IN THE SUPREME COURT OF NEW ZEALAND SC 23/2015

[2015] NZSC Trans 21

BETWEEN **MARK ARNOLD CLAYTON**

MARK ARNOLD CLAYTON (AS TRUSTEE OF THE VAUGHAN ROAD PROPERTY TRUST AND OTHERS)

Appellants

AND **MELANIE ANN CLAYTON**

Respondent

SC 38/2015

BETWEEN **MELANIE ANN CLAYTON**

Appellant

AND **MARK ARNOLD CLAYTON**

MARK ARNOLD CLAYTON (AS TRUSTEE OF THE VAUGHAN ROAD PROPERTY TRUST AND OTHERS)

Respondents

Hearing: 1 September 2015

2 September 2015

8 September 2015

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

Appearances: M J McCartney QC and K E Sullivan for Mark Arnold Clayton

C R Carruthers QC and A S Butler for the Trustees

D A T Chambers QC and J R Hosking for Melanie Ann Clayton

MR CARRUTHERS QC:
May it please Your Honours, I appear with Mr Butler for the appellant in appeal 23 and the respondents in appeal 38.

ELIAS CJ:
Yes, thank you, Mr Carruthers, Mr Butler.

MS CHAMBERS QC:
May it please Your Honours, I appear with my instructing solicitor, Ms Hosking, for Mrs Melanie Clayton.

ELIAS CJ:
Thank you, Ms Chambers, Ms Hosking.

MS McCARTNEY QC:
Yes, may it please the Court, I appear for Mr Clayton with my learned friend, Ms Sullivan.

ELIAS CJ:
Yes, thank you Ms McCartney, Ms Sullivan.

Counsel, I have been in a meeting but I have just got your agreed order of appearances. Our preference had been to hear the two appeals sequentially, because we think that that's a more intelligible way to deal with it rather than altogether, but is that going to cause problems? So we'd hear appeal 23 first and then appeal 38.

MR CARRUTHERS QC:
So we deal with the questions in appeal 23?

ELIAS CJ:
Well, what I thought would be sensible, since although the Court's posed those questions actually they're all inter-related, and we thought really that the, the Mr Clayton should go first in the 23 appeal and that Mrs Clayton would go first in the 38 appeal, which is really her appeal. Because although there is the issue of sham,

that's actually very hard to separate from, or may be hard to separate from the arguments about property in any event.

MR CARRUTHERS QC:

Well, the difficulty with that, Your Honours, is that, if you're talking about Mr Clay –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– as trustee of the Vaughan Road Property Trust –

ELIAS CJ:

Well, I have a question about that that I'll come to, but if we first of all deal with the sequence of the appeals.

MR CARRUTHERS QC:

Well, I've got one discrete question on clause 7.1 of the trust deed, which on my learned friend's argument doesn't seem to have been put seriously in issue. So it would be, that would be the only argument I would be making and – which is why we agreed that the burden of the case really falls on Mrs Clayton because all other aspects of the questions really fall on her.

ELIAS CJ:

Well –

GLAZEBROOK J:

So Mr Clayton accepts that the power of appointment is relationship property?

MR CARRUTHERS QC:

No.

GLAZEBROOK J:

Well…

MR CARRUTHERS QC:

No.

ELIAS CJ:

Well, surely – I don't want to interfere with the way that counsel think the matter should best be presented, but there is a lot of repetition. The two appeals do seem to be relatively distinct. The substantive burden of the argument in appeal 23 really is the Mr Clayton interests, if I can put it like that for the moment, particularly if it is not being accepted that the trust assets are matrimonial property. So really –

MR CARRUTHERS QC:

Well, Your Honour, can I just deal with this? Because in the issues that are before the Court are sham, illusory trust and the 7.1 clause. Now, that's just in relation to the Vaughan Road Property Trust.

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

Now sham and illusory trusts are issues on which I succeeded in the Court of Appeal and they are issues for Mrs Clayton to argue, not Mr Clayton. The 7. –

ELIAS CJ:

No, I understand all of that, Mr Carruthers.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

It's simply that the appeal that clause 7 does not mean that this is matrimonial property, which is the principal case that you are advancing, is rather difficult to separate from the sham argument. In some respects that is the converse of the proposition that – or, really, you almost call that in aid of your argument, that it is not property. But if – Ms McCartney indicated she had no difficulty with the order that I proposed with the two appeals being heard serially. Ms Chambers, do you have a problem with that?

MS CHAMBERS QC:

No, Your Honour, no. My submissions started with a kind of global introduction but then did divide into the two separate appeals.

ELIAS CJ:

Yes, yes.

MS CHAMBERS QC:

So I'm relaxed.

ELIAS CJ:

So there's two points, Mr Carruthers, I think, really: whether we hear the two appeals serially – and I didn't really understand you to be opposing that –

MR CARRUTHERS QC:

No, no.

ELIAS CJ:

– it's more the order to be taken in the first appeal –

MR CARRUTHERS QC:

Yes, it is.

ELIAS CJ:

– is it?

MR CARRUTHERS QC:

Yes, it is, yes. And can I just deal with the second appeal, because on the 44C –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– you'll appreciate from the submissions which we file that we were really assisting the Court with those in the sense that it's not, it's not a case that is against the trustees of the Claymark Trust, it's really a case against Mr Clayton. And my learned friend Ms McCartney has prepared submissions on that and I propose to say to Your Honours that I would defer to her and not address my written submissions on 44C –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– they're there, but the substantive point is really her argument. So in that second appeal I really have the section 182 issue only. So I'm perfectly content to have them heard sequentially, but I would like to hold to agreement that we made that Mrs Clayton opens on what are the, what are really the primary issues.

ELIAS CJ:

All right, but also deals with your contention on clause 7 –

MR CARRUTHERS QC:

Oh, yes.

ELIAS CJ:

– as part of that opening.

MR CARRUTHERS QC:

Yes, yes.

ELIAS CJ:

All right. Yes, all right, well, we'll stick with the order that you've agreed, that's fine.

Now, Ms McCartney –

MS McCARTNEY QC:

Yes.

ELIAS CJ:

– you haven't filed submissions in appeal 23 –

MS McCARTNEY QC:

No.

ELIAS CJ:

– and we're a little mystified by that, because you've proceeded I think on the basis that only the trustee is an appellant, whereas leave was granted to Mr Clayton as well as Mr Clayton qua trustee. Are you adopting Mr Carruthers' submissions for Mr Clayton?

MS McCARTNEY QC:

I'm sorry about the confusion in this regard, Your Honours, I really do apologise, and I'm pleased I'm here to speak on behalf of Mr Clayton in the relationship property sense. In relation to the issues arising over sham trust, illusory trust, clause 7.1, I have been involved in seeing all of the submissions. If anything arises that affects Mr Clayton I would be grateful if I could speak to it, but I do believe that the trustees' submissions cover his position too.

ELIAS CJ:

So as the first appellant –

MS McCARTNEY QC:

Yes.

ELIAS CJ:

– you are adopting Mr Carruthers' submissions, is that the case, in terms of 23, appeal 23?

MS McCARTNEY QC:

Does Your Honour mean Mr Clayton's capacity as trustee of the Vaughan Road –

ELIAS CJ:

No, I mean as husband, under the matrimonial property dispute.

MS McCARTNEY QC:

In relation to the matrimonial property dispute, Your Honour, the submission made by Mr Clayton, which is advanced in the submissions that are filed, deals with two main issues: one, whether the Vaughan Road Property Trust assets are relationship property, so if it's all set aside, if that were to happen, where does it get Mrs Clayton is really the question, given the finding in the Family Court that the whole of the property at date of hearing – at date of separation was separate property, so that's the first point. The second point –

ELIAS CJ:

Sorry, so this, the argument that is advanced for Mr Clayton in appeal 23/2015 –

MS McCARTNEY QC:

Yes.

ELIAS CJ:

– is that that the question as to whether the Vaughan Road Property Trust is relationship property is answered by what you say is the finding in paragraph 42 of the Family Court decision, is that the short answer?

MS McCARTNEY QC:

It is a short answer, Your Honour.

ELIAS CJ:

Yes, all right.

MS McCARTNEY QC:

It all comes back to separate property, or to property owned by an entity that was associated with Mr Clayton before the relationship started and which, by the Family Court Judge's finding remained separate property throughout.

ELIAS CJ:

All right. So as first appellant you are adopting the submissions that Mr Carruthers makes in appeal 23/2015, is that the answer, except that you would like to be heard if there is something additional you want to add?

MS McCARTNEY QC:

Yes, but in relation to the relationship property issues, yes.

ELIAS CJ:

In relation to appeal 23/2015?

MS McCARTNEY QC:

Yes, thank you, Your Honour. And the second point is, that I advance on behalf of Mr Clayton, is that sight can be lost of the fact that this is still a relationship property hearing. In the end it still has to be a just division of property.

ELIAS CJ:

Yes.

MS McCARTNEY QC:

And the way in which these matters have proceeded through the Court is that sometimes it seems, with respect, that the focus has gone away from an overall just

division to dealing with issues in isolation. So in the submissions I advance on behalf of Mr Clayton I will be trying to bring the focus back to the overall just division and that has been difficult before the Courts for the reason that none of the Courts had quantified their judgments.

ELIAS CJ:
All right, well, we'll hear you –

MS McCARTNEY QC:
So I'll advance that further but that is the argument.

ELIAS CJ:
– on that –

MS McCARTNEY QC:
Yes.

ELIAS CJ:
– and that's principally raised in support of your response to appeal 38/2015, is that the submission?

MS McCARTNEY QC:
It is, but it has application to the other appeal also as to what happens, depending on what the Court's judgment is.

ELIAS CJ:
All right. The reason I raise this is that in both lots of submissions filed on behalf of the Clayton interests, if I can call it that, there seems to be some point being made which almost suggested that Mr Clayton didn't regard himself as an appellant in SC23/2015, and I wanted to clarify that. You are maintaining your appeal, Ms McCartney, are you?

MS McCARTNEY QC:
I'm sorry, Your Honour, I'm just looking at the intituling of 23 –

ELIAS CJ:
Well, I think the intituling's all gone peculiar.

MS McCARTNEY QC:

Oh, is that the reason why?

ELIAS CJ:

Yes

MS McCARTNEY QC:

Oh, I see. Because I'm looking at the intituling and I see that it's Mr Clayton as trustee of the Vaughan Road Property Trust. Is this in relation to the questions, Your Honour, would you mind if I just asked that just so that I –

ELIAS CJ:

No, I'm –

GLAZEBROOK J:

If you look at the original application you'll find that first applicant was Mr Clayton and the second applicant was Mr Clayton in his capacity as trustee.

MS McCARTNEY QC:

Oh, I see –

GLAZEBROOK J:

And the leave was granted in respect of the question of the power of appointment to Mr Clayton personally and Mr Clayton in his capacity as trustee.

MS McCARTNEY QC:

I see, all right. Well, that appeal is maintained in relation to the power of appointment. Thank you for clarifying that.

ELIAS CJ:

Thank you.

MS McCARTNEY QC:

It was, I can see what happened, it was the two, the two appellants put their application for leave in together, I can see how that happened.

ELIAS CJ:

Yes, all right.

All right. Well, then, with that clarification we'll proceed first to hear the appeal in SC23/2015, hearing first from Mrs Clayton's counsel, then from Mr Carruthers, who has the principal carriage of the division of argument between the two appellants, and you may add anything to that that you see fit, Ms McCartney, and then we will proceed to hear the second appeal in which, again, Mrs Clayton, since she brings the appeal, will go first.

MS McCARTNEY QC:
As Your Honour pleases.

ELIAS CJ:
All right, thank you. Yes, Ms Chambers.

MS CHAMBERS QC:
Thank you, Your Honour.

Yes, Your Honours, I do have a road map, which I'll hand up now. So from the road map you'll see that I was intending to do an introduction, which I'm still going to do, and I was intending to deal with the section 44C and 182 submissions first, but I'll change that to deal with the –

ELIAS CJ:
Is that all right? I don't want to throw you out but we think it would be more useful for our purposes to have them sequentially.

MS CHAMBERS QC:
Yes, Your Honour. There may be some points in the 182, 44C, that I just need to double-back on –

ELIAS CJ:
Yes.

MS CHAMBERS QC:
– and one of them is the role of counsel and the role of the trustees, which we've already struck. So I do want to deal with that, because I think that that is indicative of what's gone wrong with these trusts. But I'll come back to that.

So I want to just start by making some broad umbrella comments before digging down into the facts. So as to my introduction, I do say that this case is a case about capturing the fruits of the marriage where some of those fruits have been diverted into trusts created by the husband and controlled by the husband, and that is the issue which confronts this Court.

The context, as Ms McCartney said, is the Property (Relationships) Act, it is for all of these appeals. And I want to start with *Reid v Reid* [1979] 1 NZLR 572, 580, 605 and 610, because we stand on the shoulders of that the great Court of Appeal decision, which remains the pre-eminent decision in regard to this area. So *Reid v Reid,* I refer to it in my submissions at 84 and 85, the PRA is social legislation which creates a different set of obligations for those in qualifying relationships from laws that deal with the property of strangers. The Act is neither a technical statute nor a part of the law of property in any traditional sense.

WILLIAM YOUNG J:
Sorry, have we got *Reid v Reid*?

MS CHAMBERS QC:
No, Your Honour. I'm –

WILLIAM YOUNG J:
Be easier to stand on it if we could actually have it.

MS CHAMBERS QC:
Yes, good point. It's at 85 of my submissions, it's straight out of *Reid v Reid,* 84 and 85. It's my submissions in 23. "The Act is neither a technical statute nor part of the law of property in any traditional sense. The PRA represents the culmination of a gradual process of statutory reform which leaves the property of the persons within its jurisdiction to be dealt with by a set of rules very different from those which govern the property of strangers in common law. It is social legislation in its widest general application." Mrs Clayton's case is that the Act is sufficient in its subject, scope and purpose, to address the elephant in this courtroom, the often devastating effect of relationship breakdown on women and children. To achieve the Act's aims of just division, having regard to the economic advantages and disadvantages – well, what could be a bigger disadvantage than millions of dollars going into a trust – and enhancing equality, the provisions of the Act should be read in a fashion that prevents Mr Clayton using trust structures to defeat equal sharing of the fruits of the

marriage. In this case, Mrs Clayton says the legislation itself, the terms of the trust deeds and the facts establish that Mr Clayton's ownership remained there all the time, cloaked by trust deeds to conceal the reality of this ownership. When it suits him, he takes the cloak off, for example, when he's wanting to borrow money to buy $3.3 million houses or invest in other sawmills. Mrs Clayton relies on overseas cases because the overseas cases in the United States, UK, Hong Kong, Australia and Canada have all dealt with the very issue you're dealing with, and they've dealt with that in the context of legislation which did not say, "And by the way you divide trust assets." It was legislation which said you look at property, sometimes using the word "resources" as part of the definition, and the final Courts in all of those jurisdictions have come to the same conclusion, that is, for this area of law core family values trump, and to achieve fairness, where it is appropriate, control of trust assets get taken into account in property to be divided. We are left behind, we are the only jurisdiction of equivalency who have not dealt with this issue. It's time. The overseas jurisdictions without exception have taken a robust approach, looking at the reality of the spouses' circumstances, rather than the presumptions afforded by equity. The overseas jurisdictions have focused on the core family law values of achieving fairness, particularly for women. Mrs Clayton seeks that this Court does the same thing.

Now in 23 in particular, but also to some extent in 38, Mrs Clayton puts up a number of options to solve the problem. Some of them solve the problem for all future cases, the issue of fruits of the marriage going into trust. Some tinker. They'll solve the problem for Mrs Clayton but not for other cases. Mrs Clayton urges a result which gives a comprehensive remedy to this issue. It's unlikely that this Court will have these issues before it again in the near future.

Now, so I want to go now with Your Honours' leave to the road map, and the section, the provisions in regard to 23 start with, start at page 6 under "Property".

ELIAS CJ:

Sorry, page 6?

MS CHAMBERS QC:

6. Well, actually, they don't, they don't really. They start under page 4, sorry.

ELIAS CJ:

So which –

WILLIAM YOUNG J:

Road map.

ELIAS CJ:

Oh, the road map, sorry. Yes, thank you.

MS CHAMBERS QC:

I want to start – so the heading is, "Sham, illusory, lack of intention to create a trust," that first bundle of issues, then I, in the order that Your Honours have directed the issues are to be addressed, and then I go on to deal with interests, being property.

I want to start off with some of the facts, and I am submitting that the facts show that Mr Clayton, Mr Clayton's own evidence, is entirely consistent with the property being his property. I want to go first of all to his first – oh, no, I'm slight out of synch. Sorry, Your Honour, because we're slightly out of synch here.

I want to go first of all to volume D, to Mr Clayton's first affidavit. It's at 891 of the orange volume – 892. So this is Mr Clayton's first affidavit, and there's some parts of this evidence which will be of assistance. Now he says in paragraph 2, "We had a relatively happy marriage," he says he still loves Melanie, and there's absolutely no dispute by anyone that this couple worked, both worked very hard in this 20-year relationship. 3, "As Melanie says, we had a traditional marriage. I felt a strong duty as the breadwinner to provide for Melanie and our family," that's what he was doing during the marriage, that's what the money was for in regard to these two trusts where she's a beneficiary, "I was providing for Melanie and the family." Furthermore, there was never any suggestion to the contrary. "I did not keep her in the dark. I merely felt the responsibility of running the business and all the pressure with that entails fell to me. It was in these circumstances that I did not think it was necessary to discuss the operations of the business with Melanie. As she accepts, Melanie never asked me for much information." So he's saying, "Look, I did it for us. She didn't understand that all this property was going to trusts, et cetera, I never told her, but I did that to protect her. In retrospect I accept that I may have been too controlling with regard to money, although I would emphasise that we never actually had a lot of money available, inherent in the nature of the business." He accepts he's controlling, he's controlling in nature, these trusts and the evidence establishes that he intended to control it.

ELIAS CJ:

Sorry, what's this submission directed at, what's this narrative, what submission do you make from it?

MS CHAMBERS QC:

That the trust property was effectively –

ELIAS CJ:

This is –

MS CHAMBERS QC:

– his property and that it's part of the fruits of the marriage.

ELIAS CJ:

All right.

MS CHAMBERS QC:

And was intended to be by Mr Clayton.

ELIAS CJ:

There's nothing very specific there.

MS CHAMBERS QC:

No. And then paragraph 28 on page 896, he says he's aggrieved, that the financial affairs were a ruse, and that in fact it was designed to protect Melanie from a real contingent liability, "The financial affairs have been structured not to disenfranchise anyone," well, let's make sure they don't –

GLAZEBROOK J:

Sorry, which paragraph are you reading from?

MS CHAMBERS QC:

28.

GLAZEBROOK J:

28, thank you.

MS CHAMBERS QC:

"But rather to protect all of the assets from the litigious marketplace in which the Claymark Group operates." So from that I submit that you have a man accepting that he was working for the benefit of the family, the wealth was for the family, for Melanie and the children, and that he didn't intend the structures to stop her receiving her entitlement, never intended to disenfranchise her. And yet effectively he is trying to do exactly that now.

I want to move in the same bundle please to page 1022, which is Mr Clayton being cross-examined about the Vaughan Road Property Trust.

ELIAS CJ:

So page…

MS CHAMBERS QC:

1022.

ELIAS CJ:

Thank you.

MS CHAMBERS QC:

Line 16. "Isn't it correct, Mr Clayton, that you settled the Vaughan Road Property Trust?" "I'm unsure." He doesn't even know that he settled it. Gets shown the trustees, and shown where he signed it, goes through the definitions that he's the principal family member, then page 1025 he's asked, having gone through the trust deed, line 11, "Well, does that refresh your memory about the Vaughan Road Property Trust?" "No, it doesn't." He hasn't got a clue. Further down the line, line 26, "What are your duties as trustee, Mr Clayton?" "Not sure." He hasn't got a clue. "What do you think they are?" "To be honest, I'm not sure." "Can you give me any examples?" "I," over the page, 1026, "look, I have no idea." "Okay, what documents did you sign in your capacity as trustee for the Vaughan Road Property Trust?" "Documents that are put in front of me?" and it's got a question mark, he must have said it as a question mark, as a question, he hasn't got a clue. "Who put them in front of you?" "William Giesbers it could have been or Ryan Cheshire, my people advised me." Line 28, "So in respect of the Vaughan Road Property Trust, can you give me an example of a transaction where this has happened? That's in regard to putting documents in front of you." "No, I couldn't." 1028, he's asked about, "You've been asked about land being purchased by the trust," the documents are put in front

of him, and the question on line 4 is, “So what we can deduce from that is that on 24 January 2002 the Vaughan Road Property Trust acquired some land worth $284,000 from Vaughan Road Properties Limited, with me?” “Yes.” Further down, “Who decided that?” Line 11, “Honestly, I don’t know.” “Was it you?” “I honestly don’t know.” “Could have been?” “Don’t know.” Page 1030, line 4, he’s been asked about the distributions to Claymark Trust, because this trust, Vaughan Road Property Trust makes a lot of money, I’m going to take you to the accounts, it makes about $500,000 a year as an owner of land that the mills are on, and it sends money off to the other trusts, including distributions to Claymark, because Claymark Trust is a beneficiary. So he’s asked about that, “Who made the decision to distribute that income to the Claymark Trust?” “I have no idea.” “Was it you?” “I have no idea.” “Well, was it you, was it you?” “I don’t recall.” “But these accounts have just been prepared, haven't they,” because Ms Hunter has asked him about the accounts for 2010, “just prepared?” “Correct.” “So who told the account to put $171,000 to the credit of Claymark Trust?” “I honestly don’t know.” “Well, when were these account’s prepared, Mr Clayton?” “31 March, same year as the hearing.” “That's this year, isn’t it?” “Yes, they are.” Question mark at the bottom of 32, “Did you make the decision to distribute the income?” “I’m not sure.” “It’s a lot of money,” over on 1031, “I put it to you that someone other than you directed that, didn’t they?” “I honestly don’t know.” “And then in terms of what you told me earlier, someone will put these accounts in front of you at some stage and ask you to sign them, won’t they?” “That's, that's usually what happens, yes.” “Where are the trustee minutes for the operation of Vaughan Road Property Trust?” “I don’t know.” “Do you know if you ever signed a trustee minute for the Vaughan Road Property Trust?” “I don’t know.” “What considerations,” there aren’t any, by the way. There’s one that purports to give a distribution to the two daughters, which never actually happened, and I’ll come to that in the evidence. But other than that, that's it, it’s undated. “What considerations were given to the split of the trust income between Stacy and Claymark Trust on one hand and Anna on the other?” “Look, again, I don’t know.” “Who would have made that split?” “Honestly, I don’t know.” “And so I can take it from that question,” on line 24, “that given William Giesbers and Bryan Cheshire probably sorted this out?” “I would suggest so, yes,” says Mr Clayton. So he’s taken back to the spreadsheet and asked about his current account because between 2005 and 2007, oh, just when this marriage is disintegrating, Mr Clayton takes $5.2 million out of this trust, 5.2 million, and is, in the movements in his current account, “Do you remember, we talked about this before the adjournment,” and that's back at page 1018, because he’s asked, “Where did that money go, where did the $5 million go?” and he says, “I have no idea.” “Do you understand, Mr Clayton, that in effect what

has happened is that the Vaughan Road Property Trust has paid you 5.2 million?" "Um, it could of." And he says, line 11, line 12, "I don't, look, I don't know a lot about these things." Well, that's the understatement of the century. And then 1032 there's a discussion about the current account, and I'm going to bring you to this evidence, but there he is confirming under cross-examination that he accepts as a matter of principle that the debt lent to the trusts needs to be divided between husband and wife in regard to the current account and that Mrs Clayton would be responsible for half of the debt of this debt owed to the trusts at the point of separation, "But also entitled to the asset, wouldn't she?" "I would have thought so." Now, that's important because actually all he's doing is confirming his earlier affidavits which I'm going to take you to.

So that evidence is a good introduction to the cloak of the trust which Mr Clayton seeks to hide behind. And Mrs Clayton says that the evidence establishes that Mr Clayton had – I've rather lost my track…

WILLIAM YOUNG J:
Have we finished with this volume, volume D?

MS CHAMBERS QC:
Yes.

Mr Clayton had no idea in regard to the operation of the trust, he had no idea of his obligations, it's evidence that he effectively treated the property as his own. Not only were there no fiduciary obligations under the trust deed, even if there were he wasn't going to take any notice because he couldn't even remember signing the trust deed let alone reading it.

So I then want to move on to the evidence in regard to Mr Clayton's presentation to third parties, and that's in volume G at page 1918, and it's under tab 74. Now the history of this document's important too. It only came out immediately before hearing and only as a result of Mrs Clayton getting discovery against the BNZ. Mr Clayton never produced it. At the same time that Mr Clayton was in the Family Court saying his business was worth nil and they're trusts and you can't touch them, he was trying to borrow money to buy another sawmill – the Profiles transaction, I think it is a sawmill, well, it's a similar industry anyway. This is the information Mr Clayton gave to the Bank of New Zealand and the relevant paragraphs are page 1920,

second-to-last paragraph, “This structure is designed to keep the Profiles business totally separate –

WILLIAM YOUNG J:
Sorry, what page…

MS CHAMBERS QC:
1920.

WILLIAM YOUNG J:
Yes.

MS CHAMBERS QC:
“This structure is designed to keep the Profiles business totally separate from Mark Clayton’s existing assets, which are all part of a matrimonial property pool that is subject to ongoing dispute with Mr Clayton.” He sees them as his assets, and what he’s trying to do is buy Profiles but hide it from Mrs Clayton and keep it separate from the relationship property interests. But what’s particularly important is the language Mr Clayton uses with his bankers, Mr Clayton, Mark Clayton’s existing assets. So then we go through, 1923 is of some interest in terms of these proceedings as to how Mr Clayton sees the proceedings, in that it states that everything that Mark Clayton currently owned is considered relationship, but the more important – and 1924, the second-to-last paragraph sets out his plan to use Profiles to buy back Clayton, the Claymark Industry if it gets sold as a result of the relationship property proceedings, so he’s a real little charmer in terms of planning to disenfranchise his wife in regard to a fair division. But perhaps the most important page is 1925, where Mr Clayton says to the BNZ before the Family Court proceedings, “Here is the Clayton net equity.” He rips his cloak off and says, “Here I am.” What’s in his Clayton net equity? It’s not Claymark, it’s Clayton. All of the trusts, all of them. So there he is, and he presents almost the same information, as the evidence establishes, in regard to the purchase of a house in Mount Maunganui for $3.3 million at the same time. And you’ll find the cross-examination on this document at volume D page 1081, and he’s been asked about the page 1925, which of course shows him as having wealth of nearly $28 million, $28 million, and his submissions here today say, well, Mrs Clayton’s getting 6 million and she ought to be happy with that. He says meanwhile to his bankers, “I’m worth 28 million.” So it’s put to him by Ms Hunter, line 16, “It attributes that equity to you,” it’s written down there. “So at least your position to the bank is you have an entitlement to the equity in those

trusts," it's what it says, that's what it says. "The document refers to," it's line 27, "has been referred to as being the composition of the property pool elsewhere in the proposal, isn't it?" "Yes." But he says this doesn't go ahead. Well, that's true, the BNZ doesn't amend, but it doesn't make any difference for our purposes. And then 1083, line 5, "Isn't it interesting, Mr Clayton," that to this Court you've relied on Mr Hagen and, Messrs Hagen and Dent to say that your business is worthless," that's what he was saying in the Family Court, it's worth nothing, "while at the same time you're representing to the BNZ a value in the pool of nearly $28 million." Answer, "What about its debt?" "It's the net equity, Mr Clayton." "If that's what it says." Well, it is what it says, you can see for yourself, Your Honours. And then the purchase of the apartment – I won't spend long on this – and it's at 1086, he's asked about the purchase for the apartment for $3.3 million, he borrows it, and to that lender too, because he borrows some of it, not all of it, he presents a very similar document to BNZ17. Now that document was also produced in the Family Court, and you'll see at page 1089 20 the question from Ms Hunter sayings, "The schedule you gave to borrow money for your $3.3 million house was very similar," and he confirms it –

WILLIAM YOUNG J:
Where's that schedule?

MS CHAMBERS QC:
1089 – well, we have it here, Your Honours, it was produced as an exhibit but it's – do you want that handed up?

ELIAS CJ:
Sorry –

MS CHAMBERS QC:
Am I going too fast?

ELIAS CJ:
No. Where – it was produced as an exhibit but it's not in the bundle, is that so?

MS CHAMBERS QC:
That's right.

ELIAS CJ:
All right. Mr Carruthers, that's accepted?

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

Yes, thank you.

MS CHAMBERS QC:

Sorry, we've only got one copy.

ELIAS CJ:

Can I just have a look at it?

MS CHAMBERS QC:

Certainly. Exhibit 15 11.

ELIAS CJ:

Yes, we need to have copies of that, thank you.

MS CHAMBERS QC:

So the, it's the, the exhibit is referred to on page 1090 as being produced, the letter from Karl McKnight with the schedule. But it's very similar to BNZ17, and on that basis he is lent money to buy the apartment. So all that evidence is at 1089 and 1090.

Now that view of Mr Clayton that he is beneficially entitled to all of the trust property is still his view, and we know that from the presentation to the High Court, and you'll find this in Mrs Clayton's bundle of authorities for 38, which is a decision of His Honour Associate Judge Matthews when Mr Clayton was refusing to pay costs orders and as a cons – to Mrs Clayton, and as a consequence was in the bankruptcy Court.

ELIAS CJ:

Have we got both? Oh, yes, I see, double-sided.

O'REGAN J:

This document you've just handed up does identify the assets, I mean, it calls it, "The Claymark Group," at the top of the page, so he's not saying they're his assets, is he, he's saying they're assets of the Claymark Group, whatever that is? Oh, actually no,

he's not, sorry, I think I'm wrong about that, because the Claymark Group at the top of the page has 19.2 million –

ARNOLD J:
That's right.

O'REGAN J:
– net equity it says, but then the trusts seems to be dealt with separately don't they?

MS CHAMBERS QC:
I think that will – I actually haven't got a copy of it in front of me, Your Honour, which is why I'm hesitating.

O'REGAN J:
Oh, you've given all your ones away.

MS CHAMBERS QC:
Oh, look, I have a copy. Yes, now, the important thing is the word, "Clayton Profile," at the top.

O'REGAN J:
Oh, I see.

MS CHAMBERS QC:
Because remember, you see what he does, Claymark is the company and also one of the trusts, and of course that's a combination of Mr Clayton's name, Mark and Clayton, that's where he gets it from, which is kind of a nice little irony, but Clayton is him, nothing else is Clayton. So Claymark Group is the company, which is relationship property because the trust, the shares were in Mr Clayton's name and not trust property, and that's 18 million, which is the bulk of the relationship property. But the heading, "Clayton Profile," is the key point, Your Honour.

WILLIAM YOUNG J:
You were looking at a decision of Association Judge Matthews, where's that?

MS CHAMBERS QC:
It's in my bundle in regard to appeal 38/2015.

GLAZEBROOK J:

I still couldn't find it.

MS CHAMBERS QC:

So it's…

GLAZEBROOK J:

But the page number might be wrong.

MS CHAMBERS QC:

The page, the decision starts…

WILLIAM YOUNG J:

Oh, it's 101, is it?

O'REGAN J:

Yes.

MS CHAMBERS QC:

At page 101, and I want to take Your Honours to 114. So this is after the Family Court hearing when Mr Clayton is facing bankruptcy for failing to pay cost to Mrs Clayton.

ELIAS CJ:

I'm sorry, I still can't find it. Where is it.

WILLIAM YOUNG J:

It's 101.

GLAZEBROOK J:

Page 114. But it's the volume that's 20 38 rather than 23.

ELIAS CJ:

I see, yes. And it's, sorry, what page?

MS CHAMBERS QC:

Page 114, Your Honour.

ELIAS CJ:

Right, thank you.

MS CHAMBERS QC:

So in those proceedings Mr Clayton produced an affidavit from Mr Giesbers – I can see Justice Young's already got the point – and in the affidavit by Mr Giesbers, his right-hand side, he says, "My confirmation as to Mr Clayton's solvency was based on the schedule of the equity held directly and beneficially as recorded in the financial statements of the various entities as at 31 March 2013, annexed marked 'A'," and he refers in this annexure as a consolidated position statement based on the financial statements of all the entities referred to. Exhibit A sets out a total of $29 million which Mr Giesbers describes as, "Total assets and entitlements of Mark Clayton as at 31 March 2013," and it's derived by two lists, assets of $15 million-odd as total assets owned directly by Mark Clayton and assets of $13 million as described as, "Total assets of Mark Clayton, Mark Clayton as beneficially entitled to," and those are the trust assets. If Your Honours want that affidavit I have it here. But there he is in the High Court saying, "I'm beneficially entitled to all of the interests in these trusts." Now he can't take the cloak off for some purposes and pop it back on for others, like something in *Harry Potter*, he can't do that. Do Your Honour's want a copy of that affidavit?

ELIAS CJ:

Well, I don't think we need it, do we, if it's in the judgment.

MS CHAMBERS QC:

Thank you.

WILLIAM YOUNG J:

Was the result that the money was paid or not?

MS CHAMBERS QC:

Eventually it was, Sir, yes.

WILLIAM YOUNG J:

That's the 47, 45 and the 212?

MS CHAMBERS QC:

Yes, Your Honour.

Now I want to insert here and discuss the role of the trustees in regard to this litigation, which was something I was intending to cover in regard to the appeal 38, but I will cover now. Because in these proceedings the role of the trustees is indicative of Mr Clayton owning the trust property. Mrs Clayton is a discretionary beneficiary of both the trusts that Your Honours have to deal with. She's never been asked what the position of the trust should be in regard to this litigation. They have consistently sided with the husband and –

WILLIAM YOUNG J:
These are the trustees of the Claymark Trust?

MS CHAMBERS QC:
It's actually and the Clayton – the Claymark, sorry, and the Vaughan Road Property Trust.

WILLIAM YOUNG J:
Because Mr Clayton's the only trustee of the Vaughan Road Property Trust, is that right?

MS CHAMBERS QC:
Yes.

WILLIAM YOUNG J:
Okay.

MS CHAMBERS QC:
So this submission is in regard to both trusts. So not only have the trustees consistently taken the husband's position, it's worse than that, because the trustees have effectively argued Mr Clayton's case for him in a number of respects and this, I say, indicates control and ownership.

In regard to section 44C, only the trustees, it is only the trustees who have argued against the application of that section throughout the Family Court, the High Court the Court of Appeal, until now. That is why the assumption was made that Mr Clayton would not be personally represented. Mr Carruthers took that role throughout. Furthermore –

ELIAS CJ:

Sorry, which section? Section…

WILLIAM YOUNG J:

44C.

MS CHAMBERS QC:

44C. Furthermore, if you look at the Family Court –

ELIAS CJ:

But that just could be – oh, well, the significance of that. I understand the point you make about control, but what's the significance in terms of how they've chosen to divide up the argument?

MS CHAMBERS QC:

Well, the trustees are effectively representing Mr Clayton's personal interests and have done so, against the interests of a beneficiary, Mrs Clayton. Now it gets worse than that, because if you look, if Your Honours look at the Family Court transcript, the shares in the timber business are owned by Mr Clayton personally, that was always a personal property issue, it was really a valuation issue. Who cross-examines Mrs Clayton's expert? Well, Raylee Harley appearing for Mr Clayton –

ELIAS CJ:

But was that objected to? I mean, it's a bit like the way the argument apparently is being – I do understand the point about the degree of control directed at your argument of sham, but as to how the matter is divided up in argument it's a bit like what's happening today.

MS CHAMBERS QC:

It is, it is, Your Honour.

ELIAS CJ:

But did anyone object to that course?

MS CHAMBERS QC:

There was objections made, strong objections.

ELIAS CJ:

There was.

MS CHAMBERS QC:

And in fact the Evidence Act 2006 says, it comments on it, but the objections of Ms Hunter were overruled.

ELIAS CJ:

Right.

MS CHAMBERS QC:

But to have the trust's lawyers –

WILLIAM YOUNG J:

So can I just pause you there? What was the – this was related to the valuation of what asset?

MS CHAMBERS QC:

The shares in the timber holding company.

WILLIAM YOUNG J:

Okay.

MS CHAMBERS QC:

They personally owned, they're not trust assets. It is Mr Carruthers for the trusts who cross-examines –

WILLIAM YOUNG J:

Ms Harley?

MS CHAMBERS QC:

– Mr Brendan Lyne.

WILLIAM YOUNG J:

Oh, sorry, okay.

MS CHAMBERS QC:

Nothing to do with trust ownership, nothing. And other issue in this regard is that the arguments in regard to both these appeals – all issues in these appeals have throughout all of the Courts been run by the trustees. Now I know that Your Honours raised the issue of Mr Clayton being on the original document, but that was I suggest pretty clearly in regard to the leave application in respect of valuation of the shares, that's what Mrs Harley and Mr Clayton were seeking leave on. They didn't get leave. In all of the Courts, all of the arguments before Your Honours were only argued by Mr Carruthers on behalf of the trustees.

ELIAS CJ:

So what was the, what objection was taken in – you say Ms Hunter's objection was overruled but what was the objection, to the trusts, to the trustees taking an active role?

MS CHAMBERS QC:

The objection was taken in regard to Mr Carruthers as representing the trustees cross-examining Mrs Clayton's expert in regard to valuation issues relating to the personal property of Mr Clayton.

ELIAS CJ:

But there wasn't a more general objection to the role being allowed to be taken by the trustees in the litigation?

MS CHAMBERS QC:

Only during the evidence.

ELIAS CJ:

Right.

MS CHAMBERS QC:

But I'm raising because, one, I think it's indicative of Mr Clayton's approach to the trust that's consistent with Mrs Clayton's argument that effectively he can't differentiate between himself and the trusts, and secondly I'm raising it because when you look at that recent Hong Kong case of *Kan Lai Kwan v Poon Lok To Otto & HSBC International Trustee Ltd* (2014) 17 HKCFAR 414 they address that issue. And, you know, this is what happens, the trustees roll along and invariably side with the property-owning spouse. They ignore the fact that the wife is a discretionary

beneficiary and they've come in, as they did in *Poon* and as they do in just about all of these cases, and say, "Oh, we'll side with the property-owning spouse."

WILLIAM YOUNG J:

Have there been any cases where a trustee has been removed, where someone like Mr Clayton has been removed as being unable to bring a dispassionate mind to the conflicting interest of the beneficiaries?

MS CHAMBERS QC:

There are numerous cases, and relationship property lawyers do apply to remove.

ELIAS CJ:

But that application's, sorry, under the Trustee Act 1956 to the High Court.

MS CHAMBERS QC:

An inherent jurisdiction of the High Court.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

Yes, Your Honour.

WILLIAM YOUNG J:

It wouldn't work well here because of the powers of the settler.

MS CHAMBERS QC:

That's right, although they can, you could argue that the High Court can use its inherent jurisdiction to remove his power of appointment of trustees at the same time.

WILLIAM YOUNG J:

But not necessarily to alter the beneficiaries.

MS CHAMBERS QC:

No.

WILLIAM YOUNG J:

I mean, the conflict between beneficiaries could be removed by having one beneficiary.

MS CHAMBERS QC:

That's right. So that is why I think here has – I just want to come back to the point that Justice Glazebrook raised, that is the intituling in regard to the original leave application was like that because Mr Clayton in his personal capacity sought leave in regard to the valuation issues relating to the shares, that's the only aspect that he sought leave on, and if you look at Ms McCartney's submissions for leave, that is the only thing she addressed, and that is entirely consistent with the way Mr Clayton's run this case.

GLAZEBROOK J:

But doesn't that give Mr Clayton a problem, because he has an order against him that the power of appointment is relationship property and that order would stand if he didn't appeal against that finding –

MS CHAMBERS QC:

Well, except –

GLAZEBROOK J:

– and it wouldn't matter what the trustees did because the trustees have got nothing to do with it, it's nothing, it's no skin off the trustees' nose whether the power of appointment is relationship property or not, I would have thought.

MS CHAMBERS QC:

I agree, or when there's a 44C order against Mr Clayton. But Mr Clayton hasn't –

WILLIAM YOUNG J:

But why's it not, section 44C? I'd have to have a look at that.

MS CHAMBERS QC:

Because there such a huge amount –

GLAZEBROOK J:

It comes out of personal –

MS CHAMBERS QC:

– of relationship property –

WILLIAM YOUNG J:

It doesn't matter.

MS CHAMBERS QC:

– any order under 44C will first be made –

WILLIAM YOUNG J:

Oh, I see.

MS CHAMBERS QC:

– against Mr Clayton personally.

WILLIAM YOUNG J:

Okay.

MS CHAMBERS QC:

But the point is, Your Honour, is this, that Mr Clayton hasn't felt that he needed to argue those points because he's just rolled up with the trust's lawyers to argue them, and by the way they've been funded out of the trust.

ELIAS CJ:

But what does it matter? I mean, we've got both appellants before us, we can – and so have all the Courts who've dealt with this matter – so if objection wasn't taken and the case proceeded in what seems to have been a fairly sloppy and repetitive way in the lower Courts, because essentially we've got two lots of very similar submissions, what does that matter beyond the point that you're entitled to take from it that it indicates control of the trust?

MS CHAMBERS QC:

It probably doesn't matter, except I do wonder whether in those circumstances Mr Clayton can now suddenly pop up in his individual capacity and say, "I want to be heard in regard to 23."

ELIAS CJ:

Well, we want him heard in his individual capacity, because otherwise we don't have a matrimonial property case properly constituted. If he's not going to appeal then the order in the Court of Appeal presumably stands. So it's clear that he is seeking to appeal that, and we really need to get on and hear it, don't we?

MS CHAMBERS QC:

Yes, I see your point, Your Honour, and I'll move on to the next point in my road map, that the Vaughan Road Property Trust was funded by relationship property.

Now, I want to take Your Honours to the accounts for the Vaughan Road Property Trust, starting with volume E, which is the yellow volume, and I want to take you to 1402 as the starting point. So just to commence looking at these accounts, looking at the 2003 column you will see that the Vaughan Road Property Trust has no third party debtors, it doesn't borrow money off any banks. Instead it –

WILLIAM YOUNG J:

Sorry, 2001?

MS CHAMBERS QC:

2003.

WILLIAM YOUNG J:

Hasn't it got, "Bank overdraft three million"?

MS CHAMBERS QC:

No, that's Mr Clayton.

WILLIAM YOUNG J:

Oh, sorry, I've misread the line. Okay, it had an overdraft in 2002?

MS CHAMBERS QC:

Yes. But in 2003 you will see that Mr Clayton has lent the trust interest-free $3 million. It's only got assets of five million. There's Mr Clayton using what we say is relationship property to fund the Vaughan Road Property Trust. And if we go please Your Honours to 1429, this is statement of financial position in regard to the Vaughan Road Property Trust as at 31 March 2006. Now – so that's just before separation –

GLAZEBROOK J:

Sorry, I just missed that page number.

MS CHAMBERS QC:

1429. The front page is at 1425, it's '06 accounts, but if you look at 1427 they're actually signed off by KPMG on 4 April '07. So after separation the parties are litigation mode. So looking at 1429, there is the rental income, and I'm just pointing out the fact that this trust has a substantial income of about half a million dollars a year, that's basically rent received from the Claymark Industries, the holding company, because it owns the land on which the mills operate, that's how it operates, that's the essence of this trust. And then if you go please to 1431, '05 and '06, '05, just looking at Mr Clayton's loan, there's still no outside lenders, third party lenders, PanaHome is a Clayton company, there's Mr Clayton in '05 still lending the trust interest free $3 million, '05, just before the marriage disintegrates. '06 he's already stripped it down to 1.6 million. And 1471 is the next year – sorry, is the 2008 and 2007 year –

WILLIAM YOUNG J:

Sorry, what page?

MS CHAMBERS QC:

1471. By this stage it has completely changed and Mr Clayton owes the trust money. He now owes – and you'll see it in current assets, 1471 – he now owes the trust 2.1 million in 2007 and 2.2 million in 2008. So he's stripped out $5 million from this trust between 205 and 208. So he's –

ELIAS CJ:

This is was the subject of the cross-examination you took us to earlier?

MS CHAMBERS QC:

It was, Your Honour, that's right. It's him using the trust for his benefit, interest-free.

