one really knows quite what's going to happen to that. You're just covenanting not to take back what you've sold and that's exactly the point that was made by the Court of Appeal in *Z v Z (No 1)* and that Your Honour has agreed with in *Brownie*. It is not earning capacity that you are selling under restraint of trade and that's made very clear. That could be a consequence but it's not the property interest.

GLAZEBROOK J:

Well in fact usually those will be void in any event which is why those restraints of trade are put in that manner because in fact if they are too wide for the particular purpose and they are too all encompassing, they will void in any event because of a public purpose perception.

MS HINTON QC:

And you don't have to do anything. You don't have to actually work. So it's unlike future earnings. It's a totally different case. Future earnings is about capturing, you know, what you're actually going to work to earn. Even then in *Z v Z (No 2)* and *M v B*, the Courts have done that to a significant degree where they can see an attachment to something like a partnership deed and they go for the super profits. So actually my friend won in both *Z v Z (No 2)* and *M v B* because they did – they didn't allow the enhanced earnings simpliciter, that was too big an ask but they pitched in on the link to the partnership deed and then came up with the super, which is a longstanding concept, super profits, so that you in effect you do take a chunk off the earnings but *Z v Z (No 2)* doesn't – the future earnings cases are a totally different thing. A restraint of trade is a completely different beast to a future earnings. I mean one illustration of that is if you die the week after you receive a restraint of trade payment, you still keep that payment, you didn't have to do a thing for it.

O'REGAN J:

Your heirs do, not you.

MS HINTON QC:

Yes.

ELIAS CJ:

So is your point that the position you're contending for is not inconsistent with *Z v Z (No 2)*?

MS HINTON QC:

Not at all, it's absolutely not inconsistent and in fact I think, was it *Z v Z (No 2)*? Oh one of the judgments actually makes that quite clear.

ELIAS CJ:

Mmm.

MS HINTON QC:

I mean I think they're just completely different cases. In fact *Z v Z (No 2)* is an inroad into future earnings and *Z v Z (No 1)* and *Brownie* and what I'm saying is not because it's just a special beast the restraint of trade.

ELIAS CJ:

So I'm just wondering about and you mention in paragraph 6 of your submissions the way it was put in *Z v Z (No 1)* whether that is really a very helpful way for it to have been put that it's a right or interest which is capable of being monetised without personal effort. It doesn't immediately appeal to me as a test I must say.

MS HINTON QC:

Right.

ELIAS CJ:

Do you want to say anything more about that? It just seems to make it –

MS HINTON QC:

That's not how it was put in *Z v Z (No 1)* of course.

ELIAS CJ:

That's how you're putting it?

MS HINTON QC:

That's me so don't worry about it.

ELIAS CJ:

No, no. Well I am a little worried about it. I'm just wondering what – perhaps it needs some further explanation as to what you're meaning because it does seem to be a bit more complicated than the propositions that have been put to you.

MS HINTON QC:

Yes. Look I totally agree with that. All I'm saying is if the Court were troubled by the basic obvious propositions then drilling down further that would capture it because that gets around anything about this business of the trust because he actually has got a property interest of his own that he has been building up during the relationship which is all of his own connections with the business. You know, how he would be able to effectively some take of the income earning stream. I mean that's what goodwill is about isn't it, the ability to sort of capture that income earning stream and maintain it. And so he's actually effectively got part of that. It's not there in the books but nor is goodwill anyway in the books of Nutra-Life and that's really the exercise that Mr Simmons goes through when he says, "The restraint of trade is an intangible asset and now I'm going to value it." And how he values it is he takes a chunk of the goodwill of the business. He says, "That's what would happen if Mr Thompson competed, the value will drop down and the difference between the two is the value of the restraint." All I am saying is and I know it's really hard to get a grip on it and I find it enormously difficult, much more so than Your Honours but because it's not something that's kind of sitting on a shelf and you can say there it is, it's like any kind of intangible asset. So at the very least that existed, it is an intangible asset and he's sold it, he's realised it when he got his eight million and he definitely had it at the date of separation, there's no question about that. A right or an interest. I mean the Court said in *Z v Z (No 2)*, you know, property is a very fluid thing for the purposes of the Property Relationships Act.

So that's really – it's a catch all in my submission. I agree with you it's not the easiest concept to get your head around but I do submit that it's right and it's a little bit similar to – I've picked up on these things in the submissions, the language that Justice Richardson used where he said, and I know it's a business that there wasn't a separation but he says, "The restraint of trade covenant is an element" and there wasn't any covenant in existence, so it's just a short form that the restraint of trade covenant is like an element in the goodwill of the business and that's basically what Mr Simmons is saying. He is valuing a restraint of trade that doesn't exist at the point he's doing, he's saying it's an intangible asset and now I'm going to value it.

O'REGAN J:

So would you say if you had an employment agreement that said, "If you leave our employ you must not compete with us for three years" that that employee has a right during a relationship, even if they don't leave the employment during the relationship?

MS HINTON QC:

No because that wouldn't be a right that was capable of being monetised. Whereas what Mr Thompson is building up is capable of being.

O'REGAN J:

But it is capable of being monetised just by leaving. I mean if it says, "If you leave you won't compete and we'll pay you."

MS HINTON QC:

"I will pay you X dollars"?

O'REGAN J:

Yes.

MS HINTON QC:

Mmm, I'd have to – can I just –

WILLIAM YOUNG J:

Well there are cases on, sort of cases on this as to whether bonuses that fall due after separation but are referable to work during the relationship get caught under section 9(4) and the case that the case – they tend to apportion them don't they I think?

MS HINTON QC:

Yes they do. Or, well yes, sort of the rights under employment contracts like the redundancy cases.

WILLIAM YOUNG J:

Or superannuation.

MS HINTON QC:

And they all vary. Yes well there was the incentive scheme, the long-term incentive scheme in *Z v Z* where, oh well that was about the fact he had worked two-thirds of the three year period and then the third year was outside and he didn't actually get the interest until – but that comes down to sort of when you acquire the interest, that's the key point in those cases, when you acquire the interest, whereas I say with this there's no question but that you have acquired it at separation. You have monetised it but you've acquired it.

WILLIAM YOUNG J:

There's no, I mean in *Z v Z* is a really simple case, Justice Richardson said in hypothetical market the willing but not anxious seller must be taken to seek the maximum price obtainable from what is for sale, protection of the sellers competition through a covenant and restraint of trade as an element in goodwill increasing the price a buyer would pay. An element – as an element in the goodwill the covenant attaches to the business and cannot properly be characterised as a personal attribute. Now on that approach applied here and ignoring the trust, the vendors must be taken to, if the case fell for decision before the sale, must be taken to be willing to give whatever covenant is necessary to protect the goodwill. The valuation follows from that and on that basis the 80 million would be the value of the business.

MS HINTON QC:

Mmm.

WILLIAM YOUNG J:

Now for myself at the moment I think that's the easy way of looking at the case rather than –

ELIAS CJ:

Why do you need the complication of willing sellers and willing buyers and all of that?

MS HINTON QC:

Mmm.

WILLIAM YOUNG J:

Because that's what market value means.

ELIAS CJ:

Well except why is that – I mean we have a value established by the –

GLAZEBROOK J:

Well we've got the value, yes.

WILLIAM YOUNG J:

What I'm saying is seeing it happened six months before the sale there could be no question that the value of the business was \$80 million.

MS HINTON QC:

And that's right.

WILLIAM YOUNG J:

So I can't see why the fact that the \$80 million has sliced and diced post-sale makes a difference.

MS HINTON QC:

Yes.

ELIAS CJ:

But anyway, it all falls or not on your proposition that it's part of the goodwill of the business. If that proposition is accepted then it's a property interest he had which is relationship property in the scheme of the Act, that's the end of it really.

MS HINTON QC:

Well that's my bottom point, yes, it is.

O'REGAN J:

What was the arrangement with the managing director?

MS HINTON QC:

I don't know, they wouldn't tell us.

O'REGAN J:

But presumably they paid him something too did they?

MS HINTON QC:

I don't know, they wouldn't tell us and I didn't want to have to go through – this proceeding has been so long winded we didn't want have to go through discovery and I know my friend makes the point that that would mean that we should be claiming against that. But why? That's nonsense because it's only the assets of the parties that are at issue.

O'REGAN J:

You're saying the transaction isn't substance of sale for 80 million if they paid the managing director five million it's actually a sale at 85 million.

MS HINTON QC:

Oh to the best of my knowledge he didn't get any part of the – there's no evidence that he got any part of that or if there is I'm –

WILLIAM YOUNG J:

I suppose the answer to that might be that that if they had to pay off a third party X to get \$80 million then the value or their interest in the business is \$80 million minus X.

MS HINTON QC:

Correct.

WILLIAM YOUNG J:

I mean it's not there, what we're looking at is the value of the interests of the husband and the wife.

MS HINTON QC:

Correct.

WILLIAM YOUNG J:

And if someone else can, as it were, clip the ticket, well that's good for them but the associated opportunity cost is simply an assessment of the value of the business to Mr and Mrs Thompson.

MS HINTON QC:

Yes. So I'd accept if part of that was actually paid but there's no evidence of that. It's always been agreed that the total amount that's been received by the

company/trust and by the Thompsons was \$80 odd million and certainly we would never make any claim against any amount that was paid to someone else.

ELIAS CJ:

So is there anything more that you want to develop in your argument?

MS HINTON QC:

No, I'm happy to, unless Your Honours have got other questions, perhaps, you know, well I'll pack up.

ELIAS CJ:

Thank you Ms Hinton. Pack up and retreat. Yes Ms Chambers.

MS CHAMBERS QC:

Yes may it please Your Honours. This is case really about the fruits of the marriage and it's ironic because this was an incredibly fruitful long marriage. Five children, a huge amount of property acquired, some owned personally, all agreed to be divided equally and very substantial assets and some that the parties had agreed to transfer to a trust which they also agreed in regard to which they would be treated equally. Now dealing first of all with that issue briefly in regard to the agreement in regard to the trust, the relevant evidence is really in two places. Mr Thompson's evidence at volume 4, page 34 where he sets out the intentions in regard to the trusts and he says very clearly, "I do not accept Christine's assertion that there was an agreement reached after the sale of the business by the trustees that they were to be treated in effect as they were relationship property or that it was necessarily implicit. I do not accept that Bruce Dell ever said, "the trusts don't mean anything" and neither does Mr Dell, he's denied that and he says, "Christine's affidavit in 2006 acknowledged that he had not accepted that the assets were to be treated in effect as relationship property. Christine relies on statements in my affidavit of March 2011 and comments made in a memorandum dated 6 June by Mr Vickmer."

ELIAS CJ:

Sorry can you just remind me, is this in the sequence of events, this affidavit comes where? This is sort of at the end?

MS CHAMBERS QC:

This is before the Family Court hearing, before then.

ELIAS CJ:

Yes but is this at the end of all the affidavits or is it –

MS CHAMBERS QC:

This is his last affidavit.

GLAZEBROOK J:

So this is after the memorandum which has been talked about?

MS CHAMBERS QC:

It is.

WILLIAM YOUNG J:

But the memorandum looks as though it is dated the 6th of June 2007, is that the memorandum in issue?

MS CHAMBERS QC:

I think so.

ELIAS CJ:

Sorry it's the 6th of June 2007?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

So where's that?

GLAZEBROOK J:

We don't have it. No, no I'm sorry I just wondered where the 6th of June was, yes I've got that.

MS CHAMBERS QC:

Paragraph 21 Your Honour, paragraph 21. I'm just going through it at a reasonable pace. So, and he says, "It never meant that there was an agreement the restraint of trade would be divided equally, indeed quite to the contrary. It was never my

intention to share this sum with Christine as I simply did not accept that it was fair that she would be given that, it was personal goodwill.”

WILLIAM YOUNG J:

That’s a different issue really. I mean there are two issues, one is was there an agreement and two, what does it mean? Now he’s saying well if there was an agreement it doesn’t mean that I’m going to split the goodwill and that’s fine but really what I’m sort of really striving to do is to find out whether there was an agreement.

MS CHAMBERS QC:

Paragraph 23 goes on – I agree with Your Honour. The point that he never agreed to split the restraint of trade is obvious but he also goes on and says, “Even in regard to the trust assets it was that they would be divided in a way Mr and Mrs Thompson...”

ELIAS CJ:

Sorry where is it?

MS CHAMBERS QC:

Twenty three.

ELIAS CJ:

Yes I know but whereabouts in 23? Oh, “I do not accept there was an intention by the trustees”, is that right?

MS CHAMBERS QC:

Mmm.

ELIAS CJ:

Yes, thank you.

WILLIAM YOUNG J:

But where did the Judge in the Family Court get her conclusion from?

MS CHAMBERS QC:

I don’t know Your Honour because that was I think from my friend’s submissions and also Mrs Thompson asserted that but in fact that was never accepted and indeed the High Court Judge comments on that.

GLAZEBROOK J:

But if there's an agreement to split them equally then aren't they being treated as in effect relationship property?

MS CHAMBERS QC:

Well no Your Honour because –

GLAZEBROOK J:

Well I know technically they're not relationship property or it might be said they're not relationship property but if you're agreeing to split them equally that's what you would do if they were relationship property which is what the "in effect" means.

MS CHAMBERS QC:

No, no it's not Your Honour.

GLAZEBROOK J:

So what does it mean?

MS CHAMBERS QC:

Because if you go through and read the evidence, what's happened here is that the benefit – the trustees of course are conscious that Mr and Mrs Thompson aren't the only beneficiaries, their five children –

GLAZEBROOK J:

Oh sorry I'm not talking about the trustees I'm talking about between Mr and Mrs Thompson.

MS CHAMBERS QC:

Except the assets are owned by the trustees and so what was decided in terms of the trust assets had to be the trustees and despite what my friend says, it wasn't – Mr and Mrs Thompson couldn't agree. It had to be the trustees agreeing and Mr Thompson of course was also a trustee and his evidence is, and if you read the evidence, what they've agreed to do with these trust assets is not to divide them between Mr and Mrs Thompson. They are being treated equally in that if there are distributions to Mr Thompson, Mrs Thompson also gets the same amount but they're

also to go into his and her trusts in terms of protecting the other children. So they're not being divided equally.

ELIAS CJ:

But the memorandum is against the background of the wife's application under section 44 and that really does add a different dimension doesn't it?

MS CHAMBERS QC:

Well not entirely, Your Honour, because and I can't remember whether that was against that background but the claims under section 44 were not abandoned until the Court of Appeal hearing. Remember they were pursued in the Family Court, they were unsuccessful. They were pursued in the High Court, they were unsuccessful. They were pursued in the Court of Appeal and dropped just before hearing.

ELIAS CJ:

But does that make it any – does that matter? If the background is that the wife is challenging the disposition of the shares to the trust, I'm just wondering how that affects things.

MS HINTON QC:

Your Honour can I just correct my friend on that because actually the section 44 application was abandoned as a result of that agreement, it was section 44(c) which is just the compensation provision that carried on. So the application was abandoned.

ELIAS CJ:

Do we have a section 44 application in the materials? We may not have.

MS CHAMBERS QC:

The application is at volume 1, 6.

GLAZEBROOK J:

Volume 1, page 6 was that?

MS CHAMBERS QC:

Yes and there's a 44(1) application in that.

ELIAS CJ:

But there was also, is that right, a section 44(c) application?

MS CHAMBERS QC:

There was.

ELIAS CJ:

And is it the 44(c) application that wasn't abandoned till the Court of Appeal?

MS CHAMBERS QC:

I think that's right Your Honour.

ELIAS CJ:

But the section 44 was abandoned as a result of the agreement that in effect these assets would be treated as if matrimonial property assets?

MS CHAMBERS QC:

I wasn't counsel at the time Your Honour.

ELIAS CJ:

No.

MS CHAMBERS QC:

And I simply can't remember from the papers.

ELIAS CJ:

No it's just that it is pretty significant if the submission that you're making that the trust assets, that the fact that the trust owned the assets still has any force, that submission, I would have thought whether the challenge to that position was abandoned as a result of this agreement between the husband and wife is pretty material.

WILLIAM YOUNG J:

You see I mean if there was an agreement – sorry can I pick up the point? Can I just

–

MS CHAMBERS QC:

Well let me –

ELIAS CJ:

Yes I didn't put it very well.

WILLIAM YOUNG J:

So can I just, could I make it perhaps a little bit more specific, if there's an agreement that the trust assets should be treated as if matrimonial - relationship property, it seems very odd to me to treat the trust as being a controlling consideration as the Family Court Judge and the Court of Appeal did, particularly when section 9(4) permits a just outcome. So for myself I would be inclined to say under section 9(4) we can sort the situation out in a fair way by holding the parties to the agreement and dealing with the restraint of trade payment as if the trust assets were relationship property. Is that your point?

ELIAS CJ:

Yes that is, I'm sorry I put it very badly.

MS CHAMBERS QC:

Well in terms of section 8, the evidence, and I've taken you to Mr Thompson's, I can take you to Mr Ellwood's too which absolutely clear is that these assets stayed trust assets. There's just no doubt about that.

WILLIAM YOUNG J:

No I think we all know that.

MS CHAMBERS QC:

Okay.

WILLIAM YOUNG J:

What we're saying –

MS CHAMBERS QC:

No, no, well Your Honour I need to correct -

WILLIAM YOUNG J:

It's a different argument I'm putting to you actually.

MS CHAMBERS QC:

I don't accept and the evidence is not that they agree that they would be treated as relationship property.

WILLIAM YOUNG J:

No, no.

MS CHAMBERS QC:

That's the point.

WILLIAM YOUNG J:

Well I entirely agree with that.