ELIAS CJ:

Yes, no, I understand that. I'm just really wondering about how it's being revealed in your presentation, because we've already been taken to the cross-examination where he accepts that. One would have thought that you had sufficient foundation for the submission that you make. I'm just wondering about – I mean, it's useful to go

to the actual statements of financial position, but I wonder then why we went to the cross-examination.

MS CHAMBERS QC:

Okay. Well, I suppose because it was there at the time. Sorry. Well, let me just finally check off these accounts because –

ELIAS CJ:

Well, he accepts that he took five million out.

MS CHAMBERS QC:

He does. He doesn't accept it was relationship property though.

ELIAS CJ:

No, no.

MS CHAMBERS QC:

Right.

ELIAS CJ:

Well, that's the issue.

MS CHAMBERS QC:

I'll just, I will take you to volume G, which is the cream-coloured volume, 1983, because that shows post-separation this big surplus coming into this trust of 481,000, so you understand that this is the cash producer which is used to fund effectively Mr Clayton, and there he is on 1984 owing even more money, 2.7 million, interest free, and if you look at 1984 and the equity of this trust, he, in fact the equity's only 4.8 million according to the accounts, 56% of that equity has been given interest free to Mr Clayton, because he's owed 2.7 million, 56% is actually in his hands, which he's using post-separation. Now –

GLAZEBROOK J:

If that's his separate property there's no problem with that though, is it?

MS CHAMBERS QC:

No –

GLAZEBROOK J:
So you still have to say why the assets in the trust were relationship property –

MS CHAMBERS QC:
That's right, Ma'am.

GLAZEBROOK J:
– or were funded from relationship property.

MS CHAMBERS QC:
That's correct, Your Honour. Now let's deal with that now.

I need to take you back – because I, in my submissions I dealt with this under the earlier, the appeal under 38 – to page 2 of my road map please, to point 2, because it's exactly the same evidence for both appeals that it's relationship property. So we say his advances and gifts to the trusts were relationship property –

WILLIAM YOUNG J:
Sorry, I was putting stuff away, what page should we look at, page 2?

MS CHAMBERS QC:
You're at page 2 and point numbered 2. This is proving that the advances in money he lent to the trust were relationship property, and it's the same evidence for both appeals. Now the most important point is this: Mr Clayton conceded in the Family Court that the money owed to him by the trusts and any debts back, any debts he owed them, were relationship property, he conceded it, there was never an argument. Now where did he concede it? Well, he concedes it in both his opening submissions and his closing submissions. This has never been disputed in any Court up until now, and I have copies of both.

ELIAS CJ:
Well, are you relying on anything in the Family Court decision? I'm just wondering whether it's necessary for us to go back to the submissions that were made or –

MS CHAMBERS QC:
What –

ELIAS CJ:

Sorry.

MS CHAMBERS QC:

What happens in the Family Court is that they don't deal with quantification –

ELIAS CJ:

No.

MS CHAMBERS QC:

– which is a frustrating thing. But so the Family Court decision doesn't deal with saying that the current accounts are relationship property. But I don't think that matters because it's already been conceded, and it is clear as crystal. Are Your Honours happy for me to hand up these or would you rather –

ELIAS CJ:

Yes.

MS CHAMBERS QC:

– I just read them out?

ELIAS CJ:

Well, no – yes, hand it up, thank you. But the concession, I'm struggling to see how the lack of dealing with quantification affects the acceptance of the status of the payments.

MS CHAMBERS QC:

No, it doesn't, he's, he has accepted right from the beginning that these were relationship property funds going to these trusts, he's always accepted that.

ELIAS CJ:

So is it recorded in the Family Court decision?

MS CHAMBERS QC:

No, it's not, Your Honour.

ELIAS CJ:

No, all right.

MS CHAMBERS QC:

And this is an end, in my submission, to any argument that these advances to these trusts were anything other than relationship property, it's the end of it. So if Your Honours look first at the opening submissions, the relevant part is paragraphs 12 and 13. There is Mr Clayton saying he accepts that you value these current accounts at separation, he accepts that –

WILLIAM YOUNG J:

Sorry, which…

MS CHAMBERS QC:

Opening submissions, Your Honour, at paragraphs 12 and 13. He accepts you value them at separation and of course he's right, it's like a bank account, you don't value that at date of hearing because people strip it out, or add to it, it's unfair, it's separation date, it's common sense. And he says advances from the Vaughan Road Property Trust he owes two million. So he's trying to say, "Oh, I stripped five million out, I now owe two million, I got the benefit of it, Melanie, you have to pay half of the $2 million debt," that's his argument, that's how fair he is. But the – so the issue of how much that Vaughan Road Property Trust debt is going to be an issue for the High Court. But there he is down the bottom saying that it's relationship property debt. And then, in regard to the other advances in regard to the other trusts, including the Claymark Trust – do you see that in 13? – he's accepting it's relationship property and that it's valued at separation. This was never an issue, and nor should it be an issue, it was screamingly obvious it was relationship property. Now just in case Your Honours think he may have changed his mind during the hearing, there's his closing submissions, and the relevant paragraph is paragraph…

GLAZEBROOK J:

They've got a marker by paragraph 79 if that helps.

ELIAS CJ:

Well, it's a claim –

MS CHAMBERS QC:

Oh, yes, yes, there it is. Yes, yes. So there they are – oh, that's the current account in the company – the advances, paragraph 82, at separation the respondent had made book value advances to, there's the Claymark Trust, because at this stage he is owed money from the Claymark Trust, and he says that, "As at the date of hearing

the respondent's advances were less than at the date of separation," and he says there's Mr Hagen's evidence, the advance to Claymark Trust he values at separation, the date, "The value at the date of separation, the respondent's advances to all the other entities is 286,000." So there he is with the advances as relationship property in his summary of calculations, and he treats them as relationship property.

GLAZEBROOK J:
What was it settled with, the trust?

MS CHAMBERS QC:
The Vaughan Road Property Trust?

GLAZEBROOK J:
Yes.

ELIAS CJ:
Ten dollars, wasn't it?

ARNOLD J:
Ten dollars, yes.

GLAZEBROOK J:
And then, so, is the argument that there was no outside debt ever, or that it was set – and when was it settled, remind me?

MS CHAMBERS QC:
1999 –

GLAZEBROOK J:
Right.

MS CHAMBERS QC:
– 13 years into the marriage, relationship, 13 years, and I'm going to come to this, Your Honour, but he had a little "fledgling", to use the Family Court's language, company, which actually had ceased to exist quite early on in the marriage, it gets struck off, all he had was shares in a little fledgling company that milled native timber. Somehow or other my friends are trying to say that these millions of dollars he advances to these trusts came from the separate property? Come on.

So just going on through to bang the nails in –

ELIAS CJ:
Is that – do you want to complete this before the adjournment?

MS CHAMBERS QC:
Oh…

ELIAS CJ:
No, no, that's all right.

GLAZEBROOK J:
And that's what was agreed as being 500,000, was it, the valuation, is that, the separate property, is that – that company relates to the separate property prior to marriage, does it? Prior to the relationship, sorry.

MS CHAMBERS QC:
The – yes, it does. The 500,000 was a compromise figure to deal with any separate property items he had before marriage.

ELIAS CJ:
How's that recorded? I know it's in the judgment, but was there an agreement that 500,000 represented the separate assets at…

MS CHAMBERS QC:
May I ask my instructing solicitor, Your Honour?

ELIAS CJ:
Yes, yes.

MS CHAMBERS QC:
It was an oral concession by Ms Hunter. And it was based on some fixed assets as at 1992, apparently there's a schedule, so.

WILLIAM YOUNG J:
Is it based on a document that we can be taken to or not?

MS CHAMBERS QC:

Yes.

WILLIAM YOUNG J:

Perhaps after the morning…

MS CHAMBERS QC:

After the morning tea.

ELIAS CJ:

Let's take the morning adjournment, unless you wanted to wrap up on what you were going to…

MS CHAMBERS QC:

I'm happy to take the morning adjournment.

ELIAS CJ:

All right, we'll take the adjournment now.

MS CHAMBERS QC:

As Your Honour pleases.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.52 AM

MS CHAMBERS QC:

So before the morning adjournment we were talking about the $500,000 concession and what that was based on. It's in the cream book, page 1987, it's under tab 82. It is G, the last volume. You'll see this is an exhibit produced during the hearing and that first figure 1992 gives a figure of –

ELIAS CJ:

So 1982?

MS CHAMBERS QC:

1987. Gives a figure of 569,000. Now –

WILLIAM YOUNG J:

Sorry, which?

MS CHAMBERS QC:

1987, 1992, total property is valued at 569.

O'REGAN J:

That's the total assets of Clayton Holdings?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

And that's all he had, is that what you're saying?

MS CHAMBERS QC:

Essentially.

WILLIAM YOUNG J:

So 19?

MS CHAMBERS QC:

92.

WILLIAM YOUNG J:

Oh, okay.

MS CHAMBERS QC:

The concession by Mrs Clayton was obviously incredibly generous because of course this relationship started in 1986. This is six years later. Furthermore, it was, it's fundamentally wrongs in terms of the Act because if you look at Mrs Clayton's chronology, that sets out very clearly what Mr Clayton owned before this relationship started and what he owned was a shares in a company, the 1984 company we call it, we call it that because it changes its name a number of times, and they use Claymark names and it becomes very confusing. But all of the searches were attached to Mrs Clayton's February 2011 affidavit setting out tracking through by company number the companies. So he has shares in the 1984 company and what that does is trades in native timber. It's a related business but the Claymark

business now doesn't trade in native timber. It mills non-native timber. It is a fledgling company. Only starts sawmilling in 1991. Completely different. And, of course, this company, as you can see in her chronology, gets struck off. He no longer owns the shares. But –

ELIAS CJ:

I just think it might be more helpful rather than taking us to where it's asserted in the chronology, to indicate the findings of fact in the Family Court, or the – where it's recorded so we don't need to keep going back to primary sources, if it is accepted.

MS CHAMBERS QC:

I think the Family Court records a concession and that's all.

ELIAS CJ:

Yes, but it's a concession that both of them subscribe to, isn't it?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

Can you, because I'm a little confused, and I did read it in the Family Court decision, but perhaps you could just take us to that paragraph?

MS CHAMBERS QC:

So page 75, volume A, paragraph 65 and 66. So A is green, page 75, paragraphs 65 and 66. "There is no evidence as to the value of Mr Clayton's property when the relationship began. There is an acceptance by the parties that a figure of $500,000 is appropriate, taking into account the value of the Banksia Place section and the two parcels of land in Vaughan Road."

ELIAS CJ:

So why do we need to go beyond that, or behind that?

MS CHAMBERS QC:

I don't think you do.

WILLIAM YOUNG J:

Why ask?

ELIAS CJ:

No, no.

WILLIAM YOUNG J:

I asked if there was a document it was based on.

ELIAS CJ:

Yes, well I asked about that too but there apparently is not. That's confirmation, is it, that there is no document that this is based on?

MS CHAMBERS QC:

The 500,000?

ELIAS CJ:

The concession. There's no recording?

MS CHAMBERS QC:

That was the document, oh you mean a document recording, no it was an oral concession based on that schedule.

ELIAS CJ:

Yes, well that's on her part but what's, but this records that the parties have accepted it. That wasn't based on any document produced to the Court, it was what was said presumably at the hearing.

MS CHAMBERS QC:

That's correct Your Honour. So going back to my road map, page 2.2, volume D, Mr Clayton's evidence is at page 995. It's Mr Clayton's affidavit of March 2011 and that is again him confirming in his affidavit the concession made by his counsel that the advances are accepted as relationship property.

WILLIAM YOUNG J:

So what page, was it 995?

MS CHAMBERS QC:

It was Your Honour, paragraph 25. Never argued again until this Court. And just dealing with those final points in regard to why it is relationship property, even without the concession it would be completely unfair to treat these advances as anything

else. The wording of section 9A itself says that where, that the separate property becomes relationship property if –

WILLIAM YOUNG J:
So is it the current version of the Relationship Property Act that the – the Property (Relationships) Act 1976 that applies? There haven't been any, so the latest version printed will capture everything?

MS CHAMBERS QC:
Yes Sir.

WILLIAM YOUNG J:
Right. So what are we looking at, section 9A?

MS CHAMBERS QC:
9A.

GLAZEBROOK J:
And where is that sorry? Back in…

MS CHAMBERS QC:
Well I didn't put it in my bundle because I was not expecting this argument. And it's not in any of my friend's bundles. So I'm sorry, I don't have a copy for Your Honours.

ARNOLD J:
It is in one of the judgments.

MS CHAMBERS QC:
Is it in the Family Court one?

WILLIAM YOUNG J:
It's 9A, it's increasing the value of separation property, that's the one?

MS CHAMBERS QC:
That's right.

ELIAS CJ:
And the finding –

MS CHAMBERS QC:

There is at page – sorry Your Honour?

ELIAS CJ:

Sorry, the finding in the District Court is based on that?

MS CHAMBERS QC:

It is, yes. The section appears at green 68 volume 1. And Your Honour in the Family Court finds the increase in value is relationship property both on 9A(1) and (2) and 9A(1) says, "If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of relationship property, then the increase in value or (as the case requires) the income or gains are relationship property." So my friends are trying to say, well, they hadn't separated so therefore it stayed separate without a factual basis but also ignoring the way the Act works in terms of classification of property. For example, if you look at section 8 in defining what is and isn't relationship property, the Court must go back to see how the property was used and acquired during the relationship. It's not the case that it somehow stays separate property right up until the point of separation. Once they separate you have to go back and classify as they acquire assets whether it was relationship property or separate property.

And *Fisher on Relationship Property*, the provisions that I have quoted there, is very clear on these issues, and what the learned authors say is that first of all in applying 9A the Court must bear in mind the purposes and principles of the Act including that property is generally to be divided equally, and that contributions are seen as equal, and then, and I'm quoting from 1142, that under section 9A the income or gains have to be derived from the separate property itself as distinct from the efforts of one or both of the spouses or one or both of the parties. Income derived from the work of either or both upon a separate property farm or business will normally be relationship property if it was acquired for the common use and benefits of the parties. An argument to the contrary might be mounted if it was possible to distinguish between income forming a return on separate property capital, on the one hand, and income representing a return for effort during the marriage, 8(1)(e). The way in which bookkeeping is arranged in the average farm of business makes that possibility unlikely.

So for Mr Clayton to say it all stayed separate, he has to establish that it was a passive return on his separate property, and there's just no evidence of that. He doesn't even keep the shares that he had. They had virtually nothing when they start off. The increase in value, and the very clear findings in the Family Court in regard to how this business was funded, and how it developed, and you can see that the Family Court had very little difficulties in applying 9A. You will see that in volume A, page 72, paragraph 55, "there is evidence of a general ongoing application in this regard and also a specific injection of salary into the business in 2002, 2003, and 2004 to capitalise companies. There is no dispute that over the years Mr Clayton has used his income, whether that be by way of drawings or salary, to put back into the business. When he was asked the question, 'What you have been required to do, haven't you Mr Clayton, is to put quite a bit of your income over the years back into your business?' his answer was 'Um, just about all of it.' This is evidenced by the fact that during the early years of the marriage, the building of the family home in Banksia Place was put on hold for several years while any income was used to develop the business. Mr Clayton has also given evidence that 'my income has been restricted as a consequence of capital investment and debt servicing requirements'." He hardly took anything out of this business, he was rolling the whole lot back in to grow it. "The foregoing of income is an illustration of the application of relationship property to separate property." And page 122 of Her Honour's decision, no sorry…

O'REGAN J:

That's the High Court saying there's no criticism of that finding at 44?

MS CHAMBERS QC:

Right. Thank you.

ELIAS CJ:

Sorry, at paragraph what of the High Court decision?

MS CHAMBERS QC:

At 43, page 122, and the – just going back, sorry Your Honours, to the evidence of the Family Court, on page 73 of the bundle there is further paragraphs where Her Honour makes very clear findings about Mr Clayton's salary being applied to the business and 9A(1) being met. So there is just no evidence that Mr Clayton had separate property from which he could fund these trusts. So that is the submissions as to why Your Honours can be left in no doubt that, as Mr Clayton accepted right up until this Court, the advances to his trusts were relationship property and, indeed,

he's very keen for Mrs Clayton to pay her half of the debt to the Vaughan Road Property Trust in regard to the $5 million that she took out and had the use of.

So, sham, I'm back to page 5, Your Honours, of my road map, and I've finished with the evidence and I want to move on to the law. But I do say, as I say in my submissions, that there's simply no evidence that Mr Clayton considered he was restrained in any way at all by the existence of a trust deed. He quite clearly did not consider that he had obligations at all to account to beneficiaries of any of the trusts he created, and there's no evidence that he viewed the assets of the Vaughan Road Property Trust as anything other than his own, he could do what he liked with the assets and – this is at paragraph 25 of my written submissions, Your Honour – the only contemporaneous evidence in regard to the thinking at the time of the operation of these trusts was Mr Pepper, who was Mr Clayton's right-hand man at the time the Vaughan Road Property Trust was settled, he was a director at the Claymark companies in 1999, and the asset planning that commenced in 1999 was described by Mr Pepper in the following terms –

WILLIAM YOUNG J:
Whereabouts?

MS CHAMBERS QC:
I'm at 25 of my submissions, Your Honour. "Well, Mark started the company, he had grown the company and he saw that they were, that they were his, and, you know, that's the reason way back when we transferred the properties initially, Mark was the sole trustee in the Vaughan Road Property Trust, there was no one else that was involved."

ELIAS CJ:
Well, what do you take from this? A clear indication of an intention to maintain control? Because there'll be many, very many, trusts in which there is an intention to maintain control, which is not to say that there isn't a genuine intention to benefit, at some remote point very often, those who are beneficiary entitled. So what do you take from this emphasis on control that's relevant here?

MS CHAMBERS QC:
Well, I take from that, Your Honour, that where someone purports to put property into trust but maintains total control, that can't a shouldn't be recognised as a trust, for a whole – for three alternative reasons: sham, lack of intention, or illusory.

ELIAS CJ:

So you say that an intention to have complete control leads to a conclusion that a trust is sham?

MS CHAMBERS QC:

That it is not a proper trust, not a properly formed trust.

GLAZEBROOK J:

Well, what's that trust that's set up for the looking after a child who's disabled, that child is the only beneficiary, and the parents say, "As long as we're alive we want total control over the funds because we want to make sure they're grown in a proper manner so that they will be available to look after this disabled child for life"?

MS CHAMBERS QC:

No problem with that, Your Honour.

GLAZEBROOK J:

Well, that control can't be the issue, can it?

MS CHAMBERS QC:

No. I mean control in the sense referred to in the Chancery cases.

WILLIAM YOUNG J:

Is it control without constraint?

MS CHAMBERS QC:

That's right. And I also mean control in terms of being able to treat the property as their property, so they have to be a beneficiary. So it's paragraph 51 of my submissions, that there has to be, that he intended, certainty of intention, he, there's no other interpretation, he intends to create a trust, he's ceased to be the beneficial owner and such legal right he had has gone, it's *Heartley v Nicholson* (1875) 19 LR Equity 233. So when I use "control" I mean it in that broad sense, that is that he has unfettered ability to treat it as his own properly and call on it and say, "I'm taking it."

ELIAS CJ:

So control plus, plus any beneficial interest, or control plus the ability to – I mean, is this just the argument about the power to appoint to himself?

MS CHAMBERS QC:

Well, there's the narrow and the wide version. The narrow version is, in this case it's sham, lack of intention, or a illusory trust, or the interest in the property, interest in the trusts of property, because not only did he have control, he had a clause which said he could act in his own interests. If you look at *Poon* –

ELIAS CJ:

Is that the unconstrained point that –

MS CHAMBERS QC:

Yes.

ELIAS CJ:

– Justice Young put to you?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

Unconstrained by any fiduciary obligation, is that what you're saying?

MS CHAMBERS QC:

Yes, that's, well, that is applicable in regard to the Vaughan Road Property Trust. But there's another argument as well, Your Honour, which is what the overseas jurisdictions have said. Most of the overseas cases which have said the interests in the trust are to be treated as property for the purposes of divorce have not had this bizarre clause in it which says Mr Clayton can act in his own interests and ignore everybody else's interests, all the other beneficiaries, they've still said it's property.

WILLIAM YOUNG J:

So what about, so do they deal with cases where there's control, technical constraint, but in fact an intention to act independently of that constraint?

MS CHAMBERS QC:

Yes, what they say effectively, Your Honour, because *Poon*, the husband's not even a trustee, there's a trustee company in the Cayman Islands. What they say is, well, it doesn't – that the fiduciary obligations, et cetera, don't really matter because even then, under this trust deed, the trustees are working with the husband, he has a huge

influence on them, understandably, he's the settlor, and if the trustees said, "Okay, well, we're considering all of the beneficiaries and we're considering their interests, but we have decided to distribute the trust assets to husband," they could. So what difference does it make?

WILLIAM YOUNG J:
So where *Poon* – well, could that only be reviewed in the High Court of the Cayman Islands?

MS CHAMBERS QC:
Ah, no…

WILLIAM YOUNG J:
If a beneficiary had challenged that.

MS CHAMBERS QC:
I don't know the answer to that question, Your Honour. The trustee was represented in the divorce proceedings in Hong Kong. Do you want me to take you to *Poon*?

WILLIAM YOUNG J:
Where is *Poon?* Yes.

MS CHAMBERS QC:
Poon is in my bundle of authorities and it's at page 227.

GLAZEBROOK J:
Which bundle, is it 23 or 38?

WILLIAM YOUNG J:
23, it's 23.

MS CHAMBERS QC:
It is 23, Your Honour.

GLAZEBROOK J:
And what page, sorry?

MS CHAMBERS QC:

It is at 227.

GLAZEBROOK J:

Oh, yes, of course it would be 23.

MS CHAMBERS QC:

It's a $1.5 billion Hong Kong trust, 300 million, called the Dragon Trust. And the terms of the trust deed you'll see at page 254 – actually I might take you through the facts first rather than jump through to there. I'll start at 227, it's a long marriage, he's in engineering –

WILLIAM YOUNG J:

Sorry, what page, sorry?

MS CHAMBERS QC:

227, Your Honour. He's very successful, they have shares in a company which they've put into a trust and – oh, it's actually based in Jersey, sorry, not Cayman Islands, I'm getting them muddled. Now he is the appointor of trustees so he can hire and fire. The beneficiaries were husband, wife and the three children. Two of them tragically died leaving one, Karen, alive who's an adult.

ELIAS CJ:

Was this not a discretionary trust?

WILLIAM YOUNG J:

It is a discretionary trust.

ELIAS CJ:

It is a discretionary trust. Oh yes, sorry, discretionary family trust.

MS CHAMBERS QC:

So and Their Honours, the finding in one is a good summary. "The Court asked whether if that party were to request the trustee to advance the whole or part of the capital or income of the trust to him or her, the trustee, acting in accordance with its duties and having regard to all relevant considerations, would on the balance of probabilities, be likely to do so."

WILLIAM YOUNG J:
So where's that paragraph?

MS CHAMBERS QC:
It's under the head note 1. And they say it doesn't imply impropriety. The trustees could properly take into account the husband's wishes, formal or otherwise, as to how they should use their discretionary interests. So they're saying, you know, the reality is that he could do this. The trustees could do it and –

ELIAS CJ:
On the balance of probabilities.

MS CHAMBERS QC:
Yes.

O'REGAN J:
Well they could but they also say they would be likely to do it. So it's not just an ability to do it, it's there's some –

WILLIAM YOUNG J:
Would be likely to.

O'REGAN J:
Yes.

WILLIAM YOUNG J:
Which presumably is tested by what's happened in the past.

MS CHAMBERS QC:
Yes. Well Mr Clayton has taken five million as trustee for himself so I don't think you're going to have too many problems meeting that test. And the trustees said, well really you should allow at least a third for Karen, and they said, no. That's incorrect because the trustees because, "Karen was only one amongst a class of beneficiaries in a discretionary trust without a vested interest and the Jersey law opinions did not support the proposition that the trustees could not dilute Karen's 'interest'." And then they talk about the terms of the trust deed showing that the husband had a dominant position in regard to administration. He'd made himself protector and reserved to himself important powers, including the power to remove

the trustee. He intended the trustee to have only the passive role of shareholder, leaving it to him to run the group. It was plainly not the husband's intention that the trust assets should be divided up or that he should relinquish his position of influence during his lifetime. Further the trustee often acceded to husband's wishes and allowed him access to funds. When the company declared a divided the trustee had invariably complied with the husband's wishes to distribute the money to the husband. Further, husband had been able to draw funds from the trust to satisfy awards in the wife's favour. There was every reason to believe that the trustee would comply with the husband's request.

And the other parts of the – page 246 of the bundle, they're talking about *Charman v Charman (No 4)* [2007] 1 FLR 1246 , which is the English case, and what they're saying at paragraph 33 is that you don't require impropriety in regard to these issues, you don't require that Mr Clayton, that there is a, for example, a self-interest clause. A trustee in proper control of a company will usually be acting entirely properly if after careful consideration of all relevant circumstances he resolves in good faith to accede to a request by the settlor for the exercise of his power of advancement of capital whether back to the settlor or to any other beneficiary.

And paragraph 43 on 249, Their Honours talk about Karen not having an interest protected against the other beneficiaries and they refer to the High Court of Australia decision in *Kennon v Spry* (2008) 238 CLR 366 in terms of the position of other beneficiaries because in *Kennon v Spry* the children of, it's Dr Spry and Mrs Spry, were also beneficiaries, and the wife was a discretionary beneficiary only in *Spry.* Dr Spry had removed himself after separation but retained control. And they talk about at 44 Karen didn't have any fixed interests and they also talk about, well, after the wife's paid out there's nothing to stop the trustees deciding that Karen retains a significant portion of the trust. That's paragraph 55 of Their Honours' decision.

And then 63 is the terms. The trustee has an absolute discretion to appoint capital, 62 and leading into 63. The husband had a letter of wishes taken in account and he had the power to remove trustees and certain powers conferred on the trustee are only exercisable with husband's consent as protector, including the removal of potential beneficiaries and the power to alter the deed. So they say at 65, "In making himself protector, husband has reserved to himself important powers including the power to remove the trustee, obviously intending his views as to the administration of the trust to be given great weight. In making himself a potential beneficiary he intended to benefit from the trustees' distributions of capital income. He intended the

trustees to have only the passive role of shareholder. Karen is one of the discretionary objects and has no vested interest. There is no impediment to the trustee appointing the whole or part of the capital income to a single beneficiary to the exclusion of all others." So I've come to that case because what I'm saying is that you could decide, well, the Vaughan Road Property Trust is so extreme, particularly the self-interest clause, that we're going to treat it as property. But the overseas jurisdictions aren't hampered by this and the other cases are the same. None of the cases that I rely on have a self-interest clause in them.

ELIAS CJ:

What was section – where do we find section 7(1)(a) which this is decided under? That's the matrimonial property thing in Hong Kong, obviously, is it?

GLAZEBROOK J:

It talks about resources, doesn't it?

MS CHAMBERS QC:

It does. It does talk about resources.

WILLIAM YOUNG J:

Is it …

MS CHAMBERS QC:

It's page 243 paragraph 25.

WILLIAM YOUNG J:

Income earner capacity property and other financial resources which the parties to the marriage has or is likely to have, so that's a better jurisdictional clause than, from your point of view, than the property, the Relationships Property Act.

MS CHAMBERS QC:

It's my submission that it's equivalent because, Your Honour, if you look at combined the definition of property under our Act to include any interest or right and the definition of ownership being beneficial ownership, together those two clauses are the equivalents of the Hong Kong, UK, and Australian clauses.

ELIAS CJ:

But it's not equivalent to likely to have in the foreseeable future. It's a much more expansive …

MS CHAMBERS QC:

That's true. I don't rely on that part but in terms of saying, well, these cases don't apply because it includes –

ELIAS CJ:

Well, I'm just trying to work out what it is that you are able to take from this case of application here and it must be tied to section 7(1)(a) because they decide it's not a sham and the discussion on sham, which I imagine is of help to you, is of paragraph 36. They decided it's not a sham but they simply apply section 7(1)(a).

MS CHAMBERS QC:

They do.

ELIAS CJ:

So what is the –

WILLIAM YOUNG J:

You have to rely on right to interest and it's a right to apply to have dealings with the trust and it's to be valued by reference to the likelihood that your request will be acceded to by the trustee.

MS CHAMBERS QC:

He has rights to distribute this trust to himself. No one can do a thing about it. That is the same –

ELIAS CJ:

Well, this is the argument about property, really, which does require you to focus on the terms of our statute. I'm just trying to feel for what you are taking from whom. I would have thought that to assist in terms of the test it applies to sham because on the submission you make it seems to, it may come within that test but in terms of application beyond saying, well, this isn't extreme, they do it in other countries, it really doesn't bolster, does it, very much your argument on the terms of – well, on the definition of property in the Relationship Property Act.

MS CHAMBERS QC:

Well, I am going to argue that, Your Honour, in terms of I am going to talk about resources first and property definition when I come to that part, but at the moment what we were talking about what degree of control made a valid trust and we were talking about that there were – there was actually two different levels for this Court to consider and one is to say, well, Vaughan Road Property Trust was so extreme in its terms that he had total control.

ELIAS CJ:

It was a sham applying the test in paragraph 31.

MS CHAMBERS QC:

Yes and the same argument runs through the property argument.

ELIAS CJ:

Yes, yes.

MS CHAMBERS QC:

But I'm suggesting that if you look at the overseas cases, in terms of how they've analysed how trusts work and the ability to control the property, that in most trusts – well, sorry, let's put that another way – that in the trusts Their Honours have dealt with in other jurisdictions they haven't had the self-interest clause but they've said, well, the bottom line is that under this trustee they can legitimately distribute to themselves and that's what it's designed to do so that's all we need to worry about.

ELIAS CJ:

But that gives them the sufficient – yes, I see. That makes it a financial resource available and, you would say, sufficient interest for the purposes of the definition in the Relationship Property Act.

MS CHAMBERS QC:

That's right, Your Honour. So that's how I went off down that road but we'll come back to –

ELIAS CJ:

I'm just really wondering where you think – how much more time you think your argument is going to take on the first appeal. Where do you want to take us to after this?

WILLIAM YOUNG J:

Do you need to take us to *Kennon v Spry*?

MS CHAMBERS QC:

Yes. Do you not think I do?

WILLIAM YOUNG J:

I suspect you might want to but I'm not sure.

ELIAS CJ:

Well, it's referred to in the written submissions but you might want to emphasise the use of it. I'm just really asking for a further roadmap, I suppose, of where you want to develop the argument.

MS CHAMBERS QC:

I'm going to talk about sham, illusory, and lack of intention relatively briefly because it really is in my submissions and I'm going to refer briefly to *Raftland Pty Limited as trustee of Raftland Trust v Commissioner of Taxation* [2008] HCA 21, then I'm going to get on to the property argument. So I probably have another hour, that's all.

ELIAS CJ:

Yes, all right, carry on, thank you.

MS CHAMBERS QC:

So at page 5 of the roadmap, sham, illusory, or lack of intention, and I have defined illusory in my submissions as being one – a trust where despite a subjective intention to create a trust, the trust deed itself does not objectively create what the law regards as a trust, and this argument really does depend on definitions. I accept that under sham trust it's the intention at the time of the creation. So my learned friend, I think, has misread 33. The sham trust, did they intend to create a trust? If you decide, you know, there is such a thing as an illusory trust then I'm suggesting that that relates to the circumstances where someone says, "I do want to create a trust," but in fact what they sign up to is not a trust.

ELIAS CJ:

Yes. Well, is the label "illusory", does it add anything very much to saying that the necessary ingredients of a trust are not present? That's your second argument.

MS CHAMBERS QC:

It is. You could deal with it under lack of intention to actually really create a trust, as I say in 35. So it's a concept of a zombie trust. I think it's a more exciting name.

ELIAS CJ:

It's probably one we wouldn't adopt for that reason. We are restrained.

MS CHAMBERS QC:

But you have the image of a person walking around who's actually a zombie and so I do suggest that illusory trust is a concept which is helpful which covers that situation. But I also accept that if you define it, paragraph 35, my submissions, as Justice Hansen did in the High Court, a consideration in whether in light of the provisions of the trust deed Mr Clayton retains such control that the proper construction is that he did not intend to give or part with control over the property sufficient to constitute a trust, if you define it like that it really – I think the Court of Appeal is right. That actually goes to intention to create a trust. But you can see why some of the authorities and academics have said there is this separate category of illusory trust.

So moving on to lack of intention to create a trust, whether you consider that under illusory trust or on its own, I'm certainly not going to die in a ditch over that, and the necessity to create fiduciary relations. As you know, Mrs Clayton says you can't call into account – Mr Clayton has said that the core obligations are still present in this trust and that the beneficiaries could call Mr Clayton to account in their submissions, or the trustees have.

But, of course, what would happen – let's just go through what would happen. Mr Clayton could distribute all the assets to himself. He could, if he chose to, bring forward the vesting date. There would be nothing left in the trust to vest but he could bring forward the vesting date because he's entitled to do all of this under the trust deed. That's the end of the trust. Now, the beneficiaries, Mrs Clayton and the two daughters, might say, "Well, hang on a minute. You did all of that and left us with nothing and that's a breach of trust." Well, where did they get with that litigation? Mr Clayton immediately points to clauses 11, 12 and 14 which says he's entitled to do exactly what he just did. They have no remedy.

ARNOLD J:

So you're saying that the effect of the provisions of this deed is that there are not fiduciary obligations which bite on the way he is trustee as?

MS CHAMBERS QC:

That's right, Your Honour.

GLAZEBROOK J:

And if it was the *Poon*-type situation they would be met in any event by considering and then making a decision.

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

And administering the trust properly in terms of not stealing the assets or frittering them away on matters that are then not within the contemplation of the trust deed?

MS CHAMBERS QC:

Yes. If the trust deed gave them total unfettered discretion, it's always going to depend on the terms of the trust deed.

GLAZEBROOK J:

Yes, yes, I'm assuming a *Poon* trustee.

MS CHAMBERS QC:

Yes. So Mr Clayton as settlor had a choice. He chose not to burden himself with any obligations. He intended a genuine trust would not have given himself unfettered discretion. He did not give himself unfettered discretion in regard to the Claymark Trust five years earlier when the marriage was happy. Now, I have got a section here on the Magna Carta which you might think is a slightly sycophantic –

ELIAS CJ:

Slightly over the top.

MS CHAMBERS QC:

Sycophantic, perhaps, Your Honour.

ARNOLD J:

Just on the clauses, the other clause of interest to me was clause 19.1, particularly C.

ELIAS CJ:

Sorry, where do you find that?

MS CHAMBERS QC:

Yellow, volume E.

ARNOLD J:

And so that's at –

MS CHAMBERS QC:

Yellow, volume E.

ARNOLD J:

– 1342 of volume E? "Trustee may act as such and exercise all that trustee's powers and discretions notwithstanding that the duty of the trustee and in the particular matter may conflict with the duty of that trustee to the trust fund or any beneficiary." So that again is another, it seems to me, indication that the sort of constraints that one would normally expect don't apply.

MS CHAMBERS QC:

That's right, Sir. Do I refer to that in the – I think I do. Yes, Your Honour's right. That's, it's actually littered with similar clauses, isn't it?

ELIAS CJ:

I'm sorry, just harking back to the *Poon* case. The *Poon* case really decided that, it wasn't interest, what was the word -

GLAZEBROOK J:

Financial resource.

ELIAS CJ:

Yes, there was a financial resource without any – the discussion about the powers was not to stop the relationship property regime from attaching to a trust because it was, because the property was held in a trust, it was looked at because in the lower

Courts a third of the trust was treated as, properly treated as relationship property and –

MS CHAMBERS QC:
As Karen's.

ELIAS CJ:
Sorry. And the final Court of Appeal said no, because of the power of control it was right to treat the whole, is that right?

MS CHAMBERS QC:
That's right. Yes, the lower Courts said Karen carved off a third.

ELIAS CJ:
Yes. So again, you know, you're coming to the property argument later, but on one view if the Relationship Property Act makes the assets of the trust and interest for the purposes of that Act it doesn't matter what form it's held, you don't need to say that it's sham and so on, it's just, and you don't need to look at, really, at the powers of control, except if there's an argument that only part of the trust property is properly treated as the relationship property part.

MS CHAMBERS QC:
As the interest, I completely agree, Your Honour.

ELIAS CJ:
Yes, thank you.

MS CHAMBERS QC:
Well, my Magna Carta argument is set out there clearly, so I'll go through it briefly. But what the submission is is that when you look at *Heartley v Nicholson,* which is referred to in my submissions, which are these Chancery cases going back very firmly in regard to what is a trust, it's at paragraphs 51 and 52, about, with very strong terms as to what is a trust, "You have to intend to create a trust by Acts that admit no other interpretation," and the roots for that, I suggest, are that principle going right back to the Magna Carta that a person should not be deprived of property without due process of law. That's why we have this requirement for certainty of intention to establish a trust, and it can't be done unless the person clearly intended for that property to be held on trust.

ELIAS CJ:

But this is a deferred vesting regime under the Relationship Property Act, so I'm just trying, I'm struggling to see how there's dispossession until the Court has determined the interests of the party.

MS CHAMBERS QC:

Yes, Your Honour, that's correct. I suppose that this argument goes back to the, still back at the intention to create a trust argument, and it just, how, why that is such a powerful rule in equity, and so I'm kind of an equity rather than PRA. I'm talking about intention to create a trust.

ELIAS CJ:

But there's no property until, there's no property under – your only argument for property is under the Relationship Property Act.

MS CHAMBERS QC:

It is. But I'm back talking about intention to create a trust and just talking about how strong those cases are in regard to that requirement.

ELIAS CJ:

Well, I'm not that –

MS CHAMBERS QC:

So I'm not on to property until later.

ELIAS CJ:

– it assists you very much.

MS CHAMBERS QC:

No, okay, well I'm going to move on to *Raftland.* *Raftland* is the Australian High Court decision dealing with sham trusts. I summarise it in my submissions at 74, and it comes out a week after *Official Assignee v Wilson* [2007] 3 NZLR 45, *Raftland* is a tax case, the trustees of a trust which is making huge profits effectively by a tax loss trust and to put money through that to reduce tax, and the, to make it work under Australian tax laws the distributions had to go, all of the distributions had to go to the tax loss trust. In fact that's not what happened and it was just a device, and the High Court found that the whole thing was a sham. Now I've summarised Justice Kirby's decision in my submissions, but the majority decision, which is in my

casebook, which is here, at 83, is important in terms of sham trust because they have a wider test for sham trusts than *Wilson,* and in particular they look at what happens after the trust is formed. Whereas *Wilson* says really you can only look at the intentions at the time the trust was created, in *Raftland* the trust is created in 1986 and they look at how the funds are applied, and you'll see that on page 99 of my casebook, the paragraph 33 of Their Honours' decision, and this is the majority decision, "The apparent discrepancy between the entitlements appearing on the face of the documents and the way in which the funds were applied," so it's well after formation of the trust gave rise to a question where the documents –

GLAZEBROOK J:
Sorry, which page of your…

MS CHAMBERS QC:
Sorry, 99, Your Honour, and it's paragraph 33.

GLAZEBROOK J:
Thank you.

MS CHAMBERS QC:
Midway through. So the way the funds were applied later gave rise to a question as to whether the documents were to be taken at face value. They – paragraph 35, they apply the *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 (CA) in regard to sham, but they say it doesn't necessarily – paragraph 36 – require fraud, "In the present litigation it may be used in the sense which is less pejorative but still apt to deny the critical step in the appellant's case." And paragraph 43 also shows that they looked at events afterwards.

WILLIAM YOUNG J:
As relevant in themselves or as relevant to the intention at the time?

MS CHAMBERS QC:
Relevant in themselves as I understand it.

GLAZEBROOK J:
Well, one can understand that in terms of saying that there are particular sham transactions later. One of the difficulties I've always had with the, especially the Kirby test in *Raftlands* is how do you distinguish between a breach of trust and a

sham trust, especially vis-à-vis the beneficiaries, and if you look at, say, the *Kain v Hutton* [2008] 3 NZLR 589 litigation Mr W A X Couper did retain control and did properly think of the assets as being his own, but to the extent he did it was in breach of trust rather than there not being a trust at all. It probably would have suited him quite well to – not that he attempted to, I must say – argue that they were sham trusts and it did all belong to him. I mean, as I say, he wasn't arguing that in that case and I think quite rightly because the beneficiaries would have had something to say about it and again, quite rightly.

MS CHAMBERS QC:

Well, the facts of this case kind of bring the whole thing into stark spotlights, don't they, because we know the way Mr Clayton ran this trust. It was a complete nonsense and I'll take you to that evidence, and it wasn't a breach of trust. What he's doing is not a breach of trust but to say, well, when considering whether or not this was a sham trust we have to ignore that, in my submission, is the incorrect approach because it's not necessarily a breach of trust but it does – it indicates reflecting back on his intention at the time but it's reflective of his continuing intention that this actually operate as his property, not as trust property, which means he's using a cloak.

GLAZEBROOK J:

I can understand that part of the argument. It's just I think if you take some of the matters in *Raftland* and apply them it is difficult to see the difference between the breach of others and that's particularly just as clear in his judgment, I think, rather than the majority judgment.

MS CHAMBERS QC:

Does it really matter?

GLAZEBROOK J:

Well, it does if we're trying to find a test.

MS CHAMBERS QC:

Yes. I suppose I'm –

GLAZEBROOK J:

I mean, it may not matter in this case.

MS CHAMBERS QC:

Let's say someone operates a trust in a way that – and the evidence can be used under the test both to establish sham trust and it's also a breach of trust, does it matter if the test includes the conduct of – the operation of the trust after settlement if it's also a breach?

GLAZEBROOK J:

No, that might not matter but it may matter to the beneficiaries if the assets of the trust go back into the settlor rather than to be left to the beneficiaries.

MS CHAMBERS QC:

I accept that, Your Honour.

GLAZEBROOK J:

But no – in principle looking at the actions later depending on what you take from those actions it doesn't make a difference.

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

So I accept that.

MS CHAMBERS QC:

Yes. I think we both agree with each other.

GLAZEBROOK J:

Yes. But I still haven't quite got a test which might just come back to your unfettered discretion test.

MS CHAMBERS QC:

Yes. No restraint. So if Your Honours look at 104 in paragraph 47, Their Honours, the majority decision in *Raftland* do say that the creation of such an express trust depends upon the intention of the person alleged to have created it, so they are certainly looking at that but that same test effectively is *Official Assignee v Wilson* [2007] 3 NZLR 45. But they are saying that in 48, they say, "It may mean, as the full High Court in substance found that they intended to do whatever was regarded by Mr Tobin" – that's the lawyer or tax advisor – "as necessary to secure the fiscal objective

of the exercise," and then they do still look at conduct in deciding that the trust deed did not actually – was not intended by the settlor to have substantive as opposed to apparent legal effect in 58. So *Raftland* is an argument for a wider definition of sham than *Wilson*, in particular taking into account later conduct.

In my bundle I've included an article by His Honour Justice Kirby from this book in which he talks about the judicial reluctance to declare transactions shams. It's a very interesting article where he explores that, so I refer to that.

So I'm now at property, which is the second part of this appeal, in which I will – well, I can move on. Shall I start that, Your Honour?

ELIAS CJ:
It might be as well to use the five minutes left to make a start.

MS CHAMBERS QC:
So I start in my submissions with the definition of property in the Act and of course the context of the Act and the purpose and principles of the Act which I've already addressed Your Honour on. Now, the definition of property – and I'm at paragraph 94 of my submissions, 93 and 94 – is, includes any, anything in action, any other right or interest. The definition is wide, it's inclusive, it's not limited. And "owner" means "beneficial owner". Now, we know, of course, that Mr Clayton has told the High Court and his bankers that he is the beneficial owner of the assets in this trust, so he sees himself as beneficial owner. The paragraph 94, I refer to *Fisher* and Lord Diplock as defining beneficial owner. The vital ingredients that the owner can enjoy the fruits of his or her property personally and can dispose of the property for his or her benefit, and I submit that that is, together with the definition of "property" at least as wide as financial resources and that you can't simply say, well, the English cases and Australian cases have got this additional provision and we can ignore it because resources are assets or stock upon which one can draw when necessary. That's the definition from the *Short Oxford English Dictionary* in my roadmap. Well, there is no difference, in my submission, between that and a right or interest because of our wide definition of property. Looking at "right" in my submissions at 97 includes any power, privilege or immunity secured to a person by law. Mr Clayton had those powers. He had powers and rights to distribute these trust assets to himself. That is an item of property under our Act and is effectively the same definition as resources, something you can use for yourself. So my submission is that the definitions between the various pieces of legislation are equivalent. I also, in terms of

interpreting the Act, I refer to 33 of the Act which gives the Courts power, says what powers the Courts does have in regard to relationship property and I submit that 3 is consistent with treating the interests in the trusts as relationship property because under the Act the Court can vest any property which must include, obviously, discretionary interests. It can order the transfer of rights and obligations under any instrument or contract and in order for this kind of effect has regard of any provision or term of the instrument or contract and it can order the varying of the terms of any trust or settlement other than a trust under a will. If Mr Clayton went outside into the street and said, "I'm prepared to sell all of my interests under the Vaughan Road Property Trust and I'll transfer them to someone," of course he would have someone willing to pay the value or close to the value of the assets of that trust, because as soon as you got all those powers under the trust deed you'd have control over the assets and if he genuinely believes they're not property and they have no value he could have transferred them to Mrs Clayton and avoided this litigation. He hasn't.

ELIAS CJ:
Is that a convenient place?

MS CHAMBERS QC:
It is, Your Honour.

ELIAS CJ:
Thank you. We'll take the adjournment until 2.15.

COURT ADJOURNS 1.01 PM

COURT RESUMES 2.17 PM

ELIAS CJ:
Yes, thank you.

MS CHAMBERS QC:
Thank you, Your Honour.

I wanted to finish my submissions in regard to appeal 38 just by drawing Your Honours' attention to the overseas cases. None of the jurisdictions that we're concerned with, the United States, Hong Kong, the UK, or Australia has legislation which says trust assets must be taken into account in divorce. All of the law that I'm referring to is a development by the Judges as to the definition of property,

effectively, and in some cases that definition includes financial resources to bring trust interests, which are part of the fruits of the marriage, into their system and as we go through, I'll be saying that basically if you look at their systems they are remarkably similar to ours. There are differences. They don't have separate property in relationship property but basically they look at first of all quantifying and then dividing, quantifying what there is. So I'm going to – and just the final point that the law now in those countries is that if you have property in trusts it gets taken into account in divorce has not meant the end of the world as we know it. The sky hasn't fallen in. The trust industry remains intact.

So I want to start with *Kennon v Spry* (2008) 238 CLR 366 and I hope to go through these reasonably efficiently. Dr Spry was a remarkable man and no doubt still is, but his trust was basically he was in control. He was – he had the power, he was the sole trustee and he had power to hire and fire trustees and he had power as the sole trustee to apply part of the income or capital to the beneficiaries. He is a beneficiary initially, then he takes himself out as a beneficiary, but his wife remains a beneficiary.

So the Chief Justice's decision is the first decision and I want to take Your Honours to page 169. This is in my bundle for SC23. Paragraph 61, you'll see that Dr Spry said, "You've got to take into account the interests of our children." I think there were three daughters who were beneficiaries so he argues that point. 62, the Chief Justice says, "In my opinion, the argument advanced on behalf of Mrs Spry should be accepted save that it is the trust assets coupled with the trustees' power prior to the 1988 instrument to appoint them to her and her equitable right to due consideration that should be regarded as the relevant property." It's one more slightly complicating factor in this. Dr Spry resettles or purports to resettle at one stage the trust assets into new trusts. But they go back to the position of the old trust.

Paragraph 64, the word "property" in section 69 is to be read as part of the property of the parties to the marriage because this isn't the provision which deals with the word "resources". It's the definition of "property". It is to be read widely and comfortably.

ELIAS CJ:
Conformably.

MS CHAMBERS QC:
Conformably. I forgot my glasses.

ELIAS CJ:

It's not an easy word.

MS CHAMBERS QC:

No. With the purposes of the Family Law Act, in the case of the non-exhaustive discretionary trust with an open class of beneficiaries, there's no obligation to apply the assets or income of the trust to anyone et cetera. Down to 65, where property is held under such a trust by a party to a marriage and the property has been acquired by or through the efforts of that property or his or her spouse whether before or during the marriage it does not, in my opinion, necessarily lose its character as property to the marriage because the party who is declared a trust of which he or she is a trustee and can under the terms of that trust give the property away to other family or extended family members at his or her discretion. For so long as Dr Spry retained the legal title to the trust fund, as does Mr Clayton, he's sole trustee, coupled with the power to appoint the whole of the fund to his wife and her equitable right it remained, in my opinion, the property that parties of the marriage for the purposes of the power conferred under section 79. The assets would have been unarguably property of the marriage absent subjection to the trust, and so as for the position of the other beneficiaries, it has long been accepted that in some circumstances the Family Court has power to make an order which will indirectly affect the position of a third party. Well, that's the case in New Zealand, too. Section 44C and section 182 of the Family Proceedings Act can do the same thing. Paragraph 70 on 171, the characterisation of the assets of the trust coupled with Dr Spry's power to appoint them to his wife and her equitable right due to consideration as property of the parties to the marriage are supported by particular factors. It is supported by his legal titles to the assets, the origins of their greater part as property acquired during the marriage, the absence of any equitable interests in them, and any other party, the absence of any obligation on his part to apply all or any of the assets to any beneficiary and the contingent character of the interests of those who might be entitled to take upon it a default distribution on distribution date.

Then paragraph 79 on 173, he's able to treat the assets as property. He's agreeing with the decision of Their Honours Justice Munro and Hansen as a party to the marriage, albeit subject to fiduciary duties of considerable beneficiaries, so Dr Spry didn't have a self-interest clause. This is so even though it may not be property according to the general law, so characterised for the purpose of the Family Law Act

it had an attribute in common with the legal estate, he had an asset as a trustee. He could apply them for his own benefit.

Paragraph 89 on 175, property of the parties should be read in a fashion which advances rather than constrains the subject, scope, and purpose of the legislation. In particular, the term "property" is not a term of art. It has one specific and precise meaning. It is always necessary to pay close attention to any statutory context in which the term is used. In particular, it is necessary, of course, to have regard to the subject matter, scope, and purpose of the relevant legislation.

90, they quote the Supreme Court of Canada. "The task is to interpret the relevant legislation in its purposeful way, having regard to the entire context."

And then they give in 91 the definition of property under their Act and you can see it doesn't actually include the word "resources" there. The word "resources" is used in the division provision. It's simply parties to a marriage that a party is as the case may be entitled, whether in possession or reversion. A narrower definition.

WILLIAM YOUNG J:
Would it have made any difference in that case if there had been a trustee company as the sole trustee?

MS CHAMBERS QC:
Well, I don't think so because *Poon* is the example of that scenario and it didn't make any difference in that case.

WILLIAM YOUNG J:
Here they seem to put a lot of emphasis on Dr Spry being the trustee.

MS CHAMBERS QC:
Yes, well, the core of Mrs Clayton's submissions is whether the interests are property depends on the legislation and the terms of the trust deed and she, as relied, as in Spry, says well, one of the important things here is that Mr Clayton is the only trustee. It's very hard to see clearly where he's divided legal and beneficial ownership, so I think that that was clearly a factor in Their Honours' decision.

ELIAS CJ:

Well, it is in terms of Munro and Hansen, isn't it, but the Chief Justice is a bit more emphatic that the statute, it doesn't much matter in what form the assets are held, so it wouldn't have mattered if it had been a trustee company and it didn't matter if – I think that's right on my quick reading – it didn't matter that there was a power or that he was a sole trustee.

MS CHAMBERS QC:

I think that's right, Your Honour. I think that they do have – I think the Chief Justice is more emphatic but if we say, if we take the decisions of Their Honours Munro and Hansen they still say, well, it must be the context and in that context in terms of property settlement this must be property. I'm not sure whether they make any major point in regard to the fact he is the – Dr Spry is the sole trustee.

GLAZEBROOK J:

It was possibly because he wasn't a beneficiary, so that it might have made more of a difference that he was the sole trustee because he – I'm just looking because the Chief Justice said that they don't need to make any issue as to whether he could have reinstated himself as a beneficiary.

MS CHAMBERS QC:

It was sufficient.

GLAZEBROOK J:

But there was a dual thing of it being assets of the marriage plus some aspect of control and it might have been important that because he wasn't a beneficiary that he had that control, either de facto or actual.

MS CHAMBERS QC:

Yes, that's a good point. That probably is why they've emphasised it.

GLAZEBROOK J:

I mean, in that case it was actual but de facto may have been enough on the *Poon* analysis.

MS CHAMBERS QC:

Yes. And so paragraph 93 is the definition in regard to property settlement under section 79 of the Act. I'll just draw Your Honours' attention to that to show the

legislation that the Court was operating under and the Court can make orders as appropriate. With respect to the property of the parties, altering the interests of the parties to the marriage so they, too, have the same language in regard to property interests.

Now, just as a matter of great interest, really, the finale of the Spry case is referred to in a decision which I've footnoted at 142 of my submissions was that Dr Spry was so cross that he as trustee subsequent to the High Court decision liquidated the trust assets into four million dollars cash in a suitcase and threatened to burn the lot and fortunately his wife's lawyers realised that and the daughters went in and got the suitcase. I think they got name suppression. Dr Spry's conduct did not ultimately suggest someone who had much regard to equitable orthodoxy even though that was exactly what he had argued in the High Court.

Charman v Charman (No 4) [2007] 1 FLR 1246, I want to touch on briefly because it's the leading UK case. It's at 279 in my bundle. This is the Dragon Trust one. I think I may have said it was *Poon* but actually *Charman* is the Dragon case. 28 year marriage. Dramatic success in the insurance industry for the husband and they go and live in Bermuda. He informs the wife that the marriage is at an end. They had assets of 131 million including 68 million in an offshore discretionary trust created by the husband upon an expression of wish that during his lifetime he should be its primary beneficiary. So the husband said the trust assets shouldn't be treated as financial resources of the husband because it was a dynastic trust intended for the benefit of future generations, and this case followed *White v White* [2001] 1 AC 596 and said, well, following *White*, which was again a Judge-made law in the UK saying not only do you quantify, the general rule is equality, which was the big movement forward, they said following *White* we're going to change the approach to trusts and *Charman* is the decision which did that.

They rejected – this is page 280 of my bundle, the head note – they rejected the dynastic argument as being inevitable because of the obvious fiscal purpose behind the trust, the husband's inclusion of himself as a named beneficiary, his power to replace the trustees, the contents of his letters of wishes, the absence of any documentary evidence to support his argument, the inference to be drawn from his attempts to prevent the wife having access to trust documents and other factors. And they said the test is that the Court must be satisfied, if the resources and the trust are to be taken into account, that the trustees would have advanced those

assets to the husband if he'd asked them to do so, and they said on this basis it is a resource.

And then 13, there's the head note I was referring to before. Because of *White* it's changed but since the advent of reference to proportions the focus of the Court has largely shifted from needs to computation of resources, so they've come, really, to the New Zealand situation where you decide what is the property pool rather than a kind of maintenance base that they were based on. Whenever such an enquiry had to be made, it was essential that the Court bring to the task a mixture of worldly realism and respect for the legal effects of trusts, the legal duties of trustees, and in the case of offshore trusts the jurisdictions of offshore Courts and the circumstances of the case it would have been a reproachful emasculation of the Court's duty to be fair if the assets that the husband had built up in the trust during the marriage had not been attributed to him.

And page 289 gives you summary of Dragon. Husband settlor, wealth represents fruits of investment at his request in companies until the breakdown of the marriage. His wishes were that he should have the fullest access to capital and he expressed the wish to be a primary beneficiary. And then I want to finally draw Your Honours to paragraph 57 where Their Honours say, just page 291, "For reasons of policy we are pleased to find ourselves able to uphold the Judge's attribution to the husband of all the assets in Dragon," and they talk about the focus of *White* and the need for fairness, but there is a Court pleased to be able to include trust assets in division.

Whaley v Whaley [2011] EWCA Civ 617 is at 304, and the reason I refer to that is that – there was something specific – the wife was not a beneficiary of the trust, and page 312 of the bundle, 34, there was an independent trustee, Mr Hess, but they said, "Well, he's prepared to do the husband's bidding," and they say, and this is important for Mr Cheshire in regard to the other trust, "There is simply no evidence of the trustee ever failing to provide funds for the husband's needs whether in terms of business investments or assistance with the provision of homes." "Mr Hess can be demonstrated to have fulfilled his role since the proceeding began confirms that he continues to follow the husband's wishes."

Now paragraph 51, page 315, it was argued, well, they would be in breach of their fiduciary duties in a number of respects if they provided the funds to the husband, arguing that they owed a general duty to all beneficiaries of the trusts and would be failing in that duty if they paid out the capital to a single beneficiary. "This argument

does not survive a careful reading of the terms of the declaration of trust in relation to the Farah Trust, which govern both that trust and the Yearling Trust." And the clause says, "Provided always that the trustees" –

GLAZEBROOK J:
I've lost you, sorry.

MS CHAMBERS QC:
315, Your Honour.

GLAZEBROOK J:
Yes, paragraph?

MS CHAMBERS QC:
And paragraph 51. Half way through I started reading.

GLAZEBROOK J:
Thank you.

MS CHAMBERS QC:
"Provided always that the trustees are hereby expressly authorised in exercising any of the powers hereby conferred in favour of any particular person to ignore entirely the interests of any other person interested or who may become interested" in other presents. So that clause was the end of that argument, and –

WILLIAM YOUNG J:
What happens where the trustees don't distribute money in favour of the husband so as to enable an order to be met? What would happen in, is it *Whaley*, if, contrary to the expectations of the Court the Farah Trust said, "Well, we're not going to distribute money here just to enable a Court order to be met"? Do they deal with that?

MS CHAMBERS QC:
I think – I don't know the answer to that.

WILLIAM YOUNG J:
Which probably they don't but…

ELIAS CJ:

Were they parties?

WILLIAM YOUNG J:

They're not exercising a power over the trustees. They're exercising power into the husband on the basis that he can get the money from the trust if he puts his back into it.

MS CHAMBERS QC:

Don't appear to be parties, Your Honour. That's page 304. I don't know the answer to Your Honour's question, how they deal with that.

ELIAS CJ:

Probably with contempt of Court.

WILLIAM YOUNG J:

Well, no, they're not exercising a jurisdiction over trustees. They're exercising a jurisdiction over the husband and they're attributing to the husband assets which he can, a sort of, a sum of money which to access he has to go to the trust.

MS CHAMBERS QC:

Well, paragraph 9 is the orders, on page 306, is the orders made in the lower Court, basically orders that the husband pay the wife, so I suppose in this case there was non-trust property.

WILLIAM YOUNG J:

But doesn't he, weren't they saying they couldn't do that without, that would require them to go to the trust?

MS CHAMBERS QC:

Yeah they were and I think that's dealt with on – it's paragraph 56 and 57.

WILLIAM YOUNG J:

Para 6, 10.4 million is available. Nearly seven million of this comes from the two trusts.

ELIAS CJ:

Well I'd suppose they'd be asked to exercise ancillary jurisdiction comparable to that contained in our section 33 if there proved to be a problem.

WILLIAM YOUNG J:

Maybe.

MS CHAMBERS QC:

Yes, I'm looking at 50 – paragraphs 56 and 57 and the husband has argued that the trustees should have been joined, you can see that in 56, which is what usually happens here, because as part of join under 37 the trustees get given notice so that the Court can make orders against them and they get joined but I don't know the answer to Your Honour Justice Young's question.

WILLIAM YOUNG J:

Section 182 of the Family Proceedings Act might be able to be invoked.

MS CHAMBERS QC:

And 182, on its face, doesn't require the joinder or the trustees to do it either. You might recall in *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 the trustees were not represented.

GLAZEBROOK J:

Maybe it's just so even if there's an order against him then he will exercise proper rather than improper pressure and I just need some discussion about what that might be in terms of, on the trustees, to give him the assets to fulfil the order.

MS CHAMBERS QC:

He'd face bankruptcy if he did that.

GLAZEBROOK J:

Exactly.

WILLIAM YOUNG J:

But if the trustees are sort of a company in the Cayman Islands, practically immune from the coercive power of the English Courts it's not quite so clear to me what happens.

MS CHAMBERS QC:

Not of husbands, no one's immune from the direction of husbands.

WILLIAM YOUNG J:

And if the husband is prepared to put up with bankruptcy on the basis that the real assets were on high ground in the Cayman Islands, it may be that it leads nowhere.

MS CHAMBERS QC:

There's the US case, isn't there, where he had property in a trust in the Cook Islands and orders were made against it and he refused to comply and they threw him in jail until he did comply because it was an order against him personally.

WILLIAM YOUNG J:

Threw the husband in jail?

MS CHAMBERS QC:

Mmm, United States citizen.

WILLIAM YOUNG J:

Not so good at that.

MS CHAMBERS QC:

And we're not asking for it here. Now *Poon* I've already dealt with, and that leaves *TMSF v Merrill Lynch Bank & Company (Cayman) Ltd* [2011] UKPC 17 or *Fonu*, as it's known as, which I want to go to briefly, and you'll find that in Mr Carruthers' bundle of cases, 423, 2015, and it's under tab 7. And this is decision relied on by their Honours in the Court of Appeal and the, as I say in my roadmap, the end result of the exercise of the powers in *Fonu* was the ability of the settlor to restore the trust property to himself. They were different powers, there was a power of revocation in this trust deed, but in the end the result of the exercise of the powers held by the settlor in *Fonu*, and in this case, are exactly the same. It's a Privy Council decision, 2011, and basically the defendant was – the chap in charge was a ratbag. He was bankrupted in Turkey and they got judgment against him personally in respect of his businesses for US30 million and he had shuffled away US24 million into two discretionary trusts in the Cayman Islands, and the husband, the wife and the defendant, Fonu, had power of revocation of trust deeds, and this is the decision where the Court of Appeal followed in the *Clayton* case, and you can – it's the same language under the head note, "There was no invariable rule that a power was

distinct from ownership, nor was there a rule that any departure from the distinction between power and property was effected solely by legislation; that, with regard to the trusts, the defendant owed no fiduciary duties and his only discretion was whether to exercise his powers in his own favour; that, in the circumstances, the power of revocation was such that in equity they were tantamount to ownership." So they made orders against him that he had to delegate his powers of revocation to the receivers so that they could enforce the Turkish orders. It follows *Masri v Consolidated Contractors International (UK) Ltd* (No 2) [2009] QB 450, which is another English case, and basically applies *Masri*. Mr Demirel is the ratbag who's the controller of the group, and paragraph 4 of the decision, for practical purposes the beneficiaries are the husband and wife. And in the lower Courts, too, at paragraph 8, the same issue was – the same result, that is, the power of revocation was sufficiently close to the notion of property to result in a remedy.

So paragraph 9, they had trusts in the Cayman Islands. They are discretionary, common ground that they are valid and duly constituted as a matter of Cayman Islands law, and there is the revocation clause in paragraph 12, "This trust may be revoked, amended, varied or altered in any manner whatsoever" by the settlor, provided it doesn't – won't take effect until receipt of that instrument, or if it increases the liabilities of the trustee. In substance, that's exactly the same as what Mr Clayton can do. And the discussion about powers and properties at paragraph 31, and they go through the cases about the traditional view being that a power is distinct from property but it's not an absolute rule and they go through how context is always important, as Mrs Clayton says, it's the legislation and the terms of the trust, and they say for some purposes anyway the case law establishes that a power was not property but in other cases it was effectively ownership.

They quote Lord Denning at paragraph 39, which is a lovely quote where he talks about cloaks, which I've adopted, and the quote says, "What does this come to? It means that," this is paragraph 39, "in order to avoid estate duty, the lawyer turns magician. He advises his client to execute a revocable settlement, and in an instant, before our very eyes, the contingent capital interest is gone. No one can see it. It is replaced by a continuous life interest. No estate duty is payable. And then, whilst we sit admiring the performance, wondering what is coming next, he can, when he pleases, bring back the capital interest. He advises his client to revoke the settlement, and with, of course, the consent of his co-trustee, and at once the capital interest is there intact. It makes me rub my eyes. I cannot believe it is true. Those near me acclaim the feat. But I do not. I have a feeling that the contingent capital

interest remained there all the time, cloaked by a revocable sub-settlement. Pulling the cover aside, you will see it as it really is, a contingent capital interest which became absolute on the father's death and on which, therefore, estate duty is payable."

So they quote at 47 the United States position which basically is that the assets of a revocable trust are treated, in fact, as, during the settlor's lifetime, as the settlor's property, precisely because the settlor necessarily, of a revocable trust, necessarily retains the functional equivalent of ownership of the trust assets. The trend in the Courts as well is to conclude that the settler of a revocable trust should be treated as the virtual owner of the trust property, especially insofar as the rights of creditors are concerned. A revocable inter vivos trust is ordinarily treated as though it were owned by the settler." And paragraph 46, "The approach of the Courts is that the settlor retains all of the substantial incidence of ownership and that it would be excessive –

O'REGAN J:
By essence.

MS CHAMBERS QC:
Yes, thank you, Sir. "to the form in which property is held to prevent creditors from reaching property placed in trust under such terms." So they talk about at 56 how *Masri* was an incremental development, the movement from the previous case law, the jurisdiction needing to be exercised to look at new situations, and the change in the approach of the Courts, and paragraph 59 is their summary, here's got, "The power of revocation can be regarded as having right tantamount to ownership. The interests of justice require that an order be made in order to make effective judgment of the Cayman Court recognising and enforcing the Turkish judgment." In 62 they talk about fiduciary powers, "In the present case the power of revocation cannot be regarded in any sense as a fiduciary power and the defence do not suggest otherwise. The only discretion Mr Demirel has is whether to exercise the power in his own favour, he owes no fiduciary duties, as has been explained the powers of revocation are tantamount to ownership." So those cases are a strong foundation for this Court to follow suit in terms of addressing the problems of trusts.

So I finally want to just finish briefly on *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58. Now *AIB* is a case quoted by my learned friend, Mr Carruthers QC and he refers to that as justifying a difference between business trusts or commercial trusts and other family trusts. But I've had a look at that case, and I

have copies here, because it's not in any of the bundles, if Your Honours want a copy.

ELIAS CJ:

Yes, I would like to see that case, thank you. Oh, this is the long-awaited one.

MS CHAMBERS QC:

It's a slightly complicated fact situation, but what happens is that an owner of a house wants to – I think it's a house – wants to re-mortgage their house, and so they borrow money from lender 2 in order to discharge lender 1 so that lender 2 can become the first mortgagee, but, and they're told by lender 1 that X dollars is due in order to discharge, and they get X dollars into the solicitor's trust account, the solicitors are acting, and in fact when it comes to settlement day lender 1 says, "Actually, no, it's more than what we said, we want more money, otherwise we're not discharging our mortgage." So the solicitors try and sort it out, they can't sort it out, so the solicitors for lender 2 decide to simply register a second mortgage and advance the money. Now then there's a catastrophe. There's a default and the building or home or whatever it is sold, is sold at mortgagee sale at a significant loss and lender 2, AIB, loses all of their advance, and they sue the solicitor, solicitors, for breach of trust in regard to the total loss. So what this Court is talking about is the position, the trust position, created by contract when the money is sitting in the solicitor's trust account before settlement because that is when AIB said there was a breach of trust.

ELIAS CJ:

But is this the remedial constructive trust decision?

O'REGAN J:

No, it's about equitable compensation.

ELIAS CJ:

Yes, sorry, that's what I meant really.

O'REGAN J:

It's been a very criticised decision.

ELIAS CJ:

Yes, very criticised decision. But what's the statement of principle you –

MS CHAMBERS QC:

Well, it's paragraph 70 I want to draw Your Honours' attention to because this is where they talk about commercial trusts, but my key point is what they mean by commercial trust is very different from the Vaughan Road Property Trust. They don't mean trusts which happen to have commercial business assets in them. They mean trusts which come about as a result of contractual relations. So 70, the Court says, "As to the criticisms of the passage in *Target Holdings* where Lord Browne-Wilkinson said that it would be wrong to lift wholesale the detailed rules developed in the context of traditional trusts and apply them to a bare trust which was but one incident of a wider commercial transaction involving agency, it is a fact that a commercial trust differs from a typical traditional trust and that it arises out of a contract rather than the transfer of property by way of gift. The contract defines the parameters of the trusts. The trusts are now commonly part of the machinery used in many commercial transactions, for example, across the spectrum of wholesale financial markets where they serve as a useful bridging role between the parties involved. Commercial trusts may differ widely in their purpose and content but they have in common that the trustee's duties are likely to be closely defined and may be of limited duration. Lord Browne-Wilkinson did not suggest that the principles of equity differ according to the nature of the trust but rather that the scope and purpose of the trust may vary and this may have a bearing on the appropriate relief in the event of breach."

So still the same rules apply but they're talking about a commercial trust in terms of the trusts which get set up when a solicitor accepts money into their trust account. Quite different from this. This is a traditional trust. There's gifting, there's family members, there's no contractual arrangements, there's a deed of trust. Quite different.

So those are the submissions for Mrs Clayton in regard to 23, unless I can be of further assistance to Your Honours.

ELIAS CJ:

Right, thank you.

MS CHAMBERS QC:

Thank you, Your Honour. Yes, Mr Carruthers.

MR CARRUTHERS QC:

May it please Your Honours, I want to begin by putting both of these trusts into context because, in my submission, that's the way in which they will fall to be interpreted, and I want to go to the factual findings that were made at first instance, so I'm in volume A and I'm at paragraph 73, or beginning at 72 on page 77 of volume A.

Now these were the findings that were made in relation to the Vaughan Road Property Trust, paragraph 72, "This trust was settled on 14 June 1999 by way of a declaration of trust by Mark Clayton as trustee. Effectively he is the settlor and sole trustee. The discretionary beneficiaries include Mr Clayton, as the principal family member, Mrs Clayton, as his wife, and the children are the final beneficiaries," and that's important in the context of my argument.

"The purpose for which this trust was set up was to separate and distance the underlying land ownership from the operating assets of the company. The Claymark Group had been undergoing financial difficulties, during the 1990s, to the extent that there was a risk of receivership. It was decided that the land would be transferred into separate ownership and would put in place leases to the various operating companies at that time. This rental income would support borrowings, from BNZ, secured over the land. With the additional funding from BNZ the business enterprise was able to continue and indeed flourish. The Vaughan Road Property Trust acted as a banker. It has largely borrowed from BNZ to advance loans to other entities. Financial statements have been prepared on an annual basis," and I don't need to take it any further. So that's the context for the Vaughan Road Property Trust.

Now just for convenience I'll deal with the Claymark Trust as well so one can see a pattern. In 68 the Judge dealt with it this way; in the middle of paragraph 68, "This trust was established to purchase two properties at Katikati, adjourning the sawmill." And then in 71, where there's the argument about section 182, and in relation to the trust, the Judge concludes this, and I'm in the middle of the paragraph, "There is a difficulty, however, in that it is clear that this trust was set up for business purposes and particularly, according to the evidence, to enable the purchase of properties adjoining in the Katikati mill for strategic purposes, including creating a buffer to reduce difficulties with obtaining resource consents from neighbours regarding operating hours for the mill."

So that's the context of both the trusts and I want to go back now and just look at the nature of the property that was involved in the Vaughan Road Property Trust by reference to the findings at first instance. And I am now at paragraph 39, which is on page 67. "Mrs Clayton argues that, because at that stage there was no equity in the business, any separate property that Mr Clayton had owned, prior to that, was lost and that with the restructuring of the business that had occurred with the setting up of the Vaughan Road Property Trust in 1999 from when the business started to become profitable, that property was property acquired during the marriage and therefore falls within section 8(1)(e). I do not accept that proposition. Whilst the business may have been in a precarious financial position, the fact remains that Mr Clayton or his entities owned business assets which had their origins in his pre-relationship property. Those assets comprise land and the business operating assets. Had Mr Clayton or his entities not owned those assets, then there could not have been a restructuring of the business structure with the subsequent lending by BNZ. Mr Clayton did not dispose of assets and re-acquire them during the relationship, they remained in his ownership. It was the level of indebtedness that changed, resulting in a change in the equity. I do not accept that any increased level of equity in relation to assets that are separate property can constitute relationship property for the purposes of section 8(1)(e)."

Now I want to move from there to the need to deal with property. So because –

O'REGAN J:
Mr Carruthers, can I just interrupt you there. These assets are assets in the Vaughan Road Trust, is that what you're saying?

MR CARRUTHERS QC:
That's, that's, yes.

O'REGAN J:
So why are we talking about whether they're separate or relationship property?

MR CARRUTHERS QC:
Well, it's the separate quality of them that – and the transfer of the separate quality of them to the Vaughan Road Property Trust.

O'REGAN J:
Right. Well, she seems to be talking about them as if they're his assets.

MR CARRUTHERS QC:

I think she's looking at the, at that stage immediately to 1999 prior to the transfer to the Vaughan Road Property Trust.

O'REGAN J:

Well, she's talking about whether they can now constitute relationship property. It seems to be she's talking about the business assets, not the land in the trust.

MR CARRUTHERS QC:

Well, although Your Honour – the sentence in the middle of that paragraph, those assets comprise land and the business operating assets.

O'REGAN J:

Yes, but that's effectively a finding that he owns the land which is clearly not the finding that you want to lead us to.

MR CARRUTHERS QC:

Well, Your Honour, the way in which – the context in the way in which I have understood the paragraph is that that is looking at the position immediately prior to the Vaughan Road Property Trust.

Now, I want to deal with this question of powers.

GLAZEBROOK J:

Well, how did the properties get into the trust? Is it those properties that went into the trust, the section at Banksia Place with the two parcels in Vaughan Road?

MR CARRUTHERS QC:

No, the section at Banksia Place didn't go in but the two parcels of land did.

GLAZEBROOK J:

How did they get in there? Sold for the debt back?

O'REGAN J:

Because at that point the debt becomes the relationship property or separate property, whichever way …

MR CARRUTHERS QC:

No, it doesn't become – there's no question of relationship property. In relation to *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 it arises as a species of property by way of increase in value where it's been separate property and you are looking at a position that is deferred until separation so that you then have to look at the way in which the property arose, which is why this issue of separate property comes up if the Vaughan Road Property Trust is struck down.

GLAZEBROOK J:

All right. So he had separate property which was Banksia Place and the two parcels of land. That was the agreement about the 500,000 that was attributed as value to those except for the fact in 1999 there didn't seem to be any equity in those because he had a whole pile of debts but let's forget that. So the Banksia section never got anywhere near the Vaughan Property Trust. The two parcels of land at Vaughan Road went into the property trust when and how? It was settled with ten bucks, wasn't it?

MR CARRUTHERS QC:

Well, that's – yes, it was settled. That's right. Your Honour, I might just have to go back to the evidence.

GLAZEBROOK J:

That's fine.

MR CARRUTHERS QC:

But there's no doubt that those properties were transferred and that was the purpose of setting up the Vaughan Road Property Trust so I think one can take it that with some immediacy they would have been transferred but let me deal with that by reference to the evidence and I will come back to you on that. I was going to look at this question of powers and the scope of powers because there was a need because these were business trusts to deal with the property that was in them and it is the grant of powers that enable a trustee to do that but those powers, the existence of those powers do not mean that there was no fiduciary duty on the trustee that sat alongside those powers, and the reason for the powers I suppose is illustrated by, for example, the common law rule about – or the equitable rule about no conflict of interest and in order to deal with any question of conflict of interest there had to be a power in the trust deed.

What's of significance here is that for all the criticism about the width of the powers and what be done and what might not be done, there has been no exercise of the powers that have been criticised in over 20 years of operation of the trust and there's a very easy explanation for that. It was a business trust and the powers were designed to deal with the scope of business that was necessary. Let me just look at–

ELIAS CJ:

What will you come on to, because I don't know what a business trust is.

MR CARRUTHERS QC:

I don't – in the passage that my learned friend just referred to there is no particular magic to it. There's no suggestion that it has other legal rules associated with it. It is simply that the nature of its existence is that it is in existence to conduct the business or to finance the business that was being conducted by the Claymark Group and that's the only significance of it.

GLAZEBROOK J:

But why do you need powers to resettle a trust or take out beneficiaries or appoint it all to yourself for business purposes? What possible reason – I mean, you might need powers to borrow and do various things like that for business purposes but I can't see what the powers that we're worried about –

MR CARRUTHERS QC:

Well, power to deal with himself so that he can deal with the money to acquire other assets or to divert that money.

GLAZEBROOK J:

But the trust could acquire those other assets. He doesn't need to deal with himself like that. The trust – like a company can acquire other assets. It doesn't need to deal with the shareholder. Why does the trust need to deal with him?

MR CARRUTHERS QC:

Well, he needs those powers as the trustee to deal with this. I'm talking about his powers as a trustee.

GLAZEBROOK J:

Well, no, I don't understand that. He has all the powers as a trustee to do whatever he wants with the business the trust exercises, doesn't he? He doesn't have to deal with himself for that.

MR CARRUTHERS QC:

As the trustee, he needs those powers to be able to use the trust assets for the business purposes of the group.

O'REGAN J:

No, he doesn't. He just needs the power to operate the – to lease the properties to the business. He doesn't need to be able to appoint all the assets to himself. Why is there a business purpose for that? There's lots of trusts that carry on business that don't have those sort of powers.

MR CARRUTHERS QC:

Well, let me just examine the powers, then, as to whether they are typical or atypical and my learned friend relies on clauses 11, 12 and 14 and I'm now in volume E at page 1339 which is clause 11. Clause 11 was the first clause identified and my submission is that that is a perfectly normal clause because it entitles the trustee to look at classes of beneficiary, for example, there may be children, grandchildren, nieces and nephews in the discretionary beneficiaries and it is a conventional power to allow the trustee to exercise discretion.

GLAZEBROOK J:

I have to say, I've never seen anything that's as extreme as this in a trust deed because as a discretionary trust the only right that the beneficiaries have is a right to be considered. You certainly don't need a clause like this that effectively takes away any right to be even considered by the trust deed to operate a normal discretionary trust, do you? I mean, this is an extreme clause that I haven't seen before.

MR CARRUTHERS QC:

Well, all it does is allow the trustee to distinguish between groups of beneficiaries or between beneficiaries.

WILLIAM YOUNG J:

It's its role in conjunction with clauses 7 and 19 that I suppose attract some surprise.

MR CARRUTHERS QC:

Well, let me deal with them separately because obviously I'm coming to 7 and with His Honour, Justice Arnold, mentioning 19 I'll deal with that as well. 12, my submission is to the same effect that that is not an unusual power and there are trusts with wide-ranging powers that are similar to these, as I'll come to in a moment, and 14, the issue of self benefit, the fact that there is an ability to self benefit does not detract from the concept of trust, as I shall illustrate by reference to some of the cases.

I'll go now to 19 and deal with the issue which His Honour, Justice Arnold, raised. Your Honour raised it in relation to 19(1)(c), but it's important to read that in context because it relates directly to 19(1)(b) so that if there is a trust – if a trustee is a trust of one trust and it is dealing with another trust of which he or she is also a trustee then that is the negation of conflict clause, and just reading (b), that trustee may be a trustee of any other trust to or from which the trustees propose to sell or purchase shares, securities or other rights or property or with which the trustees otherwise deal as trustees of the trust or the interests or duty of that trustee which refers back to the trustee in (b) –

ARNOLD J:

No, it doesn't, because all of these clauses start with that trustee. A trustee may act as such and exercise all of that trustee's powers notwithstanding that that trustee, that trustee, that trustee.

ELIAS CJ:

And linked by all.

MR CARRUTHERS QC:

Well, I confess I hadn't read it that way but the – it doesn't detract from my argument because if the concept is that that removes the trustee's fiduciary duty then, with respect, I disagree with that because – and this comes really around to the argument in 7.1, that there is no power in the trustee to remove the final beneficiaries, and the existence or the absence of that power, so the existence of the final beneficiaries, mean that there is always a duty to account so there has to be a fidelity to that mandate to account. That's the loyalty that is required. So just to meet Your Honour, Justice Young's, comment, it's not unconstrained at all because –

GLAZEBROOK J:

Well, it's only constrained in the fact that there might be nothing to appoint because you can resettle on one of the beneficiaries, which could include yourself, and you can do so without taking account of any conflict of interest whatsoever. You could appoint all of the capital or income to one or other of the beneficiaries, so you might have a duty to account but it was a duty to account that attached nothing.

MR CARRUTHERS QC:

And, Your Honour, in the context of the way in which the trust was operated and the purpose of the trust and where the probabilities lie, there is no suggestion and there has never been any suggest and there can be no suggestion that those powers would be exercised, that wasn't the purpose of the trust at all.

ELIAS CJ:

Well, why have them?

MR CARRUTHERS QC:

Well, the only – well, I expect it's a drafting matter that goes back to the way in which they were prepared.

O'REGAN J:

Does it matter if they haven't been exercised, well, isn't the point that the powers are there, that it means he isn't constrained by the normal constraints that would be applied to a trustee?

MR CARRUTHERS QC:

Well, but Your Honour that begs the question, my submission is that he is constrained, because the power to, the fiduciary duty to account must remain because –

O'REGAN J:

Well, no, but he can appoint the whole of the trust fund to himself, even is that conflicts with his duty, that's what it says.

MR CARRUTHERS QC:

Well…

O'REGAN J:

So why do the final beneficiaries have any say in that?

MR CARRUTHERS QC:

Well, because a Court in equity simply wouldn't countenance that conduct that would be –

WILLIAM YOUNG J:

What would be the peg that you would hang it on? They couldn't complain about the appointment of himself as sole discretionary beneficiary.

MR CARRUTHERS QC:

No.

WILLIAM YOUNG J:

Then he says, "Okay, and now I'm going to appoint everything to myself" –

MR CARRUTHERS QC:

Well, they –

WILLIAM YOUNG J:

– and you say, "Well, that's a conflict of interest," and he says, "Well, so what, look at clause 19."

MR CARRUTHERS QC:

No, no, the final beneficiaries would still be able to call to account as to whether that was a proper exercise of the power, and if the –

GLAZEBROOK J:

But why wouldn't it be, given the terms of the trust deed? And actually even probably if you take out the terms of the trust deed. Because that was the point in those cases we were taken by Ms Chambers, wasn't it, that if the trustees did as the settlor wished, being independent trustees, as long as they considered the issues of the other beneficiaries and whether they should distribute there would be nothing wrong with them distributing the trust fund to the settlor. And here they don't even have to consider the other interests, and he can do it himself without going through an independent trustee, according to the terms of the trust deed.

MR CARRUTHERS QC:

Well, the mandate, the mandate, the fundamental mandate under the trust is to benefit the final beneficiaries, they cannot be removed. So my submission is that properly interpreted he had an obligation to account to the final beneficiaries and that to do otherwise so is to defeat that part of the mandate would be a breach of trust which the final beneficiaries could enforce.

ELIAS CJ:

Can't he re-settle, can't there be a resettlement under the terms of the trust deed?

GLAZEBROOK J:

On any of the beneficiaries at all, including himself, or any beneficiary he adds, the Cancer Foundation – actually I don't think there is such a thing there is such a thing as the Cancer Foundation.

MR CARRUTHERS QC:

Well, my submission is there is certainly power to add discretionary beneficiaries or to benefit discretionary beneficiaries in different ways, but –

ELIAS CJ:

Or to re-settle.

MR CARRUTHERS QC:

Well…

ELIAS CJ:

Which is the para again?

GLAZEBROOK J:

9, I think.

ARNOLD J:

8.1 is the resettlement.

MR CARRUTHERS QC:

8.1.

O'REGAN J:

That is, at least, a trustee power whereas the appointment of discretionary beneficiaries is done by the principal family or it's the same person but in a different capacity.

MR CARRUTHERS QC:

Yes, and it carries with it different obligations, yes.

GLAZEBROOK J:

Although 9.4 it can be exercised on any terms and conditions as the trustee may decide.

MR CARRUTHERS QC:

My submission remains that the fundamental mandate is to the final beneficiaries and if powers of this kind were sought to be exercised, which defeat that mandate, then that is a breach of the trustee's fiduciary duty and on which would be enforced.

O'REGAN J:

But what would be the breach of trust?

MR CARRUTHERS QC:

It would have to be that the step that was taken was such that it defeated the final beneficiaries' entitlement –

O'REGAN J:

Well that happens all the time.

MR CARRUTHERS QC:

Well –

O'REGAN J:

I mean final beneficiaries often get beaten by appointments being made to discretionary beneficiaries earlier in time.

GLAZEBROOK J:

And 10.1A even on vesting day they can appoint by deed to any of the beneficiaries to the exclusion of the final beneficiaries, 10.1A.

MR CARRUTHERS QC:

No, Your Honour isn't that limited to discretionary beneficiaries.

GLAZEBROOK J:

Well, yes but –

MR CARRUTHERS QC:

So it's not, it can't be to the – no, no –

GLAZEBROOK J:

Well you can, you could appoint to himself or to his – if he's added as a beneficiary somebody, he can appoint even on vesting day that person to the exclusion of the final beneficiaries, as long as they are a discretionary beneficiary.

ARNOLD J:

And he also has the power to set the vesting day.

GLAZEBROOK J:

Yes.

ARNOLD J:

So he can set the vesting day and vest it all in himself.

MR CARRUTHERS QC:

Well I mean that, I'm going to just repeat the submission, that to exercise the power in that way.

GLAZEBROOK J:

Well I can't see that it is because it's a specific thing that says, distribution on the vesting day, you can by deed appoint any of the discretionary beneficiaries to be the beneficiary that takes the trust fund on vesting day. How can it defeat the final beneficiaries when it's an explicit power to do so? I can understand the argument of appoint it before –no I can't understand the argument because I think you can anyway, but here you've got an explicit power on vesting day to give it to any of the beneficiaries you want to the exclusion of the final beneficiaries.

MR CARRUTHERS QC:

I mean don't, with respect Your Honour, why does that eliminate the final beneficiaries because the argument –

GLAZEBROOK J:

They get nothing.

MR CARRUTHERS QC:

Hmm?

GLAZEBROOK J:

They get nothing on vesting day.

MR CARRUTHERS QC:

Well –

GLAZEBROOK J:

It's pretty eliminated to me.

MR CARRUTHERS QC:

Well Your Honour it does become a question as to whether the Court would see that as a proper exercise of the trustees' mandate when the fundamental obligation is to account to the final beneficiaries.

GLAZEBROOK J:

Well I just don't see that if you look at 10.1A. The final beneficiaries are if you haven't appointed one of the discretionary beneficiaries so they're effectively a contingent on that power of appointment not being made by the trustees.

MR CARRUTHERS QC:

Well they can ask for an account as to the basis, as to the justification for the appointment on vesting day of the way in which the trustee exercises that power.

GLAZEBROOK J:

Well the case law would say you're not allowed that, so unless the trustees have said, "We are being," in writing, "We are being totally capricious and we have decided we won't consider anyone else and we will appoint a, because the moon told us to

when we were dancing in it," unless they've written that down the Courts have been very reluctant to look at the exercise of discretion by trustees haven't they?

MR CARRUTHERS QC:

Yes, I accept that, and the – yes I suppose – *Kain v Hutton* is in a different category, but there –

GLAZEBROOK J:

Well they were fixed beneficiaries.

MR CARRUTHERS QC:

I'm sorry?

GLAZEBROOK J:

They were fixed beneficiaries mostly, or the trusts have already vested, in some of the cases.

MR CARRUTHERS QC:

Yes, no, I understand the point. Well, I mean, the final beneficiaries here are, in that sense, fixed beneficiaries as well.

WILLIAM YOUNG J:

Mr Carruthers, I have a feeling that there's a case where, I think, Judge Osborne reviewed authorities as to what, I think, was said to be a capricious removal of beneficiaries in a family dispute and – does this ring a bell with you at all? And I think –

MR CARRUTHERS QC:

Yes, yes it does ring a bell.

WILLIAM YOUNG J:

And I think it was held that that wasn't subject to – that wasn't a fiduciary power, that was a, you know, basically I removed them because I hate them because they've been such bad children, or something along those lines. That may review some of the authorities that are on, at least touch on the subject of your debate with Justice Glazebrook.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

I think if there was a totally capricious, proved capricious use of power, as a trustee, it could probably and would be reviewed.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

But as I say, it is normally when you have done something like write down, "I'm not even considering these other beneficiaries," otherwise there's been a real reluctance to do so. But, of course, the powers that are personal are going to be in a different category from powers qua trustee.

MR CARRUTHERS QC:

Yes I, I, and I understand that.

WILLIAM YOUNG J:

I think that's what the case, a case I was talking about, I think, was treated as a personal power, it must have been, I guess.