MS CHAMBERS QC:

So that means they stay trust assets because they both agreed to put them into trust and there's plenty of evidence about that and indeed the evidence establishes, from Mr Ellwood, Mr Dell and Mr Thompson that these – remember Mrs Thompson owned a significant portion of the shares, she agrees to transfer them to trust, as he does, for very good reason. It wasn't that she wasn't ripped off. They did it for tax reasons which they both benefited from. They did it for estate planning reasons. They deliberately did it and they both benefitted from it. So it stays trust property and that does make a difference because it's not being treated as if it's relationship property. They're not getting half each of the money.

WILLIAM YOUNG J:

No, no I'm not suggesting – that's not the argument that I suppose I'm putting to you. The argument is if this had been relationship property, *Z v Z* would provide a powerful basis for treating the restraint of trade payment as relationship property too. Given we know it's not relationship property but section 9(4) permits us to deal with the matter in a way that's just and in accordance with the Act and I don't see why one can't treat the sale of the business as if it were relationship property in terms of categorising fairly under section 9(4) the restraint of trade payment. That's the argument, it's not that it is relationship property.

MS CHAMBERS QC:

Well the – in regard to – it could only be relevant under 9(4) but under 9(4) it is my submission that because it is trust property and because they agreed to put it into trust that does make it more difficult to exercise the discretion under 9(4) because it's not directly associated with relationship property as is required by the cases, it is in fact related to a trust property.

ELIAS CJ:

But it must be easier in terms of the separate restraint of trade agreement because that isn't trust property on any basis.

MS CHAMBERS QC:

No that's true but under 9(4), by the time you get to 9(4) you've accepted it's separate property.

ELIAS CJ:

No I should say that I don't accept that this is not – I'm not yet at the position of thinking that this is not relationship property. I am not of the view that one is driven to 9(4). The payment, if one is looking at the matter simply in terms of legal interest, irrespective of the Property Relationships Act, there is no argument that on your basis that the payment to Mr Thompson was trust property. That being so surely the only issue for us is whether it's his separate property or whether it's relationship property. The trust part seems to me almost totally irrelevant to the case.

MS CHAMBERS QC:

Well the payment to Mr Thompson wasn't trust property, it was his separate property.

ELIAS CJ:

Yes, yes. Well –

GLAZEBROOK J:

Sorry there was "not" missing from the Chief Justice's -

ELIAS CJ:

The payment to him, there's argument that that is trust property. What we have to decide is whether it's –

GLAZEBROOK J:

No, you're saying there's no argument that it was trust property.

ELIAS CJ:

Yes. Did I leave another "not" out?

GLAZEBROOK J:

No, no I think it was just a misunderstanding, it was his property personally.

ELIAS CJ:

Yes. So, so –

O'REGAN J:

You're saying it's not arguable that it wasn't his.

GLAZEBROOK J:

Yes.

ELIAS CJ:

So that still the Court to determine whether, under the provisions of the Relationship Property Act 1976, that is properly characterised as separate property or relationship property.

MS CHAMBERS QC:

It does, it does and I accept that Your Honour.

ELIAS CJ:

And the trust dimension seems almost irrelevant to this context.

MS CHAMBERS QC:

No it's not irrelevant because of the provisions of the Act but let's -

ELIAS CJ:

You will have to take me to that to show me why it's not irrelevant.

MS CHAMBERS QC:

Because –

ELIAS CJ:

I mean this might have been an argument if you had been countering the equal division but the parties accepted in terms of the 72 million. So now we're just looking at the additional amount which has nothing to do with the Trust on any basis but there still is a question whether it's relationship property or separate property.

MS CHAMBERS QC:

Okay well this comes down to my first issue which I think I've finally got to which is that there were two different transactions and you'll see this argument, the issue of the trust is relevant to some extent. Now Ms Hinton contends and Your Honour Justice Young has clearly adopted this argument that Next paid \$80.3 million for this business and she says that again and again in her submissions and she has to say that because she needs the restraint of trade to be part of the business assets and she says that very clearly at paragraph 52 of her submissions where she says, "The restraint of trade covenant or the right to seek payment for it is for the purposes of the PRA to be treated as an element of the goodwill of the business."

GLAZEBROOK J:

She did have the second argument that it was treated as an asset in its own right, which you may want to deal with at some stage.

MS CHAMBERS QC:

Yes, yes, yes. And of course that's because she's relying on section 8(1)(e) and 8(1)(l) and 8(1)(e) is subject to 9(4). It has to have been a piece of property acquired during the marriage, prior to separation because it's subject to 9(4) and 8(1)(l) is similar.

GLAZEBROOK J:

You might just want to slow down slightly for me sorry.

MS CHAMBERS QC:

Okay.

GLAZEBROOK J:

Maybe if we turn up the sections it might –

MS CHAMBERS QC:

Okay. So 8(1)(e) is my friend's first basis for saying the restraint of trade is relationship property and 8(1)(e) states that, "Subject to 9(2) to (6) and 9A and 10 all property acquired by either spouse or partner after their marriage began is relationship property."

WILLIAM YOUNG J:

So section 9(4) it says it's as though you've got to read that but before separation.

MS CHAMBERS QC:

That's right.

WILLIAM YOUNG J:

Yes.

MS CHAMBERS QC:

That's right. So for this property to be relationship property it had to be acquired before they separated.

WILLIAM YOUNG J:

What property? You mean the \$8 million?

MS CHAMBERS QC:

The restraint of trade agreement or the \$8 million.

WILLIAM YOUNG J:

Well under – I suppose what, I mean if we go down the section 8 route, you'd really look at section 8(1) wouldn't you? The incoming gains derived from the proceeds any disposition of and any increase in the value of property.

MS CHAMBERS QC:

Right.

WILLIAM YOUNG J:

And that's what, that in substance, the restraint of trade can be treated as a gain from or the proceeds of a disposition of relationship property and I know that we've sort of got to ignore the trust.

MS CHAMBERS QC:

That's right.

WILLIAM YOUNG J:

Yes.

MS CHAMBERS QC:

That's where the trust comes back in. Now so I say in my submission 8(1)(l) doesn't apply because it's got the same fatal flaw. It has to be the restraint of trade agreement and the money received under it because there's items of property, has to have derived from the proceeds of disposition of relationship property.

WILLIAM YOUNG J:

All right, can we leave the trust out of it for a moment because that a separate.

MS CHAMBERS QC:

Okay. But once the trust in the second is it didn't derive from relationship property because it came from his personal goodwill and his personal goodwill is not relationship property. It related to the skills and attributes and let's use the language from the agreement, the restraint of trade agreement, "Mr Thompson has knowledge, skill and experience that if utilised by a competitor of Next would be detrimental to the business to be acquired by Next under the sale and purchase agreement."

WILLIAM YOUNG J:

But that could've been said of this list in *Z v Z (No 1)*.

MS CHAMBERS QC:

Sorry Your Honour?

WILLIAM YOUNG J:

The same can be said in the case in any restraint of trade. One doesn't give a restraint of trade unless – secure a restraint of trade and pay for it unless there's a risk.

ARNOLD J:

Particularly in *Z v Z (No 1)* because the solicitor was a sole practitioner, wasn't he?

WILLIAM YOUNG J:

Yes.

MS CHAMBERS QC:

Yes.

ARNOLD J:

So the goodwill in the practice really did reside in him individually as much as the practice.

MS CHAMBERS QC:

Yes. In this case though we can see that there is a business goodwill which Next clearly contract to buy and we can see that very clearly because, and this is the first point as to why there are two separate transactions, the parties to the contracts were of course the companies, HFI, Nutra-Life, the sellers, the purchasers, Next, the trustees a covenanters. The sale and agreement included the business assets and goodwill and that's very clear from clause 15 of the sale and purchase agreement which defines the business goodwill.

WILLIAM YOUNG J:

Are we really controlled by the way people structure their agreements?

MS CHAMBERS QC:

Except Your Honour the structure of these agreements is appropriate and fair because the business goodwill we know was owned by Nutra-Life, there can't be any doubt about that. Mr Thompson didn't own it. His personal skills were owned by him.

WILLIAM YOUNG J:

But this is a debate that it seems to me to take this any further you really have to say *Z v Z (No 1)* is wrongly decided because all of this is inconsistent with that case.

MS CHAMBERS QC:

No I don't think it is Your Honour because this is the difference, what the restraint did in terms of the business goodwill was that it enhanced it. There's just no doubt about that. It was worth way more. Next page –

ELIAS CJ:

Sorry, sorry are we talking about *Z v Z* or are we talking about this case? I'm just trying to get the submission sorry.

MS CHAMBERS QC:

I'm going to make the distinction between *Z v Z*.

ELIAS CJ:

Yes that's what I understood. So when you say the – well perhaps just make it clear what you're talking about, which case you're talking about.

MS CHAMBERS QC:

I'm talking about this case.

ELIAS CJ:

This case, sorry.

MS CHAMBERS QC:

This case.

ELIAS CJ:

That was the question.

MS CHAMBERS QC:

In this case the restraint of trade given by Mr Thompson enhanced the value of the goodwill, there's no doubt about that. Next paid \$50 million for that goodwill and they wanted to protect it. They would've clearly paid less for that goodwill but for the restraint of trade. So the goodwill goes up because it's protected, that business goodwill is relationship property and that's *Z v Z (No 1)* says. It says when you come to value a business on a separation you value it willing buyer, willing seller and you assume that a willing buyer, willing seller would give the necessary restraint of trades.

WILLIAM YOUNG J:

Yes.

MS CHAMBERS QC:

Therefore you don't value the solicitor's practice at only 25,000 you value it at 75. You assume the restraint of trade. Now applying *Z v Z (No 1)* to this case, the business goodwill is valued at the 50 million.

WILLIAM YOUNG J:

No but you value – I mean it seems that this adds a complexity that's not there in what's a very simple judgment. I think the Court of Appeal in *Z v Z* contemplated the giving of such restraint of trade as would be necessary to satisfy the purchaser as to the viability of the business they were buying and that's all they got from your client in this case.

ARNOLD J:

Well put it another way you say the outcome in *Z v Z (No 1)* wouldn't have been affected if the sole practitioner had said look the goodwill attaching to this practice is pretty minimal, my personal goodwill is really what it's all about. So the business should be valued at 25,000 plus \$10,000 goodwill for the business. I should get a separate payment of, was is it, 40,000 odd for the goodwill I personally bring to the business. On your analysis that would've been a significant difference.

MS CHAMBERS QC:

On my analysis the – it separates clearly the business and the personal goodwill, so that if, for example, of course *Z v Z (No 1)* was just a valuation issue. If a couple separate and there are company shares they get valued on the basis of what they'd be worth with a restraint of trade but they also, and we know this from *Brigg v Briggs* (1996) 14 FRNZ 404 (HC Thorp J), there can be a deduction for where part of the value relates personally to personal goodwill.

WILLIAM YOUNG J:

I think you've misread *Briggs v Briggs*.

MS CHAMBERS QC:

Did I?

WILLIAM YOUNG J:

Yes. I think what Justice Thorp said in *Briggs v Briggs* was the assessment of maintainable income, future maintainable income on the basis of which the valuation was based was unrealistic because whatever covenants and restraint of trade Mr

Briggs may have given, an incoming purchaser could not expect to maintain the level of income that he was able to generate.

MS CHAMBERS QC:

Mmm.

WILLIAM YOUNG J:

And so I don't see that personal goodwill in the sense you're arguing for, I just see it as an assessment of what the future maintainable profits were which were being capitalised and I think that was what I think the Court said in *Brownie*.

MS CHAMBERS QC:

Well *Briggs* I have read and I do read as saying that the personal attributes, and they did say, "Goodwill that was personal to the appellant as distinct from company goodwill had to be deducted from the valuation of the shares."

ELIAS CJ:

But I have a more fundamental problem really with the argument because even accepting that there may be some concept of personal goodwill, I don't see how in this case it's not entirely parasitic on the business effort and involvement and therefore is an asset that was obtained during the marriage properly treated as relationship property.

MS CHAMBERS QC:

Well the argument against that Your Honour and the reason why that's wrong is the very nature of the restraint of trade. The restraint of trade is forward looking. It's not about him getting paid for work he did during the marriage, it's entered into four and a half years after the separation and what it says is you will not go and start up another business or work in the supplements field while this restraint of trade operates.

ELIAS CJ:

You can't use the contacts you've accumulated and built up and the know how you have obtained during your work with this business, built up during the course of the marriage.

MS CHAMBERS QC:

Well he can't, remember the contacts that the business has is covered by the business goodwill definition. This is a different thing.

ELIAS CJ:

Well these are the personal contacts he has. I just don't see the, I don't really see the distinction in this case. There may be some cases where that applies but I would've thought that this really was the purpose of the analysis in *Z v Z*. It's a recognition that restraint of trade which results in value captured by one party may not be separate property. You have to get back to the separate property relationship property analysis here.

MS CHAMBERS QC:

Yes Your Honour but the – if you go back to the agreement, the agreement is not about his personal contacts, the agreement is about his skill, experience and knowledge.

ELIAS CJ:

Where's that obtained from? How did he come by that skill, experience and knowledge?

MS CHAMBERS QC:

Well some of it's inherent, some of it's his personal attributes.

ELIAS CJ:

Well I wonder how realistic that is. It's surely the skill knowledge and knowledge that he's built up through his involvement with this business.

GLAZEBROOK J:

Because I think I understand they didn't have any business at all. When they got married they started from nothing basically.

MS CHAMBERS QC:

That's right Your Honour, that's right. But the difficulties with that is twofold. One is that the restraint of trade is directed at his future earnings, his ability to set up a business in Asia for example which clearly did not own, the business –

WILLIAM YOUNG J:

Can I just ask you to test this by reference to what the restraint of trade says. If you look at volume 3B, page 227, at 1.8(b) your client acknowledges that the restraint extends no further in any respect than is reasonably necessary and is solely for the protection of the purchaser in respect of the goodwill of the business. Now that's exactly the sort of covenant and restraint of trade that's envisaged in *Z v Z*.

MS CHAMBERS QC:

Yes but *Z v Z* wasn't talking about the payment for the restraint of trade.

WILLIAM YOUNG J:

But *Z v Z* wasn't saying the solicitor can slice and dice the goodwill component and say, you know, \$35,000 is to be shared and I'll have the other 15. The Court of Appeal just says it's all relationship property.

MS CHAMBERS QC:

Well I –

WILLIAM YOUNG J:

I mean if the next door solicitor had purchased Mr Z's practice for \$50,000 and pays him separately \$30,000 for goodwill, for a covenant and restraint of trade, I don't think the Court of Appeal would be troubled by that structuring, it just would've said well there's still \$80,000.

MS CHAMBERS QC:

The reasons why it doesn't work are really as follows. I do say *Z v Z (No 1)* was a valuation issue. So if you look at this case when they separate Mrs Thompson says

–

ELIAS CJ:

Sorry can I just pause and say that may not be a sufficient answer because it depends which lens you're looking at. On one view this may be said to be a valuation issue. A valuation of the worth of the business acknowledged to be treated as if it were relationship property.

MS CHAMBERS QC:

Okay, well let's go –

ELIAS CJ:

So, but carry on with that answer.

MS CHAMBERS QC:

Well let's assume my friend's right. Let's assume that there was an item or property at the end of the marriage which related to a restraint of trade, which was relationship property. The problem with that is that, well first of all her own submissions –

ELIAS CJ:

Sorry it's not an item of property called restraint of trade, it's an item of property goodwill in the business which is dealt with in two bites.

MS CHAMBERS QC:

Okay.

WILLIAM YOUNG J:

He's getting a payment for the purpose of protecting the goodwill of the business.

MS CHAMBERS QC:

Yes but he's also getting a payment to stop him earning money in the future. That's why it's worth so much money. But what's wrong with this, there's a number of reasons why it doesn't work. Number 1, if he hadn't signed the restraint of trade he would be able to have gone out and set up another business. Now he's got very clear evidence on that. He already had his eye on another business, he had made a fortune out of the supplements business, he knew the business. His future earnings if he had gone out after separation and set up another business would've been his separate property. There's just no doubt about that and my friend doesn't contend otherwise. So this restraint of trade stopped him from earning separate property. Number 2 is that if this is right, if there was an element of, well in fact Ms Hinton's argument has to be that the restraint of trade agreement was a right already in existence at separation being then we have been missing since 1976 an asset in division of property because it's never been into account as something sitting there to be valued, ie –

GLAZEBROOK J:

Well it will have been under *Z v Z (No 1)* because it will have been taken into account in the valuation of the business at the time of separation won't it?

MS CHAMBERS QC:

Agreed, taken into account in regard to the enhancement of the value of the business and here we have that, we have that captured in the trust assets. There's no doubt that's there and that is there as an asset. What isn't taken into account in separation is the payment, the potential payment to a husband or property owning spouse of the restraint of trade is a separate item of property, the eight million.

GLAZEBROOK J:

But if somebody is going to buy a business, they're going to buy it for a certain sum. They're going to carve it up. If somebody wants to carve it up in a way where they get some here, some there, the purchaser doesn't care, does the purchaser?

MS CHAMBERS QC:

Well –

GLAZEBROOK J:

The purchaser wants the business, wants the restraint of trade and will pay a certain sum for it. There's no extra sum that they're going to pay over and above what they're going to pay for the restraint of trade and the business and doesn't *Z v Z (No 1)* say that that's the value of the business?

MS CHAMBERS QC:

Well as you know in my submission, I say *Z v Z (No 1)* is only aimed at the enhanced value and we can see –

GLAZEBROOK J:

But I don't understand that submission because to a purchaser the value is going to be X and they're not going to pay any more than X, so I don't see what the enhanced value is. Maybe you just need to go back to *Z v Z (No 1)* and explain a bit more clearly what you say the enhanced value is.

ELIAS CJ:

Just before you do that perhaps we should take the adjournment but did you want to, before you come back to that, did you want to finish anything that you were saying or would you prefer to deal with it after the adjournment.

MS CHAMBERS QC:

No I'm happy to finish it. The other problems – the problems with the argument that there was an item of property in existence at separation which my friend calls the right or ability to acquire the restraint of trade, is that it does mean that the right to seek a payment for a restraint of trade is an item of property which needs to be taken into account at separation and hasn't been, in cases since 1976 and you also run into problems that no matter when Mr Thompson enters a restraint of trade there's going to be an element of relationship property in it, even if he enters into a restraint of trade in 10 years, then you have multiple relationships. How does the restraint of trade get divided up in terms of the skills acquired during the different marriages? Why doesn't it apply to employment contracts? A Judge gets a job, the job is obviously after separation, the employment contract is obviously partly to do with effort post-separation but it's also to do with skills built and qualifications built up during a marriage. So employment contracts would be subject to exactly the same argument. Bonuses would be in the same category and also if this is – so that leads to problems in terms of the clean break principle. So those are some of the issues which arise if this Court finds that there was a right to a restraint of trade which is in part relationship property. It goes over into all other aspects of contracts entered after separation which relate in part to someone's skills and qualifications.

ELIAS CJ:

Yes.

COURT ADJOURNS: 11.38 AM

COURT RESUMES: 11.57 AM

MS CHAMBERS QC:

So *Z v Z (No 1)* is in the case book under tab 5 and my case is that what this case is concerned about is valuing business goodwill and His Honour Justice Richardson starts off by saying the only question on this matrimonial property appeal relates to the value of the goodwill of the husband's legal practice at the date of separation, that was it. And you can see over the page that His Honour talks about, "In the hypothetical market the willing and not anxious seller must be taken to seek the maximum price obtainable from what is available for sale" and the protection against the hypothetical seller's competition through a covenant and restraint of trade is an element of goodwill increasing the price a hypothetical buyer would otherwise agree to be prepared to pay and I say in respect of the business goodwill because that is

what this case is about. It's an element, His Honour says, in the business goodwill the covenant attaches to the business and cannot properly be characterised as a personal attribute. And he goes on to say that a properly limited covenant in restraint of trade does not stop a practitioner from practising his or her profession in the future. It does not affect his or her future personal earning capacity in that sense. What it does is to protect the goodwill attaching to the practice by preventing the practitioner from taking business away from the existing potential clientele notwithstanding the sale of the business. And there's the classic definition of goodwill and then he goes on to say it's independent of the current owner. The value of the business goodwill is the additional value attaching to the business as a going concern over and above the value of the assets.

And so if we look at this case, what happened in this case, if we look at what was actually agreed and the sale and purchase agreement is in volume 3A and I want to take you to page 65, the definition of goodwill. Now I've already made the point that the business goodwill was owned by Nutra-Life. There's no doubt about that, it's in my submissions, it's never been disputed by my friend. The business goodwill is owned by Nutra-Life, not Mr Thompson. So Nutra-Life's goodwill, the goodwill in the business, this is the definition goodwill in the contract and it's wide because we know that Next is paying nearly \$50 million for this goodwill and they're arms length transactions, Next isn't stupid, it's a corporate buyer and seller of businesses. Of course it structures its contract to acquire all of the business goodwill and it means the business contacts. It's covered, the business contacts is owned by the business, they've bought it from Nutra-Life. All customer and supplier relationships with the business, including any operating lease but excluding any finance lease and the IP assets are dealt with also, not as part of the definition of goodwill but as a separate asset which is also acquired.

ARNOLD J:

Just on the customer and supplier relationships, as I understood it when Mr Thompson first set up the business when he left Healtheries, a lot of existing customers and so on went to the new business, in other words the Healtheries relationships had very much to do with his personal relationships with these people. Now customer and supply and relationships here would capture that element, that personal connection that he had with customers.

MS CHAMBERS QC:

Absolutely Your Honour.

ARNOLD J:

Right, so that's part of the business goodwill?

MS CHAMBERS QC:

That's part of the business goodwill.

ARNOLD J:

Yes.

MS CHAMBERS QC:

It was owned by Nutra-Life. There is no express reference in this agreement to Mr Thompson's reputation and expertise. Now looking at the restraint of trade agreement, it of course is between Mr Thompson and Next because these were things Mr Thompson owned which were non-assignable. They are his knowledge, skill and experience. It is not the business contacts of Next, of sorry, of Nutra-Life because the business contacts of Nutra-Life belong to Nutra-Life and they'd already paid \$50 million in part for those attributes. We have two totally different property assets, two different contracting parties. These were commercial people who knew what they were doing. It is –

ARNOLD J:

It was a condition of this agreement that Mr Thompson give this restraint of trade in her personal capacity wasn't it?

MS CHAMBERS QC:

They're connected I agree. They are connected but they are separate.

ARNOLD J:

Well it's set out in clause 6.

MS CHAMBERS QC:

Yes, two separate contracts albeit connected. They're separate though. And I do adopt the Court of Appeal's view that the content of the agreement is critical in identifying what aspects of the Nutra-Life business were sold to Next. If you look at my friend's submissions and in particular the diagram she produced in the Court of

Appeal which is volume 1, page 72, you'll see her argument reduced to a diagrammatic form and you'll see why, in my submission, it is wrong. She introduces this concept of principles goodwill which she says is part of the business goodwill. Well there's no basis for that whatsoever but also look at the contracts. The principles contacts, contents rather, she says the principles contacts were the business clientele, customers, suppliers et cetera. Well there is nothing about that in – that aspect is covered by the business goodwill in the sale and purchase agreement and is part of the business goodwill and it's covered in the sale and purchase agreement. His knowledge, experience and business and his general skills are covered in the restraint of trade. They are a separate item. His knowledge and skills of the business couldn't possibly belong to Nutra-Life, how could they? They belong to him. The very width of the restraint of trade, remember Nutra-Life only operates in New Zealand and yet they restrict his ability to go and set up a supplements business say in Asia.

ELIAS CJ:

It's his knowledge, experience and business know how which affects the goodwill of the business being purchased.

MS CHAMBERS QC:

That's right.

ELIAS CJ:

Because those are the terms of the restraint of trade agreement.

MS CHAMBERS QC:

It protects it, it does protect it.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

And therefore it enhances its value.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

But you see Mr Thompson says he's not saying – what he is not saying is what Mr Solicitor said in *Z v Z (No 1)*. He's not saying, "Well hang on a minute the total business value is 72 million only because I signed a restraint of trade, therefore Mrs Thompson should get less than 72 million because of my contribution in regard to the restraint of trade." He's not saying that. That's what the solicitor in *Z v Z (No 1)* was saying. He's saying, "Look I accept that clearly Next paid a significant amount for the business goodwill because I signed a restraint of trade" and I accept that that gets – that he's not trying to deduct from that the enhancement that came as a result of him agreeing not to go and set up a business. That's the difference, that's the difference. *Z v Z (No 1)*, the solicitor was trying to say, "It's not the whole 72 million because the enhancement is due to a restraint of trade."

ELIAS CJ:

But the enhancement is because of the knowhow experience et cetera he derived through the course of the marriage in this business.

MS CHAMBERS QC:

It's actually a harnessing of that, isn't it? It's his agreement not to apply those in the supplement business. Now see that's where you get the second – you get two issues there. One I say it's a personal attribute and therefore not property, *Z v Z (No 2)*, but I'm going to come back to that because I know we've got issues there too but the second issue is if he'd gone and set up a business it would've been separate property and let's have a look at his evidence on that. It's at volume 3A, page 14, paragraph 27, "If it had not been for the restraint Next would not have purchased the business or the value would certainly have been significantly reduced. Next Capital was well aware that Healtheries went broke two years after I left. Although Healtheries never went into formal liquidation it had a major cash crisis. I was in fact appointed as an acting receiver. They were aware that I had started over 20 companies during my economic life, many outside of New Zealand, all of them have been pretty successful. Indeed at the time of this transaction I'd already had another company lined up I was wanting to establish. From the Next viewpoint they are prepared to pay me in return for an agreement that I would not compete against them. This was not consideration for the value of the company but consideration for an agreement that I would personally not go out and use my skills to compete against them. This issue was raised very early in the negotiations with Next. Although I understood why Next required a commitment by me not to compete and indeed to

continue to hold a shareholding in the company and be a director” because he has got those golden handcuffs there as well, “I did not wish to enter a restraint of trade. I wanted to go out, as I had been, and start a new business, build it up, sell it off, using my skills I knew I had. My view was that what they were acquiring was properly valued at 12 to 15. Negotiation took place. The fact that ultimately I was prepared to sign a restraint of trade benefited Christine significantly because of the purchase price obtained as a result of the restraint.”

So that’s what he was contracting and that would have been separate property and, let me just go back a bit further, you can see that distinction too in the *Fisher* quote that I’ve referred to in my submissions under *Z v Z* which recognises again the distinction, it’s at paragraph 50 of my submissions, that in regard to the personal restraint, which relates to purely personal and non-assignable goodwill, which represents compensation for the restriction of a personal future freedom rather than the recognition of a property interest. And that is the distinction here and it’s a distinction which has been recognised –

GLAZEBROOK J:

Sorry, where are you now?

MS CHAMBERS QC:

It’s a quote from *Fisher* and that distinction has been recognised in this case, by the Family Court, the High Court and the Court of Appeal. It’s because of the nature of the contracts in this case, and what they were contracting to do.

ARNOLD J:

This restriction simply prevents him setting up a competing business but because he’s a shareholder in the new business, and a director of it, he’s still able to use all his skills and abilities to grow new business, isn’t he? I mean this is not a normal restraint of trade in that sense. He’s not deprived of his ability to work and earn an income and grow the company and so on.

MS CHAMBERS QC:

In regard to the Nutra-Life business?

ARNOLD J:

The new company.

MS CHAMBERS QC:

His continuing obligation in that regard? Is that what you're talking about?

ARNOLD J:

Well he was a shareholder in the new enterprise, wasn't he?

MS CHAMBERS QC:

Yes.

ARNOLD J:

And a director of it.

MS CHAMBERS QC:

And I think he's a director.

ARNOLD J:

Yes, so he is, if he wants to be, going to be working and furthering the interests of that new business.

MS CHAMBERS QC:

Yes, now the issue there is twofold. Number 1, they don't pay him the \$8 million, they make him put that straight back into the business and retain the shares, plus a further four million. He has to retain \$12 million of shares and if he becomes a director he's not paid for it, and he's not paid for it. He therefore is forced to have a substantial input into the Nutra-Life business going forward and he's still there. The restraint of trade is still operating and will operate, we know, for at least 10 years because it ceases to operate two years after he ceases to be a director. Of course he's a director. A huge amount of his money had to be kept in the Nutra-Life business. He hadn't –

ARNOLD J:

Yes, I understand that. All I'm saying is that the restriction simply stops him setting up a competing business. He still has an interest in the business, and in its financial performance, and he can put as much effort as he likes into that.

MS CHAMBERS QC:

Yes but it's not, it's still not anywhere near as advantageous as him going and setting up his other business. There he is, we know, and it's not disputed, he's Mr Supplements in New Zealand. He's set up two – he was heavily involved in the success of Healtheries, then he sets up Nutra-Life, it's hugely successful. One is, the option he's stuck with is he's got to have money invested in the new company, he's got no choice. He's got to wait and sit there and hope that that investment comes back. He's a minority shareholder. He's an unpaid director. He's a director, that's it. Yes, he can apply his skills in that regard and hope that that helps him. Compare that to, I already had another company lined up to buy, that he had total control over, that he could go and use his skills in the very business that he'd spent his professional career working in where he knew he had skills and experience about that supplement business. It's a pretty big difference. And the whole thing was designed to tie him in there.

Now I also dispute my friend's submission, as you can see in paragraph 21 of my submission, that Next – and Justice Young picked up the same point, were prepared to pay 80.3 for the total transaction price. In fact, as I say in my submissions, we had evidence from Mr Lockhart who was the principal person involved from Next, who was not cross-examined, and his evidence was that he considered the payments of 72 and \$8 million to be completely separate and independent and –

WILLIAM YOUNG J:

But that's nonsense because one is a condition of the other.

MS CHAMBERS QC:

Yes, that is, yes, but in terms of the total amount paid. He says that –

ELIAS CJ:

Sorry, what's the reference? You just, you don't need to take me to it.

MS CHAMBERS QC:

At paragraph 21 of my submissions.

ELIAS CJ:

Thank you.

MS CHAMBERS QC:

And his affidavit is at volume 2, page 103, and he says that they were prepared to pay 72 million if Mike was prepared to give an ongoing commitment through a meaningful equity position and a comprehensive restraint of trade which they saw as a crucial prerequisite to the transaction to purchase Nutra-Life proceeding and that was made clear to the trustees who owned the business. And they knew all about, from paragraph 10, Mr Thompson's abilities and that he could start up a business in competition. They knew his entrepreneurial flair was not just limited to the New Zealand market but that he'd established numerous successful start up companies worldwide. The restraint of trade was required to stop Mike competing with Vitaco, that's the new company formed as a result of Healtheries and Nutra-Life being combined, or from soliciting any employees of Nutra-Life was as comprehensive as we could achieve. And so they thought \$8 million was appropriate.

So that evidence shows the significance of the restraint of trade in achieving the \$72 million price for the business goodwill, and it also shows that they were wanting to control his future conduct. His future application of his skills. My friend relies significantly on Mr Simmons' report. I say that's flawed for two reasons. First of all the Simmons' report was a valuation obtained by the trustees after the term sheet had been signed to check that \$8 million was an appropriate amount in regard to the restraint of trade. It's not part of the contractual documents. It was done on an urgent basis. It wasn't, it was done before the final contracts were entered into. He, of course, is not a party. He hadn't seen the final contracts, so what he says, because I know he does on occasion –

ELIAS CJ:

But that timing issue –

MS CHAMBERS QC:

– use language that is about total transaction.

ELIAS CJ:

That timing issue surely gives some assurance about the matter. You really need to show us why it, in its own terms is flawed or shouldn't be invested with too much significance. The fact that it wasn't commissioned as part of the litigation, in other words, surely gives some independence to it.

MS CHAMBERS QC:

Yes it does but what I'm saying is that it was, the purpose of it was to value the restraint of trade, that's what his expertise was. Insofar as he comments on the nature of the transactions and what was being paid for what, that's irrelevant because he wasn't a party and it's not part of the contractual deed. So for example to the extent he describes the sale and restraint as one transaction, I say that's irrelevant because he's sitting there just to do a valuation of the restraint of trade and he hasn't seen the final contractual documents. So his view as to whether this was one transaction or two doesn't assist because he had a completely different role. You have to look back at the contractual documents and they are very clear as to what these parties were agreeing to.

ARNOLD J:

It's interesting though when you look at the Deloitte advice to the Board and the trustees of the family trust, they certainly treat the Next offer on a holistic basis. They value it on a basis including the restraint of trade and excluding the restraint of trade.

MS CHAMBERS QC:

Yes they do both, they do both.

ARNOLD J:

But they treat the value to Next as being the 80 million, the full amount.

MS CHAMBERS QC:

Well I don't accept that Your Honour and I think that's dealt with by Her Honour in the High Court. If you look at paragraph 74 of Her Honour's decision, she deals with this, that –

ARNOLD J:

Hang on, just give me a moment to catch up.

MS CHAMBERS QC:

I'm sorry. So we're in volume 1, page 47.

ARNOLD J:

Thank you, right.

MS CHAMBERS QC:

“Working back from the sum of 72.3 million Deloitte calculated that EBITDA multiples of 7.2 forecast or eight historical had been applied. Deloitte’s opinion was that the multiples compared very favourable to the multiples applied for the purposes of Next’s earlier purchase of Healtheries, where the multiple was 7.6.” Now we know that the multiples should have been higher in regard to Healtheries. Why? Because Healtheries was a more strategic purchase and this is in the Deloitte’s report. Healtheries dominated the grocery part of this business. What Next were trying to get was the pharmacy and direct mailing but there were other companies in that business funnily enough there was another company called Thompsons for example, which Next had also been sniffing around to buy and we know that from the Deloitte’s report.

ARNOLD J:

I mean the report speaks for itself. If you look at volume 3B at page 286, you’ll see there Deloitte describe the Next offer and they say it’s got two key components, 72.3 on an enterprise valuation, payment of eight million for the restraint of trade. The offer therefore represents a total value of 8.3.

ELIAS CJ:

Sorry some of your colleagues are struggling to keep track.

GLAZEBROOK J:

Yes where are we?

ELIAS CJ:

So it’s volume 3B, page 286 is it?

ARNOLD J:

Yes volume 3B, page 286 and so this is an advice to the Board about the reasonableness of the offer and if you look at the way the offer is described at the bottom half of 286, represents total value to Next of 80.3 and then at the bottom paragraph, “Next have also made it clear that Mike Thompson’s ongoing commitment through a meaningful equity position is a critical element of the purchase and the value they’ve ascribed to the transaction.” So they see the restraint of trade and the continuing involvement in the business as critical to the overall value of the transaction which is 8.3 and that’s – isn’t that in economic substance what is

happening and how the parties choose to carve it up is as between them but the economic reality is, this is the package that Next was prepared to purchase and only that package, nothing else.

MS CHAMBERS QC:

That's true Your Honour but the issue for this Court is how do you categorise that package and the package was clearly two distinct contracts.

ELIAS CJ:

But that's a formalist argument and what's being put to you is that in this jurisdiction it's very important not to be blinded by the formal structure and it's been put to you that the economic reality is that this was all part of the value for the business.