MR CARRUTHERS QC:

Yes. I think that the submission was that the trustee had fiduciary obligations, they were not excluded by the deed and, although we are in difference on what might be done, my submission is that the mandate is to the final beneficiaries and if the powers were exercised to defeat that mandate, that would be an act that the final beneficiaries could ask the trustee to – could enforce an account against a trustee, so that has to be the submission.

Now, I think the only other point is 7.1, that I need to deal with specifically, and my submission, and my written submissions are that that power just does not have the qualities that the Court of Appeal said that it had. It could not achieve what the Court of Appeal said it would achieve, with respect to my learned friend's submissions, at paragraph 120, she does not seem to take issue with that but relies on other grounds in the deed.

Can I just deal with this issue of powers and the –

ELIAS CJ:

Sorry, remind me again, what is the submission you make on the Court of Appeal's treatment of clause 7?

MR CARRUTHERS QC:

I'm in my written submissions Your Honour and I dealt with that extensively in the summary of argument at paragraph 5 through 9 in summary, and then I have explained that in dealing with the Court of Appeal decision at paragraphs 26 through to 31.

ELIAS CJ:

I think I'm looking at the wrong submissions.

MR CARRUTHERS QC:

Sorry, Your Honour?

GLAZEBROOK J:

It's a bit confusing with about –

ELIAS CJ:

No, I'm sorry, I've been looking at the wrong submissions.

GLAZEBROOK J:

– sets of submissions, which is…

ELIAS CJ:

Para 26.

MR CARRUTHERS QC:

The summary, sorry, Your Honour, they're my initial submissions dated 30 July 2015 and the summary is at paragraphs 5 to 9 and then the argument is set out at paragraphs 26 through to 31.

ELIAS CJ:

Yes. It's just I have not understood Mrs Clayton to be accepting.

MR CARRUTHERS QC:

I understand. If I can take you to paragraph 120 of the submissions then at – and they're the submissions dated 18 August where the submission's made the Court of Appeal has interpreted clause 7.1 as enabling the removal of the financial beneficiaries, given that they are included in the definition of discretionary beneficiaries. Even if that interpretation is incorrect, there can be no doubt that Mr Clayton could legitimately remove any entitlement to his daughters as final beneficiaries, and then the –

WILLIAM YOUNG J:

But if the –

MR CARRUTHERS QC:

– and that's the only –

WILLIAM YOUNG J:

I had already noted though that "discretionary beneficiaries" includes the final beneficiaries, so why – I mean, it just may be ease of drafting.

GLAZEBROOK J:

I think they're probably in a different capacity as final beneficiaries. I'm not sure that the removal as a beneficiary would remove them as a final beneficiary so that they're specifically defined as final beneficiaries, that's the point.

ELIAS CJ:

I see. I had not appreciated that.

GLAZEBROOK J:

So yes, you could remove them as a discretionary beneficiary but you couldn't as final is the –

MR CARRUTHERS QC:

But not as a final –

GLAZEBROOK J:

That's the argument as I understand it.

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

That is the argument, yes, yes.

WILLIAM YOUNG J:

Okay, but the other argument is that even if that's so, you can in effect do that by removing them as discretionary beneficiaries and appointing everything to whoever substitutes for them. That's the –

MR CARRUTHERS QC:

Well, that –

GLAZEBROOK J:

Well, you don't even need to remove them. You can just appoint to one of the others and leave them there.

ELIAS CJ:

Or you can resettle.

MR CARRUTHERS QC:

Well, that's the contest that –

WILLIAM YOUNG J:

Yes.

MR CARRUTHERS QC:

Yes. But yes, I mean, all – I understand what is being put to me but the – but I put the argument on the basis of the inability to remove the mandate completely.

GLAZEBROOK J:

And also we can understand as a practical matter, he is, one assumes, very unlikely to remove his daughters as beneficiaries, in any event.

MR CARRUTHERS QC:

Well, he's very unlikely to take all of the steps that we've been discussing because of the nature of the trust. It's over – if we're looking at the probabilities, which is the

expression, I think, Your Honour, Justice Young, used at one stage of the discussion of the cases, the probabilities are that this simply wouldn't happen.

ELIAS CJ:

Mr Carruthers, I'm getting a little concerned about the time. It's not any criticism of you because you've been put upon, but I wondered whether it would be acceptable to counsel if we sat on till five today and took a short break now. Is that going to cause any inconvenience?

MR CARRUTHERS QC:

Well, can I ask this, Your Honours, in the way in which we have put the written argument –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– and in the way in which the argument has developed when my learned friend was arguing, are there particular aspects of the argument that you want me to deal with orally because once I deal with this trust argument and I may well have done as much as I can, I've simply got the property argument and the relationship property argument to deal with and I've dealt with those quite extensively already. I mean, the short point that we would be arguing is that property in the Act should be interpreted in a manner that does not involve the trust rights or interests and that's consistent with the legislative basis that led to the provisions in the Act dealing with trusts.

ELIAS CJ:

Well, for myself I would like you to develop that argument on the scheme of those provisions, particularly 44 and following, and there may be other things but how long do you think you would like to – we will be in difficulty if it's necessary to sit into a third day. That's the problem that we have.

MR CARRUTHERS QC:

I've still got 20 minutes and, Your Honour, I'm going to be going straight to my written submissions to deal with property and relationship property and the reason for interpretation and it's probably a matter that I can put almost as shortly as I have but I'll take you through the material that I've got.

ELIAS CJ:

So you'd prefer not to sit on until five and you're confident that we will complete tomorrow? That's really the question.

MR CARRUTHERS QC:

I'm confident – just give me a moment, Your Honour.

ELIAS CJ:

We're happy to sit until 5.00 and I must say I would prefer to do that because then we're going to have a little bit longer if we stop, perhaps, talking about it. Is that all right, Mr Carruthers?

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

I don't want to embarrass people if they've got other commitments.

MR CARRUTHERS QC:

No, Your Honour. I'll deal with a few matters quite shortly. Just in relation to that question of powers, can I just draw attention to the article in our bundle 1 at tab 11? It's simply an analysis of powers and I wanted to refer to the Court of Appeal judgment at paragraph 87 where the Court of Appeal is dealing with powers and just points the power under 7.1 or looking at the powers from paragraph 86 and saying powers of this nature are not unique and refers to a similar power being considered in *Nation v Nation* [2005] 3 NZLR 46 (CA). Now, Your Honours, what I'd like to deal with quite quickly are some issues I have made a note on, and I wanted to deal first when the issue of sham and just draw attention to the fact that three Courts before this Court have held that Mr Clayton genuinely intended to create a discretionary trust and the business purpose in that regard is plain and was accepted by the Courts below.

Your Honours, I just mention this, that there is very much an issue as to what the appellate practice is going to be of this Court in circumstances where there is what is really a factual review of concurrent findings of the Court below. Conventionally the practice would be that having had three Courts find on the issue of sham that would be something that a superior Court would regard as sufficient.

WILLIAM YOUNG J:

Not so much a question of reviewing the findings of fact because it's pretty clear that this was intended to be a real trust that would buy land and would borrow money and would pursue certain business purposes, in particular keeping the land away from the business. But what it all means in the context when there's this overlay of an ability to sort of unravel it, accepting for the moment, and I know you don't, that that's what the effect of these clauses in the trust deed amount to.

MR CARRUTHERS QC:

Yes. Well, my submission is that it certainly cannot be categorised as a sham on the basis of all of the authorities that are referred to by the Court of Appeal and are conventional in this area. I'd answer my learned friend's submission about *Raftland* in the High Court of Australia. That is a purely conventional decision and I'll just refer you to the passage in my learned friend's volume, appeal 23 volume, page 108, at paragraph 58 where the majority concludes there was an inconsistency between the fiscal and financial objectives of the transaction although they overlapped and then there's a description of it, and then it said, "It's little wonder that Mr Tobin found it difficult to distinguish between the legal entitlement and the commercial risk that the entitlement would be invoked. The primary Judge was fully justified in finding that the entitlement under the *Raftland* trust deed was not intended by the settler or the trustee or the tertiary beneficiary to have substantive as opposed to apparent legal effect." That, in my submission, is a purely conventional approach consistent with authorities in New Zealand and the United Kingdom and there are, as Your Honour Justice Glazebrook observed, some difficulties with the analysis that Justice Kirby makes, not only in his judgment but also in the treatise in the book *Sham Transactions*. So the next submission I want to deal with quite quickly is illusory trust and I've submitted and as I understood Your Honour the Chief Justice the label isn't particularly helpful. It's not a category that needs to be decided. The Court of Appeal, in my submission, was right that it either is a trust or it isn't a trust and there is in fact as a merit of law no category of that kind. The real question here is probably whether there was a trust and I have submitted consistently with the way in which the Court of Appeal has analysed the factual position, that there was a trust. The three certainties from *Knight v Knight* (1840) 3 BEAV 148, 49 ER 58 are established. I have made the submission that there was a fiduciary duty on the trustee, and we've had exchanges about that, and the article by Barkley, which is my learned friend's authorities, and that's at, it's in her volume for the 23 appeal and it begins at page 358, and I just want to draw attention to this passage.

On 359, on the left-hand column at the last paragraph where the learned author says, "Of course, the core fiduciary obligation of selflessness is not absolute; it may be limited in scope. One example of this is, as the Court of Appeal said, that a trustee can be a beneficiary and can benefit from the trust. However, this principle has up to now been limited to cases of fixed beneficiaries." Well, with respect, that's not, and he has cited *Purcell v Deputy Commission of Taxation* (1920) 28 CLR 77 and *Cooper v Federal Commissioner of Land Tax* (1941) 65 CLR 320.

GLAZEBROOK J:
I think I've lost where you are.

ELIAS CJ:
Page 359, left tab.

GLAZEBROOK J:
Thank you.

MR CARRUTHERS QC:
I'm sorry Your Honour.

GLAZEBROOK J:
Thank you. I was on the following article which was probably my problem.

MR CARRUTHERS QC:
So the principle has been limited to fixed beneficiaries. Well, in fact, neither *Purcell* nor *Cooper* stand for that and can I commend the reading of *Purcell* to you because there are extraordinarily extensive powers in that case to the point that one of the powers enables the settlor of the trust to manage his farm business as if it, continue to manage the farm business as if it was his own, and the Court looking at whether the declaration of trust, which was a third to his wife, a third to a daughter and a third to him, whether that was effective, having regard to the extent of the powers and it was so held.

Your Honours, there's only one other passage that I want to refer you to. It's on 359 on the right-hand column, again the second to last paragraph, "Without the fiduciary obligation of selflessness there can be no trust as traditionally understood. A deed that purports to be a trust but excludes the fiduciary obligation cannot be effective in creating a trust. It is irrelevant whether the deed itself is valid and properly executed.

It simply does not create something that is within the category of a trust." Well, one has to be careful about the fiduciary obligation of selflessness because the real enquiry is compliance with the mandate, that is fidelity to the mandate, loyalty to the mandate, and is that concept that triggers the fiduciary duty.

GLAZEBROOK J:

Well it has been said that one of the core obligation of a fiduciary is not to have a conflict of interest so if you have a trustee that says you can have a conflict of interest, you don't have to take account of it, the question would be can that therefore, can therefore that be, in fact, somebody with fiduciary obligations, isn't this the point that's being made here?

MR CARRUTHERS QC:

No, this is going, goes back to the question of the significance of the power.

GLAZEBROOK J:

Well 19C would say he doesn't, an exercise, even the trust, even qua-trustee, let alone qua-power, exercise, that he doesn't, that he can exercise it in circumstances of a conflict of interest.

MR CARRUTHERS QC:

But, I mean, the purpose of that power is because of the equitable obligation not to have a conflict of interest so the deed requires a power to deal with that.

GLAZEBROOK J:

But the argument is that as that is the core of having a fiduciary obligation, if you don't have it then you don't have a fiduciary obligation because you've excluded it and therefore don't have a trust.

MR CARRUTHERS QC:

But that is really to confuse the power with the fiduciary obligation and my submission is that the fiduciary obligation exists because of the mandate in relation to the financial beneficiaries. And that concept of selflessness also in that article derives from what's said to be a requirement for the trust property to go from the trustee to another person. That's actually not what Lord Langdale is saying in – and I've recorded this in my written submissions – that in *Knight v Knight* the language that's used is of recommendation, entreaty or wishes, so they're words of discretion

and they're conferred on a trustee by the donor or settlor, but a settlor, of course, may command but that is not necessary for the purposes of the trust.

ARNOLD J:
So just to be clear, although you don't like the term "illusory" –

MR CARRUTHERS QC:
No.

ARNOLD J:
– you would accept that a trust, in quotes, might not be sham but it might be ineffective to be a trust because, for example, it did remove, and I know you say this one doesn't –

MR CARRUTHERS QC:
No.

ARNOLD J:
– but it did, in fact, remove any fiduciary obligation.

MR CARRUTHERS QC:
If you eliminate any one of the three certainties, I mean, you don't get to the point of –

ARNOLD J:
That's right.

MR CARRUTHERS QC:
– having a trust so, as the Court of Appeal said, you've either got a trust or you haven't.

ARNOLD J:
That's right.

MR CARRUTHERS QC:
Yes.

ARNOLD J:

That's not necessarily the same thing as whether it's a sham or not because the sham, as I understand it, focuses much more on the intention of –

MR CARRUTHERS QC:

Yes.

ARNOLD J:

– the party, and they may intend to set it up but may fail to do so effectively, and you would accept that, I think.

MR CARRUTHERS QC:

Yes, yes. And the other part of sham, really the second leg that the cases recognise, is in the performance of the document. You perform it in a way that is, is not consistent with the intention with the document itself, but that's a different concept of sham.

ARNOLD J:

Okay.

MR CARRUTHERS QC:

Now, Your Honour, can I come to that, to where the argument goes to next in the Court of Appeal, and that's on the issue of whether the power under 7.1 was property, and, Your Honours, the same argument will apply to the other interests that arise under the deed, because they will all turn on whether they are property or not. So where my analysis begins, and I'll simply take you through this because I've recorded it quite fully, is in my submissions of 30 July, beginning at paragraph 38. Now I've submitted that the, that interpreting the particular power that my argument deals with as property has the effect of exposing the assets of a validly formed trust to relationship property claims. And my submission is that this is inconsistent with the legislative intention and when Parliament appointed the Act, in 2001, the Amendment Act, decided against giving the Courts the power to make orders against trust capital so as to give effect to relationship property entitlements. Trusts were created for legitimate reasons and should be permitted to fulfil their purpose, and that's part of the Select Committee report, as I've noted.

Parliament made this decision knowing that trusts were at odds with the social aims of the Property Relationship Act, and again I've referred to the report of the working

party. The legislative intent can be seen to be supportive of business, including business trading trusts, that are an established feature in industry and commerce. And the submission is that the Court of Appeal was in error in failing to take account of the legislative intention in interpreting any other right or interest instead of recognising the legislative intent the Court of Appeal wrongly, in my submission, sought to put focus and weight on what it viewed as the aims of the PRA.

ELIAS CJ:

That legislative history you refer to, did it draw any distinction between discretionary trusts and trusts where the beneficiaries interests were vested?

MR CARRUTHERS QC:

Your Honour, my answer to that is, I think, no, but I would like to check that because it's a –

ELIAS CJ:

We don't have those materials.

MR CARRUTHERS QC:

Well, no, I've referred the materials but we, we have access to them if the Court wants them, we can certainly provide them.

ELIAS CJ:

Well we probably have access to them too.

MR CARRUTHERS QC:

Yes, well that was the conclusion we thought when we –

ELIAS CJ:

Although it would be useful to understand the submission you make in its proper context, it might have been helpful to have.

MR CARRUTHERS QC:

In the sense of answering the question that Your Honour asked me?

ELIAS CJ:

Yes, yes, yes.

MR CARRUTHERS QC:

Yes, I will deal with that.

ELIAS CJ:

You might like to look at it anyway.

MR CARRUTHERS QC:

Yes of course.

GLAZEBROOK J:

Also, I just wanted to know what the order made, because if the order was the power of appointment with property, how does that affect the assets of the trust? I mean, apart from Mr Clayton putting pressure on the trust or on himself to exercise the power of appointment and give him the means of providing half of those assets to his wife.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

But it doesn't directly affect the trust does it? I was just checking –

MR CARRUTHERS QC:

No.

GLAZEBROOK J:

– what the order actually was made and it seems to have been it was relationship property.

MR CARRUTHERS QC:

Yes, yes.

O'REGAN J:

It just means he has to pay a bigger amount out of his personal resources, I don't think it affects the trust at all.

WILLIAM YOUNG J:

Well it might be mightn't it? Does he have enough resources outside the trust?

GLAZEBROOK J:

Well, but it doesn't directly – there is no order directly against the trust is the point I was putting because you say it's got the effect of exposing the assets of a validly formed trust to relationship property claims. Now it might be that there should be an order against the trust and that your complaint would be right and we might decide that is the case, but at the moment the order made by the Court of Appeal doesn't do that, as I understand it.

MR CARRUTHERS QC:

No Your Honour's right, I think that you would have to regard my submission as being the practical effect of where –

GLAZEBROOK J:

The practical effect.

MR CARRUTHERS QC:

- of where the money would have to come from.

GLAZEBROOK J:

Thank you.

WILLIAM YOUNG J:

Why is the trust appealing? Why is it not a matter of indifference to the trust?

MR CARRUTHERS QC:

I suspect it's the way in which this argument arose bearing in mind the trust, the trust appealed from the Court of Appeal – from the High Court finding that it was illusory and in the course of the argument in the Court of Appeal I have to answer this and Your Honour I'm bound to say that I probably hadn't given careful enough thought to the point that Your Honour Justice Glazebrook has raised and now Your Honour Justice Young but it was I think really as a result of the way in which the Court of Appeal dealt with it and then it was seen as being a matter for the trust to argue particularly because of that issue that we discussed at the opening, the start today about Mr Clayton's role overall in the appeal but Your Honour must be right that on its face the conclusion that the Court of Appeal has reached doesn't, in its terms, affect the trust.

Your Honour, my apologies. In our bundle of authorities under appeal 23, under tab 8 there is an extract from the select committee report that –

ELIAS CJ:
Sorry 28?

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
Tab 8.

ELIAS CJ:
Thank you.

MR CARRUTHERS QC:
That tab relates to the select committee report that I've noted in footnote 29 that I took you to a moment ago and the second page of the report under the heading, "Family trusts and companies – effect of clause 47," and deals with the background to the legislation, the history of it, and you'll see that it refers in terms to discretionary trusts.

ELIAS CJ:
Sorry in which volume? Which paragraph are you referring to?

O'REGAN J:
Well it certainly makes it clear that they realise they're dealing with discretionary trusts.

MR CARRUTHERS QC:
Yes.

ELIAS CJ:
Sorry, where's that?

O'REGAN J:
The paragraph immediately under the heading, "Family trusts and companies."

ELIAS CJ:

I see, yes.

MR CARRUTHERS QC:

Now, what I've submitted, then, at paragraph 39 is that the – what our orthodox concepts of property found in the definition at A to D –

ELIAS CJ:

So when – because this Act has been amended so many times, when was the definition of relationship property – it's been amended 2002. This Bill is an earlier amendment, isn't it?

MR CARRUTHERS QC:

Yes. Your Honour, the property definition is the original definition. Then the select committee report is dealing with the trust issue.

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

So I've said that those concepts of property together with the treatment of trust property in section 4B and 44C show that in my submission that the legislature did not intend that powers of appointment would be property such that assets or the value of a trust would be available for sharing under the Act. I've submitted that materials associated with the drafting of the Act support the proposition, and I've noted those in the footnote 32.

WILLIAM YOUNG J:

The comment in the select committee report is pretty unsophisticated, isn't it?

MR CARRUTHERS QC:

Yes. Well, it's doing the best we can, Your Honour.

WILLIAM YOUNG J:

Yes, we can't make it up, I agree.

MR CARRUTHERS QC:

Then I've noted that the extended definition of property in the Act which has its genesis in the old Matrimonial Property Act 1963 and over 40 years hasn't been interpreted in the way in which the Court of Appeal has interpreted it.

WILLIAM YOUNG J:

Where did that come from? Was that based on the sort of Married Women's Property Act of the 19th century?

MR CARRUTHERS QC:

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

WILLIAM YOUNG J:

I was looking at the Australian case and it's rather suggesting to me that it might have although there's obviously been a deviation between the New Zealand and the Australian legislature.

MR CARRUTHERS QC:

Yes, there certainly has been. Again, Your Honour, I can look at that issue overnight and see if I can track it through the Matrimonial Property Act.

GLAZEBROOK J:

You haven't found cases that have explicitly said that it doesn't include those powers, presumably?

MR CARRUTHERS QC:

No, I haven't, Your Honour.

Then I've referred to the establishment of the trust reference group and the fact that that group is building on the Law Commission's report, then I've submitted that the proper place for any changes to the law in this area is within the Parliamentary process that would enable review of policy decisions made by Parliament in 2001 not to give the Courts the power to make orders against trust capital to give effect to relationship property entitlements, to allow proper debate of the issues and understanding of all parties potentially impacted by the changes and then I've drawn attention to the fact that the Court of Appeal judgment as it stands fails to take into account the interest of creditors, for example, in this case BNZ who will be prejudiced by the finding.

WILLIAM YOUNG J:
Why?

ARNOLD J:
No, they won't.

MR CARRUTHERS QC:
Well, I think it's prefaced as I explained a moment ago on the basis that the way in which the Court of Appeal's order had been interpreted is that it would have an impact on the trust. Now, I think I've conceded that I can see that by its terms the order needn't necessarily have that effect that it simply deals with the power itself within any impact on the trust but if the Court was to exercise a power or reach a conclusion that it did, that that did affect the trust, then there are other interests that need to be taken into account that would be adversely affected and prejudiced by the finding.

GLAZEBROOK J:
How can it – because if creditors are there then it will only be the net assets of the trust that could possibly be subject to any order and if the BNZ has a security then the security would be over the assets of the whole of the assets of the trust and I doubt that any order, even if you were looking at a very determined Court, would actually take away the security that's there or be able to do so.

MR CARRUTHERS QC:
Yes, I think I'm bound to accept that, Your Honour.

WILLIAM YOUNG J:
I've just checked. The Married Women's Property Act 1882 which I think was the basis of our legislation up until 1976 refers to properties.

GLAZEBROOK J:
But not a right or interest?

WILLIAM YOUNG J:
No.

MR CARRUTHERS QC:

Well, I think the second point that I've made there about the judgment having unintended consequences for other valid trusts in New Zealand, including discretionary trusts, and that's why we submit that any law change should be left to Parliament, which has the ability to modify laws from a specific date, and affected parties may then expect to be given time to arrange their affairs.

WILLIAM YOUNG J:

1963 the Matrimonial Property Act, the property includes real and personal property, any state or interest in any property, real or personal, and any debt and anything in action and any other right or interest, so that's 1963.

ARNOLD J:

Footnote 33 says that's where it comes from.

O'REGAN J:

I mean, the – really all of these arguments depend on an assumption that the relevant spouse couldn't pay the amount the Court ordered it to pay without effectively applying property from the trust to the payment.

MR CARRUTHERS QC:

Yes, they do, Your Honour, and it was, I think it was on the basis that the order was interpreted as being against the trust but if, as the Court is indicating, it isn't an order against the trust then there would be an issue as to how the payment was to be made and that would probably involve some arrangement with the trusts in order for payment to be made, but I think it is fair for you to take the argument in the way in which you put the question to me.

GLAZEBROOK J:

What do you say to Ms Chambers' submission that the Courts overseas and all other jurisdictions have in fact interpreted their legislation which he says is similar to ours, even if the wording is different, in a way that – not specifically on the power of appointment issue but just on the issue of control and unfettered discretion or whatever the, however it's put?

MR CARRUTHERS QC:

Yes. I think there is an important distinction that my learned friend did, in fairness, mention in the course of her submissions, and that is that that is our statutory regime

which includes that separate property regime, recognition of – statutory recognition of separate property, and what I would say in answer to the use of the overseas cases is that the context is important, as the *TMSF* case, the *Fonu* case, said, and I come to this right at paragraph 45, "As with all legal categories, context was all important. There is no doubt that while for some purposes a power was not property, for other purposes the holder of a general power could be regarded as being for all practical purposes an owner," and I've done an analysis of *TMSF* that I won't take you through but what I would say directly in answer to Your Honour is that what is said in those cases needs to be measured against our regime of separate property, and I can illustrate that from *Kennon v Spry*.

GLAZEBROOK J:

Although this was held, as least in the increment, not to be separate property, wasn't it, so why does separate property make a difference? Or maybe you'll explain it when you come to the *Spry* decision, will you, or…

MR CARRUTHERS QC:

The reason, I think, my submission is that the statutory regime is important in looking at whether the overseas cases can have application because of the different contexts in which the decisions are made. So here Your Honour's right, it is the *Rose v Rose* principle, the increase in value, but if the suggestion is that, as my friend says, well, it's the whole of the resources of the marriage that can be taken into account on the basis of the overseas cases, then that's not right because that's where the issue of separate property arises or the statutory context arises.

GLAZEBROOK J:

Say we had a case where there was absolutely no separate property, these people got married and they had to borrow the licence fee from somebody, had the clothes they stood up in, and everything was acquired since the marriage, why does the separate property regime make the overseas cases not applicable to that – and there's a trust set up? Why does the separate property regime not make the overseas cases applicable to my absolutely nothing arose outside of the marriage, they had no separate property whatsoever?

MR CARRUTHERS QC:

Well, the reason is the existence of sections 4B, 44 and 44C which deals –

GLAZEBROOK J:

All right, so you're relying on the specific provisions that have been brought in and saying that's a code, basically?

MR CARRUTHERS QC:

Yes, Your Honour, yes.

GLAZEBROOK J:

And a legislative decision that that was the extent to which trusts would be brought in?

MR CARRUTHERS QC:

Yes, yes.

ELIAS CJ:

Mr Carruthers, would your argument be the same if the only discretionary beneficiaries were the husband and wife?

MR CARRUTHERS QC:

Your Honour, I think it has to be.

ELIAS CJ:

Yes, I think it has to be.

MR CARRUTHERS QC:

It does have to be.

ELIAS CJ:

I just was interested to know.

MR CARRUTHERS QC:

But I would counter immediately that it doesn't detract from the argument, the example Your Honour's giving me doesn't detract from the argument at all. I'm sorry, I thought there was a passage there that I wanted to draw attention to.

From paragraph 45 onwards I've dealt with the distinction between *TMSF* and the present case and then I've gone on to consider the question of relationship property, why if clause 7.1 was property, why was it relationship property, and there's no

explanation of that by the Court of Appeal. And at paragraph 48 I've submitted that the classification of the power as relationship property cannot be made by reference to the assets in the trust because they were not relationship property.

The Court of Appeal expressly recognised this in its findings of the disposition from VRPT to Claymark Trust were not dispositions in relation to property, and I've given the passage from –

GLAZEBROOK J:
Now why is that? Just because they were in a trust or because they were initially from separate property, being the two Vaughan Street properties, or because – sorry, it's a question. And it might be all of the above and something else.

MR CARRUTHERS QC:
I think, I think it is, I think it is all of above that – there's just nothing about the quality of the assets in the Trust that makes them relationship property.

GLAZEBROOK J:
So I think my follow-up question is, if they were relationship property before they went into the trust do they cease being relationship property once they go into the trust? So is it significant –

MR CARRUTHERS QC:
Well they become, yes they become –

GLAZEBROOK J:
– that they were separate property?

MR CARRUTHERS QC:
– subject to the trust because, because the, of the right of the parties to deal with property in the course of the marriage, that's – so the issue becomes what's the position at the conclusion of the – at separation.

GLAZEBROOK J:
So you'd say at separation they're not relationship property because they're trust assets?

MR CARRUTHERS QC:

Because they're trust assets.

GLAZEBROOK J:

Even if earlier they were relationship, well, even if earlier if they had split up they would have been relationship property?

MR CARRUTHERS QC:

Yes, that must always be the case.

GLAZEBROOK J:

Right.

MR CARRUTHERS QC:

With categorisation of assets in the course of a marriage, because of the ability to deal with them in the marriage.

WILLIAM YOUNG J:

But if the power, in context, is itself a property, is itself property for the purposes of the Act, and its value has been affected by the application of relationship property or the efforts of Mrs Clayton, why is that not relationship property?

MR CARRUTHERS QC:

Sorry Your Honour, would you put that to me again?

WILLIAM YOUNG J:

Okay, I'm going to start with a premise you don't accept so –

MR CARRUTHERS QC:

Yes, I think that's the problem.

WILLIAM YOUNG J:

- yes, okay. So if the power is property.

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

And that's, really, what we're talking about now.

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

And the value of the power reflects applications in relationship property, for instance, advances that were made by Mr Clayton, or indirect contributions from Mrs Clayton, why isn't that enough to make the property/power relationship property?

MR CARRUTHERS QC:

Well it does beg a question about Mr Clayton's advances as to whether they were relationship property because –

WILLIAM YOUNG J:

I thought he accepted that.

MR CARRUTHERS QC:

No, no I think – I'm going to leave Ms McCartney to deal with that because I think that the way in which that submission was put, as I recall it, was as the foundation, inviting the Judge to vary the agreement. It was really put, as I understand it, as I understood it, as a basis for –

WILLIAM YOUNG J:

Saying it was fair, it was a fair do.

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

They're saying that the agreement was fair because this amount of property remains within –

MR CARRUTHERS QC:

Because this amount would be offered on a variation of the agreement but –

WILLIAM YOUNG J:

Oh, I see.

MR CARRUTHERS QC:

– I think –

GLAZEBROOK J:

But where else did the property come from?

MR CARRUTHERS QC:

Well, the –

GLAZEBROOK J:

Because he had, well, he had 500,000, which were those three properties. Two of them went into the trust, so that left one, even assuming that the two went into the trust were worthless, the only money he had for a separate property, if you look at the Banksia property, which I gather has been sold anyway, was 500,000, so how did he lend two million to the – if it wasn't from relationship property?

MR CARRUTHERS QC:

Well, to be, that was – well, that was money that was borrowed from the banks, that was the way in which the money went from the banks to the trust –

GLAZEBROOK J:

So he borrowed the money personally and then lent it to the trust, is that what you're saying?

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

Well…

WILLIAM YOUNG J:

But wouldn't that be –

GLAZEBROOK J:

Relationship debt.

O'REGAN J:

It's relationship property because it's acquired during the relationship.

WILLIAM YOUNG J:

It'd turn on the rather-awkward-to-apply provisions as to what debts are relationship debts, I guess.

MR CARRUTHERS QC:

Well, I think that's…

WILLIAM YOUNG J:

At section 20.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

Well, I don't even know that it's evidence that's what he did do, myself, because you haven't taken us to anything to do with –

MR CARRUTHERS QC:

I think, well – no, I –

GLAZEBROOK J:

– setting up the trust –

MR CARRUTHERS QC:

No.

GLAZEBROOK J:

– where that debt came from, how his debt came or, so I don't even know, did he ever say where his advances came from to make to the trust?

MR CARRUTHERS QC:

Yes, Your Honour, I really, I know that that's an issue that Ms McCartney wants to deal with –

GLAZEBROOK J:
Oh, okay, oh well.

MR CARRUTHERS QC:
– and I think I should in fairness leave that –

GLAZEBROOK J:
Oh, no, you probably don't know in any event.

MR CARRUTHERS QC:
Well, I think that's, that's, other than that I do know my way round the evidence, but I'd need to have a look at that.

Now I then submitted at 50 that, "Nor can the power of appointment be relationship property on the basis it was acquired during the marriage. That approach would treat the power as property, even where the trust was settled with separate property it would give the, an applicant, greater rights than he or she would have under the Act. A stranger holding a power of appointment may find the power included in their own relationship property proceedings." I've submitted that there was no evidence that relationship property was applied to the assets of the trust, and that's a question that will need to be investigated further, or the intangible power of appointment, and so there's no evidence that Mrs Clayton contributed in any way.

Well, Your Honours, those are the submissions that I wish to make on 23/15 and, as I explained this morning, the only other part that I see myself having in the appeal is in response to my learned friend, Ms Chambers, in relation to section 182. I've filed the submissions in relation to 44C because it was thought the trust was the only party to deal with the Claymark Trust. My learned friend Ms McCartney has filed submissions and will deal with that argument, so I will be quite a short time on my section 182 submissions in response to my learned friend tomorrow.

ELIAS CJ:
Well, I think we'll require you to do those before – oh, no, sorry.

MR CARRUTHERS QC:
No, no.

ELIAS CJ:

It's in response, yes, you're right.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

I thought that you were going to argue the scheme of the Act as well and the section 44 and following paths as pulling against the suggestion as to property. Now you've developed the argument in terms of the statutory history on that point, but what's your textual argument, did you want to develop that further?

MR CARRUTHERS QC:

Oh, well…

ELIAS CJ:

I thought you were going to develop it bit further.

MR CARRUTHERS QC:

Well, Your Honour, I've simply referred to section 4B –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– preserving the law relating to trusts, and then 44 and 44C are –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– the two discrete provisions that restrict the ability of the Court to deal with trust assets.

ELIAS CJ:

Well, I just query whether they are as clear as that and wondered whether you would go to them. Sorry, I'm just trying to find 4B. I don't think it's 4B I'm so bothered about. I think it's – I mean, what do you take from 4B? It's…

MR CARRUTHERS QC:

Well, all I take from that is that the legislature recognised that there was really a discrete and separate issue where trusts were involved. That's as much as I take out that.

ELIAS CJ:

Well, subsection (1) is only relating to the position of acting as trustees.

MR CARRUTHERS QC:

Trustee, yes, and – but 4B(2) is much wider in its scope, but –

ELIAS CJ:

Well, what's the rule you're relying on then?

MR CARRUTHERS QC:

No, no, I'm – no, Your Honour. All I have relied on 4B for –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– is that is really the precursor to the way in which the legislature said that trust interest should be dealt with, and that takes us through to 44 and –

ELIAS CJ:

Which only applies where it's done for the purpose of defeating –

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

– the Matrimonial Property Act provisions.

MR CARRUTHERS QC:

Yes, and then 44C –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– which is the – and that, 44's any disposition, 44C is disposition of relationship property, and that's the compensation provision, but it restricts – the point that I made in the written submissions is that it restricts the power of the Court to, or it doesn't give the Court power to deal with the caucus of the trust. It gives the Court power to deal with income. So all I've submitted is that the legislature has chosen –

ELIAS CJ:

But all of that –

MR CARRUTHERS QC:

– to –

ELIAS CJ:

Yes, sorry.

MR CARRUTHERS QC:

No, it's just chosen to give the Court particular powers in relation to trusts which really militates against any argument that there should be a wider –

ELIAS CJ:

Well, I understand the force of that.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

But the terms of section 44C rather beg the question that we're being asked to look at here, which is whether the trust assets are relationship property.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

And, of course, 44C has to apply to all sorts of trusts where indeed the interests of the beneficiaries may have vested but certainly which don't have the rather unusual features that this trust has. So I'm just querying whether this scheme is sufficient answer. I guess you would say, "No," but you've developed the other arguments in

relation to why this, the trust assets here should not be regarded as relationship property.

MR CARRUTHERS QC:

Yes, yes, and, I mean, these provisions are relied on in relation to the Vaughan Road Property Trust only to look at what the legislative intention is in interpreting the word "property" in relation to clause 7.1, so that's the context of the submission. There's quite a different context for the Claymark Trust because there's a submission –

ELIAS CJ:

Yes. No, I understand that one.

MR CARRUTHERS QC:

Yes, yes.

ELIAS CJ:

Yes, thank you.

O'REGAN J:

But is there really anything here that is offending these principles, because the sham trust, obviously if that argument succeeds, there isn't a trust, so –

MR CARRUTHERS QC:

Yes.

O'REGAN J:

– that becomes – so the whole reluctance of Parliament and the Courts to make orders against trusts goes away because there isn't a trust to make an order against. The property just essentially reverts back to the settlor and the power being property just simply means that the relationship property pool, from which an order of sharing 50/50 can be made, is a bigger pool, but it doesn't do anything to interfere with the operation of the trust. So I'm not sure that Parliament's reluctance to have the Courts making orders about the corpus of a trust really bite here because nobody's asking us to do that.

MR CARRUTHERS QC:

Well there are two parts Your Honour. I don't rely on the legislative framework for the sham argument at all, that's quite a separate discrete argument. I do rely on it but

we actually come back to the point that we had an exchange on a little while ago about the role of the trust in relation to 7.1 and I've had, the carriage of that argument from the Court of Appeal on the basis that it did affect the trust. But Your Honour may well be right that 7.1 is not a matter that does affect the trust.

ELIAS CJ:

Thank you Mr Carruthers. Ms McCartney, was there anything you wanted to add in relation to the appeal in 23/2015?

MS MCCARTNEY QC:

There are a couple of things I would like to add. I'd like to, if possible, and I know that the Court wants to move on to the next appeal tomorrow, but I would like if possible to have the opportunity just to collect my thoughts in relation to the various points because it's sort of arisen in a –

ELIAS CJ:

Well that's fine except I had understood that for this appeal, as appellant, you were adopting a submissions to be made by Mr Carruthers, and that if anything arose you would have another go, which is a little bit unusual anyway. So I'm not sure that we had expected to hear from you at any length on this Ms McCartney.

MS MCCARTNEY QC:

Your Honour, you won't hear from me at any length on it, but I am in a little bit of a difficulty because I actually don't even have the authorities that have been referred to because of the position taken by Mrs Clayton, that I wasn't involved –

ELIAS CJ:

Well you're an appellant.

MS MCCARTNEY QC:

I did ask for them.

ELIAS CJ:

Yes.

MS MCCARTNEY QC:

And I haven't had them so I was expecting them so it has been difficult for me to follow the argument but in relation to the issues that I will address on behalf of

Mr Clayton, I would first of all say this, and this is important, and I'll develop it tomorrow, the 44C argument, the reason why, as I understand it, the trustees have carried the argument, is because there is no other property available to Mr Clayton. So if Mr Clayton has an order made against him in relation to the power of appointment, or in any other way, he will have to go to the trustees and he will have to try and get consent from the trustees to give him access to the assets, which sounds all well and good until we remember that the assets support the operating companies, and the operating company is what in terms of what Mr Clayton receives, is the whole of the property that he gets under the division. So if the assets, the land assets, are sold in order to meet any order of the Court, and if Mr Clayton's required to go to the trustees, and if they accede, the other trustee we're talking about, the Claymark Trust, and if they –

GLAZEBROOK J:
Isn't he the sole trustee of this trust?

MS MCCARTNEY QC:
No, the Claymark Trust I'm sorry.

GLAZEBROOK J:
But we're not on the Claymark Trust though, are we, we're on the Vaughan Trust?

MS McCARTNEY QC:
Well the Vaughan Road Property Trust, with respect, is in the same situation. All of the land sits under the sawmills.

ELIAS CJ:
But why is that an argument that should cut any ice with us. If we don't accept the substance of your argument? I mean, it's really just, it's consequential isn't it? If that's what the Relationship Property Act requires, is that a submission that we can take any account of?

MS McCARTNEY QC:
Well in relation to 44C, first of all, it is a discretionary –

ELIAS CJ:
Yes, yes, no I understand that and you'll develop that in relation to the 28/2015 appeal tomorrow.

MS McCARTNEY QC:

Yes. In relation to the power of appointment as to whether "it," property, what needs to be developed next, and no one's come anywhere near it yet, with respect, is what is the source of those assets held in the trust? Because if the source of those assets is separate property, and they are transferred to the trust, then, when one looks at the power of appointment and says, "We're going to value it on the basis that it's the equivalent of the net equity in the Vaughan Road Property Trust," one needs to look to see what does that net equity represent, is it relationship property originally or was it separate property originally?

O'REGAN J:

That's not a complete answer either though, because if it was funded by interest-free loans out of relationship property, of course it has to have a relationship property component.

MS McCARTNEY QC:

Well it wasn't funded by interest-free loans because –

O'REGAN J:

Well we were taken this morning to accounts that show substantial interest-free loans from Mr Clayton, out of relationship property.

MS McCARTNEY QC:

No, Your Honour was told that it was out of relationship property.

O'REGAN J:

Well it was an interest-free loan from Mr Clayton made from money, other than the actual assets which were being funded, because you say they're separate property. What else could it be?

MS McCARTNEY QC:

Well when a trust was set up – when the trust was set up –

O'REGAN J:

Thirteen years after the de facto relationship began.

MS McCARTNEY QC:

Yes. And when the de facto relationship began there were these items of property. There were, first of all, Mr Clayton's two parcels of land in Vaughan Road, Rotorua. Second, there was his business, which became Claymark Industries Limited, and that, during the course of the marriage, has transferred to Claymark Holdings Limited.

WILLIAM YOUNG J:

Wasn't it wound up? Wasn't the first, wasn't the 1984 company wound up?

MS McCARTNEY QC:

That's what my learned friend, Ms Chambers, told Your Honour but, in fact, before it was wound up it was amalgamated as part of Clayton Holdings Limited.

GLAZEBROOK J:

Well it was mixed with relationship property then.

MS McCARTNEY QC:

Claymark Holdings Limited, with respect, has never been relationship property. Claymark Holdings Limited is the company that started, back in 1984, and grew during the marriage.

WILLIAM YOUNG J:

So what happened with the amalgamation, I'm sorry, there must be evidence about that?

MS McCARTNEY QC:

Well in relation to the amalgamation, Your Honour, and remembering I wasn't counsel in the Courts below, but there's a page in the Family Court judgment which says this simply shows us what happened in terms of all these companies, and here's a simple illustration. Well I look at the page and I have to say it's one of the most complex illustrations I've ever seen.

ELIAS CJ:

But hang on. This case has been through three Courts before it's got here and we have findings which haven't been substantially challenged. Well, Mr Carruthers invites us to interpret the Family Court judgment in a way that's more favourable to

him but nobody's taking us to evidence behind the findings that we've got in the Courts.

MS McCARTNEY QC:

But the findings in the Court, with respect, are findings that favour Mr Clayton, because the findings in the Court, and they start at paragraph 32. May I just get my judgment?

ELIAS CJ:

Yes. But, in any event, you were indicating you'd like to address this tomorrow, and I'm really trying to just get a feel for the scope of what you want to address because I had thought that you were going to simply come in with any quick additional points in support of Mr Carruthers who really has had the carriage of the argument for the first appellant, and the whole thing's been slightly irregular. But are you saying you want to develop a different substantial argument in the first appeal, the 213 appeal?

MS McCARTNEY QC:

Well, no, Your Honour, what I'm doing is I'm just following the findings that were made in the Family Court that had never been challenged and –

WILLIAM YOUNG J:

This is paragraph 6 of the judgment. Is that the summary of what happened?

MS McCARTNEY QC:

It's actually, Your Honour, the page on paragraph 58.

WILLIAM YOUNG J:

Look at page 54 first because that's the summary. At the time the relationship started, Mr Clayton's property existed of three pieces of land and a fledgling business. Mr Clayton purchased his father's business in 1991 or 1992. So did that become relationship property then?

MS McCARTNEY QC:

No, Your Honour, it didn't. That's the way – this is narrative in terms of the way in which the Judge first of all set out the history. The important part in terms of the findings start at paragraph 32, I think it is – 36, where the Judge in completely orthodox fashion and in accordance with the statute that we operate under begins with the classification of the property as separate or relationship property and

addresses an argument that was advanced by Mrs Clayton at paragraph 38 that section 8(1)(e) applied because the property was acquired during the marriage and at 39, and my learned friend Mr Carruthers took the Court here to this judgment, what the Family Court said half way through that was whilst the business may have been in a precarious financial position the fact remains that Mr Clayton or his entities owned business assets which had the origins in his pre-relationship property.

WILLIAM YOUNG J:

Okay. Well, that hasn't actually addressed the point I asked you about. In 1991/92 he purchased his father's business, according to the Judge.

MS McCARTNEY QC:

Yes but he didn't purchase it. That's what number 6 says but in fact what happens, and one can see it with reference to page 58, is that while it's called his father's business – that's that diagram.

WILLIAM YOUNG J:

Oh, that's very straightforward.

MS McCARTNEY QC:

That's the said-to-be straightforward diagram. It's not but at the top left-hand column, those are the companies that belonged to Arnold Clayton which were joinery companies and prior to the relationship Mr Clayton had an agreement with his father that these businesses would become part of Mr Clayton's business. And we can see that that happened with reference to the fact, although in the middle of it it's got Mark Clayton personally, they all went into that company under Mark Clayton.