MS CHAMBERS QC:

Yes, yes Your Honour but – well there's two answers to that, one is the policy issues which I will come on to very quickly why clean break is important in this area and therefore it's important to categorise it as separate property because it is forward looking but the second argument is that Your Honour Justice Arnold, I accept that the Simmons report looked at it both ways. It looked at it both ways.

ARNOLD J:

Yes.

MS CHAMBERS QC:

There's no doubt about that but my point is this, in terms of from Next's viewpoint, they clearly saw the value of the business as 72 million. Why do I say that? Because if you look at the multiples, we know that Next expected to pay more for Healtheries. So the multiples should be higher for Healtheries.

ARNOLD J:

Right.

MS CHAMBERS QC:

It is higher for Healtheries if you don't take into account the restraint of trade payment. So Next must have seen that as the value of the business because we also –

ELIAS CJ:

Did Thompson not have any involvement with Healtheries? I'm sorry I'm a bit behind on this.

WILLIAM YOUNG J:

He did originally.

ELIAS CJ:

I know he did originally but at the time they acquired Healtheries he was out of that?

MS CHAMBERS QC:

He was. They acquire Healtheries just a few months before they buy Nutra-Life.

ELIAS CJ:

Yes, yes, no I had that sequence but I wasn't sure whether there was any remaining connection.

MS CHAMBERS QC:

No.

ELIAS CJ:

But if they – yes I see, thank you.

MS CHAMBERS QC:

And we also know that Next also there were of course restraint of trade issues in regard to Healtheries as well and that's referred to in the Simmons' report but they don't know the detail of them.

ARNOLD J:

Right.

MS CHAMBERS QC:

So my point is from Next's viewpoint they clearly saw the business as 72 million. So moving onto the policy issues and in particular in regard to the argument that there was a right or ability to acquire a restraint of trade which could be monetarised and therefore was relationship property, we have to start from the clear policy of the Act that relationship property is to be determined at separation. It's absolutely clear from

section F. It is referred to in *Z v Z (No 2)* as one of the guiding principles of the legislation and my submission –

ELIAS CJ:

Sorry F, that's in the –

MS CHAMBERS QC:

2F.

ELIAS CJ:

2F thank you.

MS CHAMBERS QC:

So the first point is, on this issue, is that there was no right at separation to seek a payment for the restraint of trade, that only came into existence with the sale. Now my friend agrees with this because at paragraph 41 of her submissions she says, "In no way was the eight million realisable without a sale."

ELIAS CJ:

Sorry I'm still struggling to find F.

MS CHAMBERS QC:

Section 2F of the Act.

ELIAS CJ:

Oh I've section 2 as the interpretation section.

ARNOLD J:

Section 2, capital F.

ELIAS CJ:

Oh 2 capital F, I'm sorry.

MS CHAMBERS QC:

Date at which the share is to be determined.

ELIAS CJ:

I see yes that provision, yes. There's no reference to the clean break principle in that which I have always really understood to be – I was slightly surprised it being used in this context because it's really more about continuing obligations whereas the purpose of the Matrimonial Property Act is that each take their property and go. So it doesn't really seem to have much application here. It's not a maintenance case or whatever it's now called, maintenance or support payments are they? Yes, so I was just surprised on your reliance on the principle of clean break here. It's really more the policy is simply that expressed about the date of assessment of matrimonial property.

MS CHAMBERS QC:

Yes but that's part of the clean break principle. The Act doesn't use the word "clean break".

ELIAS CJ:

No.

MS CHAMBERS QC:

Your Honour is quite right but *Z v Z (No 2)*, Their Honours said well if you look at the provisions of the Act, it is clear that an underlying guiding principle is clean break.

ELIAS CJ:

I should just indicate I'm not sure that that isn't a bit fuzzy. But that's fine, I understand the principle, it's really just its application here that I'm not sure of and I'm not sure why you're relying on it if it's anything more. I'm probing for whether it is anything more simply than property gets assessed as at the date of separation generally.

MS CHAMBERS QC:

Yes. But what one does under the Act is one first of all takes a snap, what existed at separation.

ELIAS CJ:

Mmm.

MS CHAMBERS QC:

Because that's what 2F requires we do.

ELIAS CJ:

Mmm.

MS CHAMBERS QC:

What existed at separation in this case was a business owned by trustees with business goodwill. What also existed was his personal skills and attributes. There was restraint of trade, there was no sign of a restraint of trade agreement. There was no agreement, there was no \$8 million. That's all that existed. The restraint of trade didn't exist and it didn't, as Ms Hinton says, it was in no way realisable without a sale. Well it's not sold till four and a half years after separation. I didn't exist and so if the sale hadn't occurred and Mrs Thompson was simply bought out, it would've been the value of the business, the business goodwill which was valued and she of course lists in her first affidavit the assets and she lists the shares as, and this is volume 2, pages 13 and 14, this is Mrs Thompson's first affidavit.

ELIAS CJ:

I take there was no cross-examination that's relevant because we're only being taken to the affidavits.

MS CHAMBERS QC:

There was a small amount of cross-examination but not really relevant.

ELIAS CJ:

No, no I just wanted to check that, thank you.

MS CHAMBERS QC:

And there she is listing the assets as she sees them and there is, of course, very significant assets and Nutra-Life she values on the basis of her own valuation, Mr Hussey, \$40 million.

ELIAS CJ:

So what do we take though from this?

MS CHAMBERS QC:

Well there is no asset in there of restraint of trade payment, that's number 1.

ELIAS CJ:

Well but that just buys back into the question as to how this is properly to be characterised. Is it for some property described as restraint of trade dangling there separately or is it an aspect of goodwill, so it's not a –

MS CHAMBERS QC:

Business goodwill.

ELIAS CJ:

Yes, it's not a separate point.

MS CHAMBERS QC:

It does come back to that.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

But you see if Ms Hinton is correct that there is a right to seek a payment for restraint of trade and it's property exists at separation, then that's going to be an asset in regard to all relationship property cases where there is a spouse engaged in a business. It's going to be a new asset and it would apply even –

ELIAS CJ:

If it is a separate asset.

MS CHAMBERS QC:

If it is a separate asset, which is what she's argued.

ELIAS CJ:

Mmm.

MS CHAMBERS QC:

And then of course it would apply regardless of when it's entered into and even if it's in 10 years' time.

ARNOLD J:

Well it would be valued, wouldn't it, at separation, if it exists as an asset?

MS CHAMBERS QC:

Mmm.

ARNOLD J:

The future right to call for an ROT payment would be valued.

MS CHAMBERS QC:

Mmm.

ARNOLD J:

So in that sense it wouldn't interfere with the clean break principle, it would just mean you would have to value it at separation.

MS CHAMBERS QC:

That's right Your Honour but of course it's never been done like that since 1976 and the same asset in regard to employment is going to come in. The right to obtain a future employment job is clearly based partly on skills, what the language of the agreement? Knowledge, skills and experience acquired during the marriage. If a person has had multiple relationships, how is it divided up between the relationships. Is it a time basis or does wife number 1 say, "No he got most of his skills during my time with him, I get a bigger portion of the contract of employment." That's how it works. It would clearly flow on.

Now in terms of, I've already made the point that if he hadn't signed this agreement, restraint of trade, and gone on and set up a new business, that would've been his separate property. I also want to mention that of course Mrs Thompson has never claimed his separate property, his post-separation earnings, not even as maintenance and that's because there's obviously significant sufficient money there for her to meet her reasonable needs.

GLAZEBROOK J:

What say they had sold this business during the marriage? Would the eight million have been separate property anyway under your view and if so, why?

MS CHAMBERS QC:

No it would've been relationship property.

GLAZEBROOK J:

Why?

MS CHAMBERS QC:

Because it's acquired during the marriage. It's under 8(1)(e).

ELIAS CJ:

Sorry the payment made to him would be?

MS CHAMBERS QC:

Absolutely.

ELIAS CJ:

Well doesn't that give away the whole game because if it's relationship property if the matter had been determined before the marriage ended, why isn't it still relationship property?

MS CHAMBERS QC:

Because of the same basic rule, Your Honour. If Mr Thompson had entered a partnership during the marriage, it would've been relationship property. If Mr Thompson entered a partnership after separation, it would've been his separate property.

ELIAS CJ:

Oh, but we're not talking about that here.

MS CHAMBERS QC:

Well we are Your Honour, we're talking about a contract which he enters into which is an item of property, the restraint of trade and a payment of \$8 million.

ELIAS CJ:

I see, yes I understand that argument, yes.

MS CHAMBERS QC:

Yes. So this Act recognises you get property during a relationship, it's highly likely to be relationship property unless it's come from separate. Bang, this restraint of trade would have been relationship property, the \$8 million, no doubt about that. You get property after separation, using your skills and acquisitions or whatever, then it is separate property.

ELIAS CJ:

Well why isn't that entirely arbitrary result a reason to look to the underlying asset as common at both stages before and after separation? Why is that not a reason to avoid the formalism that you're urging on us, that one has to look at the agreement between the parties, the vendor and Mr Thompson as the source of this property rather than the asset that's been built up during the marriage?

MS CHAMBERS QC:

Because that is fair. Because the Act says that your effort after separation is your separate property.

ELIAS CJ:

Well the effort here was simply concluding the agreement, wasn't it?

MS CHAMBERS QC:

No, no, you see that's where I disagree with Your Honour. The effort here was an agreement not to apply his personal skills to go out and make more money for himself.

ELIAS CJ:

Well then the effort here was the agreement.

MS CHAMBERS QC:

No, no I don't think it can be defined that narrowly because what he – he wasn't just signing an agreement, he was saying, I won't go out and use my skills that I have.

ELIAS CJ:

It was new value on your analysis, it's post-marriage value that he has given?

MS CHAMBERS QC:

Given away.

ELIAS CJ:

And that's the issue that we really have to decide.

MS CHAMBERS QC:

That's right, that's right, that's right.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

It's value, he agreed not to get property which would otherwise have been his separate property, that's the key issue. Now if we say, no, no, no let's treat it as relationship property, let's look at the triggers that happen if you decide that. Mr Thompson in fact in my submission did the right thing by Mrs Thompson. He acted entirely fairly. He knew that she'd had the business valued at \$40 million for the purposes of relationship property. He knew that. He knew that. And he knew what a good deal Next was. And he knew that the restraint of trade would hinder his ability to go out and make stacks of more money in the supplement business, and he didn't want to sign it. He could have been a rat. He could have been a rat. I'm afraid like I said Mr Brownie was –

GLAZEBROOK J:

Well but if he'd been a rat, he actually wouldn't have got half of the 72 million –

MS CHAMBERS QC:

That's true.

GLAZEBROOK J:

He would've had to have continued on with the business, wouldn't he?

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

So he would've been cutting off his nose to spite his face frankly.

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

Because you must sell at the height of the market, take some shares in the future ongoing, it's actually a good deal from anyone's point of view.

MS CHAMBERS QC:

Yes but he could have, he knows that there's someone there, sitting there waiting to buy it, he could have refused to sign the restraint of trade agreement because he could've said, well, if I have to share that \$8 million with Mrs Thompson, it's actually not worth me doing it.

WILLIAM YOUNG J:

But then wouldn't Justice Richards have said, well that's okay but I'm going to, we're going to vest the shares in you but you are at a value of \$80 million. Because that's effectively what happened to poor old Mr Z.

MS CHAMBERS QC:

No it would've been a value of 72 million.

WILLIAM YOUNG J:

Well I know – the short answer to it, on the view that I currently prefer, is that a Court would value the property in his hands at \$80 million. And that's, I mean, and that would, because that is what happened in *Z v Z*. Not quite so many noughts.

MS CHAMBERS QC:

Well I don't accept that because, of course, I don't accept that *Z v Z* actually dealt with a restraint of trade payment, and – but even on that basis you'd have to say that husbands like Mr Thompson would first of all not, they'd be dis-incentivised in terms of selling the business. They would sit and wait. They'd negotiate to buy the wife out for the \$40 million instead of the 72 million. They wouldn't contract, in my submission, to limit their future separate property earnings without a reasonable compensation, and we know that because Mr Thompson said he wouldn't. He wasn't prepared to sign that sale and purchase agreement unless he got \$8 million because it cost him, it has cost him big time in terms of his future earnings. For 10 years he has not been able to go out and start up his own business, in this area –

WILLIAM YOUNG J:

Well doesn't he –

MS CHAMBERS QC:

– which he set up numerous businesses in.

WILLIAM YOUNG J:

Yes, in this area.

MS CHAMBERS QC:

Yes, in this area. So he, instead he says, no, no, let's take this deal, let's take the whole enhancement, I'm not just going to pay out Christine Thompson 20 million, let's take the whole enhancement but I want to receive the money that relates to my future separate property. So I do say that the distinction between property acquired during the relationship and after is important because it stops couples being in financial purgatory when they separate. The delay – it discourages delay in terms of Court proceedings, and having to go to Court, otherwise the other party will cling on to the coattails of the financially energetic party, because the benefits and efforts done post-separation get shared equally. You can see that it would incentivise people like Mr Thompson not to enter these kind of agreements.

So those policy considerations in the Act supports Mr Thompson's case, and as the Court of Appeal said, the recognition of and giving effect to separate property, being property acquired after separation, is as much a policy of the PRA as the general policy of equal division and the Act couldn't be clearer about that. I've pointed Your Honours to 2F but 2H is also relevant. The use aspect as to relationship property is defined during the relationship. 2E itself, 2(i)(e) – sorry, sections 8(1)(e), 8(1)(ee), 8(1)(g), 8(1)(i) and 9(4) itself, all talk about this separate property concept, that if you get it after separation it's separate property. And even the principles also reinforce this. The purpose of the Act is to reform the law relating to property of couples who live together and recognise the equal contribution to the marriage partnership and adjust division when the relationship ends. The Act is all about the fruits of the marriage, not something after the marriage.

Now my friend also says, the amendments in 2002 support her case. Well in my submission they don't in that Parliament did not change the definition of "property".

Z v Z (No 2) had already been decided. *Z v Z (No 2)* said that earning capacity and personal goodwill are not included in the definition of "property". That's what the Court said. Parliament amended this Act radically in 2002. It didn't change the definition of "property". Parliament can be taken to have accepted *Z v Z (No 2)* as correct in that regard.

What it did change, in terms of traditional marriages, was section 15. Section 15 was Parliament's answer to the issue of earning capacity. They didn't change the definition of "property". They clearly accepted *Z v Z (No 2)* and that was the result. The earning capacity compensation provision. There is no claim under section 15 by Mrs Thompson and so I say that *Z v Z (No 2)* must have been accepted as appropriate by Parliament.

So for all those reasons I say, in summary on section 8(1)(e), that the restraint of trade was a separate property item which came into existence after separation. It's not relationship property. It shouldn't be relationship property because otherwise you run into serious problems in terms of the desirability of couples getting on with their separate lives, and it's not part of the business goodwill, it simply can't be, because the business goodwill was owned by someone else and it was a different element of property from what the restraint of trade was concerned with.

So then to 9(4) which in some ways overlaps the section 8 arguments. Now my friend says, well, if it's separate property, then Mr Thompson was only able to secure the 8 million payment because of the knowledge, skill and experience he'd built up during the marriage and therefore the discretion should be exercised. I say that's wrong for the following reasons. Number 1, *Z v Z (No 2)*. *Z v Z (No 2)* had the question, does the increase in the earning ability gained during the marriage from acquiring degrees and qualifications and improving career skills and expertise can constitute matrimonial property. And I'm reading, Your Honours, from paragraph 75 of my written submissions. Now Mrs Thompson is seeking an interest in the skills and talents of Mr Thompson built up during the marriage that he is agreed not to use going forward and that is clear from the language of the restraint of trade, that's what it was about. And Their Honours held that that was not property for the purposes of the Act and it is not something that a partner is entitled to share on division. The increased earning ability gained during the marriage from acquiring those skills is not property, it's something that a spouse is entitled to have at separation and as I've said Parliament clearly accepted that. There was no change to the legislation.

That's what the restraint of trade captures, that's what it captures, personal skills, that's not property and Parliament agrees. The second point –

ELIAS CJ:

Well I just have to say because I don't want to hold you up but that form of statutory interpretation is often invoked very loosely and I wouldn't want you to think that I necessarily go along with it, that if there has been a decision of the Courts Parliament is taken to have endorsed the position reached. In some cases that may be so but you'd need to develop that argument more thoroughly for me in this case by reference to the specifics of what Parliament thought it was doing. So I just want to flat that because I wouldn't it to be thought that that approach to statutory interpretation goes without saying.

MS CHAMBERS QC:

Okay let's flag it. In 2002 the Act was amended significantly.

ELIAS CJ:

I understand all of that. I do know something of the background to that. I'm just saying that if you're making the bald submission that *Z v Z (No 2)* was endorsed by Parliament you'd need to give chapter and verse.

MS CHAMBERS QC:

Okay. Well the first point I was making was obviously, and Your Honour knows that, that the Act was so radically changed in 2002 and huge numbers of aspects of the Act were amended in terms of obviously de factos et cetera but also in terms of the division of relationship property. We got rid of that old concept of core relationship property and balance relationship property.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

All that goes. So in my submission it was a thorough look at this Act by Parliament. They do not change section 2, the definition of property and in *Z v Z* I was arguing that earning capacity is relationship property, the Court of Appeal said no it's not. Parliament doesn't change that definition. It does however and the academic commentators accept this, it does accept that there is an issue in regard to the

division of earning capacity after a marriage ends, particularly I suggest in traditional marriage and that came from Their Honours' decision in *Z v Z (No 2)* because we know that because the academic commentators say what came out of *Z v Z (No 2)* was section 15 and you'll find that in the commentaries. That's what change. Section 15 is Parliament's answer to that issue about the inequality that occurs in traditional marriages if all you do is divide existing assets. Section 15. They didn't – and it is in my submission that Parliament can be seen to have made a clear decision not to change the definition of property to include personal skills and earning capacity.

ARNOLD J:

Well I mean it's certainly right that in *Z v Z* the Court accepted the distinction between business goodwill and personal goodwill.

MS CHAMBERS QC:

Yes.

ARNOLD J:

They specifically referred to *Briggs v Briggs* at 291 of their decision but also the Court accepted that that being a partnership case, when you came to value the bundle of rights that were associated with being a member of that partnership, you were entitled to look at the appellant's likely future income and entitlement sum to the partnership agreement and those of course reflected, in part, his in that case personal attributes and qualities that would enable him to earn the sort of income that was available to partners. So the Court was really saying, although we can't deal with this directly as property here's a mechanism in this case that we can take account of future earning capacity and I guess one could say in the present case that there's a similar device or mechanism available to the Court because we have this restraint of trade payment which is inextricably linked to the sale of the business. And so the real argument it seems to me is why wouldn't that be an appropriate mechanism as the valuation of a bundle of rights was in *Z v Z (No 2)*?

MS CHAMBERS QC:

Well there's two answers to that. First of all the skill and attributes of Mr Thompson applied during the marriage are reflected in the sale and purchase of the business and because it was valued on future maintainable earnings, which related to the business contacts we know, the goodwill et cetera, that's what they were buying. So

Mrs Thompson is getting the share and a significant return for the application of Mr Thompson's skills and experience through that contract. And the second aspect is that the difference is that the restraint of trade agreement in this case only comes into existence after separation. The partnership in *Z v Z (No 2)* was of course acquired during the relationship and the funny thing about partnerships at that time is that they weren't valued on the basis of company shares, they were out on their own little funny wing where the partner signed a contract saying it's got no value and they were therefore treated as, well the High Court said worth nil.

ARNOLD J:

Mmm.

MS CHAMBERS QC:

It simply brought partnerships more into a valuation akin to private company shares, future maintainable earnings, what he was going to acquire. Well we've already got that component I say in the sale and purchase agreement. The restraint of trade as in *Z v Z (No 2)*, it harnesses property, it becomes a new item of property. It's a contract, it's a payment for \$8 million. But in this case because it comes into existence four and a half years after separation and because it relates that particular payment, the eight million, relates to Mr Thompson saying, "I won't go out and use my skills", that means that it is clearly in the category of personal attributes but not applied or compensation for work done back during the marriage and that's why it's not on the tree, it's a separate tree. It's got nothing to do with effort during the marriage. It's got everything to do with effort in the future. Because his effort during the marriage is captured in the sale and purchase agreement goodwill and all of the cases so far do recognise this difference between personal goodwill and business goodwill. Now how they're categorised depends on when they're acquired first of all and analysing exactly what the contracts are. What are they actually buying and selling?

ELIAS CJ:

Are the contracts determinative though or would ultimately it be a matter of assessment as to how the characterisation is to be attributed properly?

MS CHAMBERS QC:

It's a matter of assessment, I accept that Your Honour.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

So for example, I think that in this case the contracts really are determinative. Why? Because these were arm's length transactions. Next is a big Australian corporate raider or whatever you want to call them and the people contracting with them were the company and the independent trustees. Mr Thompson has to step out.

GLAZEBROOK J:

Next wouldn't care if it said \$1 for the business and whatever the other sum is for the restraint of trade would it? All it would care is that it got the restraint of trade, it got the business and that it only paid 80 million for it.

MS CHAMBERS QC:

Well I don't know the answer to that Your Honour and it wasn't put to Mr – wasn't cross-examined.

WILLIAM YOUNG J:

But why would it worry them? Why would it worry them? I mean conceivable it might but for the moment I can't think of a reason why it would.

MS CHAMBERS QC:

Well there may, presumably what they paid for it would be relevant to what they told their investors, what they resold it for, establishing the value of Healtheries going forward. I mean when valuers value companies they look at like sales. All of that would've made a difference to Next in terms of what it was acquiring. If it was only acquiring a company worth \$10 million and paying a restraint of trade of \$70 million, that would affect the value of Healtheries and the value of this company when it came to sell it. So I suspect they would've had a whole lot of reasons for why they thought the company was worth 72 million and the restraint of trade only worth eight. I mean remember they are a company which takes other investor's money and buys companies to on-sell. That's what Next does. So what they sold for the business would've been very important to them. Sorry what they paid for the business would've been very important and I do say that if my friend's case was Next would've paid it regardless, she was obliged to cross-examine the Next person who was

involved in the transaction and she didn't. It wasn't put to him. But no I don't accept that Next wouldn't have cared at all. I don't accept that at all.

GLAZEBROOK J:

I think I was just countering your proposition that we can take this as being absolute because it was by parties that were at arm's length but you've said yourself that Next could've had any reasons under the world for how it actually calculated that sale price.

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

So it wasn't anything to do with what Ms Hinton should or shouldn't have done it was just countering that this is an arm's length transaction.

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

Well yes it's an arm's length transaction in terms of the 80 million and the total paid but not necessarily in relation to the division.

MS CHAMBERS QC:

Well I still say Your Honour that Next would've been concerned to make sure they were paying the right amount for the business as opposed to the restraint of trade and I do contrast that with *Brownie* because in *Brownie* –

GLAZEBROOK J:

Well do you know how they treated in their books because they may – because actually you wouldn't have had the goodwill on your books anyway, you would've had the assets in your books usually and you wouldn't had the – I think you would actually have had the whole thing together. I mean do we know what the accounting treatment of it is? I suspect you have to write-off both as being part of the acquisition price of the business?

MS CHAMBERS QC:

I don't know.

GLAZEBROOK J:

You don't have a separate asset which is a restraint of trade asset. So it would all be lumped into goodwill I would have suspected.

MS CHAMBERS QC:

I don't know the answer to that Your Honour.

ELIAS CJ:

I see it's past one. How much longer do you think you might be?

MS CHAMBERS QC:

Perhaps one more hour Your Honour.

ELIAS CJ:

Another hour?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

All right we'll take the adjournment now.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.16 PM

MS CHAMBERS QC:

I think before the lunch adjournment, Your Honour Justice Glazebrook was suggesting that Next would have paid, which is a fundamental issue, 80 million regardless of how it was carved up. The other reason Next would've cared about that is tax. It's an Australian company. It is liable to pay capital gains when it sells this business so the amount it paid for the business was highly relevant in terms of tax. So I don't accept that Next didn't care which way it was paid, and as I say that wasn't put to the principal actor on behalf of Next. The other problem with the argument –

GLAZEBROOK J:

Do we know how the restraint of trade is dealt with when it's looking at the purchase price for tax purposes?

MS CHAMBERS QC:

No, Your Honour asked me that and I don't know the answer to that and there's no evidence on that. The other problem with this too is that the total transaction price wasn't 80 million. We know that Next paid Mark Matthews, the CEO, a restraint of trade and that was the point raised by Your Honour Justice O'Regan.

WILLIAM YOUNG J:

What does that matter though? I mean from the point of view for the realisation by Mr and Mrs Thompson of the value, their value in the business, they have to accept there are some expenses and if, they're not going to get 80 million unless someone else gets some money well then, you know, that's just something they have to accept, isn't it?

MS CHAMBERS QC:

I understand the point Your Honour makes but where I think it does come in is the principled approach to what exactly is this. Is it part of the business and is it just really one transaction. Well it's not one transaction, partly because to acquire the business, and to protect its goodwill, Next also required a restraint of trade from Mark Matthews, and that was exactly the same. It was, Mr Matthews, you're not going to compete with us.

O'REGAN J:

Is there evidence of that because Ms Hinton said there wasn't.

MS CHAMBERS QC:

Yes, there is evidence Sir, it's volume 3, there's three bits of it, volume 3B, page 287 and 315, do you want me to take you to it Sir?

O'REGAN J:

That's all right, I can look it up later.

MS CHAMBERS QC:

And also volume 3A, page 90, and you'll also see it's in the sale and purchase agreement in exactly the same place as the restraint of trade in regard to Mr Thompson and that's volume 3A, page 80. It was conditional that Mr Matthews entered into a restraint in regard to him and in terms of his employment. Same thing. Why isn't that part of the total transaction? It demonstrates the difference –

WILLIAM YOUNG J:

Well it's not the value they held.

MS CHAMBERS QC:

– that I'm trying to emphasise.

WILLIAM YOUNG J:

It's not the value that they held.

MS CHAMBERS QC:

Sorry Sir?

WILLIAM YOUNG J:

It's not the value that they held. It's not value, it's value that someone else had.

MS CHAMBERS QC:

That's my point though Sir. The value that the business held did not include the value of stopping key employees, Mr Thompson and Mr Matthews, from competing against it. So we've got two very different assets and you can't roll them together. The other reason you can't roll them together is demonstrated, for example, by public companies. When a public company is taken over it's absolutely standard to have a restraint of trade of key executives. They're paid money, they're gotten rid of, they're paid money not to compete. That restraint of trade money of course doesn't belong to the shareholders and we can go further –

ELIAS CJ:

Well was there a, sorry was there a restraint of trade agreement entered into with Mr Matthews under these conditions?

MS CHAMBERS QC:

There was a – yes there was Your Honour.

ELIAS CJ:

And was there some payment made to him?

MS CHAMBERS QC:

I'll get the evidence. "Combination of equity and options for Mark", page 287 and 315, "Restrains of trade are entered into with Mark Matthews." That's page 315. Not the details of it Your Honour. The details we don't have.

ELIAS CJ:

So we don't know what value he received?

MS CHAMBERS QC:

Not that's because it was kept confidential.

ELIAS CJ:

Yes, yes.

MS CHAMBERS QC:

And Mr Thompson doesn't know the answer to that but we do know that he was paid.

ELIAS CJ:

So, I mean there's no possible basis for that to be matrimonial property but so what? Your argument is simply that it is in substance the same sort of arrangement, is it?

MS CHAMBERS QC:

Yes, well there's two points out of those issues, Your Honour. First of all under section 9(4), if you say – no, hang on I've got that around the wrong way. Under section 8 my friend is saying that, let's get this right exactly what she says that it is part of the same transaction and what she really is saying is that the restraint of trade is part of the business goodwill, that it's all part of the same asset.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

And the problem with that is demonstrated by Mark Matthews' position because it was also a restraint of trade which Next required before it did the deal and it also was there to protect the business goodwill. So it came out of the business in the same and it related to his further actions and it demonstrates my argument.

ELIAS CJ:

Well only in the sense that it's an equivalent provision for which he didn't get any payment attributable to the value of the business.

WILLIAM YOUNG J:

Just put it in another way. Say they paid him \$2 million and so from the point of view of Next they're saying crikey, you know, we want a business and we want two restraints of trade and we're prepared to pay 82 million. So Mr and Mrs Thompson you better get a restraint of trade off the CEO, if that costs you two million that's tough but you've still got 80 million in process. Isn't this just a matter that bears on the value that they are able to achieve from the sale of the business?

MS CHAMBERS QC:

Well I don't think it does Your Honour because I think it demonstrates the point that Mr Thompson makes that these are totally separate assets and different entities and you can't just roll them into one and say, "Look they were prepared to pay \$80 million for the whole shebang" because they recognise that they wanted different things off different people and what they wanted from Mr Thompson was not related to the business itself and was not owned by the business, it was owned by him and it related to future conduct.

WILLIAM YOUNG J:

The restraint of trade is only valid to the extent to which it's necessary to protect the business it sold.

MS CHAMBERS QC:

Yes.

WILLIAM YOUNG J:

Isn't that inconsistent with your argument?

MS CHAMBERS QC:

Well the restraint of trade in regard to Mr Matthews was presumably also only valid because it related to protected.

WILLIAM YOUNG J:

Well he's an employee, he's an employee so it's a little bit different. But in the case of someone like Mr Thompson who is a vendor, the restraint of trade can only be justified to the extent to which it's necessary to protect the goodwill of the business being sold.

MS CHAMBERS QC:

I just don't see the distinction between that and Mr Matthews. Same thing. Why would they pay Mr Matthews anything if they didn't think it was necessary to protect the value of the business that they were buying. What's the difference?

WILLIAM YOUNG J:

Well I'm not particularly interested in Mr Matthews. What I'm really interested in is this whole sort of dichotomy between what Mr Thompson is selling and what the company is selling but what Mr Thompson is selling is effectively the preservation of the goodwill of the company which is the way it's addressed in the agreement but it's –

MS CHAMBERS QC:

But he's also selling – he's not just selling that Your Honour, he's also selling his agreement not to go out and make other money.

WILLIAM YOUNG J:

That's right.

MS CHAMBERS QC:

Which would've been separate property. It's about his future conduct.

ELIAS CJ:

Not to go out and make other money by competing with the business.

MS CHAMBERS QC:

In the supplements business.

ELIAS CJ:

Mmm.

MS CHAMBERS QC:

Which he was going to do. So if one takes an example of say Nutra-Life had been owned ABC Limited –

ELIAS CJ:

I'm sorry aren't we entitled in any event to draw the inference that he was going to go and compete with the business because that, correct me if I'm wrong on this, I had thought the material you took us to indicated that he was looking at launching another company while he was effectively the proprietor of the existing business subsequently sold, is that right?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

So it's in different circumstances. When you say he was intending to do it, he was intending to do it before he moved out of that business and cashed up really.

MS CHAMBERS QC:

Oh no I think his evidence goes far wider than that.

ELIAS CJ:

Does it?

MS CHAMBERS QC:

Remember he says and the paragraphs go on, "I did not want to enter into a restraint of trade, I wanted to carry on working in that field that I knew all about." And of course why wouldn't he? That's where he'd made all his money or their money I should say. So I want to give a few more examples. Let's say that Nutra-Life was owned by ABC Limited which had nothing to do with Mr and Mrs Thompson and he's just a key employee and ABC sells Nutra-Life four and a half years after Mr Thompson separated from Mrs Thompson and they say, "We want a restraint of trade payment agreement from you." Exactly the same but they don't own it. "And we want it so that you won't go out and compete against the business." Well in my

submission that would not be again relationship property. It's completely different. It's about him and his earnings after separation. Or alternatively what say Next had said, "Listen Mr Thompson forget the restraint of trade, we actually want you to carry on working for us as you have been and we'll carry on earning you the – paying you the 600,000 or \$1 million you've been earning as a salaried person. We don't need a restraint of trade because you're employed but we want a contract from you of employment before we do this deal." In fact they didn't want him to work for them they wanted him out. Would that be relationship property? No it wouldn't, of course it wouldn't. Ms Hinton's never claimed Mr Thompson's earnings post-separation, even though they came out of the business, they related to the skills and qualifications he had built up during the marriage. Never claimed.

Or say he's employed, happily earning his \$600,000 a year, working for Next, Vitaco, three years later after that he says, "I want to go" or they say, "We don't want you anymore." And they say, "Okay well look we want a restraint of trade off you, so here's \$8 million if you sign this." Is that relationship property? No of course it's not. It's not because it's after separation and it's future looking. It's to do with his skills. They could've sold the business with an employment contract. They could've said five or six years down the line, here's a restraint of trade. That would not be relationship property. You need to disentangle the two assets. All of those examples demonstrate that the nature of the restraint of trade is separate property.

Now, we know, also, that in the High Court Her Honour said, "Well, to the extent that the restraint of trade agreement relates to his effort during the marriage, then that will be relationship property under section 9(4). You've got a chance to call further evidence." Now, Your Honours know that there is no evidence which demonstrates that the restraint of trade was due to his performance during the marriage. Why? Because in the Court of Appeal that was accepted by Ms Hinton that there was no further evidence to bring. The restraint of trade payment couldn't possibly be for his performance during the marriage because Next didn't own the company then. They weren't interested in paying him for something he'd done before they acquired the business. Of course they weren't. They were interested in paying him for his post-separation conduct. So it's not – for 9(4) it is not part of the fruits of a marriage because it's not directly traceable to the relationship property.

Also under 9(4), of course, I employ the same argument I used this morning that the discretion shouldn't be exercised because it's contrary to the clean break principle

and I have already developed that need for people to be able to get on with their separate financial lives in separation given that many of us, Your Honours excluded, are having H1, H2, H3 and H4. Obviously also if Your Honours were to exercise the discretion under 9(4) in this case it would also obviously apply to employment contracts.

ELIAS CJ:

Sorry, are you talking about serial marriages? I didn't quite understand the reference.

MS CHAMBERS QC:

Yes, I am.

ELIAS CJ:

I'm always slow at jokes.

ARNOLD J:

Isn't that a slightly artificial analysis in this case in this sense? Here you have a business and the status of the business hadn't been determined at the point the relationship broke down. So there was an issue as to how this business was to be treated and there was the section 44 application and so on but ultimately the very sensible reasons the parties agreed that it would be split and that was given effect through the sale and so on. So it's a little artificial, isn't it, to say, well, this all happened after separation and it happened in that way because it wasn't easy to determine at the point of separation how this asset was going to be dealt with and that has all happened subsequently. So really your main point is that not so much that it happened later but that it's forward-looking, because if it had all happened contemporaneously with the breakdown of the marriage, I think you'd say then, wouldn't you, that the restraint of trade was a future-looking thing dealing with future income-earning potential and wouldn't be brought into play.

MS CHAMBERS QC:

I'd certainly say that but I'd still have the same argument for the reason set out in the legislation. Whether the restraint of trade agreement and the payment under it were relationship property or separate property depends on whether they were entered into before or after separation, even if it had been entered into six months after separation.