WILLIAM YOUNG J:

Yes, but were they acquired by Mr Clayton?

MS McCARTNEY QC:

They were. It was an amalgamation, Your Honour.

WILLIAM YOUNG J:

No, one step at a time. Who purchased the shares in Arnold Clayton's companies?

MS McCARTNEY QC:

Well, Your Honour, I have to say there's absolutely no evidence about that at all.

WILLIAM YOUNG J:

Well, this diagram rather suggests it was Mr Clayton who purchased them.

MS McCARTNEY QC:

I can actually find – there is a little bit of evidence through various affidavits and I can take Your Honours to them.

ARNOLD J:

But this is effectively a factual finding.

GLAZEBROOK J:

Well, it actually says so. It says so that he bought the shares and the companies were amalgamated into Clayton Holdings, so they've done an amalgamation and everything became Clayton Holdings but the shares were purchased by, during the relationship by Mr Clayton.

MS McCARTNEY QC:

In accordance with the agreement he had with his father before the relationship started.

ELIAS CJ:

But what does that matter?

MS McCARTNEY QC:

And on what he described as – I can't remember what he said.

WILLIAM YOUNG J:

Favourable terms, but I think he said he purchased them on favourable terms but that's normally regarded as a purchase, isn't it, in these cases, or it used to be said in a farming case, "Well, I bought the farm and Mum and Dad gave it to me at Government value and it really should be treated as a gift." I don't think that argument has ever been bought, has it?

GLAZEBROOK J:

I think it may have been with some unequal share in cases taken into account because I think there might have been, in part of that, in *Nation* one of the arguments for unequal sharing. I'm not sure it succeeded in that case but it has in others.

MS McCARTNEY QC:

If I could just leave the narrative and come to the actual finding, which is at paragraph 42. "On the evidence put before the Court, I am satisfied that all property owned by Mr Clayton has been acquired out of his separate property, being the property he owned prior to the relationship beginning the section at Banksia Place and the two parcels of land in Vaughan Road. His property can be traced both to the proceeds of disposition of separate property and to income or gains from separate property. The issue becomes, then, whether the income or gains derived from separate property are subject to section 9A." So the finding is –

GLAZEBROOK J:

Well, it can't really be the case if there were borrowings, can it, because if there were borrowings the property has been acquired through borrowings so it can't possibly be the case unless there were no borrowings ever in that group that everything stemmed from the separate property, the 500,000, that in effect wasn't 500,000 anyway because two of the properties that made up that 500,000 went into the trust so there were no proceeds from that upon which they could build relationship property.

MS McCARTNEY QC:

But the finding is that it –

GLAZEBROOK J:

Well, that might be the finding but it's just idiotic.

ELIAS CJ:

The finding is just one step, isn't it, along the way in terms of the decision that section 9A applies and the decision that the value of the separate property was 500,000 and everything else was relationship property, surely that's the finding you have to –

MS McCARTNEY QC:

It is, Your Honour, and the answer in relation to that is section 9A doesn't make the underlying property relationship property. It makes the increase in value relationship property. In *Rose* this was addressed by Justice Blanchard, paragraph 24, where Justice Blanchard said that the increase in property is an independent species of property. So it's not –

ELIAS CJ:

But not if there's a finding that the increase in value – that what you put to work becomes relationship property because of the section 9A considerations. If you maintain it entirely separately, that might be right.

MS McCARTNEY QC:

But by *Rose* this independent species of property, what happens is Mrs Clayton doesn't share in the shareholding of these businesses. She shares only in the increase in value which is that independent species of property. What's important in terms of the finding – and it's at paragraph 66 – is that the Court doesn't say or the Court does say, is the way I'd put it, the Court finds – "I find that the increase in value of Mr Clayton's separate property over and above 500,000 is relationship property to be shared equally." So the separate property, the underlying property, remains separate. The increase in value is to be shared equally. Importantly, the Judge does not order that the income from that property is to be shared.

ELIAS CJ:

Well, I read this as everything over and above $500,000 which is the value of the separate property is gain, which applying section 9A is relationship property on finding of the Judge.

MS McCARTNEY QC:

That is the property to be shared. That is the independent species of property to be shared but the underlying property throughout the relationship remained separate property. That is what 42 says and that is what 65 says and that's what 66 says. So – and this follows, Your Honour, with this cornerstone provision in the Act which says that during a marriage it's open to you to deal with your property. You can deal with the property and it's not going to, in any way, other than the claw-back provisions that we know about in section 44 and 44C, it's not going to bite at all. So Mr Clayton has his separate property at the date of commencement of the relationship. There's an arbitrary figure put on it. I can show Your Honour's how that happened. There's an arbitrary figure put on it at date of relationship. During the whole of the marriage his property remained separate, all of it. The Judge is satisfied she can trace it all back –

O'REGAN J:

It just turns the whole regime on its head. That's just crazy. Of course that can't be the law. I mean, they applied, they applied the money that he would otherwise have

gained. He had put it back into the business. That was an application of relationship property. That's why the Judge says, at 66, all of the increase in value is relationship property, everything above 500,000.

MS McCARTNEY QC:
With respect –

O'REGAN J:
That's the whole point. That's an just an application of the normal rule that when you earn money which is relationship property and you put it into your business, you are turning what was a separate asset into relationship property.

MS McCARTNEY QC:
Well, with respect, that's not what section 9(2) says. Section 9(2) says –

O'REGAN J:
That's what the Judge has found though. She says it in words of one syllable in 66.

MS McCARTNEY QC:
But it's not the shareholding that's relationship property and it's not the –

O'REGAN J:
But what else can it be?

MS McCARTNEY QC:
As I say, it's the same as in *Rose v Rose*. In *Rose v Rose* the wife wasn't able to go and say that she was going to take over the piece of land. She was entitled to –

O'REGAN J:
No, but if the –

MS McCARTNEY QC:
– the increase in value of it.

O'REGAN J:
If the property was worth 500,000 in 1986 and it's worth 28 million now, 27.5 million is relationship property.

MS McCARTNEY QC:

Well, and, Your Honour, that's where I'd like to start when I address the Court –

WILLIAM YOUNG J:

All right.

MS McCARTNEY QC:

– because it's not 28.8 million.

O'REGAN J:

Well, if you wanted to address this you should have made some written submissions on it. I mean, you can't just pull it out of a hat in the middle of the hearing.

MS McCARTNEY QC:

What part of it, Your Honour?

O'REGAN J:

This whole argument.

MS McCARTNEY QC:

That's in my submissions. It's in our submissions.

ELIAS CJ:

No, no, no, it's in relation –

O'REGAN J:

No, you haven't made any submissions on this part of the case.

ELIAS CJ:

Yes.

MS McCARTNEY QC:

On the issue of 44C I have.

O'REGAN J:

But you haven't made any submissions on Vaughan Road at all, which is what we're talking about now.

MS McCARTNEY QC:

I'm sorry, Your Honour, I was invited to add submissions and –

O'REGAN J:

Yes, but not to create a completely new case involving relitigating the factual findings made in the Family Court.

MS McCARTNEY QC:

Well, with respect, I am not doing so. I am adopting the findings made in the Family Court.

ELIAS CJ:

And you're adopting the submission –

GLAZEBROOK J:

But 42 can't be right.

ELIAS CJ:

You're adopting submission that Mr Carruthers made, that 42 is to be interpreted in a way that, I suppose, members of the Court are indicating they don't read it in that light, but he's made that submission. Are you wanting to say anything additional to that?

MS McCARTNEY QC:

Well, I'm going to address it in the 44C argument –

ELIAS CJ:

Yes, yes, I understand that.

MS McCARTNEY QC:

– Your Honour. But can I just say, if I may just make this submission, this case has, with respect, advanced through the Courts on the basis that it's $28 million worth of –

ELIAS CJ:

Well, I think really –

MS McCARTNEY QC:

– of property and it –

ELIAS CJ:

– in a way the Court has no basis for knowing that, and no valuations have been done, and there is simply an assertion based on some evidence that was put forward for a different purpose, so I don't think the Court is in any position to say that there is $28 million value in here. It's just not known.

MS McCARTNEY QC:

Thank you, Your Honour. But there actually are valuations before the Court and with reference to those valuations it's possible, and I'll develop this in the 44C argument, it's possible to show where the parties parted company in relation to value and how that happened and how as a result of that this case has been advanced through the Courts on the basis that there is $28 million worth of property that Mr Clayton's refusing to share, and, in fact, the values that we now have, and I can take Your Honours to, show what the figures are that we're talking about, and also in relation to the main difference between us is the value of the operating company, Claymark Holdings Limited, which Mrs Clayton has always advanced on the basis that it's worth $17.5 million or not less. Today she took the Court to the bankruptcy case, which I'll come back to tomorrow, which showed that in the bankruptcy Court she accepted that the value of the operating businesses was negative equity. So that changes the whole of what the Court is going to be looking at –

WILLIAM YOUNG J:

It doesn't really change the argument that you've put and which has run into some trouble but –

ELIAS CJ:

That argument is going to be pursued tomorrow. Is there anything –

WILLIAM YOUNG J:

Can I just draw your attention to –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

– a page in the evidence, page 938 of, it's volume D. It's just I'd just like you to look at it and come back tomorrow on the points I'm going to raise.

ARNOLD J:

938 in the D?

WILLIAM YOUNG J:

938, it's in the orange version, orange booklet. This is Mr Clayton's narrative affidavit – sorry, second narrative affidavit.

MS McCARTNEY QC:

Can Your Honour just tell me what paragraph number?

WILLIAM YOUNG J:

Para 23.

MS McCARTNEY QC:

Yes, I am aware of that, Your Honour.

WILLIAM YOUNG J:

Okay, so first of all, "I purchased a small mining operation in Katikati."

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

On the face of it that would be relationship property?

MS McCARTNEY QC:

Yes, I can follow that through, Your Honour.

WILLIAM YOUNG J:

Yes, okay, secondly – I'm not really asking for concession, I just want you to come back tomorrow. "In the same year my father had bypass heart surgery and it became obvious he was going to need to slow down. So I purchased his business from him in 1992. It was on terms that were very generous to me. On the face of it, in the absence of something more than we have, that too would be relationship property."

MS McCARTNEY QC:

I didn't draft the affidavits, Your Honour.

WILLIAM YOUNG J:

No, no, but on the face of it, on the fact of this evidence –

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

– that looks like relationship property. Acquired after, by him after marriage. Possibly it mightn't be, but on the face of it, unless there's some more information, it is – I don't really want an answer now, I'm just drawing your attention to it.

MS McCARTNEY QC:

No, I'm not going to answer it right now. I've heard the question, Your Honour, and if I can come back to it –

WILLIAM YOUNG J:

Yes, and then the –

MS McCARTNEY QC:

– I will do so.

WILLIAM YOUNG J:

Then 25, "On 23 April Melanie and my second daughter, Anna, was born. Shortly thereafter we moved into the newly completed house at Banksia Place." How was the house funded?

MS McCARTNEY QC:

The house, Your Honour, the section was purchased prior to the separation and the house was funded by getting cheap timber from people associated with the business. It's –

WILLIAM YOUNG J:

So that looks, so the extent to which there's a house on it it looks as though it's been improved by relationship property.

MS McCARTNEY QC:

Oh, that's the relationship home, it's conceded.

WILLIAM YOUNG J:

Wasn't Banksia Street treated as part of a pool of separate property?

MS McCARTNEY QC:

At the beginning of the marriage it was but it's –

GLAZEBROOK J:

That was the section, if you look back at paragraph 17.

WILLIAM YOUNG J:

Okay, all right, okay. To that extent, when Banksia goes in to, does that wind up in one of the trusts?

MS McCARTNEY QC:

No, Your Honour, that –

WILLIAM YOUNG J:

Okay.

MS McCARTNEY QC:

When the agreement was set aside that was just treated as the family home.

WILLIAM YOUNG J:

Okay, so –

GLAZEBROOK J:

The building of the house was funded through his father's business, he says, but after the relationship started, so there was a property built on it.

WILLIAM YOUNG J:

Okay, so we're looking at the Katikati sawmilling operation and the, and his father's business?

MS McCARTNEY QC:

Yes. And what Your Honour has just identified is something I will address tomorrow, but I have to say that the difficulty in this case is that the way in which the evidence came in the Family Court was that it came in on the basis that just the pool of

property was valued, and no one actually – I'm talking about the experts – no one traced it back to original property. So –

WILLIAM YOUNG J:

But there's a finding effectively that everything over 500,000 is relationship property, it doesn't have to be 27 million, it can be a million dollars. And has that finding been challenged in the Court of Appeal or an attempt to challenge it in front of us?

MS McCARTNEY QC:

The quantum's correct, Your Honour –

WILLIAM YOUNG J:

No, I'm not interested in the quantum at the moment other than that anything over 500,000 is relationship property, that's what the Courts have said so far.

MS McCARTNEY QC:

That's dealing with the operating businesses, the value from 500,000 up to the valuation that's been adopted by the Courts is property to be shared under section 9A.

WILLIAM YOUNG J:

And you accept that?

MS McCARTNEY QC:

I accept that.

WILLIAM YOUNG J:

Well, what have we been talking about then?

MS McCARTNEY QC:

Because the underlying property remained separate throughout the marriage, that's the point, it never lost its separate property classification.

GLAZEBROOK J:

Can you tell me when Clayton – I have real trouble understanding that, but can you, I would quite like to know how and when everything went into the Vaughan Property Trust. When was Clayton Holdings actually incorporated?

MS McCARTNEY QC:

I can look at the chronology but I think it's 1991.

GLAZEBROOK J:

So that's post – so everything that was amalgamated into Clayton Holdings was amalgamated into a company that was started and set up after the marriage?

MS McCARTNEY QC:

And it's sourced entirely from separate property.

GLAZEBROOK J:

Well, I don't understand that, because – well for a start you've just been pointed to the sawmilling business post the marriage and the other one, and what was actually sourced because the Vaughan – the Banksia property, which was separate property, went into the – was a house.

MS McCARTNEY QC:

Stayed to one side.

GLAZEBROOK J:

The Vaughan Road properties, which were a separate property, went into the Vaughan Road Trust. There was a fledgling business which doesn't seem to have gone anywhere.

MS McCARTNEY QC:

Well the fledging –

GLAZEBROOK J:

So where does the separate property create all this other property other than businesses that have been started since the marriage, or the relationship started?

MS McCARTNEY QC:

In accordance with the finding of the Family Court.

GLAZEBROOK J:

Forget the finding, just tell me sensibly where it possibly could come from separate property when the only thing is actually in the Vaughan Property Trust, the two

Vaughan Road properties which are separate properties, and the Banksia property which they were living in.

MS McCARTNEY QC:

Well the Banksia –

GLAZEBROOK J:

And the fledgling business which doesn't seem to have been worth much. So where does it all come from if it doesn't come from what happened during the relationship?

MS McCARTNEY QC:

And Your Honour's directing my attention to the Vaughan Road Property Trust?

GLAZEBROOK J:

No I'm just asking you –

MS McCARTNEY QC:

Just generally?

GLAZEBROOK J:

Where does it come from if it doesn't come from the relationship?

MS McCARTNEY QC:

Well at the date the relationship commenced, there was the Banksia Street property –

GLAZEBROOK J:

Which certainly didn't go to helping the –

MS McCARTNEY QC:

Family home, no, it's the family home. There were the two parcels of land in Vaughan Road, which belonged to Claymark Industries Limited, the 1984 company. There was the agreement with the father Arnold that the businesses would be transferred and there was, I've already said Banksia Place. During the marriage what happened was that the –

GLAZEBROOK J:

Where did he previously agree that?

MS McCARTNEY QC:

Yes, that's in the evidence, I can take you to it in the chronology.

O'REGAN J:

But it doesn't matter. He didn't buy it until after the relationship. The fact he had an option to buy it is neither here nor there.

MS McCARTNEY QC:

Well I'll have to come back to the evidence as to how the, what the structure of the arrangement was.

GLAZEBROOK J:

But for 1985 –

ELIAS CJ:

I think it might be sensible, we are going to hear this tomorrow, we're going to hear it in relation to the 38/2015 appeal?

MS McCARTNEY QC:

Yes.

ELIAS CJ:

Is there anything else you want to add in relation to the Vaughan Street Trust appeal?

MS McCARTNEY QC:

I hope not Your Honour. I have to say as I was listening there were things that I thought that could be added and I thought we'd go past the –

ELIAS CJ:

I'd really like Ms Chambers to be able to get up tomorrow morning, do a quick, I hope, reply, and then get onto the other appeal so that you've got, you obviously will need some time to develop the detailed argument you want to advance to us in the 128 appeal. Is it 128, 28.

ARNOLD J:

It's 38.

ELIAS CJ:

38, sorry, appeal. But is there anything before we close off and then Ms Chambers can reply on the first appeal in the morning, is there anything else you want to add?

MS McCARTNEY QC:

No, thank you Your Honour, I'll leave it there because the submissions tomorrow that I'm going to advance are obviously the issue of the just division.

ELIAS CJ:

Yes, and we understand that there is a certain extent to which these two appeals overlap.

MS McCARTNEY QC:

Yes.

ELIAS CJ:

And so it's not hermetically sealed but we also have on board that you adopt Mr Carruther's submissions to the extent that you haven't advanced other ones to us?

MS McCARTNEY QC:

Yes, thank you Your Honour.

ELIAS CJ:

Yes, all right. We'll take the adjournment now.

COURT ADJOURNS: 5.14 PM

COURT RESUMES ON WEDNESDAY 2 SEPTEMBER 2015 AT 10.06 AM

MR CARRUTHERS QC:

Your Honours, may I be heard briefly on an issue that arose out of yesterday's hearing. Overnight the concern is about the nature of the powers in the VRPT deed and whether they are usual powers and what I've done overnight is obtained a copy of Butterworth's standard form of discretionary trust and I have prepared a two page outline of the provisions that are common between the VRPT trust deed and the Butterworth's precedent, and all I want to do is hand that up. I've given a copy to my learned friend. I understand there'll be an objection to the course I propose, but I have said to her that I wouldn't expect her to be replying on this in the 23 appeal and from my point of view I'm content for her to reply on it in the 38 appeal when she comes to that point.

ELIAS CJ:

Yes, thank you. Yes Ms Chambers?

MS CHAMBERS QC:

I do oppose this course. I haven't read the document that my learned friend is proposing. It's some three pages long plus a document which is effectively evidence from the Bar. It's too late, in my submission, and it's unfair particularly given the principles of the Act in terms of dealing with these matters efficiently for my friend, having sat down, to now produce yet more submissions and evidence from the Bar in regard to this matter.

ELIAS CJ:

Well he was asked, Ms Chambers, questions about whether the terms of the trust were usual or not. If this is a published source, I haven't, of course, seen the, what comes with it, whether it's simply the Butterworth's published source, there would seem to be very little basis on which we couldn't receive that, if it's simply, you know, in public currency. Yes, of course you can reply on it, and if you need more time that's fine, but is there any principal basis on which there could be an objection to that, given the questions that were asked by the Bench?

MS CHAMBERS QC:

Well if it's being put forward, and I don't know whether this is correct, that this is a standard trust deed, then presumably I need to go back and have a look to see whatever standard trust deeds are provided by NexisLexis, what are used by the big

firms, what is standard practice in terms of trust deeds et cetera. I mean it's a matter for which there could be reply evidence. If my friend is saying this is a standard trust deed, I don't know whether it is or not.

ELIAS CJ:

Well, but if you're given leave to put in additional information if you obtain it, what's the prejudice?

MS CHAMBERS QC:

More cost and delay but perhaps if Your Honour is minded to accept it, and my friend seems to be putting in a whole series of more, further submissions, it's three pages.

ELIAS CJ:

Well we don't want further submissions. If we be handed anything it should simply be, Mr Carruthers, whatever the published material is.

MR CARRUTHERS QC:

Well I'm in Your Honour's hands on that. It was just – the narrative is simply to deal with the relationship of the clauses to the precedent. But I'm absolutely in Your Honour's hands and I certainly don't want to make any further –

ELIAS CJ:

Well you could simply give us the reference?

MR CARRUTHERS QC:

Well I can –

WILLIAM YOUNG J:

We can have a look at it anyway. I think we may as well have it frankly.

GLAZEBROOK J:

I wonder whether Ms Chambers should just have a chance to have a look at it first so that if there is anything that is objectionable in terms of extra submissions or that she needs a chance to reply –

ELIAS CJ:

Well I'm not interested really in extra submissions. What I'm interested in is simply seeing the published document. Can't that just be handed in?

MR CARRUTHERS QC:

Well I can hand up the published document. Really the narrative is simply to assist the Court but I'm content to just hand up the published document. Your Honours, that's as much as I wanted.

ELIAS CJ:

Yes, thank you. All right Ms Chambers, you'll have leave to put in any additional material by memorandum.

MS CHAMBERS QC:

Thank you Your Honour.

ELIAS CJ:

In the same form, without submissions, just in any published –

MS CHAMBERS QC:

Thank you Ma'am. Yes, I don't know the date of this or how many other precedents there are in that book but I'll have a look at that when I get a chance.

ELIAS CJ:

Actually we don't know what this is.

MS CHAMBERS QC:

No –

WILLIAM YOUNG J:

I really think we need the extra document to explain it.

MS CHAMBERS QC:

Yes, presumably this is just version 47.1 of a trust deed from whoever produced this.

ELIAS CJ:

Well there's no cover page or anything like that.

MS CHAMBERS QC:

Is it the short point that Your Honour's able to go and have a look if you wish to in regard to precedents provided online to practitioners in regard to trusts?

WILLIAM YOUNG J:

Well we're likely to have regard to, either from our own experience or otherwise, to whether just how usual these clauses are. Now that may not be in the end controlling but we are, for myself, I am likely to do that, and I found it unhelpful not to have the most help I could get.

MS CHAMBERS QC:

Mmm.

ELIAS CJ:

Mr Carruthers, can we have a cover page, thank you. I appreciate it's an online publication is it?

MR CARRUTHERS QC:

Yes it is. It's the – from LexisNexis New Zealand forms and precedents, and it's described as the standard form for creating discretionary trusts.

ELIAS CJ:

And is there a date, is this the current online version?

MR CARRUTHERS QC:

Yes, it's the current online version.

ELIAS CJ:

Yes, thank you. Yes Ms Chambers?

MS CHAMBERS QC:

Thank you Ma'am. Now just briefly by way of reply to my learned friend Mr Carruthers. His submission was concerning, particularly with the Court of Appeal finding that Mr Clayton, as principal family member, could remove the final beneficiaries pursuant to his ability to remove beneficiaries. But as Your Honours pointed out, Her Honour the Chief Justice, re-settlement solves that problem. As Justice Glazebrook pointed out, distribution of the all the trust assets solve that problem. But I also want to emphasise Justice Arnold's point about vesting, bringing forward the vesting date. That's important because that is exactly the same as the Court of Appeal's finding because it has the affect of completely removing the girls as final beneficiaries and he has power to do that and that's in the trust deed under definitions of vesting which is E1336. So I just re-emphasise the ability to bring

forward the vesting date that Mr Clayton has because of the definition of "vesting date."

In any event I submit that applying robust reality, what is the point of saying that he has trustee obligation when Mr Clayton is the sole trustee, doesn't even remember that he has established this trust and has no idea what his trustee obligations are? If someone put in front of him a piece of paper bringing forward the vesting date and distributing the assets to himself, we have every reason to believe on his evidence that he would simply sign it. He is an emperor with no clothes and this Court should point out the reality of his nakedness.

Your Honour Justice Glazebrook was asking where did the money come from in the beginning of the Vaughan Road Property Trust. The answer to that is also in volume E, because we do have the first set of accounts in regard to this trust. It's at page 1348, and that shows that by 2000 it had income of some 59,000 in it and that's what its equity was. It was funded in terms of its acquisitions on page 1352 in part by third party borrowing which is AXA and BNZ but also by the Claymark – by the group, Claymark Trust lent it $230,000, Claymark Industries lent it $137,000, and Mr and Mrs Clayton's – sorry, Mr Clayton's parents lent $300,000. That allowed the trust to acquire property at Vaughan Road, Rotorua, which you'll see at 1354, which it acquired in 1999 for 690 – sorry, it's a bit more than that. For $1.9 million. No, that can't be right. Yes, $1.9 million. But where it says the land and buildings at cost, 10-24 Vaughan Road, Rotorua, that is actually four properties at Vaughan Road, Remuera – sorry, Rotorua, including the two original separate property ones, which were owned by the 1984 company which gets struck off, and two more, and you'll see that evidence referenced in my chronology on the date 21 July 1999. The husband as trustee of the Vaughan Road Property Trust purchases property at Vaughan Road from Claymark Properties Limited, which is another Claymark business, and the 1984 company and from Earl Karaitiana, who is an unrelated vendor. So by –

ELIAS CJ:
Sorry, what page is that?

MS CHAMBERS QC:
That is on my chronology Your Honour.

ELIAS CJ:

I see.

MS CHAMBERS QC:

21 July 1999 so – and it has the page reference in the evidence. So in July 1999 the husband as the trustee purchases four pieces of land and the other page reference for that is page 309 where Mrs Clayton tracks through in her affidavit the various titles, but, and some of the titles get amalgamated so it's a little bit complicated but that is essentially what happens.

And I had, I think, yesterday morning referred Your Honours to 1402 in the bundle, which is quite a good summary of who funds the Vaughan Road Property Trust from then on and as I said from 2001 onwards Mr Clayton himself is funding this trust one million dollars, 1.9 million and three million dollars. So first year he's not personally lending them anything, but the entities he controls is second, third, fourth, and subsequent years he's funding it.

GLAZEBROOK J:

Can you just help me on how the – if the properties that were in the trust initially were separate property, and if the properties from then on are in the trust, leaving aside the lending from 2001 onwards, how do the properties in the trust become relationship property, even under a section 9 analysis?

WILLIAM YOUNG J:

I'm not sure if they do, do they? It's the interest in the trust that becomes relationship property.

GLAZEBROOK J:

Exactly, that's what I'm asking. So it's not the underlying assets. It's the interest in the trust that becomes relationship property and how does that become relationship property through the loans to the trust by Mr Clayton or entities associated with him which in themselves are relationship property, or how conceptually does that work on your analysis?

MS CHAMBERS QC:

Because he gets interests and rights during the marriage in regard to the trust deed, they are items of property which become relationship property under section 8(1)(e).

GLAZEBROOK J:

Thank you.

MS CHAMBERS QC:

And …

GLAZEBROOK J:

And how do you deal with the separate property that arose beforehand? Is it the – so it's the increase in value of those, the trust assets, is that how that works?

MS CHAMBERS QC:

Yes, Your Honour.

GLAZEBROOK J:

It's not entirely clear that that was the way that it was conceptualised on the District Court, that's all.

MS CHAMBERS QC:

That's right, Your Honour.

GLAZEBROOK J:

But then one can understand that because there was a disregarding of the trust altogether.

MS CHAMBERS QC:

The trust does purchase the properties. It's not gifted across.

GLAZEBROOK J:

At market value or at book value?

MS CHAMBERS QC:

I don't know the answer to that but it's 1.9 million for all four. I don't know whether there's any evidence breaking it down. But we know the trust purchases it and we know that relationship property, ie, property from the businesses which are effectively relationship property, given that their increase in value is relationship property but for 500,000 is used to help fund that interest-free, from memory. I don't think it's paying any interest to those entities. It doesn't look like it's the amount of interest. It looks insufficient for the full amount of the loans. So in terms of the looking at whether or

not that, those components lost their separate property nature those transactions given that it's effectively been purchased and sold by Mr Clayton in his personal capacity the separate property nature of them is lost.

Now, my instructing solicitor has just referred me to the evidence about that purchase which is Mr Clayton's affidavit, volume D, page 937 paragraph 19. It's Mr Clayton's affidavit at 10 March 2009. "In this context, I incorporated a company in 1985, Claymark Industries Limited" – and that's what we call the 1984 company to try to stop confusion – "which purchased a bare piece of land adjoining my father's business in Vaughan Road, being what I think was 26 Vaughan Road. This has since been transferred to the Vaughan Road Property Trust. I set up a basic yard and dry shed on the property and then shifted Rotorua Timber Suppliers" – which wasn't a company, it was just him trading under a trade name – "to the site. I cannot remember what Claymark Industries Limited paid for this property. I've not been able to locate any documents in relation to the purchase but I have instructed my solicitors to undertake a title search to see what further information may be revealed." So it's not wildly helpful but remember that what he owned, of course, in terms of his separate property was the shares in the '84 company. That's what he owned and that goes because that company gets struck off.

ELIAS CJ:
Following a consolidation, was the point, I think, that was made against you.

MS CHAMBERS QC:
When was it struck off? It was struck off …

ELIAS CJ:
Because there's amalgamation.

GLAZEBROOK J:
That may have been a later amalgamation because it had already been transferred into industries, I think. The business was transferred.

MS CHAMBERS QC:
I think that's right. It's not struck off until 2001 and the holding company is formed in 1991 if you have a look at my chronology, which is the company, which is the holding company. So Claymark – the 1984 company just withers and dies off on the side and the Family Court Judge doesn't really kind of focus on what is the item of

separate property he had in terms of the business. What he had was shares and they disappeared during the marriage. Instead, she looks at the business and says, "Well, I'm going to allow a bit for the fact that he had a business going before the relationship started," so she takes a generous view to Mr Clayton.

Now, Your Honours were asking with Mr Carruthers, well, Mr Carruthers was indicating that there was a discussion around where will the payment for Mrs Clayton's claim in regard to the Vaughan Road Property Trust come from and of course Mrs Clayton's reply to that is, "Well, Mr Clayton himself values his total assets as some $27, 29 million," and I referred to that evidence earlier. But there is of course concern. We know that Mr Clayton had a strategy in BNZ 17 which he told his bankers about, about folding the business and then buying it back cheap through profiles. Do you remember I pointed that evidence out to you yesterday? So in my submission the order should be that Mr Clayton pays – this is assuming that Your Honours find that there's a property interest that therefore it's an order under the Act that Mr Clayton pay Mrs Clayton an amount in terms of the value of his property interests. But in addition, I submit that Your Honour could make a machinery order in much the same way as Their Honours did in *Spry*. If Dr Spry didn't pay, they put in a machinery order. If Mr Clayton didn't pay and elected to go bankrupt rather than pay his wife, then, in my submission, the appropriate backup order would be that if Mr Clayton doesn't comply with an order to make payment, then under section 33(3)(l) he must transfer his interests and rights, under the trust, to Mrs Clayton. Again, it doesn't – it is only a transfer of property, relationship property, not of the trust assets. That is the appropriate machinery order.

GLAZEBROOK J:
What about an order that was made in *Poon* that he exercise his power of appointment in favour of Mrs Clayton?

MS CHAMBERS QC:
Yes.

GLAZEBROOK J:
As to the proportion of the assets of the trust that should be. That will interfere, though, with the assets of the trust won't it?

MS CHAMBERS QC:
It will.

GLAZEBROOK J:

Do you have anything to say about that?

MS CHAMBERS QC:

Well the – if you – section 33 does seem to contemplate, well does contemplate orders against not just relationship property but property, because when one looks at the machinery orders, for example, 33(3)(e), the legislation says that the Court can make an order for the partition or vesting of any property, which must be taken as being deliberate, so – and likewise, under (k), the Court can make an order for the transfer of the title or documents of title of any property. It seems to give a wide power, as you'd expect under this Act, to make the type of orders that Your Honour is discussing. So, another alternative would be an order that, as trustee, he must vest the properties owned by the Vaughan Road Trust Deed in Mrs Clayton or transfer that title.

GLAZEBROOK J:

Or re-settle –

MS CHAMBERS QC:

Or re-settle.

GLAZEBROOK J:

– on a similar trust?

MS CHAMBERS QC:

Yes. There was also discussion yesterday afternoon about the definition of property and I just wanted to remind Your Honours of *Z v Z (No.2)* [1997] 2 NZLR 258 (CA) which did have quite a significant discussion on the definition of property. I refer to it in 86 and 87 of my submissions. And, in particular, Their Honours finding that, "The concept of property is fluid and has extended, over the years, to include interests which might not earlier have been covered by it. Its meaning and scope must be affected by the statutory and wider context in which it is used. The wider context includes changing social values, economic interests and technological developments."

So that's, of course, a seven-member Court of Appeal bench indicating the movement of the meaning of property. One of the academic commentators says it's like the word "love," it means different things in different contexts.

WILLIAM YOUNG J:

Can I just answer that for a minute? There's never been a claim that Mr Clayton's interests in the Claymark Trust is, itself, relationship property, is that right?

MS CHAMBERS QC:

Yes there has Sir.

WILLIAM YOUNG J:

Is it – but where is that claim dealt with?

MS CHAMBERS QC:

In the Family Court decision –

WILLIAM YOUNG J:

Sorry, I've – before I jumped ahead, I was really looking at the Court of Appeal judgment. Is there an assertion that his interests should be valued in the same sort of way as it has been, and approached in the same sort of way as the Court of Appeal approached the Vaughan Road Property Trust?

MS CHAMBERS QC:

Yes and I'll have to take you back to the unfortunate history of these proceedings. If Your Honour looks at the Family Court decision you'll see that bundle of rights was argued by Mrs Clayton. Page 62 of volume A. That was – paragraph 26 lists the claims Mrs Clayton made in the Family Court in regard to the trust assets. So she argued –

WILLIAM YOUNG J:

That's E?

MS CHAMBERS QC:

Yes.

WILLIAM YOUNG J:

26E, okay.

MS CHAMBERS QC:

Yes, she argued a whole series of things, including 44C.

WILLIAM YOUNG J:

Yes.

MS CHAMBERS QC:

The Family Court Judge decides that it is an illusory trust and doesn't deal with the rest.

WILLIAM YOUNG J:

That's, that is Vaughan Road?

MS CHAMBERS QC:

Yes.

WILLIAM YOUNG J:

But what about Claymark?

MS CHAMBERS QC:

Oh, we're on to Claymark?

WILLIAM YOUNG J:

Yes, that's what I'm – I'm just trying to get my head around the Claymark…

MS CHAMBERS QC:

Claymark was argued under 44C right from the beginning.

WILLIAM YOUNG J:

No, but was it not suggested that Mr Clayton's bundle of rights in relation to Claymark was relationship property?

MS CHAMBERS QC:

The bundle of right argument was applied against all of the trusts.

WILLIAM YOUNG J:

And how was that addressed in relation to Claymark?

MS CHAMBERS QC:

She doesn't address it. Because His Honour decides – because she decided on certain grounds she doesn't then go on a deal with the other grounds.

WILLIAM YOUNG J:

But why did – I see. Well…

ELIAS CJ:

So how, was Claymark – I've forgotten now – how was Claymark classified?

MS CHAMBERS QC:

Claymark, she was unsuccessful on Claymark.

ELIAS CJ:

Yes, but so it was decided, what that it was –

MS CHAMBERS QC:

Only under 44 – hang on, I'll find Her Honour's rulings. She doesn't go on to deal with it is the short point.

ELIAS CJ:

So 68 she deals with the Claymark Trust. And the argument under section 182, which you're going to advance to us in the second appeal.

MS CHAMBERS QC:

That's right.

ELIAS CJ:

Was that the only basis that was put forward? It wasn't suggested that Claymark Trust or his interest in Claymark Trust was relationship property?

MS CHAMBERS QC:

Well, I had understood that that argument was made in regard to all of the trust interests, because obviously if it applies to one it applies to the rest, because all of the trusts were created during the marriage. But I'll just check with my instructing solicitor.

WILLIAM YOUNG J:

It's not mentioned in the headings to Justice Rodney Hanson's judgment.

MS CHAMBERS QC:

Well then you see what happens, Sir, is that it goes to the High Court on the issues decided by the – no, hang on, I'd better check that, because I wasn't counsel. I'd better just check to make sure I've got that right. Yes, my instructing solicitor's telling me that in the Family Court Mrs Clayton argued bundle of rights in regard to all of the trusts, and she has the submissions here if anybody wants to see that, from Mrs Clayton. Then in the High Court –

WILLIAM YOUNG J:

Just pause there. The Judge, Judge Munro, doesn't deal with bundle of rights in relation to Claymark?

MS CHAMBERS QC:

Any of them.

WILLIAM YOUNG J:

And what about in the High Court.

MS CHAMBERS QC:

In the High Court in regard to the trusts, findings of Her Honour Judge Munro, Mrs Clayton seeks to uphold the findings of the Judge, ie, illusory trust –

WILLIAM YOUNG J:

But that's only Vaughan Road.

MS CHAMBERS QC:

– and sham trust. And in regard to Claymark she appeals, but only under 44C and 182.

WILLIAM YOUNG J:

All right. So for practical purposes a bundle of rights argument is not on the table in relation to Claymark Trust?

MS CHAMBERS QC:

No.

WILLIAM YOUNG J:

Is there a reason for that? The trust doesn't have quite the same features, I think, that attracted attention in the Court of Appeal in relation to the Vaughan Road Property Trust.

MS CHAMBERS QC:

There's no logical reason for that not being there, it should be there.

GLAZEBROOK J:

Well, I think he wasn't a – was he not a beneficiary and he had a extra trustee of the Claymark, is that right?

MS CHAMBERS QC:

He does.

GLAZEBROOK J:

Or was he a beneficiary? I think he was one.

MS CHAMBERS QC:

He's a beneficiary as well.

GLAZEBROOK J:

He is a beneficiary. But it had an added trustee?

MS CHAMBERS QC:

It did. Didn't have the self-interest clause either.

So the case has gone through its appeal process in part in response to the judgments of Their Honours, so in reaction to that. I need to correct slightly. My instructing solicitor has just referred me to paragraph 151 of the High Court decision at page 152 green volume, volume A. It does appear that Ms Hunter did raise alternative claims in relation to the trusts which were not considered having regard to the findings made by the Judge under section 44 of the Act.

WILLIAM YOUNG J:

So are you still –

ELIAS CJ:

Not here, not on the table here but it's still alive. Is that the point?

GLAZEBROOK J:

I think – aren't you saying it was alive in the High Court but not dealt with for the reasons there and then presumably that carries through into the Court of Appeal?

MS CHAMBERS QC:

It does.

WILLIAM YOUNG J:

But they're still on the table?

ELIAS CJ:

Yes.

MS CHAMBERS QC:

Well, except that – well, that's a difficult question. The matter is down for quantification hearing in March in the Rotorua High Court but it is a quantification hearing.

ELIAS CJ:

In the High Court but this indicates that it would have to be pursued through the Family Court.

MS CHAMBERS QC:

The Court of Appeal transferred it to the High Court which, as we all agreed, should have happened way earlier. I applied but the Family Court refused to transfer it. It should have been in the High Court from the start with a commercial Judge.

WILLIAM YOUNG J:

Paragraph 151, however, is still – wasn't interfered with by the Court of Appeal judgment.

MS CHAMBERS QC:

No, that's true, it wasn't.

WILLIAM YOUNG J:

So that is the question whether bundle of rights is applicable in relation – and when I say "bundle of rights" I use that loosely. It's the Vaughan Road property bundle of arguments are relation to Claymark is still then on the table, at least as an alternative to the 44 and 44C claims.

MS CHAMBERS QC:

Yes, Your Honour, because, I mean, the other thing is the Vaughan Road Property Trust is …

WILLIAM YOUNG J:

Much more significant.

MS CHAMBERS QC:

It is pretty obviously a 44C as well, and Their Honours in the Court of Appeal having heard from us only on sham and illusory trust said, "Well, what about 44C, can we have written submissions on 44C?" which we did supply. I think that's recorded in Their Honours' judgment but in the end they decided we don't need to deal with 44C because we consider the power of appointment of beneficiaries to be property. It is a complicated case because he had 11 trusts which were attacked on different grounds, and of course it's a complicated structure.

ELIAS CJ:

Sorry, the answer you just gave about the Court of Appeal returning it to the High Court, I thought that was for the valuation. If the argument about an interest in the Claymark Trust is live, as appears to be the case under paragraph 151, what was contemplated there is that that application would have to go back to the Family Court. Do the terms of the Court of Appeal order transfer that also into the High Court? I'd just like to check that.

GLAZEBROOK J:

Well, why wouldn't we deal with it if it's still live?

O'REGAN J:

But it's not still live, is it, because it's not part of the leave.

WILLIAM YOUNG J:

It wasn't dealt with. We have no findings on it except, I suppose, a finding implicitly against it because the Family Court Judge doesn't mention it.

O'REGAN J:

But we haven't given leave on it.

GLAZEBROOK J:

We could give leave.

ELIAS CJ:

I'd just like to look at the terms of the Court of Appeal. I suppose it's up the front. Was it a separate judgment? It's only sent back to the High Court for determination for the section 44 matter in relation to the trust and issues of quantum.

WILLIAM YOUNG J:

Okay. We've got the most unsatisfactory possibility of proceedings in two streams, one in the Family Court, one in the High Court.

MS CHAMBERS QC:

If Mrs Clayton was successful in her appeal, she doesn't care, so it solves the problem.

WILLIAM YOUNG J:

So by that you mean if she's successful as to section 44C and 182, she doesn't care?

MS CHAMBERS QC:

Mhm.

WILLIAM YOUNG J:

Okay.

GLAZEBROOK J:

I still don't quite understand why it goes back to the Family Court.

WILLIAM YOUNG J:

It hasn't been dealt with.

GLAZEBROOK J:
If it hasn't been dealt with, wouldn't you send it back to the High Court saying the proceedings have been transferred?

WILLIAM YOUNG J:
Well, you would have thought but they haven't. The Court of Appeal hasn't done that.

MS CHAMBERS QC:
You could, you could do that.

ELIAS CJ:
We could do that.

WILLIAM YOUNG J:
Yes.

MS CHAMBERS QC:
In the Court of Appeal all counsel agreed it was sensible that the whole thing should be transferred to the High Court.

WILLIAM YOUNG J:
That any outstanding issues be dealt with in the High Court?

MS CHAMBERS QC:
Yes.

Just three final points in reply, my learned friend said it wasn't clear why the Court of Appeal felt that the power which was property was relationship property, well, that's easy, it's section 81E. It's acquired during the relationship. In terms of the legislative framework, I do submit that section 4 is far more important than 4B because of its very specific provisions in regard to cutting across the normal common law and equitable rules. The Act applies instead of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property, and subsection 4, any questions which arise relating to relationship property must be decided if it's decided under this Act, and finally it is disappointing to read submissions that in 2015 Mrs Clayton did not contribute in any

way to the assets of the Vaughan Road Property Trust. Given the long marriage and at the very least as a traditional wife we recognise now in the modern world that this is a significant contribution.

With Your Honours' leave, I would like to move on to 38.

ELIAS CJ:
Yes, thank you.

MS CHAMBERS QC:
I'm now back on my roadmap at page 1 and the first issue is was there a disposition of relationship property to the Claymark Trust, and I've detailed the gifts that were made during the relationship and I'm going to take you to the accounts but I won't do that now, but that is the list in the accounts of gifts made. Now, I know that the Family Court for some reason only refers to the first three gifts, but as we go through the accounts you'll see that Mr Clayton in fact gifted $243,000 of relationship property to this trust because it came from his advances which we say are relationship property for the reasons I advanced yesterday. I don't know why the later gifts have been ignored.

ELIAS CJ:
What dates were they again?

MS CHAMBERS QC:
They're in your roadmap.

ELIAS CJ:
They're in my roadmap. Yes.

MS CHAMBERS QC:
Then there were the interest free advances, which on the case law is a disposition of relationship property because of the interest free nature of them. Then there were dispositions, and they were distributions from the Vaughan Road Property Trust to this trust, and you've seen how the Vaughan Road Property Trust was funded. The issue there is, of course, that 44C says, "Relationship property disposed of to a trust." The issue there is dealt with in my written submissions, so I won't come back to it, is how do you treat that for 44C because it's pretty easy to have an interloper trust to avoid 44C, if we don't address that.

And the final one is the loans made by Mr Clayton to a company called Kaimai Developments Limited. It is 100% owned by the Claymark Trust. It owns the avocado orchard and loans were made to it by Mr Clayton and, again, it's the issue under 44C, well is that, effectively, an interest free loans, is that effectively captured by 44C, and I've dealt with that in my submissions.

Point 2, that the advances were relationship property. I dealt with yesterday, so I don't need to deal with that again, and that was his concessions in his counsel's submissions, his affidavit, his cross-examination, the wording of the Act and *Fisher*, which explores that issue thoroughly, and the findings of the Family Court Judge, and the fact that he had a fairly small amount of separate property, which certainly didn't create the large volumes of money here, many years into the relationship.