ARNOLD J:

But that's a timing feature which is really my point so you might then deal with it under section 9 rather than saying it's relationship property under section 8 because the timing is a kind of happenstance. It's not a kind of critical event in the reality of how that asset, which we'll assume for the sake of argument that the business is a relationship asset or being treated like that, it's a happenstance that the sale occurred later, after the relationship had broken up. So wouldn't that put you squarely into the discretionary territory?

MS CHAMBERS QC:

I can see the point Your Honour makes in that if it had been acquired prior to marriage it would have been relationship property but then Your Honour is right, I would fall back on the second argument that you have to look at what the contracts say in terms of what he was agreeing to do and then analyse it in accordance with the philosophy of the Act. What was that restraint of trade payment for? It was to stop him going out and earning what would have been separate property in the future well after separation.

ARNOLD J:

And coupled with a commitment from him to effectively work in the new business by taking the equity.

MS CHAMBERS QC:

Yes and for nothing and effectively it has to be a director because he's got so much invested there and he's still working as an unpaid director and he's still caught with a lot of his money in that company. Quite a big contrast to Mrs Thompson post separation, who hasn't had to do anything at all for the \$4 million she would get if the restraint of trade is considered to be relationship property.

ELIAS CJ:

You did slip into saying the restraint of trade agreement was property but it's the value he gets that really is property, isn't it, rather than the agreement, which is a restriction. Is that right?

MS CHAMBERS QC:

No, it's not right. Because of the definition of property, property includes contracts under the Act, so the actual –

ELIAS CJ:

Well, it might be but the contract simply restricts him so what's the –

O'REGAN J:

It also entitles him to be paid \$8 million.

ELIAS CJ:

I see, so you look at the whole thing, is that the argument? Where is the contract defined?

MS CHAMBERS QC:

Property includes – it's in section 2 of the Act, a thing in action, so if we apply that definition on my analysis there were two items of property which came into existence in 2006. The actual contract, restraint of trade contract, and the payment of \$8 million, and of course I say that they only came into existence well after separation. That is the property.

ELIAS CJ:

What is the thing in action? The obligation to pay?

MS CHAMBERS QC:

Well, the actual contract is an item of property, yes, the agreement to pay and his agreement not to go out and work in the supplements business.

ELIAS CJ:

So the issue – I'm just wondering why, if against the background that this is inextricably entwined with the sale of an existing asset, if that is the position there isn't some onus to show that the value is properly attributable to the restriction. I know you have evidence that it mattered an awful lot to them and there is some valuation evidence.

MS CHAMBERS QC:

There is good valuation evidence, Your Honour, because the trustees were concerned to make sure that the transaction was fair to the beneficiaries, so they got

Mr Simmons to value the restraint of trade and that evidence is there and they got Deloitte to have a look at the value of the shares so they were making sure that there was no double-up and there's no allegation, there's nothing here which says that Next paid too much for the company or too much for the restraint of trade or that it wasn't an absolutely neutral transaction. Unlike *Brownie*, these were big commercial entities. These were trustees watching their back because they knew they were concerned to protect Mrs Thompson, and it was – there's never been a dispute that this – Mrs Thompson has never disputed that the value for the restraint of trade was appropriate or – and of course she's accepted that the value for the business was an excellent one.

ELIAS CJ:

But isn't the whole underlying premise of her case that she doesn't accept that that value was given for the restraint of trade but that it was given as part of the value of the business that was sold?

MS CHAMBERS QC:

That's right. She's arguing about categorisation, not value.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

And she's saying it's part of the business.

ELIAS CJ:

But why isn't, and this really goes back to the question I asked you earlier about when you said that *Z v Z (No 1)* is really just a case about valuation, why is this not a case just about valuation too in the same way?

MS CHAMBERS QC:

Because *Z v Z (No 1)* I say is a case about the valuation of the business goodwill and the – you can see this very clearly in the facts of this case, the business goodwill cost \$50 million and was sold by Nutra-Life and it was valued at \$50 million partly because it was protected with restraint of trade. So the difference is that Mrs Thompson still gets that whole \$50 million of business goodwill which is more, we know this, we know this on the evidence, it's indisputable which is way more

because of the restraint of trade. Mr Solicitor in number Z was trying to say that you don't value the business goodwill, you discount the business goodwill, you don't take into account the increase that would occur with the restraint of trade. So it wouldn't have been 50 million it would've been right down to 30 or 40 million. That's what he was trying to argue about.

WILLIAM YOUNG J:

Except for the problem the restraint of trade that Mr Z would've given would've been at a level of generality exactly the same as the restraint of trade here, it would be such a restraint of trade as was necessary to protect the goodwill of the business being sold. Now in a case of a solicitor it might not be as extensive and detailed but as extensive in substance as what Mr Thompson gave.

MS CHAMBERS QC:

Well I don't agree with Your Honour on that and the Court of Appeal didn't either. If you *Z v Z (No 1)* the restraint of trade that His Honour Justice Richardson is talking about is not taking away the existing clients of the business.

WILLIAM YOUNG J:

That's what I said, well it would normally be not to practice in the area for three or four years.

MS CHAMBERS QC:

Right.

WILLIAM YOUNG J:

But sorry but at the level of – I understand the details differ but the generality is that the restraint of trade can only be justified by reference to what's necessary to protect the goodwill of the business that's being sold, which I think you accept.

MS CHAMBERS QC:

Yes.

WILLIAM YOUNG J:

So one can assume that the purchaser of Mr Z's business would have required the maximum restraint of trade that could be fairly referable to that topic, just as Next did it in this case. So that level of the generality they're on all fours.

MS CHAMBERS QC:

Yes I accept that but I do say it's relevant, Your Honour, and when you look applying *Z v Z (No 1)* to take into account that Their Honours of course weren't considering an actual restraint of trade but they were assuming that it would be, as you said, ie Mr Solicitor you can't take your existing customers away from your practice, you can still practice as a solicitor because Justice Richardson says he expects that he would be able to, it wasn't stopping him practicing, it just was stopping him practicing in competition with that partnership. This restraint of trade is so much wider that that is another distinction and I accept Your Honour's point that in order to protect the Nutra-Life goodwill, business goodwill that they were paying for, they needed to stop him in the supplements business worldwide because he could, even though this is just little New Zealand business, he could've gone to Asia, started up a supplements business and exported and thus affected their investigation. Now that wasn't something owned by the business and it had to go that wide. And he had to be paid for that because that was a huge thing he was giving away, inability effectively to work in his trade, unlike the solicitor. So the breadth of it does indicate the personal nature of it and also why it should be separate property.

So moving back to 9(4) of course the same point I made this morning, it would also cover contracts of employment because contracts of employment entered into after separation are in part only secured because of the knowledge and skill and expertise built up during a marriage. The Act is designed to capture the fruits of a marriage or relationship and in exceptional cases where the fruits of a marriage or relationship have been received during a period separation 9(4) grants this Court a discretion to treat that as relationship property. This isn't such a case.

Now there's just two other issues I want to deal with briefly. *Brownie* I've kind of dealt with in my submissions at 96 but some further aspects on that. In *Brownie* there was only one agreement, one agreement and of course Mr and Mrs Brownie owned the shares and the whole thing was in one contract including the restraint of trades. Mr Brownie's son was the managing director of the purchaser. It wasn't an arm's length transaction and he said his father was not required to do anything of significance for the \$60,000 yearly payments. He could go to Hawaii if he chose. And there was evidence in this case from the accountant who said that he prepared tax assessments on the basis that the \$10,000 of the yearly retainer was income and \$50,000 was capital and non-taxable. So on that the Family Court Judge, which was

upheld by Your Honour in the High Court said, “Well \$50,000 of the \$60,000 each year is in fact part of the purchase price.” And remember too that under the agreement for sale and purchase Mr and Mrs Brownie guaranteed each other’s performances. So Mrs Brownie was responsible in part for making sure that Mr Brownie performed in regard to his restraint of trade that he got paid for. So they had the same obligations. It was quite different from this case. In this case the deal was negotiated arm’s length more than four years after separation, Brownie was almost immediately after separation and represented our strategic opportunity to sell and the price received was calculated and documented separately with the benefit of expert valuation evidence. It’s a completely different league from *Brownie* and the two payments here represented the acquisition of different assets, interests.

GLAZEBROOK J:

I thought there was just an offer from Next, I didn’t think it was calculated via – didn’t Next just make an offer and there was negotiation about the price?

MS CHAMBERS QC:

Yes but then there –

GLAZEBROOK J:

Sorry, it wasn’t a price that was a price at valuation and agreed on that. There was valuations for the trustees.

MS CHAMBERS QC:

After the term sheet is the point Your Honour is making isn't it?

GLAZEBROOK J:

Yes.

MS CHAMBERS QC:

And that’s true and I accept that, that the Simmons’ valuation and the Deloitte’s one is after the term sheet but look at the context. Next is a big commercial raider who’d just bought Healtheries. They knew the business they were into and they’d looked carefully – they were clearly looking to get that increased profit by combining those two areas of the supplements industry, groceries on the one with Healtheries, pharmacies and direct selling with Nutra-Life. They knew the business, they were experts themselves and it was a willing buyer, willing seller situation. So in a way

Next had expertise as well as did the people who were selling them. It wasn't a cosy in-house family arrangement, it just wasn't.

O'REGAN J:

But the agreement provided for a price adjustment if the assets didn't measure up to the 22, whatever it was, million. That all came out square did it?

MS CHAMBERS QC:

Very close. A slight adjustment, nothing that really concerns us.

O'REGAN J:

Right, not material to what we're doing?

MS CHAMBERS QC:

No.

O'REGAN J:

No, right.

MS CHAMBERS QC:

Actually it was remarkably close at the end of the day after due diligence. So the difference was minor.

So *Brownie* kind of answers Your Honour's question about is it substance or form, what are we looking at because Mr Thompson's case is in this case it's really clear what they were buying and what they paid for it and it's not challenged, there's nothing phony about it, it's not a nonsense. *Brownie* I do say was highly suspicious in the circumstances and it looks like Mr Brownie, bless his cotton socks, was trying to rip off his wife. That was what he was trying to do. Now I accept that the law says it is fact specific. Each separation would need to be looked at carefully to make sure what is it they're contracting for, is it separate property or is it relationship property and that depends on the facts and the circumstances. If he's actually selling, after separation, an aspect of business goodwill, then it's going to be treated differently. So I don't say that the Court is simply bound by whatever the contracts say. In some cases where it's been manipulated by a dominant partner you would look through it, of course you would, you look at what's actually happened but in this case the

contracts do reflect what they were selling, what they were buying and what they were prepared to pay for them. There's nothing disingenuous about this transaction.

And finally, I turn to a few issues, the issue of fairness in regard to the restraint of trade. Mrs Thompson does put forward in her submissions a list of complaints seeking to establish that she's been treated unfairly or in order to seek sympathy and I want to address those because my –

ELIAS CJ:

Well I can't see that it's relevant at all, so –

MS CHAMBERS QC:

So the issues – she seems to indicate that the transfer to trust was somehow unfair.

ELIAS CJ:

What are you referring to in the appellant's submissions?

MS CHAMBERS QC:

I'm referring to paragraph 100 where she suggests, and I won't go there if Your Honour thinks it's irrelevant, that there was the transaction to the trust of the shares was –

WILLIAM YOUNG J:

We still don't have the memorandum, the in effect relationship property memorandum I take it?

MS CHAMBERS QC:

No.

WILLIAM YOUNG J:

Reading your client's affidavit he didn't seem to be denying that such a memorandum existed but rather he was trying to explain it away I thought.

MS CHAMBERS QC:

Such a memorandum does exist and in fact you can see that. I'll tell you where else you can see that. You can get some fairly clear evidence on this from Mr Ellwood's

evidence which really does give a blow by blow description of what happened and what they agreed and it's at page 39.

ARNOLD J:

Volume?

MS CHAMBERS QC:

Blue volume 5.

ELIAS CJ:

Page 39?

MS CHAMBERS QC:

Yes. So paragraph 86 there's a discussion between Mr Ellwood and Ms Hinton and he says that he was concerned that Christine was saying that it was her money, the trust's money and then there's a further email from Christine saying, "The trustees have agreed to distribute the assets equally."

GLAZEBROOK J:

Where's this sorry?

MS CHAMBERS QC:

Paragraph 87 of Mr Ellwood's affidavit and he's quoting a letter from Christine Thompson. And he goes on to say, "I deny that Christine or Michael have any beneficial vested interest in the trust fund. Mr Teresum, who is the trust's lawyer, wrote to Ms Hinton saying place on record their grave concern with the approach taken by Christine Thompson. Through her emails Mrs Thompson is asserting a vested entitlement to the assets. She is mistaken about the trustees' decisions to date and would be grateful if you would disabuse her of that notion. While the trustees have agreed in principle ..."

ELIAS CJ:

Sorry what are you reading from now?

GLAZEBROOK J:

Page 40.

MS CHAMBERS QC:

Page 40, point 2.

ELIAS CJ:

Page 40, para?

GLAZEBROOK J:

C.

MS CHAMBERS QC:

The top of the, the top paragraph numbered 2. "While other trustees have agreed in principle that distributions out of the trust fund would be made in equal proportions and ultimately the assets of the trusts would be divided equally between the trusts of Michael Thompson and Mrs Thompson, neither of these decisions in principle or the approach of the trustees are sufficient to give rise to a vested interest."

WILLIAM YOUNG J:

That's a submission, though. The argument is we're going to treat the trust as if the assets should be held equally for the benefit of Michael and Christine or at their direction but we say that that doesn't encompass or have any relevance to the restraint of trade, whereas I think what Mrs Thompson would say is, "Yes it does because in reality this restraint of trade payment should be treated as referable to the trust and under section 9(4) we can get it that way," and that's not really the argument they're engaging with.

MS CHAMBERS QC:

Okay. Well, engaging with that argument, the trust assets have been divided, taking into account the other beneficiaries, so they get treated equally but they're not actually getting half each.

ELIAS CJ:

When was this written? Was this written before the memorandum?

MS CHAMBERS QC:

I think it might have been after because isn't the memorandum 2006?

WILLIAM YOUNG J:

2007.

ARNOLD J:

If you look at paragraph 82, 1 June, isn't that the memorandum?

MS CHAMBERS QC:

Yes.

O'REGAN J:

So did they set up new trusts?

MS CHAMBERS QC:

They have.

O'REGAN J:

And have the same beneficiaries of this one?

MS CHAMBERS QC:

This is in the evidence. There has been some money distributed to Mr and Mrs Thompson, I think about 30 million each or something like that, large sums have been distributed, equal sums to him and her. Then another large portion of the trust assets, because it also owns the commercial property that Nutra-Life operates out of, are to be distributed into his and her trusts, so one is Mrs Thompson and the children and one is Mr Thompson and the children, so it hasn't been treated exactly as relationship property but fairly Mr Thompson in his personal capacity and the trustees have agreed that Mr and Mrs Thompson are to be treated equally in regard to those trust assets because –

ELIAS CJ:

This is against the background of a section 44 application, which would have cut through all of that. It's hard to take it out of the equation, isn't it?

MS CHAMBERS QC:

44 would not have cut through it, I don't think.

ELIAS CJ:

Well, eventually it would have.

WILLIAM YOUNG J:

It may have.

ELIAS CJ:

Well, it would have set it up to be ...

MS CHAMBERS QC:

That comes back to where I was before, the circumstances of this trust being set up. There is no way it was set up to defeat Mrs Thompson's interest.

WILLIAM YOUNG J:

It doesn't have to be, though, does it? Isn't the effect enough?

MS CHAMBERS QC:

No, not 44. You are thinking 44C. 44 has to have –

ELIAS CJ:

In order to defeat the claim.

MS CHAMBERS QC:

In order to defeat the claim.

WILLIAM YOUNG J:

44C is the effect one, is it?

MS CHAMBERS QC:

Yes.

O'REGAN J:

That's only income, though.

ELIAS CJ:

That's compensation.

MS CHAMBERS QC:

So in regard to 44, it couldn't have succeeded, in my submission, anyway because of the circumstances of the trust and you'll see that in the evidence, that remember Mrs Thompson owns almost half of the shares in this company.

ELIAS CJ:

That may be entirely correct and from all I've seen it does sound to be but the outcome was achieved against the background of an unresolved section 44 application, as I understand it, which just rather means that that whether the trust assets are vested seems entirely beside the point. Of course they haven't. But the parties have decided to – presumably the trustees have fallen into line and are going to make those assets available so that they can be treated as if they were the assets of the husband and wife.

MS CHAMBERS QC:

Yes. I suppose there's a distinction, though, isn't there? Mr Thompson and the trustees have never agreed that this was a case where the trust was going to collapse under challenge because they both set it up, they both wanted it, they both got huge advantages from having these assets and trusts. They got huge advantages at the time because remember the trust tax rate was lower. They both got those advantages. They agreed to Mr and Mrs Thompson being treated equally, not because they were threatened that the trust structure was going to collapse but because in the circumstances of this long marriage that was fair. It was fair but that it is a trust structure and that it exists in my submission cannot be ignored for the purposes of applying the Act because the Act recognises that trust-owned property is different from non-trust owned property.

ELIAS CJ:

I'm sorry, I've lost track a little bit. What is it you say the effect of this being trust property for the purposes of the argument we have to look at here?

MS CHAMBERS QC:

It comes in under section 8(e) in that – it comes in three different ways. Under section 8(1)(e) to be relationship property it has to be acquired during the relationship and it had to exist at separation. Well, they didn't own the shares at separation, so it's not relationship – the business itself is not relationship property under section 8(1)(e). It just isn't because it was in a trust and the Act doesn't say you can ignore trusts for that purpose because it's got specific trust-busting

provisions and under section 8(1)(l) it says that in this case we're looking at gains derived from the disposition of property becomes relationship property, well, there was no disposition of relationship property under 8(1)(a) to (k) because it wasn't relationship property. It was under 9(4) the argument is also relevant because we know that when you use your exercise of the discretion it's usually used in regard to property which is closely associated with relationship property. One of the factors relied on by Mr Thompson in regard to the exercising the discretion under 9(4) is that the business was not relationship property. It was trust property.