So the accounts for this trust, which is established in 1994, but we do not have the earlier accounts. There was no explanation given for that, they simply never appeared, so we don't know the earlier funding. But I do want to take you through those because it tells you exactly how this trust operated and why Mrs Clayton should be successful in regard to 44C and 182. So I'd ask Your Honours to go to the yellow volume, at page 1213, it's volume E.

Now this 121 – so these are the 2000 accounts, but they have the 1999 accounts in them and if Your Honours turn to 1216, this is the earliest view of the acorn that grows the oak tree, which we say should be captured by section 44C. And what you can see there is that it has fixed assets of $281,000. And that, we know, is, from page 1222, the land at Katikati and Wellesley Street, the Wellesley Street apartment. And that is funded by Mr Clayton to a significant extent, page 1220. In 1999 Mr Clayton, effectively lent $270,000 to this trust, which only had equity of some 162,000 which had equity of only 126,000 in 1999 and 149,000 in 2000. Page 1221.

O'REGAN J:
So the 270 is the combination of the 166 and 86, is it, on that page?

MS CHAMBERS QC:
It is, Your Honour, and I mean you could – well, it's a bit less than that, isn't it? It's about 250,000. The aluminium specialists, I'm assuming, is a third party independent so take that one out.

WILLIAM YOUNG J:

I thought it might – are you sure about that?

MS CHAMBERS QC:

I'm not sure about that.

WILLIAM YOUNG J:

There is a reference to it, a company with a similar name somewhere.

MS CHAMBERS QC:

You're right, Your Honour. It is a Clayton business, so it's 273. And we know, too, that by this stage he's already gifted $81,000 into this trust because of the evidence on that. So the acorn consists of the $81,000 which he's gifted plus in 1999 the interest-free loans. And so no independent third party lending until 2000.

And then page 1221, you'll see there his gifting of 27,000 for that year. If we go to page 1222, there is the Katikati land owned at that stage. We can see its original cost price with its building is $40,000. Oh, no, that's the revaluation. Its original cost price is 15 plus 60 is $75,000. It is later sold for $103,000 and we can see that in the accounts. Wellesley Street is bought for $25,000 and of course at that stage he's loaned the trust 166,000.

WILLIAM YOUNG J:

249,000, I think. 25,000 is a very cheap apartment.

MS CHAMBERS QC:

Yes, I've added it up wrongly. So the original cost price of Wellesley is 24.

WILLIAM YOUNG J:

250,000.

MS CHAMBERS QC:

Where do you get that, Sir? Wellesley only appears once.

WILLIAM YOUNG J:

Yes, Wellesley, 1222, 249,512.

MS CHAMBERS QC:

Okay, oh, yes, 249, okay. Thank you, Sir. And of course he's loaned the trust most of the value of those assets.

1244 shows the accounts for 2000 to 2001 and there is the, on page 1247, the big jump in equity in assets and it's when the, during the 2001 year, further land is bought and the liabilities, obviously, also go up, and he purchases, at page 1251, for 2001, there is outside borrowing there of $575,000 with the Bank of New Zealand to Smart Limited, Smart Limited, two advances. So at that stage, that snap picture on 31 March 2001, third party lending, plus some increase in Claymark Industries lending has funded those purchases. And the purchase is at a cost of $492,000, and you can see that on page 1254. As you go through you might like to see those gifts again, on 1252, there they are. 1254, the purchasers of the new property, in total, 492,000.

So then we go to the next year and we see the 1283, the third party funding replaced by Mr Clayton.

GLAZEBROOK J:

Sorry, what was the page number?

MS CHAMBERS QC:

1283. 2003, 1286, there's the term liabilities. You'll see that the trust, in 2002, on 1287, made a profit of $64,000. 1289 shows the funding. So there were are, in 2002, Mr Clayton, at that stage, has advanced $548,000 bang on 31 March 2002 presumably. And in the following year that – he pulls out 260,000 back again but that has clearly been applied to pay off what has now became the elders home loan, the second elders, which was smart. I think they must have its name, second tier lender, because that liability has gone and the liability was about $200,000, which is about what Mr Clayton has put into that trust over the course of 2002/2003, and we know it hasn't been applied, by way of investments under note 3, because the investments of the trust, if anything, has gone down, it's been used to repay that debt, which is acquired, been used to acquire property. So when Ms McCartney says, "Well, his loans and his money in this," well, what we say is relationship property, was not used to acquire assets, she's wrong.

The logical deduction from the accounts is that this money was used to repay debt, used to acquire land, and in that way Mrs Clayton is in exactly the same position as

Mrs Nation and Mrs Gallagher. Interest-free loans of relationship property have been used to acquire trust assets which have, of course, gone up with inflation. And there is the, page 1290, there's the note, which I think appears in just about all of the accounts, under note 8, "The settlor of the trust, Mr Mark Clayton, has advanced funds to the trust. These advances are interest free."

GLAZEBROOK J:
Do you have to trace it quite so clearly through to assets because if you lend money to the trust for working capital that enables you to keep the assets, in any event, if you need working capital?

MS CHAMBERS QC:
I agree, Your Honour. I think Ms McCartney's argument is because this trust took money in and then invested it in the business, she got the advantage of it anyway. But, as I've shown, that's not always the case, because this acorn is growing and this trust is growing in terms of its land assets, which has, we say, diverted relationship property to a trust. But you could say, "Well, so what?" because if he's lending money interest-free to the trust and then it's lending it on to the business, which is relationship property anyway, she's still missing out, because the interest that she would gain from the relationship property or other assets acquired is just sitting there static, frozen, in the same way at Mrs Nation and Mrs Gallagher, that's all she's got, the frozen asset in regard to the advance back, the debt back.

So, I can go through the rest of these fairly quickly, I think. 1307 is '04 and '03, and by that stage, although there's still one, by that stage Mr Clayton is still nearly a 50% funder of this trust with his interest-free loans, and 1314 shows us another big jump in terms of the trust capital – see how the acorn is growing – to half a million dollars – and 1315 shows the first distribution by this trust to its beneficiaries, which goes to a distribution to Vaughan Road Property Trust. So you can see how all these entities get intermingled and fund each other.

ARNOLD J:
Sorry, what was the page for the distribution?

MS CHAMBERS QC:
1315.

Now also I draw to your attention the motor vehicle costs of $7000, that appears throughout, it's Mrs Clayton's car, not disputed. And you'll see as we go through that that car –

ELIAS CJ:

Sorry, where's the indication that that is distributed to the Vaughan Road Property Trust? This is the 209 5500, is it?

MS CHAMBERS QC:

Yes, I'll just –

ELIAS CJ:

Oh, I see, it's the – is it the…

GLAZEBROOK J:

Beneficiary income, 2005?

O'REGAN J:

But that doesn't show it's been distributed though.

ELIAS CJ:

Yes, but it doesn't show it goes to. I just wondered…

MS CHAMBERS QC:

I think it shows up in the Vaughan Road Property Trust accounts for '05, which is at –

O'REGAN J:

In note 3 on 1317 it's shown as an investment in the Vaughan Road Property Trust.

MS CHAMBERS QC:

Yes, it's, the accounting's a bit dodgy but you'll see, page 1430, Vaughan Road Property Trust accounts, 1430, it shows up as income distributed to – no, that's net surplus, sorry. Oh, there it is, sorry, page 1435, it's called a beneficiary distribution. May have been done for tax purposes, but anyway it's done. So there goes part of the oak tree through to the Vaughan Road Property Trust. Just, the motor vehicle's important because it's Melanie's, it's Mrs Clayton's, she's a beneficiary of this trust, she gets a benefit from it. It's important for her expectation of a benefit. The other thing that it's important for is this. Up until separation, she's not debited for the use of

that car. The trust just pays extra tax on it because, obviously, it's not a proper cost to the trust. After separation, the trustees decide she's going to start incurring a debt and I'm going to point to that under section 182 as indicating why her position changed on divorce. It certainly changed. They started treated her in a far less kindly fashion in regard to this trust.

Now, page 1317, this is the purchase in 2005 of the avocado orchard and you see the Kaimai Development's limited investment has gone up to 237,000. That's the avocado orchard coming in. And who's funded it? Mr Clayton's advance. Mr Clayton's advance has increased between 2004 and 2005 by 199,000 which is almost exactly the amount of the increase in the investment in Kaimai Developments Limited. It hasn't come from anywhere else. There's no other source from which it could come. All the other lending remains static and it's not making huge sums of money. In '04 it suffered a loss of 16,000.

1324, there is another big distribution out to the Vaughan Road Property Trust. There's after gifting on 1325 and 1326, you see that the Claymark Industries Limited is lending significant sums to the trust, as is Mr Clayton still, 366,000.

1329, there's an example of Mrs Clayton's car being properly treated for tax purposes but you'll note there are no beneficiaries' accounts saying she owes the money back.

Now, for 2007 we need to go back to 1235 of this bundle. The accounts are done after separation. Again, there's been a significant distribution in '06 and '07 to the Vaughan Road Property Trust and now there is no lending from Mr Clayton. It's gone. He's pulled it out. Page 1235 shows finance from both parties. The only thing I want to point out on that is the big distribution to the Vaughan Road Property Trust.

The next page, 1236, two more gifts during the marriage. 1237, again, you see this jump in equity to '07 and Mr Clayton at that stage is starting to pull back his loan from the '06 stage of 363,000. It's very hard to read that line for 2004 but I can tell Your Honours it's $298,588 from Mr Clayton. And if we keep going through on 1242, you will see the first beneficiaries' accounts appearing. After separation suddenly Mrs Clayton is incurring a debt in regard to her car. It never appeared before and there's an adverse treatment of her following separation which is important for her 182 claim.

ELIAS CJ:

It might have been helpful to have this in schedule form. I'm just looking at your submissions. You've got the advances. Yes.

MS CHAMBERS QC:

I agree, Your Honour. It should have been done in a schedule.

And finally, if Your Honours go to the cream volume, G, on page 4992, which is Claymark for 2010, you'll see in 2010 it's still distributing, making distributions to the Vaughan Road – that's actually very unclear. It's come back in as an investment. I think what that means is that the 229,000 was the distribution from Vaughan Road Property Trust which comes back in. It's complete muddlement but there on page 1993 is Mrs Clayton's current account by 2010. She's suddenly owing the trust 51,000 and 1996 shows that by 2009 and 2010 this trust has invested through its current account in the Vaughan Road Property Trust. We can logically deduct where that money's gone because we know that during the separation period Mr Clayton pulls out five million dollars from the Vaughan Road Property Trust.

ARNOLD J:

Can I just ask something? If you look at 1995, see under "discretionary beneficiaries" children in remoter issue of M A and M Clayton, now, when you took us to some earlier accounts they distinguished between M A Clayton and M Clayton in terms of advances and I think you treated them as all Mr Clayton. I just wondered why. In other words –

MS CHAMBERS QC:

You think the advances were named in the accounts coming from both husband and wife, were they? It's probably because I didn't notice.

ARNOLD J:

Well, it struck me why was there an entry for MA Clayton and then one for M Clayton? As I understand it, you treated them as both coming from the husband but, in fact, it does seem to me that where M Clayton is used it means Mrs Clayton.

MS CHAMBERS QC:

Yes, it does. I must have overlooked that.

ARNOLD J:

If that's right that strengthens your case considerably.

ELIAS CJ:

Where's an example of that? I missed it.

ARNOLD J:

It was in the earlier accounts that we were looking at, so if you go on I will find it.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

And 1845 are the most recent accounts, I think, that we have, in G, for 2011. 1846, there's that constant recording about the advances from Mr Clayton being interest-free and page 1849, Mrs Clayton now owes the trust 81,000. No doubt it's gone up since then. He's still gifting in 2010 which probably isn't that significant. He's got 1852, a relatively small loan. But the net assets have increased to 1.3 million. That, I think, is based on the purchase price of the assets but the land does get valued at 2011 and in fact it just happens to be a bad time for avocado orchards and so the equity goes down for our relationship property case, but that's just how it was. So that's why the equity drops. The avocado orchard goes down in value at the time of the Family Court hearing.

So Mrs Clayton's case is this all grew effectively from the acorn of relationship property funds and we should capture the oak tree.

ARNOLD J:

The example I had noticed was at volume E at 1220 that you took us to at the outset, but there's an M A Clayton and then an M Clayton and we don't have the earlier accounts, so what I wondered was whether …

MS CHAMBERS QC:

That was Melanie, Mrs Clayton.

ARNOLD J:

Yes, was treated as having – in the accounts as having made an advance because it does seem rather odd.

ELIAS CJ:

In the same entry.

ARNOLD J:

Yes.

MS CHAMBERS QC:

It does appear to be Mrs Clayton. My instructing solicitor is telling me there is no evidence on that. No one else has picked it up, I think, Your Honour.

ARNOLD J:

Yes, well, there it is but it just seemed to me a bit odd.

WILLIAM YOUNG J:

It was taken out by the Claymark Industries advance somehow.

GLAZEBROOK J:

It looks like it.

WILLIAM YOUNG J:

It probably – well, I'm too old for mental arithmetic but it may well be that the difference is the 86,947.

MS CHAMBERS QC:

I mean, she would have been working. Maybe her wages were applied into the trust and loaned to the trust.

ARNOLD J:

Well, who knows? Anyway, there it is.

MS CHAMBERS QC:

So the arguments for Mr – for the trustees, well, first of all they say, well, Mr Clayton doesn't control this trust. Well, the trust deed is in the yellow volume at 1180.

GLAZEBROOK J:

1180?

MS CHAMBERS QC:

1180. No, it's not. The Claymark Trust is at 123 – no, where has it gone? There it is. It's at pages 1188. Page 1189, he's a beneficiary and so is Melanie in all three categories, former wife and widow. The trustees under 5.1 have a wide discretion to benefit any of the discretionary beneficiaries to the exclusion of the others. 1190 paragraph 5.2, the trustees can dispose of the capital but they can only do that if at least one of the trustees is not a discretionary beneficiary or a relative, and then there's a majority vote. Now, that is not a hold on the horse because Mr Clayton has power of appointment of trustees and that is under clause 14.1. He can appoint as many as he likes, so he can appoint non-discretionary beneficiaries to get that majority vote.

And that halt on the horses at 5.2 does apply to capital appropriation under clause 8, can't give away capital without a majority vote where there's trustees other than beneficiaries, doesn't apply to 10.1, the ability to resettle.

ELIAS CJ:

Sorry, what doesn't apply?

MS CHAMBERS QC:

Resettlement under clause 10 or amendments to the trust under clause 11. And that is a wide power of amendment because the power of amendment can be under 11.2B for the benefit of any one of the discretionary beneficiaries.

GLAZEBROOK J:

Although presumably a self-dealing rule may apply in those circumstances.

MS CHAMBERS QC:

It may. It's nowhere near as extreme as the Vaughan Road Property Trust and there are some breaks on him in these trust deed. The 12.2 is the majority provision and 13.1 allows the trustees to take out discretionary beneficiaries, so Mr Clayton no doubt will take Mrs Clayton out of this trust once this litigation is complete and there would be nothing she could do.

He has to have two trustees. That's another brake on him. Although if you look at 14.4 you can have a trustee company as a sole trustee but he can't be – it's actually merely one of two directors of such a company. Well, it's incomprehensible. Presumably he can be the sole director. It's badly drafted. And –

GLAZEBROOK J:
That's what they might mean by governing director, a sole director. I don't know.

MS CHAMBERS QC:
True.

And 14.5, the trustees – Mr Clayton has got power under E to remove any trustee, as well. So under the trust deed I submit that ultimately he does have control because he can stack. Mr Cheshire, well, he is in my submission a puppet of Mr Clayton's and the most glaringly obvious example of the fact that he is completely at Mr Clayton's behest is in my chronology in September 2009 when, after separation, on 1 September 2009, Mr Clayton causes to be established a new trust called Lighter Quay Trust. Bryan Cheshire is the settlor and New Zealand Trustee Services Limited is the trustee. Mr Clayton's not in there as a beneficiary. Neither is Mrs Clayton. And in due course by the time it gets to hearing Mr Cheshire is the sole trustee and he's also the named beneficiary under the trust deed. The evidence became clear and the reference is there in the evidence that under cross-examination Mr Cheshire said, "Well, actually, of course I hold it for Mark Clayton." You'll find that evidence at volume F, the pink volume, 1533. Ms Hunter says, "Let's talk about the Lighter Quay Trust." Question on 16, "On the face of it, you are the trustee and the beneficiary in control of that trust?" "Correct." "There's no mention of Mark Clayton being a beneficiary of that trust, is there?" "No." "And your evidence is that you have not nominated him, have you?" "No." "But you haven't gone on to tell the Court that the trust is for Mark Clayton's benefit, have you?" "I haven't." That's in his affidavit or brief or whatever it is. He doesn't mention this. "Didn't you think that was relevant to this case?" "No." "Why not?" " I wasn't asked." "So unless we ask you directly what Mark Clayton's legal beneficial protection entitlements, you weren't going to answer that?" Over the page, line 4, "Did anyone tell you that this process is" –

ELIAS CJ:
So where is the answer that he actually gives apart from the "Why did you?" You didn't tell us. Where is the answer on the point?

MS CHAMBERS QC:
Line 21 of 1534.

GLAZEBROOK J:

He says he hasn't decided who the beneficiaries of that trust are, but it's not you and it's not intended to me.

MS CHAMBERS QC:

"You would recognise that, in fact, the legal obligations you have are to Mr Clayton?" "Yes, I do." "Yes. And you would no more assert a legal right to the sale proceeds of the Lighter Quay Trust that owns an apartment in Auckland and steal from him, would you?" "No." And so it goes on.

ELIAS CJ:

Ms Chambers, is that a convenient place to take the morning adjournment?

MS CHAMBERS QC:

It is, Your Honour.

ELIAS CJ:

Thank you. How much longer do you expect to be?

MS CHAMBERS QC:

I think I will be about 30 minutes.

ELIAS CJ:

Yes, all right, thank you.

COURT ADJOURNS 11.33 AM

COURT RESUMES: 11.50 AM

MS CHAMBERS QC:

I'm onto 3B of the roadmap. Mr Carruthers says there was no claim against the trustees. Well, the answer to that is in volume A and it's a simple point really, page 2 gives the section 44C claim clearly made under –

O'REGAN J:

Sorry, what page?

MS CHAMBERS QC:

Page 2 Your Honour, under point 5 in the claim and 44C, of course, is referred to down the bottom. It's only against Mr Clayton because the trustees are joined after the proceedings are issued and that, of course, is clear from the front page of the trial Judge's orders at page 102. And page 151 shows Mr Carruthers appearing in regard to the 44C claim in the High Court.

Mrs Clayton did have to file a separate claim against the trustees in regard to the constructive trust claim, but she didn't have to file a new 44C claim because, of course, the trustees were in due course joined to the relationship property proceedings anyway.

O'REGAN J:

Does that mean that all the claims made on page 2 have been applied to the trustees as well?

MS CHAMBERS QC:

To the extent that they were relevant because they were parties in that proceeding.

ELIAS CJ:

Well you're not seeking any relief against the trustees are you?

WILLIAM YOUNG J:

Could do.

ELIAS CJ:

Just the income – or the income?

MS CHAMBERS QC:

Well we anticipate that there will be sufficient relationship property to meet the 44C claim in regard to –

ELIAS CJ:

Right.

MS CHAMBERS QC:

– from Mr Clayton's half share but I suppose if there wasn't then we would be looking at income from this trust. Role of the trustees, I've already dealt with yesterday.

Business trust, well we, again, we discussed that yesterday. My submission is a simple one, 44C does not recognise that there's some different category, called business trust, and we know that the concept, the distinction in the Matrimonial Property Act between core property and balance property has gone a long time ago. And, of course, *Nation v Nation* and *Ward v Ward* both concerned, although *Ward,* of course is under 182. *Nation v Nation*, of course concerned a farm which, of course, is a business trust, in my friend's terminology. Didn't stop a remedy and of course it shouldn't, in terms of the aims and principles of this legislation.

The extent of property shared, well that's a she's got enough, she's getting enough. We've offered her six million, I think, is the effective submission. Of course, no such principle under the Act, and I point to the evidence that I referred to yesterday, that Mr Clayton himself thinks he's worth somewhere between 27 and $29 million when he goes to the banks or the High Court bankruptcy Court, but he says that she's entitled to six million.

Fairness, the fairness claim by Mr Clayton is a complete nonsense, given that offer, and also the way that he's conducted these proceedings and his conduct throughout. He remains of course in control of the vast majority of this couple's money, including all the income-producing assets, many years later.

So moving on to section 182. Now Mr Clayton says in his submissions at page 105 that if you break down *Ward* – at paragraph 105 rather – in fact the test is a five-step test. Now I don't really disagree with that, I think if you break it out he, my learned friend's correct, except for a slight amendment to his B, because he talks only about Mrs Clayton's reasonable expectation, but in *Ward v Ward* Your Honours talked about both parties' expectations in regard to the trust, although with an emphasis on the claimant's expectations. But the way I've formulated my submissions is in accordance with the standard texts, which tend to treat B, C and D as part of the discretion, and A as the hurdle to jurisdiction.

WILLIAM YOUNG J:
And the Court of Appeal seems to have got them conflated together.

MS CHAMBERS QC:
They do, they do. And so I'm suggesting in my submissions that whether this was a nuptial settlement is actually very straightforward and to the, and really what Their Honours were talking about was the discretion in the Court of Appeal, because this

trust of course was settled during the marriage, Mrs Clayton is a beneficiary in every potential capacity she has, and so are the children, and so is Mr Clayton, it settled during the happy time in this marriage. So I am suggesting it's a very straightforward hurdle.

Now Mr Carruthers for the trustees says, "Well, the settlement does not make any form of continuing provision for the parties." Well, that must be wrong and is blatantly wrong, in my submission, yellow volume, the trust deed, volume E, 1189. How can you say that this trust doesn't make continuing provision for the parties when they are the first four named beneficiaries? And the trust provides wide discretions to distribute to those beneficiaries. And the final beneficiaries are the children of the marriage.

WILLIAM YOUNG J:
Well, that's pretty common in any nuptial settlement, isn't it?

MS CHAMBERS QC:
It is, very common. And I've taken you already, well, clause 6 means the annual gifting can go out to the discretionary beneficiaries, it contemplates that happening, and 8 allows the trustees to distribute the capital to the discretionary beneficiaries. How can you possibly say that the settlement does not make any form of continuing provision for the parties? Then Mr –

ELIAS CJ:
Sorry, can you just remind me where I can find section 182 in the bundles?

MS CHAMBERS QC:
In my bundle you're on or under 38, at page 2.

ELIAS CJ:
Sorry, I'm just losing all of this.

MS CHAMBERS QC:
So it looks like this.

ELIAS CJ:
Thank you, that's fine, don't hold things up.

MS CHAMBERS QC:

Thank you. Mr Carruthers then argues, well a trust set up for business purposes is not a settlement made by reference to the married state of the parties compared to a trust set up over the family home or chattels. Well, there's nothing in section 182 to support that contention. There's nothing there which says, "Well actually this section only covers trusts set up for the family home and the chattels." And it's wrong, on the simple basis of *Ward. Ward* was a farm, transferred to a trust. In fact, it's shares in a company that owned a farm.

And finally on this point, of course, this trust is continuing to provide for either or both parties to the marriage, it's continuing to provide Mrs Clayton with her vehicle expenses.

O'REGAN J:

Well it's not is it because it's charging for them?

MS CHAMBERS QC:

Well, that's, yes, that's one way of doing it. I suppose it's interest free, to that extent it is.

GLAZEBROOK J:

Well it provides her with a vehicle but charges her interest free in respect to it, is that –

MS CHAMBERS QC:

In regard to its running costs.

GLAZEBROOK J:

That's post-separation?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

The, sorry, the case law emphasising intention of the parties, under section – in terms of nuptial settlements, where, where's that derived from? It's not in the statute is it?

MS CHAMBERS QC:

Where is 182 derived from?

ELIAS CJ:

No, no, where's the, where do they get the emphasis on intention of the parties?

MS CHAMBERS QC:

Ward v Ward. It's not in the legislation, it's *Ward v Ward.*

ELIAS CJ:

Yes, I'm just really wondering about that, however…

MS CHAMBERS QC:

Yes, well, well, it's a good point. The section doesn't say –

ELIAS CJ:

And indeed it contemplates settlements on the parties and very often these settlements are made by other people. Okay, thank you. I suppose their intentions would then be important.

GLAZEBROOK J:

I suppose it's trying to work out whether it is for the parties –

ELIAS CJ:

For, for the parties, yes.

GLAZEBROOK J:

– especially in the context of a discretionary trust, where it becomes more difficult to – because if it's a discretionary trust you may not expect to benefit from it because it may be through the children, or something of that nature, I suppose.

ELIAS CJ:

Yes, I just don't – yes, all right. I'm just not sure why, I mean, the intentions of the settlor might – must be relevant but I'm not sure why it's necessary for, for the emphasis that the Court of Appeal put on the intention of the wife. Anyway, I'm sorry, it's just a bit of a distraction.

MS CHAMBERS QC:

They, they've put –

ARNOLD J:

It does come from *Ward v Ward* though. I mean at paragraph 25.

ELIAS CJ:

I know it comes from *Ward v Ward,* I'm querying *Ward v Ward*.

WILLIAM YOUNG J:

Where it got to, where it came –

ELIAS CJ:

Where it came from, yes.

GLAZEBROOK J:

It may have been the Court of Appeal put you wrong because I suspect that was what, maybe what was argued in the Court of Appeal.

MS CHAMBERS QC:

Their Honours in this Court said, as part of exercising the discretion you take into –

ELIAS CJ:

Sorry, what paragraph are you taking us –

GLAZEBROOK J:

Oh, so the – so it might be not, not an indication of the barrier to it, but an indication of how you would exercise the discretion, which might be different –

WILLIAM YOUNG J:

It can't be a method of defining what a nuptial settlement is.

MS CHAMBERS QC:

That's right. That's right, so Mr Carruthers' nice little summary, at paragraph 105, we are currently just looking at whether it's a nuptial settlement, which is A. But the other points, B, C and D and the point Your Honour the Chief Justice was referring to, where you, according to *Ward v Ward,* hone in on reasonable expectations at the time of the settlement, comes from *Ward*, and it goes to the discretion. B, C and D

go to discretion, it doesn't go to nuptial settlement, it can't, it's not relevant. And that's one of the mistakes we say the Court of Appeal made. But I think – and I'll come to discretion – but I think Your Honour's point that, well, why are we, even in exercising the discretion, why are we focusing in on the time the trust is established, instead of more properly at the time the marriage, before, immediately before the marriage ends –

ELIAS CJ:

Well, which paragraph of *Ward v Ward* is it? And then move one, because there's no point in…

MS CHAMBERS QC:

It's paragraph 25.

GLAZEBROOK J:

But isn't the answer to that is immediately before the marriage ends, if the settlement is in the control of one of the parties then any reasonable expectation is probably gone? Because in some instances the settlements on say the actual, the actual wife not the former wife explicitly, so isn't that why they look at the time it was set up and during the…

MS CHAMBERS QC:

Mmm, during the marriage would be sensible.

GLAZEBROOK J:

Because in many cases the reasonable expectation will be, well, if the husband is going to be unreasonable or the wife going to be unreasonable, that you'll be excluded.

MS CHAMBERS QC:

I think *Ward v Ward* does capture those cases where the trust deed says you're only a discretionary beneficiary while you're a wife, because if your expectation –

GLAZEBROOK J:

Exactly.

MS CHAMBERS QC:

– your expectation has changed on divorce.

GLAZEBROOK J:

Exactly, yes.

MS CHAMBERS QC:

But, well, there's no cases on that yet.

WILLIAM YOUNG J:

It's been largely a dead letter in New Zealand, hasn't it? How many cases are there where section 182 has actually been deployed?

MS CHAMBERS QC:

Ward v Ward reinvigorated it, there's just no doubt about it that it is now a standard tool.

ELIAS CJ:

I've never encountered it in practice.

MS CHAMBERS QC:

The, it's from England of course, it's from English legislation, Australia has it as well, we've all stuck and pasted it across. It is one of the major methods of dealing with trusts in the UK, their equivalent provision.

ELIAS CJ:

They have those trusts that roll on down majestically, don't they, marriage portions and all that sort of thing.

MS CHAMBERS QC:

And if you look at *Spry,* Her Honour Justice Kefler, it says –

WILLIAM YOUNG J:

Keifel.

MS CHAMBERS QC:

Pardon?

WILLIAM YOUNG J:

Justice who? Keifel.

MS CHAMBERS QC:
Keifel. Actually it's Keifel.

WILLIAM YOUNG J:
Keifel, sorry.

MS CHAMBERS QC:
She says the remedy for Mrs Spry is actually the equivalent of section 182, so she goes that way, because Australia has it as well.

So the answer to your question is it's been a bit of a dead letter but it's now being used and I think it's, one of the reasons it's become back is because we now have so many New Zealanders using discretionary trusts for family wealth.

WILLIAM YOUNG J:
Was there any commentary on the Court of Appeal's approach to section 182?

MS CHAMBERS QC:
I think there was a lot of articles about it.

WILLIAM YOUNG J:
About section 182?

MS CHAMBERS QC:
Yes.

WILLIAM YOUNG J:
What –

MS CHAMBERS QC:
You mean the Supreme Court's?

WILLIAM YOUNG J:
No, no, I mean the Court of Appeal in this case, the Clayton…

MS CHAMBERS QC:
Oh, I see what you mean. I have not done a full search on that. I think my friend has one article commenting on it.

ELIAS CJ:

It's a bit odd, I must say, 25, because the English authority cited isn't about the expectations at the time of settlement at all, it's just about the expectations you have as to lifestyle, but anyway.

MS CHAMBERS QC:

The English cases take a much more robust attitude towards 182.

Now I was dealing with this claim of business trust, and Mr Carruthers in his submissions at paragraph 120 says the Courts have consistently declined to vary beyond the extent to which the – sorry, I'll start at the beginning of the sentence. "Where the farm is owned before the marriage, often inter-generationally or acquired during the marriage out of pre-marriage separate property and/or borrowing for proper businesses, the Courts have consistently declined to vary beyond the extent to which the farm or farming operation was provided for the applicant." Well that has to be wrong, it's completely contrary to *Ward* for a start, which was a farming case. "If the trust is settled well before the marriage and the farm goes through without the wife claimant," assuming it is the wife, "being a beneficiary or specified in the trust deed," and it's all formed well before the marriage then, of course, 182 will not apply. But otherwise it does and there's no authority quoted by my learned friend for that submission.

The next step is –

WILLIAM YOUNG J:

Can I just ask a question? There's a case here that's been given, *Kidd v Van den Brink* HC Auckland CIV-2009-404-4694, 21 December 2009. Wasn't there an application, didn't I sit on an application for leave to appeal in relation to that?

MS CHAMBERS QC:

You did and you gave it leave.

WILLIAM YOUNG J:

And what happened?

MS CHAMBERS QC:

They settled it, it didn't proceed, the appeal didn't proceed. Ms McCartney was counsel for the wife.

ELIAS CJ:

Well I can't see in any of the English cases that are cited in *Ward v Ward* authority for saying that you look at the contention of both parties to the marriage at the time the settlement was made. The English cases are all about the expectations of those who settle the trusts and it's a bit odd really to look at the – I mean, the – Mrs Clayton, in this case, was excluded, in part, because the Court said that she couldn't have had any expectations because at that stage there was a prenuptial agreement which excluded her in place.

MS CHAMBERS QC:

It did.

ARNOLD J:

I think, maybe, there are two different sets of expectations aren't there. Looking at it in terms of if the marriage continues what the expectations are. But the trouble with the prenup, of course, it really bites when the marriage is over and there are different considerations at play. Now if you look at it, in terms of a continuing relationship and the parties' expectations in that context what the prenup provides is, in a sense, neither here nor there because everybody's assuming the marriage is going to go on and things are going to work, you know, well. So in a sense I can understand talking about the expectations of the parties, in that general sense, while the relationship continues, but it doesn't answer the question what happens then when it ends.

WILLIAM YOUNG J:

And, I mean, it's also a bit odd to pick up the prenup anyway, when it's been held to be invalid.

ARNOLD J:

Well yes.

MS CHAMBERS QC:

That's right.

WILLIAM YOUNG J:

I mean it strikes – why give it any effect at all?

ELIAS CJ:

But it's perfectly possible that s 182 could apply, even if the wife, in this sort of situation, had no idea about the settlement.

MS CHAMBERS QC:

That is a good point Your Honour and it would be –

ELIAS CJ:

Whereas, whereas what this reference to, at the time it was made, would do would make that very different so I think the language is probably pretty loose in paragraph 25.

MS CHAMBERS QC:

And how unfair would that result be? If that is the answer, under 182, it encourages the property owning spouse to go off and secretly do trusts doesn't it? That's exactly what it encourages, therefore you can't have any expectation of an interest because you didn't even know about it at the time it was forming. And, you know, the – Mrs Clayton does say, and her evidence is, you know, she wasn't all over the financial affairs. And Mr Clayton says, "I didn't tell her about it," I started my submissions with that, "Because I didn't think she needed to know and I'm a controlling kind of guy." So that is a problem with the *Ward v Ward* test.

Expectation of a benefit, well, my submissions refer to Ms Clayton's evidence that she said, and this is at paragraph 101 of my submissions, she's not cross-examined on it, that, "My," this is at paragraph 101 of my submissions in the footnote, "My expectation at the time that all the trust was set up was that Mark and I would remain married and that he and I would be able to benefit equally from the accumulated wealth." No cross-examination. The Court of Appeal, though, I think, were of the view that that was not specific enough, but if Mr Clayton's case was that you didn't expect to benefit from this trust at the time it was established, surely under the *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 approach he had an obligation to say that and give evidence about it and cross-examine her about it.

It was a happy marriage at the time. Everything was going well. They had two little children. I'm up to bullet point 2 on page 4. The evidence from Mr Clayton that I

referred to yesterday which I won't take you to again about how he was the breadwinner and he wanted to provide for Melanie and the family and that he never intended to disenfranchise her. There's no evidence from Mr Clayton that he did not expect to benefit, and that's part of the test under *Ward v Ward* and there's no evidence from him that he did not expect Mrs Clayton to benefit.

The trust was used for her benefit. The car can't be disputed. It's a relatively small thing. I know the Wellesley apartment is disputed but the car is sufficient. The trust deed terms, well, the Family Court said the intention of setting up the Claymark Trust was not to provide for Mr and Mrs Clayton in the future. Well, how can that be right? There's a muddlement here in the thinking. Part of the reason for setting up the trust for commercial reasons was to divide off land into a trust. Well, that's one factor, but it must also be, given that the trust deed sees this for the benefit of Mr and Mrs Clayton, that it was going to be to provide for them.

My final point, Mr Carruthers seems to be suggesting that she could expect to benefit from a trust that held the family home but not a business asset. Well, why would that make any difference? The business itself was, of course, relationship property and any distinction under the Act is long gone.

Paragraph 114 of my learned friend's submissions, he refers to the pre-nuptial settlement which we've just discussed, but the problem with that is that the pre-nuptial agreement did not govern interests under the trust deeds. If Mr Clayton chose to establish a trust making his wife a beneficiary, there was nothing in the section 21 agreement which stopped that and it doesn't deal with it.

WILLIAM YOUNG J:
There's nothing – even if the section 21 agreement were valid, it wouldn't preclude a section 182 application, would it?

ARNOLD J:
Well, subsection 6 does create a limit where there are part 6 agreements.

WILLIAM YOUNG J:
Does it? I see. Okay.

O'REGAN J:
I think *Ward* said it had to actually be referred to in the pre-nuptial agreement, the trust, didn't it, or it had to be very clearly linked, I think.

ARNOLD J:
There had to be a link, yes.

WILLIAM YOUNG J:
Do I take it that the High Court judgment in *Kidd v Van den Brink* has been treated to date as controlling the situation, as it were, the interpretation of the Delphic pronouncements from the Supreme Court in *Ward*?

MS CHAMBERS QC:
It has been applied in the Family Court, *Kidd* has, yes. Well, no, that's not fair because counsel are all aware of the leave application having been granted so it's kind of up in the air a bit, but remember that was –

WILLIAM YOUNG J:
It still would apply of control of the Family Court, I guess.

MS CHAMBERS QC:
Yes.

Mr Carruthers suggests in 114B that the wide provisions of the trust deed itself with discretionary beneficiaries should make a difference and the discretion shouldn't be exercised. There were, of course, other beneficiaries in *Ward* and Mrs Clayton's authorities is just a reference to where *Ward* is. Where the reference is in the evidence and the decision of *Ward*, it was the same kind of trust in terms of the family members being beneficiaries.

Also, the remedy sought by Mrs Clayton in regard to 182 is the same as *Ward*, a splitting of the trust into a his and her trust, so it protects the children's interests in any event.

I've then referred to Her Honour Justice Kiefel's decision in *Spry* because in that decision, as I have said, Her Honour says, well, the equivalent of 182 is the answer and she gives a strong decision in regard to the operation of that. I won't take too much time because I've given you the page references on that. But Your Honour the

Chief Justice will be interested in reading that in terms of how Her Honour from the High Court interprets the equivalent provision because she talks about the purpose – I'm at page 221 of my bundle in 23 – of that provision and says it's meant to be, to give power to the Court to deal with all property held for the use and benefit of the parties to the marriage which may represent the accumulation of their assets in the course of the marriage. It's to ensure that previous arrangements for the property cannot continue. Since previous arrangements can't continue, the property is applied equitably for the benefit of the parties or the children. Whether or not the settlement qualifies as an ante-nuptial or post-nuptial settlement made in relation to the marriages informed by these purposes rather than by reference to the authorities dealing with statutes employing different language and having different purposes. So she, in pages 221 and 223, says it's intended to have wide operation. It's held for the benefit of the parties. It's intended to apply across all of these trust formed during the marriage. You can't – paragraph 231, she talks about my learned friend's submission that because there's other beneficiaries in the trust which extend beyond the husband and wife and the children of the marriage, you can't deny the nuptial element of the trust because in this case Dr Spry's sisters and their issue were also in the beneficiary class. The question of the impact of any order upon those persons might be put to one side for present purposes because we're concerned with the character of the trust and their inclusion does not deny the nuptial element. So she gives a strong judgment and in 236 she talks again about the position of the other beneficiaries of the trust shouldn't be assumed. She said the lower Court had not assumed importance in His Honour's reasons no doubt because of the view he took of the true nature and purpose of the trust. So she says the argument of Dr Spry in regard to the other beneficiaries cannot hold water. This is 236. "It was not doubted that the rights of third parties may be indirectly affected by orders of the Court. It has long been accepted that third party interests could be altered by Courts dealing with property, the subject of a nuptial settlement. Whether and the extent to which the Court would alter such interests might depend upon the remoteness or uncertainty of those interests. Here the interests of the other beneficiaries and the due administration of the trust were always subject to the husband's control. The extent of that control, to the detriment of the third parties' interests, were shown by the attempted distribution of the entire trust property to the children's trusts."

So you might say, well, the children, Stacey and Anna, of this couple may be better off anyway in a trust controlled by their mother.

Now, finally Mr Carruthers submits in 114D that Mrs Clayton confirmed in addressing specifically the Claymark Trust that she was aware that the purchase of land remained primarily to future-proof the mill from resource management issues and noise restriction from neighbours. Well, I have not been able to find that evidence. My instructions are that evidence wasn't given. The reference in the footnote to the Family Court judgment does not establish that proposition.

Then, finally, Mr Carruthers talks about policy issues in paragraph 122 onwards of his submissions, and he says that the policy is that trusts can be a good thing and provide very effective framework for business to operate and for personal affairs to be arranged. He says that farmers and business owners are particularly concerned that family property built up over the years and sometimes through generations should not be lost over one generation.

Well, in my submission, there's no real basis for those submissions. 182 is, in fact, aimed directly at unfairness at dissolution. There's no special category under 182 for farmers and businesspeople and nor should there be.

Those are my submissions, Your Honour, unless I can be of further assistance.

ELIAS CJ:
No, thank you, Ms Chambers. Yes, thank you, Ms McCartney.

MS McCARTNEY QC:
As Your Honours will see, I'm speaking next. I'm speaking in defence of the Property (Relationships) Act. It is a piece of legislation that's doing its job and the only reason why the case is here today is because Mrs Clayton wants more than what is relationship property and available to be divided, and the reason why Mr Clayton is opposing is not because he's being unfair, it's because there is no money. Now, I can take the Court to the valuations and I'm going to do that, but the starting point is the Act does its work, it has done its work in this case, we can see it's done its work because the trusts have been set aside, the education trusts and the post-separation trusts, and we can see it's done its work because all of the value in the marriage, which is in the operating businesses, other than the initial 500,000 is being shared.

So our submissions dated 28 August 2015 address the issue of section 44C, but in addressing section 44C what needs to be remembered is that it's an adjustment provision and the Court has a discretion as to whether or not to use it, and the reason

why we say it shouldn't be used, or the reasons, are, first, because the jurisdictional requirements aren't met, and I'll come to that, and, second, in terms of the exercise of the discretion, if the Court were to exercise the discretion in the circumstances of this case, it would result in Mr Clayton having to go to the other trustee and seeking to have the land asset sold and as I'll take the Court to the evidence –

WILLIAM YOUNG J:
Well, not necessarily. I mean, the Court could just go direct to the land assets itself, couldn't it?

MS McCARTNEY QC:
Of the Claymark Trust?

WILLIAM YOUNG J:
Yes.

MS McCARTNEY QC:
In what way, Your Honour?

WILLIAM YOUNG J:
If it upholds the 44C claim, couldn't the Court make – have direct resort –

MS McCARTNEY QC:
No.

WILLIAM YOUNG J:
– to the Trust?

MS McCARTNEY QC:
No. 44C doesn't allow the Court –

WILLIAM YOUNG J:
Does not?

MS McCARTNEY QC:
– to make orders in relation to the capital of the Trust, only compensation orders against the other party.

WILLIAM YOUNG J:

Well, I may have missed that, I'm sorry.

ELIAS CJ:

Do you want to go to 44C?

MS McCARTNEY QC:

I've passed up the – I'm sorry, I'm just getting – I've passed up copies of a number of the sections. Section 44C is, I think, in the submissions.

GLAZEBROOK J:

It is in the bundle, I think. It's in Mr Carruthers' bundle –

MS McCARTNEY QC:

Thank you.

GLAZEBROOK J:

– at – as trustees of the Vaughan Trust, I think. Yes. Actually, is it? No, it must be in another one. Oh, no, it's there. So it's the bundle of authorities in respect of the Vaughan Road Trust, tab 1.

MS McCARTNEY QC:

Mr Butler has got five copies of the Act. I make that might be quite helpful because then we've got them all in one place rather going backwards and forwards. Would that be helpful?

ELIAS CJ:

The full Act. I've got it so…

MS McCARTNEY QC:

You've all got it? All right, thank you.

GLAZEBROOK J:

Actually, I haven't got it with me because I had it on iPad which I left upstairs.

MS McCARTNEY QC:

Would it be helpful, Your Honour?

GLAZEBROOK J:
Yes, thank you.

O'REGAN J:
I'll get one too, please.

WILLIAM YOUNG J:
Section 44C would permit an order to be made against the trustees in relation to the income of the Trust.

MS McCARTNEY QC:
The income, Your Honour, not the capital.

GLAZEBROOK J:
And Ms Chambers has said that their perception is that there's enough –

WILLIAM YOUNG J:
Otherwise.

GLAZEBROOK J:
– other property to meet any order.

MS McCARTNEY QC:
Yes, but I'm going to address the default position where Ms Chambers has suggested the Court should make orders in relation to the power of appointment and other powers under the trust deed, but I'll come to that.

As I say, I'm here defending the PRA, and in the course of defending it I do want to take the Court back to where we left it yesterday, and I know it was an unattractive submission but I wonder whether or not I could just work my way through it? It goes back to the Family Court judgment which is at tab 9, and beginning really at paragraph 29 in terms of the relationship property issues. So in the Family Court what happened is there was a section 21 agreement that Mrs Clayton was seeking to set aside. Your Honours have been taken to the opening submissions and closing submissions of Mr Clayton and it's been put to Your Honours that in those submissions Mr Clayton conceded relationship property. The judgment in fact shows what in fact happened. It's at page – paragraph 34, and it is that Mr Clayton

proposed that the following items of property be classified relationship property and divided equally. That was his proposal. It wasn't a concession.

ELIAS CJ:
Sorry, 29?

MS McCARTNEY QC:
34, Your Honour, page 65.

ELIAS CJ:
65, I'm sorry, I had 63.

O'REGAN J:
So you're not referring to 29? You're referring to 34, is that right?

MS McCARTNEY QC:
I started at paragraph 29 –

O'REGAN J:
Yes.

MS McCARTNEY QC:
– to say that this is where the Judge started in her judgment. She looked at the section 21 agreement and at paragraph 34 referred to the proposal put forward by Mr Clayton. Now yesterday Your Honours were passed, just to repeat it, the closing, opening and closing submissions by Mr Clayton and Your Honours were asked to accept those opening and closing submissions as concessions as to relationship property. Paragraph 34 of the Family Court judgment deals with this correctly. It was a proposal that Mr Clayton put forward which, at paragraph 35, the Family Court Judge rejected, and on the basis of rejecting that proposal and setting aside the section 21 agreement, the Judge then went on to do what is, with respect, completely orthodox and correct in dealing with the Act. At paragraph 36, having set aside the section 21 agreement, the Judge, at paragraph 36, identified, which is the first step under the Act, identified the property and the property was the family home, the family chattels, and any vehicles owned by the parties, either personally – sorry, personally in the relationship. So that's the relationship property at –

O'REGAN J:

Well, it's not the only relationship property, it's some of it.

MS McCARTNEY QC:

I'm coming to it, Your Honour. And the next –

ORE

Right. It's not the relationship property though, is it? There is more.

MS McCARTNEY QC:

I'm coming to it, yes, I am.

ELIAS CJ:

This is property personally owned by Mr Clayton?

MS McCARTNEY QC:

It's property personally owned by – it's in Mr Clayton's name but –

ELIAS CJ:

Yes.

MS McCARTNEY QC:

– but it's by section – by virtue of the provisions of the Act it's relationship property. And then at paragraph 38 the Judge went on to deal with the argument in relation to, sorry, at 37, the balance of property, and in that regard Mrs Clayton submitted to the Family Court, as she submits here, that section 8(1)(e) applies, and 8(1)(e), as we know, is the provision in relation to relationship property subject to sections 9(2), 9(2) and 9(6), 9A and 10, all property acquired by either spouse or partner after their marriage began.

So Mrs Clayton in the Family Court was arguing in relation to the balance of property and the balance of property was the shares in Clayton Holdings Limited, she was arguing that that by virtue of section 8(1)(e) was relationship property. So the Judge addressed the argument at paragraphs 38 and 39, referring to the fact that although it was conceded that Mr Clayton owned property prior to the marriage, I just inserted that word "conceded", which he developed during the relationship, there was a time in the mid-1990s when the business ran into significant fiscal, sorry, financial difficulties, and it refers to the arrangements with the Countrywide Bank and personal

guarantees which were in jeopardy of being called up, and at paragraph 39, as I took Your Honours to yesterday, the situation was one where, according to Mrs Clayton, there was then no equity in the business. That's how dire the circumstances were, and she said, "So any separate property," this is with reference to the shareholding of Mr Clayton in CHL, "which he'd owned prior, was lost at that time," and then with the restructuring of the business that occurred with the setting up with the Vaughan Road Property Trust, when the company started to become profitable, Ms Hunter argued, well, then the property was acquired again. So there was property acquired during the marriage under this argument, and the Judge said, with reference to these assets that are land and business operating assets, "Had Mr Clayton and/or his entities not owned those assets then there could not have been a restructuring of the business structure with subsequent lending by BNZ. Mr Clayton did not dispose of assets and reacquire them during the relationship. They remained in his ownership. It was the level of indebtedness that changed, resulting in a change of equity. I do not accept that an increased level of equity in relation to assets that are separate property can constitute relationship property for the purposes of section 8(1)(e)." So that was the argument in the Family Court and it was rejected.

Then the Judge turned, in accordance with the requirement under the Act, which is, first, to identify and then to classify, the Judge turned to look to see what happened to Mr Clayton's property. She said, "The question then becomes whether Mr Clayton's property is separate property pursuant to section 9(2) of the Act," and set it out. And, again, this is important because it is subject to sections 8(1)(ee), section 9A(3) and section 10, and at paragraph 42 the Judge made this finding, "On the evidence put before the Court I am satisfied that all property owned by Mr Clayton has been acquired out of his separate property."

WILLIAM YOUNG J:
Can I just pause there? How is that reconciled with the purchase of the father's business?

MS McCARTNEY QC:
Yes, the answer, and Your Honour asked me this yesterday, the answer is that the company was operating throughout the marriage. The shares in the company belong to Mr Clayton.

WILLIAM YOUNG J:
But he said he purchased, he purchased, his father's business.

MS McCARTNEY QC:

Well, he transferred them to the company. We're not sure of how –

WILLIAM YOUNG J:

Yes, but he said, "I purchased them."

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

That must have been relationship property when he purchased them and what happened to them after that becomes – is affected by that relationship property status.

MS McCARTNEY QC:

Well, Your Honour asked me is it relationship property and you saw me standing here thinking on my feet. I don't know because I actually don't know –

WILLIAM YOUNG J:

Yes, but that's the – is there any other evidence?

MS McCARTNEY QC:

There isn't – we actually don't know at all how that purchase took place. We –

WILLIAM YOUNG J:

All we know is that he says, "I purchased it."

MS McCARTNEY QC:

We know that his father had four companies and we know that those four companies were amalgamated into what became CHL but, Your Honour, I'm not sure whether it's something that we have to worry too much about anyway.

WILLIAM YOUNG J:

Well, I'm worrying about it because there have been – there are some gaps in the Family Court Judge's decision.

MS McCARTNEY QC:

There are, yes.

WILLIAM YOUNG J:

And she simply, in this section –

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

– overlooked something that seems to me to be – to warrant attention.

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

That is, that certain other assets got into the mix that didn't come through the 1984 company, that didn't originate within the 1984 company.

MS McCARTNEY QC:

Yes. Certain other assets in the nature of businesses during the marriage were acquired and it's dealt with by Mr Lyne, who is Mrs Clayton's expert, in red.

GLAZEBROOK J:

Well, can we just – there's no way that there was any disposition of the proceeds of separate property if the only disposition of separate property was the 1984 company being wound up, the Banksia property which became the matrimonial home and the two Vaughan Street properties which are still owned.

MS McCARTNEY QC:

Yes, well, I've heard Ms Chambers say –

GLAZEBROOK J:

So where did the money come from – no, no, but she said his property can be traced both to the proceeds of disposition of separate property. Well, I haven't seen any disposition of separate property or the proceeds thereof.

MS McCARTNEY QC:

Well, can I help Your Honours in that regard, because my –

GLAZEBROOK J:

And then the income or gains gained from separate property, well, again, I'm not entirely sure what that is either.

MS McCARTNEY QC:

Can I just go back to Justice Young's question first?

WILLIAM YOUNG J:

Yes.

MS McCARTNEY QC:

In relation to the business, if I may take the Court to red line –

GLAZEBROOK J:

Sorry, I asked that question because it's related to Justice Young's question.

MS McCARTNEY QC:

Yes, I'm coming back to yours, Your Honour, if I may. Which is – well, one of the pages is 659. It's in his other report.

GLAZEBROOK J:

What volume are we in?

MS McCARTNEY QC:

Sorry, it's red. Volume red, which is C.

O'REGAN J:

659, did you say?

MS McCARTNEY QC:

659. Just at the beginning at their second paragraph, "During the period of the relationship, CHL acquired and grew a significant sawmilling, manufacturing, and sales business. In addition, significant property assets were acquired during the relationship both relating to wood processing and manufacturing business and other assets, as well." Then on page 815, he refers there to at paragraph 71 to that first timber buying operation, Rotorua Timber Supplies, and at paragraph 72 the commencement of that business that became Claymark Industries. This included the purchase in 1991 of a sawmill out of liquidation from a Mr Aitken, and at 73 on the

purchase of the sawmill business Mr Clayton arranged for the custom cutting of the radiata pine for the forestry corporation. This business, together with his father's business which he acquired following his father's heart attack formed the basis of the business that now constitutes the Claymark Group.

So if I can come back to Your Honour Justice Young's question, of the documents that are passed up they include the amendment to the Property (Relationships) Act and if I might just refer the Court to 817, the third paragraph, and I'm not bringing this to the Court's attention because Mr Clayton deliberated avoided, but I'm just showing where corporations sit in the regime. A more effective way of avoiding the regime is not to own property. The Act applied only to assets beneficially owned by either the spouses at the time of separation, assets held in discretionary trusts, or owned by companies did not generally come within the ambit of the Act. Now, that hasn't changed so in answer to Your Honour Justice Young it is that the item of property that had to be addressed at the end of the marriage and by the Court was the shares in Clayton Holdings Limited and Clayton Holdings Limited itself had the assets, not the parties. So that is the reason why when the value is valued they didn't value the individual businesses, they valued the shares and they valued it on the basis of capitalisation of earnings. So what was acquired during the marriage, if you like, and Your Honour has asked me was it relationship property and I've had to say there's not really a tracing anywhere, what was acquired during the marriage went into Clayton Holdings Limited and it was valued at the end of the marriage and it was –

GLAZEBROOK J:
Can you just remind me when Clayton Holdings Limited was incorporated.

MS McCARTNEY QC:
1991, and when –

GLAZEBROOK J:
Well, that's post-relationship, isn't it?

MS McCARTNEY QC:
Yes, it is. But the shares were in Mr Clayton's name so when it came on for hearing he had the shares in his name, the company owned the assets, and the way in which the Judge addressed it was the Judge addressed it at paragraph 42 saying, "Well, look, what I'm looking at here, I can see that all property owned by Mr Clayton has been acquired out of his separate property.

WILLIAM YOUNG J:

But she just hasn't engaged with the evidence.

MS McCARTNEY QC:

Well it hasn't been appealed – this, this –

WILLIAM YOUNG J:

No, but partly, because I suspect there's a misunderstanding or a sort of non-engagement as to what it all means, but what I understood the Judge to mean is, effectively, the business assets can be looked at as, in part, separate property as to $500,000 but everything else is relationship property. That's my interpretation of what she says. Now what you're saying is something different I think.

MS McCARTNEY QC:

It is different Your Honour and it follows through from this finding at paragraph 42, which is the Judge has gone back, looked at the source of everything. As you know, counsel in this case weren't counsel in the Family Court. And says that she's satisfied, in relation to it, that it all can be traced back to –

WILLIAM YOUNG J:

Yes, but then she goes – but that's before she gets to section 9A.

MS McCARTNEY QC:

Exactly.

GLAZEBROOK J:

But she can't really have been satisfied because, if it was really an argument she'd have to go back and say, well, the Clayton Holdings was in 1991, that's post-marriage, so all those shares in that are effect relationship property because they were acquired post-relationship. She'd have to go back and say, well who actually bought the father's business? Mr Clayton said he did. In fact it wasn't a company, it then went into industries, that was – wouldn't she have to have gone through all of that in detail and, in fact, it didn't matter because all she was saying was well 500,000 was separate property and the rest is relationship property.

MS McCARTNEY QC:

Well it's not anyway different, in relation to section 9, if I can take the Court back to section 9, which is separate property, and the rules in relation to section 9, the

classification rules, are that separate property is defined and it's at section 9(1) and (2), "Subject to sections 8(1)(ee), 9A(3), and 10, all property acquired out of separate property and the proceeds of any disposition of separate property." Now in relation to the business, that Justice Young asked me about, the evidence is, and this is in the affidavit of Mr Clayton, at page 937-ish, 938, paragraph 23, it's the paragraph Your Honour took me to, Justice Young.

O'REGAN J:
Sorry, which volume are you in here?

MS McCARTNEY QC:
It's orange, 938.

O'REGAN J:
938.

MS McCARTNEY QC:
938. It's the last sentence that's important. The funding would have come from the existing business and the bank.

ARNOLD J:
Sorry, the last sentence?

MS McCARTNEY QC:
At 23, paragraph 23 Your Honour.

ARNOLD J:
23. Oh, I see, thanks.

GLAZEBROOK J:
Well it didn't come from the existing business did it? I mean whatever he says it just didn't because the existing business, and anyway that's 1991, so it's well past the relationship.

WILLIAM YOUNG J:
But say he borrowed money from the bank, doesn't that necessarily mean that it's relationship property?

MS McCARTNEY QC:

I – Your Honour, may I say, that is with respect, from my submission, a misapprehension. Can we just bring it back to something quite simple? Imagine that pre a relationship I own land. Post the relationship I want to improve that land, it's not my family home, I want to improve it. So I go to the bank and I borrow some money and I improve the land. Now that doesn't mean the land is relationship property. It keeps its status as separate property.

WILLIAM YOUNG J:

Well it may depend on what's quite a, what I regard as the application of quite a difficult section, section 20, but here, this is a new business, the Katikati sawmilling operation. I purchase it for $365,000. I fund it from the existing business and the bank, ie, money I borrow from the bank. Now why isn't that relationship property?

MS McCARTNEY QC:

Well let's just put it back into the land situation.

WILLIAM YOUNG J:

No, no, because this is a new business.

MS McCARTNEY QC:

Well I can, after I've got my land and I've improved it, borrowed some money to improve it, I might want to buy the next door neighbour's piece of land.

GLAZEBROOK J:

If you do that during the relationship it apply relationship property.

WILLIAM YOUNG J:

I would think it's inevitable that's relationship property.

MS McCARTNEY QC:

No because I purchase it out of separate property. I borrow against my separate property and it remains separate property. That is how section 9 works.

ELIAS CJ:

Well it would depend on the terms of the borrowings –

MS McCARTNEY QC:

It – yes.

ELIAS CJ:

– and the application of section 20.

O'REGAN J:

But also you're not working for the piece of land, you're not actually running it as a business, which he was here and putting income that you otherwise would have earned back into it.

MS McCARTNEY QC:

In relation to the working for it, if I, if it needs to be improved, as I say, and I borrow, and that's how I improve it, fine. If I'm on a salary, and I apply my salary to that land, it doesn't change the status, the underlying status of the land, what happens is the increase in value becomes available under section 9A, that is the way the –

WILLIAM YOUNG J:

But what's the increase in value reflected by? I mean, what's the tangible representation of the increase in value?

MS McCARTNEY QC:

Well it's intangible Your Honour, I mean, it's valued, but it's –

WILLIAM YOUNG J:

Okay, well that's where I suspect, at least for the moment, you and I are apart. I would have thought that if you've got an asset that is, in part, convertible to separate property and, in part, attributable to the application of relationship property, it is, to the extent to which it is attributable under the Act as relationship property, relationship property.

MS McCARTNEY QC:

All right, well the case is *Rose v Rose*, which is in the bundle, she says, looking for it.

ELIAS CJ:

Which bundle?

MS McCARTNEY QC:

It's the, it came in with the trustees' submissions Your Honour. I'm just going to have a look and see where it is. I think it's bundle of authorities, dated 26 August 2015, tab 5.

GLAZEBROOK J:

That's the 38 one, there's a 23 one, which won't have a tab 5. This is 38.

MS McCARTNEY QC:

I'm sorry, I should have said the appeal number, I'm sorry Your Honour.

GLAZEBROOK J:

Could I say that one would have thought, seeing they're heard together, that there could be one bundle of authorities and that you could have actually sorted out the bundle.

MS McCARTNEY QC:

Yes.

MS McCARTNEY QC:

Now *Rose v Rose* is the leading authority on section 9A, it's a judgment from this Court, and paragraph 24 is where Justice Blanchard explains the way in which section 9A works. And he says, at paragraph 24, "The general purpose of the Act is to provide for the sharing of property, which either party brings into or acquires during the relationship. Property owned before the relationship is prima facie excluded from the sharing regime but can, in certain circumstances, become subject to it. Consistently with the underlying philosophy that property acquired during the relationship falls for division when the relationship ends, the Act provides for certain circumstances in which increases in the value of separate property which occurred during the relationship must be shared. Such increases in value are viewed as an independent species of property which is notionally severed from the underlying property."

WILLIAM YOUNG J:

Yes, I read that, but then if you keep on reading on you get a slightly different flavour. Say, in a simple case where there are no trusts interposed, the husband has a property, the wife puts money into it, a house is built, et cetera, husband owns the house and wants to sell it, could the wife get a claim in interest in it on the basis it

was relationship property or would she be told you've only got an interest in a notional increase in property which is intangible and won't support a notice of claim?

MS McCARTNEY QC:
Is that the family home Your Honour's talking about?

WILLIAM YOUNG J:
Well, I'm saying a – not necessarily a family home because that would be relationship property anyway, but a house or some property that –

MS McCARTNEY QC:
Yes.

WILLIAM YOUNG J:
– where relationship property has gone into improving it –

MS McCARTNEY QC:
Yes.

WILLIAM YOUNG J:
– and improving the value, but you would say that the relationship property is separate from the land itself, probably because it's intangible, presumably wouldn't support a notice of claim and it's just sitting out there somewhere.

MS McCARTNEY QC:
You'd get a notice of claim on it, in my submission, because –

WILLIAM YOUNG J:
Doesn't it have to be relationship property?

MS McCARTNEY QC:
– because – no, because section 9A would be biting. I mean, this is the complete beauty of the Act. It actually extends to exactly the situation that Your Honour's talking about. Under section – and it's fair because the husband who originally owned the land put the house on it. That's his separate property. The relationship starts. The contributions, if you like, to the property and contributions to the marriage partnership, and those contributions are recognised not by giving the wife a share in

the underlying separate property but by virtue of the increase in value. Now – and Your Honour doesn't like it, may I –

WILLIAM YOUNG J:
I don't much actually.

MS McCARTNEY QC:
– can I see from your face? And – but can I say that there's another way of dealing with it, always has been, and it's constructive trust, but where there's enough relationship property –

WILLIAM YOUNG J:
But you don't need constructive trust between husband wife.

MS McCARTNEY QC:
But what I'm saying in relation to – I'm sorry, in relation to the land, it's the contributions in relation to it, and that's what this case was argued, as a remedial constructive trust case, but the thing is that the beauty of this Act is section 9A gives you exactly the remedy that you want.

ELIAS CJ:
But I don't see that – that isn't what was delivered. That's where I have a problem with it. I don't have a problem with the analysis that you're coming up with. I just have problems with its application.

MS McCARTNEY QC:
But it has been delivered, Your Honour, because Mrs Clayton shares in the increase in value of the operating entities which, I mean, have been valued with an EBITDA of 6.75 million and a multiple of 6.25, less the debt, and, as we say, this is what that amount is. There is absolutely no other property, and then you go and you look at the trusts. So that is the property. The property at date of separation was the home shared equally, the chattels shared equally, the car shared equally. The only other item of property were the shares in Clayton Holdings Limited, and by virtue of this judgment Mrs Clayton shares equally in the increase in value from the date the relationship commenced. So I'll talk about the trusts later.

WILLIAM YOUNG J:
I don't know where you're disagreeing with me then actually.

MS McCARTNEY QC:

Well, it's in terms of how you define the property. Your Honour would like to define I – well, I'm not…

WILLIAM YOUNG J:

Yes.

MS McCARTNEY QC:

The way I'm hearing Your Honour, Your Honour might like to define the property being shared as the shares themselves. The underlying property remains separate. The increase is an independent species of property which is shared equally, and it works very, very well in a situation where, for example –

WILLIAM YOUNG J:

But what's wrong with just treating the shares as being part separate property and part relationship property?

MS McCARTNEY QC:

Well, that's – well, besides the fact of the –

ELIAS CJ:

And relationship property up to a value of –

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

– $500,000.

WILLIAM YOUNG J:

Yes.

MS McCARTNEY QC:

I'm sorry, Your Honour?

ELIAS CJ:

The relationship value –

WILLIAM YOUNG J:

It's the other way round, other way round.

ELIAS CJ:

Yes, sorry.

WILLIAM YOUNG J:

Separate property.

ELIAS CJ:

Separate property up to a value of $500,000.

GLAZEBROOK J:

And, in any event, wasn't the Family Court judgment, you made that statement at 42, reacting to the submission that there was no separate property because it had already disappeared at the date of the relationship starting, or soon after? So wasn't that the – the statement was in reaction to that submission. Now she then went on to say she was satisfied that everything grew from there and, frankly, I can't see how she could have been satisfied of that but it doesn't matter because she said, "Well, anything over 500,000 is relationship property anyway."

MS McCARTNEY QC:

The separate –

GLAZEBROOK J:

So maybe conceptually she was wrong or maybe factually she was wrong but she got the right answer by a different route.

MS McCARTNEY QC:

Can I answer the questions in this way? Section 9A is the provision and the Court, with respect, must apply the statute, and the statute doesn't say that you share in the underlying property. It says you share in the increase in value. So that's the first point as a jurisdictional hurdle.

O'REGAN J:

And are we agreed that the increase in value is the entire value less 500,000?

MS McCARTNEY QC:

We are, Your Honour, but –

GLAZEBROOK J:

But how can –

O'REGAN J:

So why are we having an argument? It doesn't matter –

MS McCARTNEY QC:

Because it's not relationship property and it's important that we understand that because then I'm going to come to talk about section 44C.

GLAZEBROOK J:

But how can you share in the increase if you don't share in the underlying property? If the only property is a piece of land, how can you share in the increase without sharing in the property because there's no other property you can share in?

ELIAS CJ:

No, you're not disagreeing, are you?

MS McCARTNEY QC:

No, I'm –

ELIAS CJ:

But what you're doing is you're classifying.

MS McCARTNEY QC:

Classifying. I'm –

ELIAS CJ:

You're saying –

MS McCARTNEY QC:

Yes.

ELIAS CJ:

– it's not relationship property, it's not separate property –

MS McCARTNEY QC:

Separate property.

ELIAS CJ:

– it is increase under section 9A.

MS McCARTNEY QC:

Yes.

ELIAS CJ:

I see, and that's the distinction you're trying to make prefatory to going on to –

MS McCARTNEY QC:

It is, Your Honour.

ELIAS CJ:

– your submission? I see.

MS McCARTNEY QC:

Thank you, Your Honour, and I'm sorry that –

ELIAS CJ:

Can I just ask you a question?

MS McCARTNEY QC:

– it seems that I've laboured it but actually it's quite a hard little sort of classification provisions to work your way through, but, in my submission, that's where you end up.

WILLIAM YOUNG J:

Can I just ask you to look at section 42 of the Act?

ELIAS CJ:

Should we perhaps take the adjournment and…

WILLIAM YOUNG J:

Yes, sure. Yes, deal with it after.

ELIAS CJ:

We'll deal with it after the adjournment. We'll take the luncheon adjournment now.

MS McCARTNEY QC:

Is that the notice of claim, Your Honour?

WILLIAM YOUNG J:

Well, the point I'm going to make is that in my example –

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

– where land is improved by relationship property, you would say the land is not relationship property, therefore there could be, on that – there could be no notice of claim because the wife couldn't claim to have an interest in the land.

MS McCARTNEY QC:

Yes, she has an interest. She has the interest because she has the interest in the increase in value.

ELIAS CJ:

No, what you're –

WILLIAM YOUNG J:

But that's not distinct from the – but you say that's distinct from the land itself which retains its separate property character?

MS McCARTNEY QC:

Yes, I do.

WILLIAM YOUNG J:

Well, then, how could she have a claim – an interest in that land, if it's separate property?

ELIAS CJ:

She can't.

WILLIAM YOUNG J:

No.

ELIAS CJ:

She can only have the claim, on this argument, in relation to the increase in value.

WILLIAM YOUNG J:

So there could be no notice of claim in this sort of case?

MS McCARTNEY QC:

There could be a caveat, Your Honour.

WILLIAM YOUNG J:

Well, no, there can't be a caveat –

MS McCARTNEY QC:

Well, there is because it's an interest in the – it is – all right.

O'REGAN J:

But doesn't the increase in value itself become relationship property? So everything except the $500,000 in this case is relationship property, isn't it?

ELIAS CJ:

Yes, you're relying on a stray comment and you need to convince us that the scheme of the Act is that there are three species of property under the Act.

MS McCARTNEY QC:

Yes.

ELIAS CJ:

Something that I find hard to, immediately to accept. So we should return to that after lunch, thank you.

MS McCARTNEY QC:

Yes. Well, I'm looking forward to it, Your Honour.

ELIAS CJ:

Thank you.

COURT ADJOURNS: 1.08 PM
COURT RESUMES 2.21 PM

MS McCARTNEY QC:
So I am coming back to dealing with the issue of the independent species of property. Under the Relationship Property Act, there are two categories of property. There is separate property and there is relationship property, and in this case the shares in CHL have been found by the Family Court and agreed by the High Court to be separate property, and there's been no appeal against that. So in terms of the way in which the scheme of the Act works, where there is separate property to which there had been contributions the legislature came up with a clever solution, how do you deal with the contributions? And the answer was that you put a price on it. The notional amount is relationship property. It's divided by two. You put all the property together and that becomes, if you like, the judgment sum, and then you have all your items of property together and as a Judge you work out is the, if you like, imbalance to be paid and you put that in the judgment sum and you direct that that amount be paid, and if the person directed to pay doesn't do so then you've got all the remedies, which include bankruptcy, and if someone's bankrupted then obviously the OA is involved but before that you have got the party who's entitled to say, "Well, I've got a claim under the PRA." But the beauty of the way in which it's dealt with is that it recognises that a party who has separate property is entitled to say that property came from original separate property sources and I –

WILLIAM YOUNG J:
"And I can dissipate that property and any increase in its value without consequence despite section 9A."

MS McCARTNEY QC:
Did Your Honour say "dissipate"?

WILLIAM YOUNG J:
Yes, because isn't the point of this the dissipation of the increase in value doesn't attract any consequence because it's not relationship property?

MS McCARTNEY QC:
But it hasn't been dissipated.

WILLIAM YOUNG J:

Well, what about advances – I thought this was the purpose of, in relation to the way in which the trust dealt with assets, made advances and so on.

MS McCARTNEY QC:

Yes but that's not from Claymark Holdings Limited. The allegation there is that Mr Clayton personally made advances or that the Vaughan Road Property Trust made advances to Claymark Trust.

WILLIAM YOUNG J:

Yes, and the Vaughan Road Property – and I understood what you were saying is that it doesn't matter because nothing is relationship property until there's an order from the Court saying it is.

MS McCARTNEY QC:

Well that's what the, but that's how the regime works, it's a deferred sharing regime and that preserves, and this is another cornerstone principle, it preserves the right of the parties to deal with property so during the marriage you can deal with your separate property and you can deal with relationship property. But if you defeat the other party by doing that intentionally there's a claim under section 44. Unintentionally, if you like, but having the effect, there's a claim under section 44C. it all works very well.

O'REGAN J:

But section 44C only applies to disposals of relationship property doesn't it?

MS McCARTNEY QC:

That is correct.

O'REGAN J:

So how does this half way house property come into that regime?

MS McCARTNEY QC:

Well it, because it, well, can I say first of all, it hasn't been disposed of, it's there at the end, and it's available to be shared. A money judgment, go to Mr Clayton say well here you are you've got options, you can sell the shares, the business, and pay up or you can go to the bank and raise some money. So he gets to keep what was his originally. It's respectful of separate property entitlement.

O'REGAN J:

If he disposed of the property into a trust would section 44C apply or not.

MS McCARTNEY QC:

Does Your Honour mean if he disposed of the shares into trust?

O'REGAN J:

If he disposed of any property of the quality that you've just described to us –

MS McCARTNEY QC:

Yes.

O'REGAN J:

– into a trust, could section 44C apply?

MS McCARTNEY QC:

If it's – 44C requires in terms of jurisdictional requirements that it's relationship property. Section 44 doesn't require that it's relationship property.

O'REGAN J:

Just yes or no, it's an easy question. Would it apply or not?

MS McCARTNEY QC:

Under 44C, no, because it's separate property. But can I just say under section 44, yes.

WILLIAM YOUNG J:

But that means you've got to show, effectively, an intention to defraud.

MS McCARTNEY QC:

Yes, but Your Honour very helpfully in *Regal Castings v Lightbody* [2007] NZCA 396, [2008] 2 NZLR 153 improved the test, and the test –

WILLIAM YOUNG J:

The Supreme Court did really but –

MS McCARTNEY QC:

Well, it started off with Your Honour's minority judgment, you're quite right, with respect, it's the Supreme Court –

WILLIAM YOUNG J:

But the truth is, I mean, it does leave a bit of a gap, the section, effectively property can be dissipated without recourse under section 44C.

MS McCARTNEY QC:

But, with respect, if it's not intentional, if it's not intending to defeat the other party, why is that a problem? If somebody takes the relationship property and goes off to the casino and loses it all, that's just part and parcel of the relationship. If somebody doesn't trade well, you know, through their business, you can't come in five years later and say, by the way, can you go back and give me that.

ARNOLD J:

So the effect of what you're saying is that property that is recognised as being relationship property by virtue of section 9A can't, by definition, come within section 44C?

MS McCARTNEY QC:

That's exactly right.

ARNOLD J:

And so the consequence is that – I mean if the principle of the Act is equal sharing of what is identified to be relationship property, this is, in fact, a significant hole in it, isn't it?

MS McCARTNEY QC:

Well I'm not sure, Your Honour, whether that's correct because I would have thought that if – can I just have a quick look at, I'll just check to see before I answer that question. The disposition of property. If value assets in CHL that have value are taken out prior to the end of the marriage, under section 44, if there's an intention, if there's an intention, there would be relief. So there's not a hole. The whole idea of section 44C is to ensure that the relationship property entitlement is not undermined to the disadvantage of one partner of the relationship –

ARNOLD J:

Well say –

MS McCARTNEY QC:

– and the advantage of the other, and I think – I'm sorry Your Honour?

ARNOLD J:

I mean say all the shares in the operating company were put into a trust, so how is the increase in value going to be dealt with then, on your view of it? So the shares are owned by the husband.

MS McCARTNEY QC:

Mhm.

ARNOLD J:

You say they're separate property.

MS McCARTNEY QC:

Mhm.

ARNOLD J:

The husband puts them into a trust, all of the share.

MS McCARTNEY QC:

Yes.

ARNOLD J:

So then they're no longer his property.

MS McCARTNEY QC:

Yes.

ARNOLD J:

So how is the Act supposed to work on that? Now you say, well, if there's an intention –

MS McCARTNEY QC:

Yes.

ARNOLD J:

– 44 will cut in.

MS McCARTNEY QC:

Yes.

ARNOLD J:

Let's say there's no intention, it's just one of these myriad of arrangements that have been made in this case and in others but it has the effect.

MS McCARTNEY QC:

Well, can I just talk about section 44, because the test in relation to section 44 is whether at the time of the disposition the person disposing had knowledge that they were exposing the other party to risk in relation to a claim, and it has to be characterised as dishonest as well, but that covers it.

ARNOLD J:

But why would it – would it have been? If this occurs at a time when the marriage is strong and it is one of this sort of myriad –

MS McCARTNEY QC:

Yes.

ARNOLD J:

– of things that took place –

MS McCARTNEY QC:

Yes.

ARNOLD J:

– in relation to these business activities, you're not going to be able to attack it under section 44 –

MS McCARTNEY QC:

No, but you can –

ARNOLD J:

– but it would have – wouldn't it have the effect and you would say, "Well, too bad"?

MS McCARTNEY QC:

No, I don't say, "Too bad." I say everything that you, that the Court's putting to me as a problem, under the present legislation there's an answer, and in relation to that –

WILLIAM YOUNG J:

That may not be a very satisfactory answer, though, that's on your approach.

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

I mean, I…

ARNOLD J:

Well, what is the answer then?

MS McCARTNEY QC:

Well, in this case there's not a completely satisfactory answer, I have to say, be –

ARNOLD J:

Look, in my hypothetical, that's what I want, yes.

MS McCARTNEY QC:

The answer in this case is section 182 of the Family Proceedings Act but it does –

GLAZEBROOK J:

Which doesn't apply to de facto couples.

MS McCARTNEY QC:

I knew someone was going to say that, and it must, and everyone says it must and it's in the Law Commission Report that it must, as I understand, it's certainly Nicola Peart's very strong submission. But that is the answer, and that's how you get to it. But, I mean, we're talking about, and I can understand that the Court's concerned about this, but it hasn't happened because Your Honour, Justice Arnold, said to me, "What would happen if they took this property and put it into a trust?" What they're disposing of is they're disposing of the entity that earns the money, and you can't begin to say that that wouldn't be something that would be seen as defeating a claim. It –

ELIAS CJ:

But suppose it's done before the marriage?

MS McCARTNEY QC:

Yes.

ELIAS CJ:

So it's separate, own shares.

MS McCARTNEY QC:

Yes.

ELIAS CJ:

And during the marriage, well, really very similar to the position here.

MS McCARTNEY QC:

It is.

ELIAS CJ:

Relationship property gets –

MS McCARTNEY QC:

Yes.

ELIAS CJ:

– applied to it.

MS McCARTNEY QC:

You get it. You get it under section 9A.

WILLIAM YOUNG J:

But not if it's disposed of before the Court hearing.

MS McCARTNEY QC:

Well, you – but you will because you will get it back.

WILLIAM YOUNG J:

Only under section 44.

MS McCARTNEY QC:

Well, that's how it happens because you're allowed to deal with your property. So you're allowed to deal with your separate property, and that has to be right because otherwise how could you run your business?

O'REGAN J:

So are you saying that section 44C needs to be read as any disposal of relationship property (except relationship property under section 9A)? Is that how you say we should interpret it?

MS McCARTNEY QC:

No. In relation to section 44C what needs to be disposed of is the relationship property and section 9A provides –

GLAZEBROOK J:

So in disposing of the property, you're not disposing of the increase in value of the property, is that the submission? So that's somehow the increase in value of the property doesn't go along with the property?

MS McCARTNEY QC:

No, it's notionally severed off, as I've submitted, but section 9A –

GLAZEBROOK J:

Well, where is it, if it doesn't lie in the trust, because you've disposed of the whole of the property to the trust? You must have disposed of the increase in value as well.

MS McCARTNEY QC:

Are we talking about the hypothetical that Justice Arnold put to me?

GLAZEBROOK J:

No, no, we're not talking about any hypothetical.

MS McCARTNEY QC:

Yes.

GLAZEBROOK J:

This is actual.

MS McCARTNEY QC:

No, it hasn't happened in this case. The shares stayed in the –

GLAZEBROOK J:

No, I'm not talking about the shares. I'm actually talking about the assets in the trust at the moment have been disposed of to the trust actually with a full payment, so in fact it's not separate property. Probably by the time that happens, the separate property is the proceeds, but leaving that aside.

MS McCARTNEY QC:

All right. Can I bring this back to the start? The separate property are the shares in Clayton Holdings Limited. The shares in Clayton Holdings Limited still exist. They haven't been disposed of anywhere. Mr Clayton holds that share. He always has. The increase in value is attaching now today to the shares. If Mr Clayton doesn't pay the judgment sum, the shares can be in bankruptcy or other enforcement action, secured and sold.

GLAZEBROOK J:

But aren't we talking about the Claymark – I thought you were making submissions on the Claymark property assets.

MS McCARTNEY QC:

I am. I'm coming to Claymark property assets.

GLAZEBROOK J:

Because you only make a 44C order if you've disposed of assets to the Trust, so I don't quite know why we're talking about Claymark Holdings because it's never been disposed of to the Trust so it's nothing to do with this.

MS McCARTNEY QC:

No, that is correct, but what has happened is that during the marriage the allegation is that Mr Clayton and Vaughan Road Property Trust made dispositions to Claymark Trust and the allegation, or the claim, is that those are relationship property. So to start, in order to classify, what I'm saying to the Court is that it is the increase in value of the Clayton –

GLAZEBROOK J:

Can I just – I don't think that is all of the allegation. If you look at – there are gifts, specific gifts to the Trust. Ms Chambers went through a whole pile of…

MS McCARTNEY QC:

Yes, she did, Your Honour, and none of them are pleaded against us and none of them have been anywhere near the Courts below. There are only two pieces of quantum in the Courts below relating to Mr Clayton, and the figures are 60,635 or 365, I think, and 81,000. It's changed. We've come to this Court and it's turned into a claim for 363,000. The distributions from the Vaughan Road Property Trust weren't even before any of the Courts below, so it's all new, these claims.

WILLIAM YOUNG J:

What about all the exhibits that are referred to?

MS McCARTNEY QC:

The exhibits that are referred to?

WILLIAM YOUNG J:

In the road map. There's an exhibit referred to for all gifts.

MS McCARTNEY QC:

Yes, well –

GLAZEBROOK J:

There were dispositions with gifts, interest re-advances, Vaughan Road Property distributions and loans.

MS McCARTNEY QC:

Yes, well, that's right, that's what's been told to the Court today, but none of that's been the subject of any claim, any judgment, any evidence below. The only amount, and I'll take Your Honours to it in the judgment, the only amounts that we're talking about, and I can actually do it right now, in relation to the Family Court judgment, and it's under the heading of Claymark Trust, the only amounts, it's paragraphs 69 and 70, are three gifts of 27,000, the total's 81,000, and at 70, 60,365. So those are the section 44C dispositions dealt with in the Family Court.

WILLIAM YOUNG J:

But what happened to the other dispositions? Were they just not referred to, because, I mean, there's presumably evidence of a series of $27,000 gifts up to 2007?

MS McCARTNEY QC:

Well, it was something, Your Honour, that I knew nothing about till I got the road map yesterday. So then in the High Court, Justice Hansen who dealt with this matter, a section 44C claim, which is at paragraph 144 of his judgment –

ELIAS CJ:

What page is it?

GLAZEBROOK J:

150.

MS McCARTNEY QC:

It's page 150, Your Honour, tab 11, and it's on page 151, paragraph 146. Those are the two dispositions, section 44C dispositions, that we were dealing with, and in this Court it's changed in quantum so that that quantum has become 363,000 in relation to Mr Clayton and 1.6 million in relation to Vaughan Road Property Trust. So if it feels a little bit –

GLAZEBROOK J:

Well, but we were taken to the accounts. So you're saying it's a pleading point?

MS McCARTNEY QC:

Well, it's a pleading point. It's an evidence point. It's –

GLAZEBROOK J:

Well, but do we know –

MS McCARTNEY QC:

– it's a finding point.

GLAZEBROOK J:

Do we know what was put in front of the Family Court Judge that –

ELIAS CJ:

Well, presumably it's what we've got.

MS McCARTNEY QC:

It's what you – it's what's here in the judgment and the Judge –

GLAZEBROOK J:

Well, no, no, but in terms of the evidence, the evidence was clearly that there had been more than three gifts of 27,000.

MS McCARTNEY QC:

Well, the Judge, and my learned friend Ms Chambers said this was a primary point before the Family Court, and if you turn to the judgment –

GLAZEBROOK J:

Well can't the Judge count or read accounts, or was that all that was put to her?

MS McCARTNEY QC:

Well that must have been all that was put to her.

ELIAS CJ:

Well we can't be sure of that I suppose.

MS McCARTNEY QC:

Well can I, I think that's a fair thing to say Your Honour, with respect, but that was she, that was the order that she made. It was appealed, it was part of the appeal to the High Court, and the High Court dealt with it –

ELIAS CJ:

Sorry, I'm just looking at the notice of claim because you say this hasn't been pleaded, but the pleadings, it's not specific, it's just about the contributions and then it's a question of evidence for the Court to identify.

MS McCARTNEY QC:

Well, Your Honour is correct, with respect, at page 2, in relation to this claim, paragraph 5 in reference to 44C.

ELIAS CJ:

Yes, so the Judge had to find out what relationship property was disposed of to trusts and she heard a great deal of evidence. How long did the case go on in the Family Court?

MS McCARTNEY QC:

I think about three weeks.

ELIAS CJ:

Yes and –

MS McCARTNEY QC:

And this is the – sorry Your Honour?

ELIAS CJ:

Yes, so it's a matter of evidence not pleading, isn't it?

MS McCARTNEY QC:

So I'm coming to the evidence.

ELIAS CJ:

No but I'm just picking you up on your saying that this is a – well I thought you were making a pleading point. You're not really, are you?

MS McCARTNEY QC:

The claim in relation to 44C, in relation to the new claim of distributions from Vaughan Road Property Trust is not sitting in that claim at page 2.

WILLIAM YOUNG J:

The Vaughan Road Property Trust advances were dealt with in the, at least at one stage, by saying well it's not relationship property.

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

So there's no need to quantify them?

MS McCARTNEY QC:

I'm sorry did Your Honour say –

WILLIAM YOUNG J:

Because the Courts held that the trust assets were not relationship property, they didn't, there was no need to discuss the Vaughan Road Property Trust payments any further, was there?

MS McCARTNEY QC:

I actually don't know how it went through the Courts Your Honour I have to say but page 2 says that the claim under 44C is against Mr Clayton not Vaughan Road Property Trust. But in relation to Chief Justice's observation that it's evidence, in terms of the evidence this is the evidence in relation to Claymark Trust. Remember Claymark Trust is, where it's alleged that Mr Clayton made his contribution, made his dispositions to, that's at page 687.

ELIAS CJ:

Which volume is that?

MS McCARTNEY QC:

It's the red volume, 687 through to –

ELIAS CJ:

What is this document by the way? I can't remember.

MS McCARTNEY QC:

This is Mr Lyne's initial evaluation. Mr Lyne is the expert engaged by Mrs Clayton and Mr Lyne received instructions to value the property pool. So he worked his way through the property pool and he came to Claymark Trust, and that's at page 687 through to 691, and he valued it.

GLAZEBROOK J:

And he was valuing that though, wasn't he, as at the date – what date was he valuing that as?

MS McCARTNEY QC:

2010, June 2010.

GLAZEBROOK J:

Yes, so he wasn't looking historically back as to how it had been funded, he was looking at a snapshot position in valuation, is that right?

MS McCARTNEY QC:

Yes, but in this Court the claim that's made, as the Chief Justice just put to me, is a claim under 44C, and it's a matter of evidence. So I'm taking the Court to the evidence and there is none. There's no evidence of any disposition.

GLAZEBROOK J:

What about the accounts we were taken to, were they not in front of the Family Court and is that not evidence?

MS McCARTNEY QC:

They must have been put in front of the Family Court Judge because –

GLAZEBROOK J:

Well why isn't that evidence? Because this isn't to the effect of there being dispositions of matrimonial property. This person was asked to value the assets of the trust as at a particular date and has done so.

MS McCARTNEY QC:

Yes but in terms of the response that Mr Clayton was able to make, in the claim it wasn't specified, in the evidence of the expert it wasn't set out, there's no evidence from Mrs Clayton about this. It emerges in the course of the hearing, some accounts. And the Judge, doing the best she could with it, deals with it in her judgment, as I've said, at page 76. And when the matter goes onto the High Court –

ELIAS CJ:

It can't be page 76.

MS McCARTNEY QC:

Page 76 Your Honour, first volume, green volume, and it's paragraph 69 and 70.

ELIAS CJ:

Yes, sorry, I was looking at the High Court.

MS McCARTNEY QC:

And when it goes onto the High Court, before Justice Rodney Hansen, he deals with it, as I've said, beginning at page 144, and he deals with it in terms of the same quantum. The paragraph number is 146, page 151.

GLAZEBROOK J:

Did she have to – the way she dealt with it though, did it matter to her what the dispositions had been?

MS McCARTNEY QC:

Did it matter to the Family Court Judge?

GLAZEBROOK J:

Yes, because of the way she dealt with it?

MS McCARTNEY QC:

Yes, because she was asked to deal with it as a section 44C disposition, and to provide compensation, a compensation order. And the order that she made, which is at paragraph 71, is that the Judge said that she was satisfied that the only claim that Mrs Clayton could have in respect to those dispositions to Claymark Trust was the debt owing by Claymark Trust to Mr Clayton or to any entities which are found by this judgment to comprise property in his hands.

GLAZEBROOK J:

But all I'm saying, that meant she didn't, it didn't matter what had been done in the past. The only issue was what was owing at the time –

MS McCARTNEY QC:

At date of hearing.

GLAZEBROOK J:

– at the date of hearing.

MS McCARTNEY QC:

That's the way the Judge dealt with it.

GLAZEBROOK J:

So she didn't need to – it really didn't matter if there'd been 5000 gifts earlier or a whole pile of advances earlier, the only thing that mattered, on the way the Judge dealt with it, was what was owing at the time of the hearing?

MS McCARTNEY QC:

That's correct.

ARNOLD J:

But 71 is dealing with section 182 rather than section 44C isn't it?