ELIAS CJ:

I'm trying to feel the strength of this argument. Is your contention in effect that this never was a matrimonial property dispute because the equal sharing was reached by agreement in terms of the business assets and the matter was never tested, leaving the additional payment outside and not subject to agreement and not able to be brought in as matrimonial property?

MS CHAMBERS QC:

Yes, leaving the business outside, yes.

ELIAS CJ:

Leaving, no leaving the restraint of trade payment outside because it has been agreed that the business assets, the sale proceeds will be distributed equally but you say that's all been reached as a matter of fairness outside the regime of the Relationship Property Act but that there would have been no remedy if there hadn't been agreement in terms of the sharing.

MS CHAMBERS QC:

No remedy, no remedy.

GLAZEBROOK J:

Well there would've been remedy wouldn't there because under 44C it would have the effect of keeping relationship property away from her wouldn't it and there would be an order for half of it to be paid, not by the trustees but by him.

MS CHAMBERS QC:

In regard to the business.

GLAZEBROOK J:

Yes.

ELIAS CJ:

And if that is so –

GLAZEBROOK J:

That would have to be the case.

ELIAS CJ:

- why doesn't it apply to the – I mean what your argument is as to why it would not be appropriate but in terms of the power the Court has, why isn't that also an 8C matter?

GLAZEBROOK J:

8(1)(e)?

ELIAS CJ:

No.

GLAZEBROOK J:

The 44C would only be the trust and the trust property. The restraint of trade wasn't trust property so that wouldn't apply there but there would've been, if he'd dug his toes in or the trustees had dug their toes in there would've been a personal order against him under 44C if he'd said, "I'm not handing over half."

ELIAS CJ:

Sorry 44C.

O'REGAN J:

That's only from income though, 44C only relates to income.

GLAZEBROOK J:

No it's not income, it's not just income, it's a disposition of property isn't it?

O'REGAN J:

No but you can only make an order against income can't you?

GLAZEBROOK J:

No you make an order against him, you don't make an order against the trust. So you tell him to hand over whatever the 35 million was and then he has to then get it out of the trust or not as the case may be. I'm not imagining that am I?

MS CHAMBERS QC:

You are slightly in that 44C only allows orders in regard to Mr Thompson's separate property to be paid from or –

WILLIAM YOUNG J:

But he must have rather a lot of separate property.

GLAZEBROOK J:

No but that's the point he –

MS CHAMBERS QC:

Yeah well relationship property. I don't think he'd have this amount. Or the trustees to pay income. Remember it's quite narrow.

GLAZEBROOK J:

But my point was there was no way he could say this is in a trust I don't have to do anything, a 44C order would be made. Whether she would get anything out of the 44C order without the cooperation of the trustees releasing that money is another matter.

ELIAS CJ:

But there might be other remedies against them.

MS CHAMBERS QC:

I agree. Look let's go into reverse gear here. I accept that when they agreed to set up this trust and they transferred the shares they owned into the M L Thompson Trust, they were disposing of relationship property to trust, right and so 44C applied and I agree that in part, well first of all the trustees agreed it was fair that they be treated equally but also there was 44C sitting in the background. I accept that, I accept that. What I say though is that here you're not concerned with making sure that the business assets are divided fairly between Mr and Mrs Thompson because they've already agreed that, even though it's in a trust. They've already agreed

they're going to be treated the same way and there's no issue with that. That's been down.

ELIAS CJ:

No but you say it's not under the regime of the Property Relationships Act and if there hadn't been agreement there is no way that could have been achieved.

MS CHAMBERS QC:

No, no I don't say that Your Honour. Sorry if I gave that impression, I don't say that. What I do say and the distinction I'm trying to make is that it's still a trust. It is still a trust, it's still owned by trusts and therefore you still have to come back to the exercise my friend and I do day after day, at separation what was owned, is it separate property, is it relationship property or is it trust property. Those are the three boxes that we have to categorise property and they're all treated differently under the Act. In this case the business was and is trust property and that does make a difference despite the agreement, you still have to apply this Act to that business item.

WILLIAM YOUNG J:

But it's very easy, I mean it's all a lot of detail because it's very easy to say do it in two steps. What would be the proper outcome of the case if they'd never transferred the shares to the trusts? It's a proper outcome of the case on that hypothesis is that the \$8 million is relationship property. The same result can be achieved very quickly and directly through section 9(4).

MS CHAMBERS QC:

Okay.

WILLIAM YOUNG J:

On the basis that there was an agreement that the parties would be dealt with equally by reference to the Trust.

MS CHAMBERS QC:

Well there's two answers to that Your Honour. First of all let's assume that as you say the shares were owned by them and it was relationship property, the restraint of trade payment –

WILLIAM YOUNG J:

I'm just making the assumption that let us first look at the position as to what it would've been if the shares had been owned by the parties.

MS CHAMBERS QC:

I accept that.

WILLIAM YOUNG J:

If the outcome of that is, and I'm not saying this is the outcome, but if the outcome of that is that the \$8 million becomes relationship property, then the second step of the exercise is to say well does it really matter that there's a trust interposed given that there were these agreements and can we not just simply cut through this by reference to section 9(4).

MS CHAMBERS QC:

The distinction is this, Your Honour, Mr Thompson's case is that even if the shares in Nutra-Life had remained –

WILLIAM YOUNG J:

Yes I really understand that. I'm actually dealing with the second one, I understand that –

MS CHAMBERS QC:

The restraint of trade would have been separate property?

WILLIAM YOUNG J:

Yes I fully understand that.

MS CHAMBERS QC:

You accept that?

WILLIAM YOUNG J:

Yes.

MS CHAMBERS QC:

Right. So the issue in regard to the trust is nevertheless an issue for this Court because it reinforces the same position. It makes a difference to how you apply the sections.

ELIAS CJ:

I just want to query your submission that the Act is concerned with three categories of property because although trusts feature in the scheme of the Act, the Act is concerned with separate property and relationship property. There are two categories for the purpose of the Act are there not?

MS CHAMBERS QC:

No there's three Your Honour, in my submission.

ELIAS CJ:

So how is trust property treated in the scheme of the Act as different?

MS CHAMBERS QC:

In 44C, 44B.

ELIAS CJ:

But what I mean is I understand that there are specific provisions dealing with trusts but I'm really talking about the scheme of the Act. The Act is concerned with relationship property and with separate property and the critical issue surely in this case is whether the eight million is properly characterised as separate property.

MS CHAMBERS QC:

Yes. I don't dispute that last aspect but just in terms of trust property, I do say that is a consequence of the way the Act operates and because divide beneficial and legal ownership they end up being treated, trust assets are treated differently from relationship property and separate property.

ELIAS CJ:

But surely the only question is whether you can hook them back in under the provisions of the Act.

MS CHAMBERS QC:

Oh yes, yes but –

ELIAS CJ:

That's all. It's not a different category of property.

MS CHAMBERS QC:

It's different – it's only different in terms – it is different in terms of the consequences under the Act because 44C treats trust property as quite –

ELIAS CJ:

Yes I understand that, yes.

MS CHAMBERS QC:

You have a different regime for it.

ELIAS CJ:

I suppose I am speaking about as between husband and wife there's only two categories of property.

MS CHAMBERS QC:

Yes agreed.

ELIAS CJ:

Then what comes into the pool, there may be some issues as to how other property, not nominally, the property of the husband and wife is treated.

MS CHAMBERS QC:

Mmm, yes I see Your Honour's point and I accept that. I suppose the other point to make in terms of the trust issues, just to finish this point off is that if we assume that the restraint of trade was part of the business and effectively the trustees owned it, they would've said, "Okay well we're selling this part of the business goodwill to Next." They would've then had to have turned round if that was trust property and paid Mr Thompson anyway so it becomes circular, because otherwise he wouldn't have signed it. The fact that it would have gone into a – if it is a trust asset they still would have had to have paid.

ELIAS CJ:

Well, that's why the real question is, is it separate property?

MS CHAMBERS QC:

That's right. So I was going to – I just draw Your Honours' attention to the fact that there is a significant amount of evidence to say that both Mr and Mrs Thompson wanted the assets put into trust. Now, my learned friend also says that Mr Thompson deliberately sold the business without informing Mrs Thompson. That's not correct. You'll see in the blue bundle at page 118 a letter from the trustees, 27 November 2006, to Ms Hinton saying that agreement to try and agree the division of property has broken down and we have decided in those circumstances, taking into account the interests of the beneficiaries, these are the independent trustees, that we are going to now try and sell the business and they're going to actively pursue a sale that maximised the value of the company to the trust.

GLAZEBROOK J:

Do they tell her about the particular sale?

MS CHAMBERS QC:

No, they don't.

WILLIAM YOUNG J:

That was deliberate because they thought she would be difficult about it.

MS CHAMBERS QC:

They don't tell her about the deliberate sale because they weren't able to and that's in the same volume.

GLAZEBROOK J:

Does it matter, actually? Is it of any moment?

MS CHAMBERS QC:

I don't think it does matter except that I'm trying to refute the arguments that Mr Thompson has been a rat because I think he has been anything but.

ELIAS CJ:

I really don't get that impression at all.

MS CHAMBERS QC:

There were confidentiality provisions. Next was very strict about it and Mr Ellwood says that.

WILLIAM YOUNG J:

I don't think it matters but I think he also did say that he didn't want to tell his wife because he thought she was trying to scuttle it.

MS CHAMBERS QC:

Yes. There were also allegations that Mr Thompson has been paid unfairly, that he has received too much money. All of that is dealt with in the evidence. He, after separation, continues to effectively run Nutra-Life but also he manages the extension of the trust commercial property. He gets paid for that. He gets paid by other companies –

ELIAS CJ:

But she has no claim.

MS CHAMBERS QC:

No, she makes no claim in regard to it.

ELIAS CJ:

So it's just really irrelevant. I suppose it is a bit of balance to the suggestion that, of what he's giving up with the restraint of trade.

MS CHAMBERS QC:

Well, presumably it's put in there to say that it's fair that you exercised your discretion under 9(4) but my point is that Mrs Thompson –

ELIAS CJ:

That hasn't been developed as a submission.

MS CHAMBERS QC:

No, well, I'm not sure why it's in the submissions but in any case there is no doubt that Mr Thompson was paid independently for that post-separation work and he was historically paid well for that work and he continued to be and that was his separate property.

GLAZEBROOK J:

I think it might have been partly also a response to the suggestion that Mr Thompson had been disadvantaged because he had to be a director for nothing and all of that sort of stuff so it was just a counter to that, both of which I think are probably irrelevant.

MS CHAMBERS QC:

I think it is irrelevant and it's not a counter because it's a different thing that's been paid for.

So just to conclude, the restraint of payment, of course, Mr Thompson says is separate property and he was paid for future restrictions which improved the price of the Nutra-Life business. The restraint of trade wasn't acquired out of relationship property and it's therefore not appropriate to exercise the 9(4) discretion.

Unless I can be of further assistance, those are the submissions for Mr Thompson.

ELIAS CJ:

Thank you, Ms Chambers. Yes, Ms Hinton.

MS HINTON QC:

We have found one of the memoranda on this issue about the agreement about the equal division, treating the trust assets as if relationship property.

ELIAS CJ:

One of them? I hadn't got the impression that there was more than one.

MS HINTON QC:

I think that there were a series of communications so really – and that was all put to the Family Court Judge and she has then recorded in her judgment, which has never been challenged, not being a part of the appeals, she has recorded that there was agreement that the parties had –

ELIAS CJ:

So there wasn't a memorandum that was put in to the Court recording the position?

MS HINTON QC:

Well, there is, for example, a memorandum – one of the memoranda from Mr Vickerman where he says –

ELIAS CJ:

There's no memorandum from both parties recording the position?

MS HINTON QC:

I don't think so, but I think the Judge was advised and then recorded in the judgment what the position was, so in Mr Vickerman's memorandum he was then representing Mr Thompson and he says, "The applicant in her affidavit threatens that unless the first respondent accepts that all assets are to be treated in effect as if they are relationship property, I seek a declaration that the establishment of the M L Thompson Family Trust is void for the representations made to me." Then he says, "The second respondents have, in effect, treated the assets of that trust as relationship property by undertaking an equal distribution of its net assets, although certainly not for the reason advanced by the applicant." Then he goes on to talk about the other trusts and he says, "It is the understanding of the first respondent that all of the trust assets are to be divided equally." I've got some copies of that.

I think the affidavit that my learned friend has taken you to was an affidavit filed by Mr Ellwood, who was seeking to effectively, in my submission, resile from the arrangement that was reached after my friend took over representing Mr Thompson and saw, I would say, potential arguments running on from that. So I think Mr Ellwood is stuck with whatever arrangement was actually reached and can't change that by swearing an affidavit subsequently drawing distinctions.

O'REGAN J:

Well, except that what one trustee says doesn't necessarily bind the others, does it?

MS HINTON QC:

No.

O'REGAN J:

Mr Vickerman was acting for the husband, was he, not for the trust?

MS HINTON QC:

He was, yes, although at that point he may have been representing both.

WILLIAM YOUNG J:

He is referred to in Mr Thompson's affidavit as acting for him, I think.

GLAZEBROOK J:

They were parties at one stage, weren't they?

MS HINTON QC:

They were. They were second respondents at the time of this memorandum and they're named in the intituling, and I see that the – Mr Vickerman's memorandum is described as a memorandum by the first respondent, so it's not described as a memorandum for the trustees.

ELIAS CJ:

Is this the memorandum that's being referred to? That's what I have slight anxiety about.

MS HINTON QC:

I think it's one of them. I think there may be more.

GLAZEBROOK J:

There seem to be a number of – in the affidavit of Mr Ellwood which I've now forgotten, now I mislaid, there was reference to about three or four memoranda from –

ARNOLD J:

Yes that's in volume 5 at page 38.

ELIAS CJ:

Oh goodness.

ARNOLD J:

There's a whole sequence of them mentioned.

GLAZEBROOK J:

There's a whole raft of memoranda.

GLAZEBROOK J:

Because there seems to be a memorandum of an agreement of January or something confirmed in June.

ARNOLD J:

That's right, paragraph 82.

GLAZEBROOK J:

Yes so Mr Tesiram filed a memorandum with the Court on 1 June 2007, that the trustees were acting in accordance with the agreement reached on 9 February 2007 that it would be divided 50/50.

MS HINTON QC:

Right well I don't have that one but I've got a memorandum –

GLAZEBROOK J:

So presumably there's some indication of what the agreement was on 9 February as well.

MS HINTON QC:

I've got a memorandum that I have filed.

GLAZEBROOK J:

That was 1 June 2007?

MS HINTON QC:

5 November 2007.

GLAZEBROOK J:

Oh, so that's a later one. Apparently you did file one on 1 June 2007 according to Mr Ellwood.

MS HINTON QC:

Mmm, well I don't have that.

ELIAS CJ:

But do we need anything more than the 6 June one?

GLAZEBROOK J:

Well we made the 1 June 2007 because that's the trustees.

ELIAS CJ:

Yes I think perhaps counsel should confer and put a complete –

GLAZEBROOK J:

So that was paragraph 82 of Mr Ellwood's affidavit because the 1 June 2007 seems to be somebody acting for the trustees.

ELIAS CJ:

Yes.

GLAZEBROOK J:

As far as one can tell.

MS HINTON QC:

Yes thank you. As I say the matter is –

ELIAS CJ:

But this is all directed at the Family Court Judge's indication that the matter, as between parties, has been treated – that the proceeds of sale have been treated as if relationship property.

MS HINTON QC:

Yes she says, "The parties have also agreed that the assets of the M L Thompson Family Trust were to be treated as in effect relationship property and divided equally, although I note that both respondents have emphasised that agreeing to treat the assets as if they were relationship property does not mean it is accepted that those assets were in fact relationship property.

ELIAS CJ:

Yes, yes, yes.

MS HINTON QC:

That's not what was recorded at the time in the memorandum but that's what was being told to the Family Court.

ELIAS CJ:

Yes.

MS HINTON QC:

A bit later by the respondents.

ELIAS CJ:

Yes.

MS HINTON QC:

So by that stage though the section 44 application had been dropped.

GLAZEBROOK J:

And the 44C wasn't needed but was still there in relation to the restraint of trade but failed in respect of that is that –

MS HINTON QC:

That's right but it's such a peculiar situation because normally you'd be applying under section 44C in relation to an asset that had actually gone into a trust. This was the reverse.

GLAZEBROOK J:

Yes.

MS HINTON QC:

And ridiculous. I mean it is ridiculous for the applicant to be having to rely on section 44C when the trustees had agreed that everything was to be divided equally from the Trust and yet the respondent still uses the Trust as his defence to the claim in respect of the restraint of trade.

ELIAS CJ:

That it's not property acquired in the marriage?

MS HINTON QC:

Yes.

ELIAS CJ:

Well that was a point I was trying to put.

MS HINTON QC:

Yes so, you know, it's illogical that on the one hand the trustees accept that everything that's in the trust is to be divided equally but on the other hand the respondent is able to or tries to take the technical point that because the rest happened to be transferred to the Trust, he can then say, "Hang on a minute because of that this isn't part of the proceeds of sale of relationship property" which otherwise it would be of course immediately under section 8(1), just like it was in *Brownie*. So I totally, well agree is the wrong word because you're only expressing a tentative view but the answer to that if there is no other answer has simply got to be section 9(4) because really the only reason that is being advanced here for that asset being separate property would absolutely and inexorably be under *Z v Z* and *Brownie* but for the transfer of the shares to the trust.

WILLIAM YOUNG J:

I see Judge Rogers concluded that if the sale to the trust hadn't occurred and the shares had remained relationship property the payment would've been relationship property.

MS HINTON QC:

Yes.

WILLIAM YOUNG J:

But she just said well it's too long ago and 12 years since the Trust.

MS HINTON QC:

Yes.

WILLIAM YOUNG J:

Was that issue argued in front of Justice Andrews?

MS HINTON QC:

Yes, yes. So we appealed that and she, well my friend appealed it I think. I'm not too sure now what happened there but it was argued in front of Justice Andrews who also decided against it and I really – you know, it was so expensive also having the trustees involved throughout this. They were making claims for cost orders and so and I decided that it really was quite a tortuous argument under section 44C.

WILLIAM YOUNG J:

Well Justice Andrews dismissed it because she didn't think the restraint of trade payment was referable to the business goodwill. So she disagreed with Judge Rogers and then did it go on – was it dealt with in the Court of Appeal? I haven't read the decision.

MS HINTON QC:

No we didn't run that argument.

WILLIAM YOUNG J:

No, okay.

MS HINTON QC:

I decided to just stay with the claim against Mr Thompson. But there is still of course section 9(4) which fulfils exactly the same point and is somewhat less tortuous but I certainly as an ultimate position, if the arguments don't prevail which in my submission they should, then the ultimate position must be section 9(4). I think though that that would be an unfortunate thing as a matter of precedent. It would be good for Mrs Thompson but unfortunate for precedent because the problem with this Court of Appeal judgment and if we end up with everyone, you know, my friend it will be good because you will be able to deal with it on a case by case basis. That's exactly what we haven't had to do. Because of *Z v Z (No 1)* you've never had to have these arguments because it's always stood. There has been no issue about it. People haven't tried these sorts of things. There's never been anyone go to Court before, well no reported decision where they've tried since *Z v Z* and *Brownie* to say this payment that I've received for restraint of trade is my separate property, even though quite plainly it is a part of the proceeds of sale. So it's as a result of that but you see the problem if we stay with this kind of thinking that it's not actually section 8 and everyone has to fall back, because almost every one of these decent sized sales in New Zealand the businesses are owned by trusts. So the distinctions that the Court of Appeal drew from *Z v Z (No 1)* would be the sorts of things that would

happen on an extremely regular basis because people would make sure that the restraints that they signed up to were extensive, you know, worldwide, why wouldn't you, and, you know, the assets are owned by trusts. So in every instance where there's a sale after a separation which is a very common thing, because these cases do go on for, as Your Honours will be well aware they go on for some years and every instance the prima facie position will be that the restraint of trade payment, no matter how large, will be separate property and the wife, typically the wife who supposedly has made equal contributions towards, will learn a valuable lesson that she should've been the one running the business and been in a position to get a lump sum for restraint of trade and not stay at home and done all of that stuff. So all that thing about equal contributions that Justice Bisson emphasised will pretty much go by the board and you'll have to come back to the Court each time and say, "Please exercise the discretion in my favour," and that's wrong. Not only that it is bizarre what my friend accepts that if you sell a business, even though it's owned by a trust, if you sell it a week before the separation the restraint of trade payment is relationship property, even though, as my friend calls it forward looking, which I do not agree, that's exactly what *Brownie* and *Z v Z* said it's not but if you sell it a week after, bonanza. I mean that is a ludicrous proposition and people will contrive these things and do, but even without contriving it would be easy to do, and what do you have to do, you know, how do you get around – I mean, if the payment is only five million will it be okay under section 9(4), or if it's 50 million will it not be okay? I mean, *Z v Z* was a very clear precedent that was set and it's operated extremely well. There have been no issues with it whatsoever, reinforced very clearly by *Brownie v Brownie* and then this case, and frankly the end result of that judgment from the Court of Appeal, you wouldn't really – with the greatest of respect – have a clue how that was going to operate except that it will operate very unfairly against the non-income earner, so in my submission either you find that the restraint of trade payment is relationship property under section 8(1) because of the agreement to treat assets as, in effect, relationship property which must mean as if relationship property ie that that section applies and it's just simply, just like in the other cases, part of the proceeds of sale or you have another careful look at the argument that I have run that in any event the restraint of trade right is relationship property on its own for all the reasons that we have set out in the submissions. It's recognised by Mr Simmons as such, not as relationship property but as an asset, before the contract was signed. How could he value that unless it was an asset in existence? The trustees asked him to value it. He said, "Here I am valuing an intangible asset, the restraint of trade." There was none.

WILLIAM YOUNG J:

The intangible asset must be the right to work in a particular area. The restraint of trade isn't an asset. If there's an asset, it would have to be the asset that he forgoes by entering into the restraint of trade, which must be the right to earn a living in a particular way.

ELIAS CJ:

That's a strange use of the concept.

WILLIAM YOUNG J:

I think it's a very strange use of the concept.

GLAZEBROOK J:

Isn't the asset the assets that you've built up that then give you the restraint? Because otherwise it doesn't – otherwise it is a restriction.

WILLIAM YOUNG J:

Yes, it's referable to the sale of assets that are within the reach of the Act one way or another.

MS HINTON QC:

Yes, so I guess that comes back to that sort of goodwill intangible kind of thing, so you're building up right through the marriage all those personal connections and knowhow, business knowhow, not your personal attributes. You're not selling those at all. You keep all of those. You've still got all that entrepreneurial skill. You are actually still in a much better position than the person who stayed at home. But you can't use the actual knowhow that you've got that you've built up which is really, in my submission, goodwill. It's goodwill and it's directly associated with the company, so I called it, when I did that schedule for the Court of Appeal which they, in my submission, well, it obviously didn't help and I think, with respect again to the Court of Appeal, that they have misrepresented the schedule in three or four places in their judgment but I'm not going to waste time going through that because hopefully if you look at it you'll see when you look at the schedule it does not say what the Court of Appeal – how the Court of Appeal reinterpreted it. But it must be the case, mustn't it, Mr Thompson was the person – and Mrs Thompson, as well, they were both involved in the business to begin with. He was the one who was personally going along

building up all of this, in effect, goodwill. He had the knowhow, just look Mr Z in *Z v Z*. What is he selling when he sells the business? It's goodwill that's actually him. Well, the same with Mr Thompson, in my submission. There's most of the goodwill is owned by the company, but some of it, because he started the business and ran it all that time, is still with him and ongoing right through the relationship, and it seems when he sold – or Mr and Mrs Thompson sold, because they almost equally owned the shares, the shares to the trust, there can't have been any restraint of trade. Mr Thompson can't have been paid for a restraint of trade so he had the right at that point to seek one but held on to it, so he still had it at the end when he sold, and in my submission that is, in itself, that knowhow is goodwill and it's not owned by the company. It's running alongside with it and that's why he was able to say on his sale, "You pay me," either to the trustees or the purchaser. What's he getting the money for? I know the way it is framed is not to compete, a promise not to compete, but in effect what he's selling is an intangible asset and that's exactly what Mr Simmons says and it's consistent with what Justice Richardson said and it's consistent with the approach to property in terms of the Act. I mean, if a bundle of rights is property –

WILLIAM YOUNG J:

Well, how would you have valued it? If this litigation had happened while the business was still owned by the trust, what would you have suggested the valuation would have been?

MS HINTON QC:

Just exactly the same way that Mr Simmons valued it before the sale and before the restraint of trade.

O'REGAN J:

No, Mr Simmons had a contract in front of him and was asked is this a fair value for what he's giving up. It's a completely different exercise.

MS HINTON QC:

No, with great respect, I don't agree. You would have to say what's the value of this business based on the maintainable earnings, what multiplier will I choose? Now, if Mr Thompson is left free to compete, what impact will that have on my view of the value of the business? The same thing Mr Simmons did. He won't know the numbers, I agree with you, he would have to come up with his own numbers in this situation.

O'REGAN J:

Well, you got a valuation. Nobody asked this question, did they?

MS HINTON QC:

Well, I think this valuation was based inclusive of a restraint of trade.

O'REGAN J:

It's actually was quite the contrary, because it said it didn't think there was any key employees.

MS HINTON QC:

I don't know. I haven't looked at that.

GLAZEBROOK J:

It just turned out to be a bad valuation, one assumes, because – or this was just a very lucky sale price.

MS HINTON QC:

Well, no, I think there are a few things there. One is, as the Court of Appeal recognised, it was an indicative valuation and it was based on incomplete financial information. The second thing is that this sale was a particularly favourable sale, and this is so on the evidence of Mr Thompson of the trustees because of the synergistic nature of it, because Next was managing to buy, at the same time, these two complementary businesses and there's often a huge margin in that because you can streamline your expenses and so it wasn't so much that they were overpaying. The two companies were just fortunate in being at the same place at the same time, so the value was there because of the nature of the sale.

O'REGAN J:

Yes, but the question I was asking is what would – you're saying an asset exists, some sort of right to call for a restraint of trade in the future if the business is ever sold. Is that what it is?

MS HINTON QC:

Correct.

O'REGAN J:

And what I am saying is, well, how would you suggest that should – if there hadn't been a sale as there wasn't in *Z v Z*, what would you have suggested should have happened?

MS HINTON QC:

I think you value it in the same way you value the intangible assets of the company. So you look at the income stream.

ELIAS CJ:

You look through the trust, is that what you're saying?

MS HINTON QC:

No.

O'REGAN J:

You can't look through the trust at the moment because you haven't got this agreement to treat the relationship property yet, so there's a trust that owns the company and the company owns a business and the business employs, in this case the husband, and you're saying the husband has a right that when the company owned by the trust sells the business it will have to get him to give a restraint of trade and he will have to be paid for it. Is that what you're saying? That is his asset so his asset is the possibility of being called on by the company to give a restraint of trade if the company decides to sell its business in the future.

MS HINTON QC:

Yes.

O'REGAN J:

Is that it?

MS HINTON QC:

Well, it's the goodwill. It's the goodwill that he's built up and that he is able to capitalise on, realise, via the restraint of trade on a sale, and the same, the same – goodwill is built up in the company.

O'REGAN J:

But –

MS HINTON QC:

Can I answer the question about how I think they'd value it?

O'REGAN J:

Well, I'm just trying to understand what you're saying the asset is.

MS HINTON QC:

It's an intangible –

O'REGAN J:

You're saying it's the – he can call for a payment in the future if an event occurs where a company owned by a trust he's associated with sells its business? Is that what...?

MS HINTON QC:

Yes. I think it's goodwill.

WILLIAM YOUNG J:

Yes, I know, but goodwill is a horrible word really because –

MS HINTON QC:

Well, an intangible asset.

WILLIAM YOUNG J:

– because it has so different meanings.

MS HINTON QC:

Mmm.

WILLIAM YOUNG J:

I mean, leave the G word out of it.

MS HINTON QC:

Yes, okay, I'm happy to do that.

ELIAS CJ:

Will, do you mean? Make it “will”?

WILLIAM YOUNG J:

Yes. Well, yes. The –

MS HINTON QC:

Or good.

WILLIAM YOUNG J:

Two ways of looking at the assets. There’s one way which is effectively the way Justice O’Regan has put it, that it’s the opportunity to get paid if there’s a sale.

MS HINTON QC:

Mmm.

WILLIAM YOUNG J:

And the other way is it’s what you’re giving up by signing a restraint of trade which is effectively a right to earn an income in a particular way.

MS HINTON QC:

Well, I don’t agree with that second because if you look at – I don’t think – when you look at the way in which they do value restraints of trade, you value it by determining what chunk of the goodwill, the future earnings of the company, will be lost. So they don’t value it by –

WILLIAM YOUNG J:

I really think this an extraordinary complex and elusive argument –

MS HINTON QC:

Right.

WILLIAM YOUNG J:

– when there’s a very simple argument here.

MS HINTON QC:

All right, well, let’s just go with 9(4) then, or section 8(l).

WILLIAM YOUNG J:

I think 9(4), section – I think section 8(l) and 9(4) –

MS HINTON QC:

Yeah.

WILLIAM YOUNG J:

– are the straightforward ways of looking at the case.

GLAZEBROOK J:

It's just a similar way of saying it's referable to the asset.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

So however, whichever way you put it, it's referable to the asset. It's just trying to describe how it's referable to the asset by making it a property right encounters those difficulties of terminology.

MS HINTON QC:

Yeah.

GLAZEBROOK J:

But all you're really saying, it's an asset that's referable to the sale and therefore it's an asset in its own right. It's relationship property and not separate property.

MS HINTON QC:

Correct. I think it would be helpful to read the Simmons' valuation to see how it could – because he is the expert for the trustees and his evidence is put forward by Mr Thompson to see how he approached the matter of determining the value of the goodwill, sorry, of the restraint of trade.

GLAZEBROOK J:

So it was a comparison between the value of the business without the goods – without the restraint of trade and the value of the business with the restraint of trade

and the difference between those two was the value of the restraint of trade. Have I got that right?

MS HINTON QC:

Yeah. So he said there'd be a risk of the future maintainable earnings dropping down and so he worked out what the future maintainable earnings would be if Mr Thompson were to compete and said so therefore the goodwill would be worth that much less, and the decrease in value of the goodwill of the company was correspondingly the amount attributed to the restraint of trade.

ELIAS CJ:

Is that...?

MS HINTON QC:

Look, I totally agree that the more, much more straightforward route is section 8(l) or section 9(4).

Now I'm just trying to see whether there's anything else that my friend has raised. I probably should just make it clear I don't know whether Your Honours probably appreciate this or if I said it before, we agreed not to cross-examine any of the witnesses. All we did, because we agreed that it was a legal point basically, so all – there's very limited evidence only because Justine Reeves, who's one of the daughters of the Thompsons, gave evidence about what Mr Thompson had said about the Vitaco shares and what they were worth and how he hoped to sell them for twice what he'd paid for them, and she got cross and so we agreed to have evidence purely on that issue. So other than that it was agreed just to simply leave the matter on the basis of the affidavits and I didn't think that that really affects anything.

Is there anything that Your Honours are – this business about the – I think I probably do need to say this again, although I did say it in opening, the restraint of trade being future looking. That is the point that Your Honour dealt with in *Brownie* where you said, "Well look that's one way of looking at it." That was the argument. That was the argument that succeeded before Justice Holland in *Z v Z (No 1)* and got overturned in the Court of Appeal and then it was the argument that was also run in *Brownie* and the answer was no it's not, it's not, that's not what it is, it's part of the proceeds of sale of a business. It's not a payment for future looking for lost earnings or anything of that nature and when you look at Mr Simmons' valuation, that's not in

any way how he's calculated the eight million, it's simply a chunk of what would otherwise be the goodwill of the business.

GLAZEBROOK J:

What do you say about the four year or four and a half year gap before it was entered into?

MS HINTON QC:

Oh, after separation?

GLAZEBROOK J:

Yes.

MS HINTON QC:

Well I'd say it's immaterial because it's clear that what you do is value as at the date of hearing and that's really important to the law. People don't get disadvantaged, in fact in my submission –

GLAZEBROOK J:

So the argument is that it's just a – because it was really just a valuation of the asset that was available at the date of separation. That's fine.

MS HINTON QC:

Correct.

GLAZEBROOK J:

It wasn't an asset that came into existence at that date because it's referable to the sale?

MS HINTON QC:

No and, you know, for example in *M v B* the Court seriously, in my submission, rewarded the wife for the long period of time that there was. I mean people – the way the Act works is such that the Courts make quite sure and the provisions are all there to ensure it happens, that there is no prejudice to a claimant by the fact that it's taken some years to get to a hearing date. That shouldn't be in any way relevant.

GLAZEBROOK J:

So that's the only relevance of it because you say it was the asset that was there at the date of separation?

MS HINTON QC:

Yes either as the part of the proceeds of sale or –

GLAZEBROOK J:

Or a separate asset.

MS HINTON QC:

– goodwill or the same thing applies if it's 9(4), it would be the same approach.

GLAZEBROOK J:

Yes.

MS HINTON QC:

I mean that's really imperative because both parties have to share and I totally agree with Your Honour that there's no significance in the points that my friend was raising right at the end of her submissions. They were really just raised as a counter to this claim about unfairness to Mr Thompson which I say has no relevance at all to the issues. That would only come in if it were a section 18B claim, where everyone's post-separation contributions get properly dealt with. I mean the scheme of the Act actually works quite well as long as you stick to the basic principles. You can't start throwing at a section 8 argument the kitchen sink, you've really just got to say is there property viewed in a substantive way, you know, in the substance of the thing and when was it acquired and the act is intended to be, as I think the cases are made fairly clear to, you know, aim at capturing everything that does come out of a relationship and so it should be. I don't think there's anything else that I've –

O'REGAN J:

I take it that nobody is contending for the kind of apportionment that the High Court Judge suggested?

MS HINTON QC:

Well no I couldn't see how that would work to be honest with you Your Honour.

O'REGAN J:

Yes I think that seems to be a joint view.

MS HINTON QC:

Yes.

O'REGAN J:

So I just wanted to make sure that's something we can put to one side.

MS HINTON QC:

I think, you know, it should really be the sort of line of questions that Justice Young raised earlier, you know, if but for the Trust this would've been relationship property, the answer to which is yes, then if for some technicality it's not it should be treated as such under section 9(4) and I think it's important because of the unfortunate flow on consequences of the case otherwise for everyone else. So unless -

ELIAS CJ:

No thank you.

MS HINTON QC:

Thank you.

ELIAS CJ:

Thank you very much counsel for your helpful arguments. We will reserve our decision but would you confer about putting before us the full set of memoranda or perhaps an agreed statement if that's possible.

COURT ADJOURNS:3.56 PM