MS McCARTNEY QC:

It is, because the Judge deals with the two claims against Claymark Trust. First of all section 44C which is –

GLAZEBROOK J:

Well she says 44 but…

WILLIAM YOUNG J:

Can I just go back to – I was looking through the closing submissions for the respondent in the Family Court, they were put in yesterday. At page 22 –

GLAZEBROOK J:

I don't think – there was only one copy of that was there, did we all get…

ELIAS CJ:

No we all – I think they photocopied it.

GLAZEBROOK J:

Oh did they? I'm not sure where mine are.

WILLIAM YOUNG J:

So this is, Mrs Harley says, at paragraph 124, "Three gifts of $27,000 each were made," and refers to the '95, '97, and '98 –

ELIAS CJ:

Sorry, what paragraph?

WILLIAM YOUNG J:

Paragraph 124. And then says, "No other disposition of the Claymark Trust, whether a *Re Polkinghorne Trust* kind or otherwise was established by the evidence." So that must be, that presumably is where the Judge gets her $327,000 from. What we don't know is what Mrs Clayton's position was in the Family Court.

MS McCARTNEY QC:

Well I can find the submissions Your Honour.

WILLIAM YOUNG J:

But I mean, on the face of it, there were other gifts. There is ev – I mean the statement, "No other disposition to Claymark Trust was established on the evidence," would appear to be wrong because there was evidence of other gifts.

MS McCARTNEY QC:

Well, presumably that was, I mean, Your Honour's correct because we've seen the accounts now.

WILLIAM YOUNG J:

Yes.

MS McCARTNEY QC:

But it looks as though, in the Family Court, that there was no evidence directed to it. And the reason why I've taken Your Honours to the –

ELIAS CJ:

But hang on. The accounts must have been – were the accounts not before the Family Court Judge?

MS McCARTNEY QC:

They were Your Honour.

ELIAS CJ:

So they were evidence in the case. They were probably – were they produced by your client?

MS McCARTNEY QC:

They, I think they were produced by, by Mr Giesbers, Your Honour, and I don't know who he was acting for when he produced them. Mr Carruthers says one thing and Ms Chambers says something else in my other ear, but…

WILLIAM YOUNG J:

I mean it does seem odd that there's evidence of gifts which is overlooked in these submissions.

MS McCARTNEY QC:

May I say this Your Honours. This case is just extremely difficult to deal with, and must have been in the Family Court, for that Family Court Judge, Judge Munro, because none of the items of property that the Judge addressed, other than the increase in value of the shares in Claymark Holdings Limited, are set out in any of the evidence to support the claim. So when the Chief Justice asks me, well the pleading that's just a pleading for relationship property, and it is and we can't criticise it because that's the way it goes, it is usual to have an expert's brief which gives you chapter and verse of what's been claimed against you. Because once you know what's been claimed against you, you can respond to it, and we're in this Court now, and as I've told the Court we've not got this new allegation, a new claim that Vaughan Road Property Trust made all these distributions at –

WILLIAM YOUNG J:

But I'm not sure that's a new claim, is it?

MS McCARTNEY QC:

It is a new claim Your Honour. It is a new claim Your Honour. It's not dealt with, here it is Claymark Trust, page 76 of green at paragraph –

GLAZEBROOK J:

But she didn't need to deal with it because her view of it was that he just got the outstanding loan at a particular date. So if she's wrong in that –

ELIAS CJ:

She didn't make the determinations of fact and if we take a different view we have to look at the evidence.

MS McCARTNEY QC:

And if Your Honour's, I'm just moving on to the Vaughan Road Property Trust distributions, raised in this Court for the first time –

ELIAS CJ:

Well hang on. Do you want to say anything further on the gifts before we go to the advances?

MS McCARTNEY QC:

Well in relation to the gifts the figure used in the Family Court at paragraph – it's page 76, paragraph 69, is three gifts of 27,000, 81,000. The figure confirmed in the High Court –

ELIAS CJ:

Well it's the same figures.

MS McCARTNEY QC:

At page 151, paragraph 146, the same figures. And then we go to the Court of Appeal judgment, and in the Court of Appeal at paragraph 153, sorry it's page 255, paragraph 155, where the Court of Appeal sets out what Justice Rodney Hansen said in his judgment, and that's at paragraph 146 I just took the Court too, and in relation to –

GLAZEBROOK J:

Certainly the dispositions were dealt with there rather than for the first time in this Court because paragraph 162 makes it absolutely clear that was the case.

MS McCARTNEY QC:

I'm not suggesting the dispositions weren't dealt with. It's the quantum, Your Honour, that I'm talking about. The quantum has changed.

GLAZEBROOK J:

Doesn't quantum all go back to the High Court? Are we concerned with quantum? I thought we weren't.

MS McCARTNEY QC:

Quantum goes back to the High Court in terms of the claim that is made that is left unresolved and unresolved at the moment is the overall value of

Clayton Holdings Limited. That's the unresolved. There's a couple of other things, there's a –

WILLIAM YOUNG J:
There is a loose end here, doesn't it have to be resolved? I mean the distributions from the Vaughan Road Property Trust were put in issue in the Court of Appeal at least.

MS McCARTNEY QC:
No Your Honour they weren't.

WILLIAM YOUNG J:
Well look at page 256, 157B.

MS McCARTNEY QC:
Page 256, 157B?

WILLIAM YOUNG J:
Page 256 and in paragraph 157AA.

GLAZEBROOK J:
And 162 which rejects that submission.

MS McCARTNEY QC:
All right. At 157, in respect of the claim under section 44C, two aspects there, interest-free loans by Mr Clayton, the next bullet, distributions from VRPT.

WILLIAM YOUNG J:
Yes.

MS McCARTNEY QC:
If you come over the page to paragraph 161, here there are two different dispositions to Claymark Trust to consider. Three gifts –

WILLIAM YOUNG J:
Yes. So it's wrong? I mean, the Court of Appeal has lost track of the story at this point because they've got gifts in at 161 but not in at 157, and then they dismiss the VPRT claim on the basis that it wasn't relationship property.

MS McCARTNEY QC:

Your Honour, in relation to 161(a), the three gifts or distributions are the ones from Mr Clayton referred to –

WILLIAM YOUNG J:

Yes, I know, I understand that's the three times 27.

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

But they also with deal with, at 162 and 157(a), with distributions from the Trust, the VPRT Trust.

MS McCARTNEY QC:

Well –

WILLIAM YOUNG J:

So it must have been an issue in the Court of Appeal.

MS McCARTNEY QC:

What happened is that after the hearing in the Court of Appeal counsel were invited to put forward more submissions about section 44C, and in the course of putting forward those submissions Ms Chambers included, instead of the original 81,000 and 60,365 from Mark Clayton to Claymark Trust, included a further about $1.6 million from Vaughan Road Property Trust. Mr Carruthers, acting for the trustees, said, "We object. It hasn't been the subject of any finding in the Courts below. There's been no evidence at all. If you're going to bring this in at this stage, we're going to have to have evidence. There has to be an evidential foundation and, in any event, we can show why this doesn't apply."

WILLIAM YOUNG J:

As it turned out, the claim was dismissed because, in the Court of Appeal, because the VPRT money wasn't relationship property.

MS McCARTNEY QC:

Yes, which is still the case here.

WILLIAM YOUNG J:

Okay.

ELIAS CJ:

Well, it's – but it's open and if we were to conclude that it is relationship property then the premise for the Court of Appeal's consideration, and, indeed, the High Court's consideration, and, indeed, the Family Court's consideration –

GLAZEBROOK J:

Which is on a different basis.

ELIAS CJ:

– which is a different basis, yes, but they all fall away and we're left with – we would be left with having to resolve the claim on the evidence that the parties put into the Court or sending it back for reconsideration.

WILLIAM YOUNG J:

Can I just pick up one last point on this then I will shut up? The interest-free loans made by Mr Clayton totalling $60,000 are a date of hearing figure, aren't they?

MS McCARTNEY QC:

Yes, they are, Your Honour.

WILLIAM YOUNG J:

Whereas the figure, the 298,000, is the date of separation figure.

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

And it was the 298,000 figure that was obviously in issue in the Family Court, having regard to the submissions from Ms Harley that I've looked at a few minutes ago.

MS McCARTNEY QC:

What was it, a 298 figure, Your Honour?

WILLIAM YOUNG J:

It was 298,000.

MS McCARTNEY QC:

298? I'd have to say – I have to say, Your Honour, I haven't looked at those submissions in that regard.

WILLIAM YOUNG J:

And I think the proposition that was advanced is that that – that in relation to that asset, the current account advance, it should be valued at the date of separation because otherwise the dissipation is all to the good for Mr Clayton.

MS McCARTNEY QC:

Yes, and that, with reference to the table that Ms Chambers has put before the Court at paragraph 24, shows the Court that that middle column, "Liability to Mark Clayton," that's actually Mark Clayton advances, and Your Honour's referred to the figure of 298588 which is that, the nearest balance date to separation, and the next column it's Claymark advances and you can see that the Claymark advances have increased to 1.398 million by date of hearing, while Mr Clayton's advances have reduced. So there's an offsetting there. So if you have the date of hearing valuation for the Claymark advances but date of separation for Mr Clayton, you're going to be double-counting, and that's the reason why, and I think it's paragraph 71 of the judgment, very sensibly the parties agreed to adopt date of hearing as a consistent date for valuation of everything.

WILLIAM YOUNG J:

So that's para 71 of the Family Court judgment?

MS McCARTNEY QC:

I'm hoping so, Your Honour. That was memory. No, it's not. It's paragraph – it's not 71, I'm sorry. It might be – it's 114, I'm sorry, Your Honour, page 91.

WILLIAM YOUNG J:

But that's the business valuation. That's not the valuation of current account advances, is it?

MS McCARTNEY QC:

Yes, but in terms of the valuation, the way in which the Court, the experts addressed it, was they took date of hearing as the date to calculate the advances, and they – and you've got the liability, Mark Clayton advances, which the Family Court Judge says are to be taken into account, and the Claymark entities advances to be taken

into account, and you can't have both. You can't have, on the one hand, Claymark advances at 1.4 and Mr Clayton's advances back at 2006. It has to be consistent, and that's the reason why the experts did that, I submit.

CLICJ
So what do you say the net position is?

MS McCARTNEY QC:
Well, I'm just relying on the findings in the Courts below, Your Honour.

ELIAS CJ:
But if they don't reach the issue, what – so I'm just trying to work out, what do you say is the extent of the double counting?

MS McCARTNEY QC:
I can – may I come back to Your Honour on that one –

ELIAS CJ:
Yes.

MS McCARTNEY QC:
– because I will be able to find out what the current accounts were valued at and I'll be able to let Your Honour know, but it's just more than – it's more than just looking at that figure there, I'm afraid.

Now I've gone off track. Can I come back –

ELIAS CJ:
We're going to take an adjournment at 3.30 and sit till five. We can't sit tomorrow.

MS McCARTNEY QC:
Yes. Well, Your Honour, I think that I should tell Your Honour that I will be still going

ELIAS CJ:
When?

MS McCARTNEY QC:

At 5 o'clock. And I'm telling Your Honour that in circumstances where, I mean, a lot of issues have arisen in the course of the hearing and –

ELIAS CJ:

That weren't flagged in the written submissions?

MS McCARTNEY QC:

Well, for example, the *Ward v Ward* that being relied on, the *Rose v Rose* that was being relied on, the new submissions in relation –

GLAZEBROOK J:

Well, you were relying on *Rose v Rose*.

MS McCARTNEY QC:

No, that the Court's – the Court's – unlike – Ms Chambers didn't put forward another interpretation but the Court has so we're addressing it, but I have tried to suggest to counsel that we carve up the days and –

ELIAS CJ:

What days?

MS McCARTNEY QC:

The two days, and we've really only just started for Mr Clayton and the trustees.

ELIAS CJ:

All right, well, carry on. We'll take the adjournment and 3.30 and we'll consider what we do then.

MS McCARTNEY QC:

So –

ELIAS CJ:

Where are you taking us, because we don't have any sort of overview of –

MS McCARTNEY QC:

No, I –

ELIAS CJ:

– of what the submissions are you want to make orally?

MS McCARTNEY QC:

I'm actually – Your Honour, I'm sorry about that. I've written submissions. I'm following my written submissions.

ELIAS CJ:

Well, we have read your written submissions.

MS McCARTNEY QC:

But I actually, I got off track because I came back to answer the question about the intangible property.

WILLIAM YOUNG J:

You've probably done that to death, I think.

MS McCARTNEY QC:

Have I? Oh, good. Well, I'm happy about that, Your Honour.

WILLIAM YOUNG J:

I'm sure I would be happy about it actually but I'm not sure that – I mean, there's a limit to what can be said about it.

MS McCARTNEY QC:

Yes. Can I just say one more thing about it? Just – I don't know whether this is helpful or not. I'm hoping that it is. If the wife was an investor in a marriage, the wife in a marriage was an investor, and she put separate property into the Stock Exchange into Kiwi Income Property Trust, for example, if her husband or partner was an accountant and he does the accounts, so he makes contributions, indirect, he can't register a notice of claim or a caveat against the land owned by Kiwi Income Property Trust. The wife has a shareholding in the company which owns land. Any increase in value is dealt with under section 9A and that is a money judgment just the way this is, and enforced as such.

So if I may come back to the written submissions, I think in terms of, I'm hoping in relation to, at paragraph 4, I've already been through the question of the agreed date for valuation and I have explained, this is 4(b), the basis on which this is advanced

from Mr Clayton, that the loans were not relationship property. It follows from paragraph 42 of the Family Court judgment, that any advances that were made were from separate property but not relationship property, and that the Court was correct in the way in which it dealt with it.

In relation to the alleged distributions from Vaughan Road Property Trust, the way in which this has been put to the Court is that there was an error by the Court of Appeal in relation to quantum. The error's not in relation to quantum, it's in relation to what party made the distributions, because in the Family Court and the High Court that was directed to Mark Clayton. And section 44C doesn't apply. If Vaughan Road Property Trust is set aside then all of those assets are acquired out of separate property and they keep that status. Vaughan Road Property Trust is not a partner in the relationship; these are the jurisdictional requirements for 44C. And Ms Chambers has put to the Court that it's open to the Court to treat them as if they're relationship property and, with great respect, that would defeat the jurisdi – that would be in conflict with the jurisdictional provisions. And in terms of whether an order –

GLAZEBROOK J:
So the submission that the assets are the separate property, what does that rely on?

MS McCARTNEY QC:
That relies on the findings in the Court below.

GLAZEBROOK J:
Oh, yes. Can you just explain to me why that is, in words, rather than relying on something else?

MS McCARTNEY QC:
Well in words, it's like this. The Judge says that all the property is held at date of hearing – at date of separation, other than the home, the chattels and cars, all of it was separate property, and the increase in value is what's shared. The income and the –

GLAZEBROOK J:
So it's the same argument as before, that's all right, that's fine.

MS McCARTNEY QC:

It's the same – and the income and gains aren't shares so –

GLAZEBROOK J:

That's fine, I just want to understand that, it's not an extra argument in relation –

MS McCARTNEY QC:

No, no.

GLAZEBROOK J:

– specifically to the Vaughan Road Trust, it's the, it's your split between –

MS McCARTNEY QC:

It is.

GLAZEBROOK J:

That's fine.

MS McCARTNEY QC:

It is.

GLAZEBROOK J:

That's all I wanted to know.

MS McCARTNEY QC:

Thank you. So in relation to the chronology, we've been through the chronology and have looked to see where all the property came from and we end up, and this is come through to paragraph 17 and the Claymark Trust and why it's set up, and it's set out in the judgment that it's set up for proper reasons, it was the need to separate out the land from the underlying operating, from the operating assets. And then the property is acquired, and my learned friend, Ms Chambers, took Your Honours through the acquisition of the property but, with respect to her, failed to point out that the property purchases took place between 1999 and January 2001, and over that period of time Mr Clayton's loans, loan advances, decreased and the documents, the accounts before the Court show, that the acquisitions of property, of land, were from borrowings, not from any advance from Mr Clayton.

And if I can just leave the written submission just for one moment and say this. The way in which the case has been advanced against Mr Clayton is that the Court's being told that over the whole of the relationship what he was doing was moving property away, from what would be a sharing regime, to look after himself, to benefit himself and just this morning the Court was told, in relation to the bank proposal that was made when the marriage came to an end, that what Mr Clayton was doing there was to sell the business and buy it back cheap, and I looked at page 1924 to see whether that's what the proposal says.

ELIAS CJ:
What volume?

MS McCARTNEY QC:
Cream.

GLAZEBROOK J:
So what number, sorry? G?

MS McCARTNEY QC:
Cream 1924.

GLAZEBROOK J:
G?

MS McCARTNEY QC:
I'm sorry. Do you prefer me to say –

GLAZEBROOK J:
No, no, just both probably.

MS McCARTNEY QC:
Both? G, cream, 1924, and the paragraph is that second paragraph there, "The profiles acquisition provides an appropriate vehicle for Mark Clayton to reacquire the Claymark business and all the properties to recreate his current property pool. The acquisition process will be fully transparent and all repurchase will occur on open market. There is a degree of risk that Mark Clayton will not be able to repurchase and his current property pool, however, current market conditions are tough." Now, nothing there about Mr Clayton selling the property and buying it back cheap, and

what I'm trying to do, Your Honours, is run this case for Mr Clayton on the basis of principle and the record and the evidence and not on the basis of prejudicial, with respect, submissions that are made about him. He is coping as 1924 shows with extremely different, difficult, market conditions, and he is doing the best he can.

Now this document's also been relied on to show that Mr Clayton had a view about the assets and that they were worth 27 million. That's page 1925. And, with respect, a document prepared by accountants and put before bankers in order to get some money to settle relationship property is not a means of classifying the value of the property or the nature of the property.

Now just before I leave cream G –

GLAZEBROOK J:
One would expect that he would honestly think that this was the case though, wouldn't one, because otherwise he's deceiving the bank when he's asking for a loan?

MS McCARTNEY QC:
Well, with respect, no –

GLAZEBROOK J:
So you're allowed to lie to the bank and double your net worth when you're trying to borrow money?

MS McCARTNEY QC:
What he's doing is he's saying to the bank that, "These are the assets I may have available to assist in order to settle with my former wife." That's what he's trying to do. He's not trying to borrow money to dissipate or hide or anything else. He's borrowing –

GLAZEBROOK J:
No, it's nothing to do with that. It's one would expect, if you're putting up a statement of assets and positions to borrow from the bank, that you would do so truthfully.

MS McCARTNEY QC:
It's an accountant's statement, Your Honour.

GLAZEBROOK J:

Well, you'd expect, in particular, the accountant would do it truthfully.

MS McCARTNEY QC:

Well, maybe the accountant can speak for it, Your Honour, but in relation to Mr Clayton he has genuinely done what he can to settle with his former wife and the issue's going to be value, and I'll come to value in a moment, but before I do that may I turn –

ELIAS CJ:

You know, Ms McCartney, you're entirely correct –

MS McCARTNEY QC:

Yes.

ELIAS CJ:

– that a lot of matters of colour have been traversed, but I think it's not necessary for you to respond to them. Perhaps I should have intervened to stop some of those things being expressed quite in the way they were put, but you can be sure that the Court is not going to be affected by those sort of matters. We want to deal with the matter on the basis of principle and also the provisions of the Act.

MS McCARTNEY QC:

Yes.

ELIAS CJ:

And we do seem to be getting perhaps too deeply into some of the matters of background.

MS McCARTNEY QC:

Well, with respect, I entirely agree but would Your Honour please let me just deal with the $5 million? It's very simple.

ELIAS CJ:

Yes.

MS McCARTNEY QC:

It's at page 1988. It's a simple way of dealing with it because this is a summary of current accounts and borrowings from Mark Clayton, and Your Honours were told that $5 million was taken out at separation by Mark Clayton, and the impression that was left was clearly he was looking after himself. So in relation to the nine VRPT liabilities loaned from Mark Clayton –

WILLIAM YOUNG J:

I'm still looking.

MS McCARTNEY QC:

1988, cream G I think. And if we follow that line along we come to 2005 and the figure is 3.1 million which is –

GLAZEBROOK J:

Sorry, I just need to –

MS McCARTNEY QC:

2005. The line VRPT liabilities. And Your Honours can see in 2007 that changes, it becomes two million 114 and the difference is 5.3 million which sits directly above, in that first line, the Clayton Holdings Limited Group in 2005. The dates don't quite line up but there's the figure 5.3 and it's dealt with in the Family Court judgment at paragraph 46 – I'm sorry, 56 I think it is, page 72, there's the figure, $5.3 million. It went on a money go round for tax purposes, it didn't work, but the point that I'm making is that Mrs Clayton knows that that money wasn't taken to strip assets from Vaughan Road Property Trust. It went into Clayton Holdings Limited and most of it stayed there.

Now in relation to the funding of Claymark Trust I have in the chronology for Mark Clayton I have put in the account references which are in yellow and the account references show that for each piece of, item of land that was purchased in that period of time, 1999 to January 2001, each item of land that was purchased was purchased with a matching, or nearly matching, borrowing from external funders. So it's not the case that Mark Clayton paid for the land and that can be seen with reference to the table of my learned friend at paragraph 24, because during that period of time, 1999 to 2001, Mark Clayton's advances went down, not up.

Now in relation to the Vaughan Road Property Trust, which comes into the frame because of the claim that they made in this Court about distributions, the property transfer is set out at paragraph 23. It needs some refinement because we know now because of the further evidence that we've got exactly what entity owned prior to and what the cost and where the borrowing was. It's set out in the chronology that Mark Clayton has filed with all the references there. And what happened in relation to, I'm coming back to the judgment, I'm sorry Justice Glazebrook, is that we are relying on the fact that the source was separate and the separate property went into a trust, Vaughan Road Property Trust, and –

GLAZEBROOK J:

So it is a different argument than you said to me before? Or the same argument that you were saying before?

MS McCARTNEY QC:

This relates to the distributions from the Vaughan Road Property Trust because there are two arguments. The two dispositions, one is the disposition by Mark Clayton to Claymark Trust and the second one is the disposition –

GLAZEBROOK J:

Wait, let me see, so the dispositions from him, although I don't think it was him because I think it was a company, but the dispositions from him to the Vaughan Road Trust are separate property because 9A has this funny species of relationship property off to the side, is that…

MS McCARTNEY QC:

Yes, it is –

GLAZEBROOK J:

Yes.

MS McCARTNEY QC:

– but its dispositions to the Claymark Trust.

GLAZEBROOK J:

And so then from Vaughan Road to Claymark it's the same argument because they were separate in Vaughan Road, is that…

MS McCARTNEY QC:
That's it.

GLAZEBROOK J:
Thank you.

MS McCARTNEY QC:
So –

GLAZEBROOK J:
Sorry to be slow.

MS McCARTNEY QC:
No, no, no, Your Honour, it's a picky little argument and I apologise for that but it's just – it's a classification argument, is really what it is, and that's the reason why it's necessary to sort of take it through in this way.

So then coming up to paragraph 25, the separation, and it's – again, I just have to come back and say this, it's been put again that Mr Clayton from the beginning didn't want to share with his former wife, and I can refer to the three mediations that he attended and I can refer to his evidence, which is in orange at around about 93… Can you give me those references, please, the two references about him wanting to settle? I think I actually set it out somewhere else. It might be in his first affidavit.

O'REGAN J:
Well, let's just take it that there is evidence that he wanted to settle. That's all you need to say, I think.

MS McCARTNEY QC:
Thank you. And when I first addressed the Court yesterday, the impression had already been created that there was $28 million worth of property and in, in complete obstruction, delay, causing difficulty, and I passed up to the Court the judgment that this all comes from and it just shows how an early judgment in the Family Court can be used to get traction in relation to this sort of allegation. It's the judgment of Judge Adams.

ELIAS CJ:
No, is this just redressing the colour again, because is it really relevant –

MS McCARTNEY QC:

It's –

ELIAS CJ:

– to what we have to look at?

MS McCARTNEY QC:

It's redressing colour, Your Honour, and it's also dealing with the submission that is repeated against Mark Clayton that he didn't give proper discovery and that the Court, if it's going to make findings, is entitled to make findings adverse to him on the basis the allegation is that the proper documents weren't provided, and in –

GLAZEBROOK J:

Well, we're only going to make – we're only going to look at the documents we've got in front of us, aren't we?

MS McCARTNEY QC:

Well, Ms Chambers, with respect, said this morning we don't have the 1994 accounts, 1994 to 1998 of Claymark Trust.

GLAZEBROOK J:

Well, so – well, we can't make a finding in respect of how that was financed because we don't have them.

MS McCARTNEY QC:

And the submission goes on, and it's in the written submissions, you can make findings adverse because those accounts aren't there. Well, 1994 accounts to 1999, no obligation to hold them. At no – nothing that shows whether even ever existed, and it's this constant submission made is that in some way Mr Clayton failed to meet his discovery obligations. There's about five pages of index to the reports of the experts showing every document they had for all of these entities and in relation to Mr Lyne, the expert acting for Mrs Clayton, he also had, he was given open door access to the chairman of Claymark, Mr Giesbers, and to Mr Hancock, the manager, so he could get anything that he needed to –

ELIAS CJ:

Ms McCartney, we are interested in the points on which you gave leave. Unless this judgment of Judge Adams touches on them –

MS McCARTNEY QC:

Yes.

ELIAS CJ:

I don't think you need to take us to it.

MS McCARTNEY QC:

Thank you, Your Honour, but he has been painted in the Courts below constantly, and it – I'm not expecting this Court to be able to redress it but I do, in making my submissions, want to make it clear that he has complied, and his first affidavit, which is dated – well, it was one of the first affidavits. I'm not going to take the Court to it other than to find it myself, dated 10 March 2009 at page 933, begins with saying, "I am mindful of the order that's been made by Judge Adams and I am responding to it, chapter and verse."

WILLIAM YOUNG J:

Can I just, in defiance of what you've just suggested, take you to one little section in this judgment of Judge Adams where he says that, "Mr Clayton was to precisely identify the assets he owned at the commencement of the de facto relationship and prove how and to what extent they could be traced into existing assets. To the extent he does not do so, assets will be deemed not to have been acquired out of separate property."

MS McCARTNEY QC:

Yes. So at –

WILLIAM YOUNG J:

If that's a valid order, it sort of rather leaves the risks of the uncertainties about what happened in the '90s in your court, doesn't it?

MS McCARTNEY QC:

No. At paragraph – in the affidavit that was filed by Mr Clayton –

WILLIAM YOUNG J:

No, I think you've missed the point.

MS McCARTNEY QC:

No, I hear what Your Honour's saying. What I'm saying –

WILLIAM YOUNG J:

I take – I'm referring to the uncertainties surrounding the items referred to at page 938 of the case in his affidavit, which I've taken you to once or twice.

MS McCARTNEY QC:

If there were uncertainties, Your Honour, and if we – as we see from paragraph 42 of the judgment of the Family Court, the Family Court Judge did not consider there were any.

GLAZEBROOK J:

Well, she didn't need to because on her view it didn't matter if they all came from relationship property or none of them did because her view is the only thing left were the loans and so what did it matter what was in the Trust?

MS McCARTNEY QC:

Well, it wasn't the Trust. It was in relation to Clayton Holdings Limited and what the Judge –

GLAZEBROOK J:

Well, that wasn't, I don't think, but –

MS McCARTNEY QC:

We have to assume that the Judge in making, and the –

GLAZEBROOK J:

No, but even in relation to Clayton Holdings Limited –

MS McCARTNEY QC:

Yes, all right, all right, yes.

GLAZEBROOK J:

– what did it matter because everything but 500,000, which was a sum agreed between the parties, was going to be relationship property in relation to anything that was not in trusts.

MS McCARTNEY QC:

Yes, but in –

GLAZEBROOK J:

So again what did it matter?

MS McCARTNEY QC:

In order to get there, the Judge had to be able to trace back, which is what she did.

GLAZEBROOK J:

Well, no, she didn't, because she just went directly to 9 and 9A.

MS McCARTNEY QC:

Well –

GLAZEBROOK J:

And having gone to 9 and 9A –

MS McCARTNEY QC:

I'm –

GLAZEBROOK J:

– and having an agreement on what was separate property, who cared?

MS McCARTNEY QC:

I'm relying on paragraph 42. I'm relying –

GLAZEBROOK J:

Well, we understand that but –

MS McCARTNEY QC:

– on the fact that there's no appeal and I'm relying on the fact that in the High Court Justice Hansen made the same finding that the original property is separate property and it's the increase in value and there's been no appeal. And can I say, Justice Young, in response, that in the event that that is how Judge Adams' judgment gets applied it would be extremely unfair because Mr Clayton believed he had responded to it, and he goes and he not only responds in his affidavit, he gives every document that it is asked of him to the other side. He pays the other side's accountant to do the valuation and then the valuer comes to Court and said, "Well, I didn't actually go back and trace the source. I just valued the pool of property," and when he comes to Court he's told, "Well, look, we've got a little, you know, hole here,

so who are we going to blame for that? We'll blame Mr Clayton. We'll make him pay some more money."

But the next issue which I'm coming to, Your Honours, which is really important, in relation to section 44C, is the jurisdictional requirements and whether those jurisdictional requirements are met with, in relation to the first disposition, the ones from Mr Clayton, the loans, and then the second, distributions from VRPT, and in looking at the jurisdictional requirements and whether or not they're met, and then looking at the discretion, and in order to address the discretion the submission that I'm making is that this is a relationship property division. The question is, is it a just division, and in order to determine whether it's a just division 44C(4), I think it's (b), says one of the factors that needs to be taken into account is the value of the relationship property.

ELIAS CJ:
Is that a submission that you can't exercise a section 44C jurisdiction until the relationship property has been valued?

MS McCARTNEY QC:
The relationship property has been valued to an extent but it's never been quantified.

ELIAS CJ:
Well, what is your – what's the end point of your submission?

MS McCARTNEY QC:
The end point of my submission, Your Honour, is that if we go and we look at the values, valuations, of the two experts and see where we've come to in terms of the Court of Appeal's finding of 6.7 million times the multiple of 6.25 less the debt, we're at the figure of around about between 10 and $11 million in terms of that main part of relationship property, and then you add on the Trusts and you come up to a figure of around about $14 million. Now the main part of that is Clayton Holdings Limited increase in value, and the point that I'm making in relation to these advances in distributions is that they've all been applied, not – I can't say all – they have been applied directly or indirectly to Clayton Holdings Limited and Mrs Clayton, in getting the increase in value, gets value for what it is that has been distributed.

WILLIAM YOUNG J:

Well, that seems – it may well be a fair point and in any reconsideration there has to be care taken to ensure there isn't a double counting.

MS McCARTNEY QC:

Yes, and that is the concern. There's a second concern, if I may say so just before we adjourn. Is that all right, Your Honour? The second concern is this, the land that we're talking about in Vaughan Road Property Trust and in Claymark Trust is the land that sits under the sawmill and under the kiln drying operation. It's been given a number by the valuers, but, you know, the truth is that there's no market for it other than the person who's operating the sawmill or the kiln drying operation. Mr Clayton's been before the Bankruptcy Court twice by Mrs Clayton enforcing orders, and the Bankruptcy Court, in the judgment of Associate Judge Matthews, the submission on behalf of Mrs Clayton was that all the experts in the Family Court said that the Clayton Holdings Limited shares had negative equity, and it's recorded in the judgment. That was, with respect, a misrepresentation because Mr Lyne's always said it's worth 17.5 million.

In terms of value, what Mr Clayton ends up with is he ends up with his operating business, timber processing. Alan Dent tells us how difficult the circumstances are around that we know he's got $37 million worth of debt in the business. He's personally guaranteed it. There is nothing in this land that can be sold without a cascade effect on the business, because if the land's sold you don't have the security in terms of your ability to operate from there. You don't have the lease. You don't have the rent. And Alan Dent put it very well when he said, you know, this is a real concern. In these sort of financial conditions, what happens if he's not able to meet his obligations for the $37 million debt and has to, as a result, the receivers are put in? If the receivers are put in, the value of that shareholding goes straight down, the land will be sold, it will be realised at well below market value. Mr Clayton will be called on his personal guarantee. He will be bankrupted. And where does that leave everybody?

O'REGAN J:

What are you asking us to do? Not to apply the law because he's facing hard times?

MS McCARTNEY QC:

No. I'm saying in terms of the exercise of the discretion under section 44C it's necessary to take into account that if the Court makes further orders, compensatory

orders against Mr Clayton, on top of the at least $7 million that he's going to have to find, that what that does is it brings into, well, jeopardises, so, I mean, just completely jeopardises the viability of the business and affects the value of his share of relationship property. So I come back to where we need to start from, a just division.

ELIAS CJ:

Yes, thank you. All right, we'll take the adjournment. Ms McCartney, by my calculation, which could well be astray, you are only 15 minutes short of the time that Ms Chambers took for this appeal, so in terms of equality of opportunity I think, you know, I really would like an indication from you when we resume how much longer you need to be. Thank you.

MS McCARTNEY QC:

I hear what Your Honour says, thank you very much.

COURT ADJOURNS: 3.35 PM
COURT RESUMES: 3.54 PM

ELIAS CJ:

So we'll go into Tuesday, if that's convenient for counsel, thank you.

MS McCARTNEY QC:

Now as requested, Your Honour, I can indicate that, depending on –

ELIAS CJ:

Questions, yes.

MS McCARTNEY QC:

– the questions, I'm hoping for between 30 and 45 minutes, if that's –

ELIAS CJ:

Thank you.

MS McCARTNEY QC:

– acceptable to the Court. I've got 15 more points to make.

ELIAS CJ:

Mhm.

MS McCARTNEY QC:

The rest are set out in the submissions. The first point, and it starts in the written submission at page 13, paragraph 50, just the jurisdictional requirements that you're all aware of, and the next paragraph is the loans, and may I refer the Court to orange. The Court doesn't need to go there, I'm just giving the reference. Volume D, orange, 1094, lines 17 through to 34, where Mr Clayton was cross-examined on the advances and it was in relation to three gifts of 27,000 only.

So in relation to that, the submissions comes through advancing that there was no error as to quantum at date of – and date of valuation and that Mrs Clayton's claims or rights have not been defeated.

We've been through *Rose v Rose* and I will pass by that.

But in relation, this is at page 18, in relation to *Nation v Nation* and *Rabson v Gallagher* [2011] NZCA 459, [2011] NZFLR 1040, at paragraph 68, the submissions set out the main distinguishing feature here which is that the general purpose advances cannot be viewed in the same way as disposing of an appreciating assets that's already established relationship property in return for a static debt or something, or something of lesser value.

And then on page 20, under, or above paragraph 73, is the submission in relation to the exercise of the discretion and the submission made is it's not a case where the Court should make an order, and the reasoning is set out.

And at paragraph 77, that is the response to the submission by Ms Chambers that Mr Clayton is synonymous with Claymark Trust and with reference to the clauses in the trust deed I'm just getting now the clauses that are relied on to show that he had control of the Trust in order to show the Court, with reference to the Butterworths Trust Deed that was passed up to Your Honours earlier, that those clauses are normal clauses in a trust deed and to make the submission in relation to the application in practice of the clauses and why they're there. There's nothing unusual or wicked or out of the ordinary about a trustee, sorry, a settlor including those sorts of trusts in a trust deed, and in this regard I am, with respect, very concerned that the Court does hear this submission. I'm grateful that I'm in a position to make this submission because these sorts of clauses, as I've submitted, are just very normal, not just in a business trust but in any family trust, and just as an example, in terms of self benefit, if we consider a situation where, say, two grandparents put their home

into a trust and they set up the trust so the final beneficiaries are their grandchildren, and then they stay living in the trust, in the home, but they don't pay rent, now that's a benefit and they are entitled to have that benefit, but if it wasn't provided for in the trust deed they could be in breach of the established fiduciary duties as we know them. So a settlor can carve out, and, and, the type of fiduciary duties that are going to continue to apply, and fundamentally there remains one core obligation, *Armitage v Nurse* [1998] Ch 241, and it's the obligation of accountability. So the settlor can carve out self benefit, dealing with themselves, for example, if they were a director of the company that's renting the land that's held in trust or if they're the owner of the orchard that's got the fruit that the – they're the director of the company, they want to buy it, these are things that under the laws of equity you're not allowed to do but you are allowed to, can I use the word "moderate" or "carve out" those particular, you know, very austere application.

ARNOLD J:
Well, could you end up with a trust which had no fiduciary duties at all?

MS McCARTNEY QC:
Well, this is the point, you can't, because if you did that there wouldn't be a trust in the first place, so –

ARNOLD J:
So what –

WILLIAM YOUNG J:
Well, who would own the land?

MS McCARTNEY QC:
What the Court would do, Your Honours, and this is what happened in *Armitage v Nurse* where the clause was an exemption of liability clause and I think it was Lord Justice Millett, that that's who it then was, was, had to look at it and say, "Well, what do we do about the fact that this exemption and liability clause has gone too far?" "Or has it," was the question really, and I'm going to say that I think the answer was, no, it hadn't gone too far. But let's assume it had. It's a valid trust, settlor intention is established, all the ingredients of a trust, been operating for a long time, and suddenly somebody says, "Look, there's this exemption of liability clause in it. What are we going to do about that? Is the Court of equity going to set aside the whole of the Trust or is the Court of equity going to sever that clause?" And the

answer is always it just takes out the clause because you've got to have your rump, your core obligations. So once we establish that there's an intention to set up a valid trust and there's final beneficiaries to whom you owe fiduciary duties, you will, no matter what the trust deed says, in terms of self benefit or dealing, it will be interpreted on the basis that there is a fiduciary duty and if the trustee is acting in a way that exceeds and breaches the fiduciary duty, the Court of equity, as I've said, will either sever that clause or remove the trustee, but the benefit –

ARNOLD J:
Sorry, what was the second, sever the –

MS McCARTNEY QC:
Remove the trustee. If the trustees –

ARNOLD J:
Well, if you take the VRPT Trust –

MS McCARTNEY QC:
Yes.

ARNOLD J:
– because it's got a broader combination of things than the Claymark one, I mean, how would the Court approach the situation where if it considered that when you took a series of provisions in combination, they really removed the heart of the Trust obligation? You're saying, well, the Court would have to, what, sever enough so that it was left with what looked like a trust? Which ones would it choose?

MS McCARTNEY QC:
Well, in relation to all those clauses, all the provisions, they're provisions that are quite standard in family trusts and the Court will see it when the Court goes through the Butterworths' precedent.

ARNOLD J:
Well, I've had a look at that but –

MS McCARTNEY QC:
Yes.

ARNOLD J:

– it doesn't have the self-dealing one. Specifically provides that if the trustee is a beneficiary he or she is not to participate in decisions about him or her as a beneficiary. So there are quite significant differences between that sample and the VRPT one.

MS McCARTNEY QC:

I thought when I read it the only one was the one that relates to the sole trustee and –

ARNOLD J:

Well, you may be right but I –

MS McCARTNEY QC:

– and when I was reading it, I was reading it as a standard family trust where you'd have two trustees and you could understand that clause.

ARNOLD J:

Well, you may be right but I thought it clearly didn't cover the self-dealing that the VRPT one did.

MS McCARTNEY QC:

I will –

ARNOLD J:

Anyway, it doesn't matter. The –

MS McCARTNEY QC:

I will be able to find that clause in 10 minutes.

GLAZEBROOK J:

But does it actually matter though because isn't the real argument whether you treat those sort of rights that you have in the Trust as relationship property so that effectively the Trust assets become available, at least either through 44C or directly as relationship property? So there might be perfectly standard clauses and perfectly all right, it's just the question is what the effect of those clauses under the Relationship Property Act. Now, I expressed some surprise yesterday at some of the clauses in the Vaughan Property Trust and that's because I don't think that's a very

standard trust. I do think that the Claymark Trust is much more standard in terms of the type of provisions it has and that has been acknowledged as being in a different category, hasn't it?

MS McCARTNEY QC:

The way in which 44C is dealt with is in terms of the jurisdictional requirements and Ms Chambers has put it on the basis that Mrs Clayton has missed out, she'll miss out, and she –

GLAZEBROOK J:

Well, she says relationship property has been applied to the Trust –

MS McCARTNEY QC:

Yes.

GLAZEBROOK J:

– and – which was set up during the marriage so it's just an AT ordinary, just an ordinary AT as I understand it because it was set up during the marriage and, not only that, there were a whole pile of assets in the form of interest-free loans and gifts that were applied to it. So relationship property has gone to support that Trust.

MS McCARTNEY QC:

And the submission that we've made in response to that is the advances, in relation to the advances, they're from Mark Clayton, separate property, not relationship property, and that's the end of that.

GLAZEBROOK J:

But how are the advances not relationship property? Where do they come from if they don't come from relationship property?

MS McCARTNEY QC:

I'm going to irritate Your Honour by answering that with reference to section, sorry, paragraph 42 of the Family Court judgment.

GLAZEBROOK J:

Well, all that says – well –

MS McCARTNEY QC:

Because –

GLAZEBROOK J:

Well, it just – I really do have difficulty in terms of advances which are money, fungible –

MS McCARTNEY QC:

Yes.

GLAZEBROOK J:

– suddenly keeping its character a separate property because of paragraph 42 –

MS McCARTNEY QC:

Yes, but –

GLAZEBROOK J:

– which wasn't even relevant to what the Judge was looking at.

MS McCARTNEY QC:

But then you go on to section – I'll just finish this quickly – paragraphs 65 and 66, the Judge under section 9A has the option. It can be the increase in value of the property or the income or gains that are treated as relationship property. The Judge elected to treat the increase in value as relationship property. The underlying property, the shares themselves, the income and gains from them were Mark Clayton's, and we know that he didn't have salary that was available to him. It went to the family and it went back into the business, increasing the value of it, and that's how he got caught, that's how it was all caught under section 9A.

O'REGAN J:

So are you saying his salary?

MS McCARTNEY QC:

Yes.

O'REGAN J:

His salary he got from the business is separate property?

MS McCARTNEY QC:

No, no, I'm not. I'm saying that that was what the Family Court Judge found. That went back in and that was the relationship property that was applied. So – but the income and gains from separate property is available to Mark Clayton to make the advances. He made the advances to Claymark Trust. And just before I leave this can I also add that in relation to Claymark Trust there's genuine reason behind that, I mean, I've said it a number of times, and Vaughan Road Property Trust. There's genuine, bona fide, good, business sense behind that and there's genuine, bona fide reasons for it retaining the Trust character.

I'm sorry, I didn't mean to get sidetracked there. I apologise.

The next point, it's on page 22, and this is the argument in relation to the distributions from Vaughan Road Property Trust to Claymark Trust and it's advanced on three separate scenarios. The first one is if Vaughan Road Property Trust is a trust, is set aside as a sham or not a valid trust, the argument is that it becomes relationship property. The answer is if it's set aside then the assets that belong to Vaughan Road Property Trust, if transferred from third parties and from a separate source, will be separate property. If it can be shown that they're transferred from relationship property, the Court might take another view, but the big answer here is in relation to 10-24 Vaughan Road. The parcels of land that came from the father and from Mr Clayton himself prior to the relationship are separate property and they have the big value. I think they're worth about $4 million or some $5 million maybe. That's where the value lies in this Trust.

O'REGAN J:

There were two sections, weren't there?

MS McCARTNEY QC:

There were two –

O'REGAN J:

That was separate property and then there was the one that became the matrimonial property, the matrimonial home.

MS McCARTNEY QC:

Yes. There were two sections that Mr Clayton owned.

O'REGAN J:

That he still holds, that are still – well, the Trust still holds, yes, yes.

MS McCARTNEY QC:

That's right, and then there were the sections his father's – in the father's business that were transferred.

O'REGAN J:

Yes, but he bought those after the relationship, didn't he?

MS McCARTNEY QC:

Yes.

O'REGAN J:

Yes.

MS McCARTNEY QC:

Yes, and they went into the business, and I'm coming back to it again, and the shares in the business are separate property. So that's all the separate property source.

O'REGAN J:

Well –

GLAZEBROOK J:

So everything's separate property, in your view, absolutely every asset that's ever been acquired during the marriage is separate property? It's only the increase in value which is some species of air money judgement that becomes relationship property, so therefore nothing actually came out of relationship property ever? And why did the salary become relationship property then?

MS McCARTNEY QC:

Well, salary is usually treated as relationship property and that was –

GLAZEBROOK J:

But on your analysis, or is that just because it's personal exertion during the marriage, is it?

MS McCARTNEY QC:

I understand that the Court doesn't like the argument, what I'm trying to say in terms of the outcome.

GLAZEBROOK J:

Well, you might like to try and find another argument –

MS McCARTNEY QC:

Yes, I know but –

GLAZEBROOK J:

– because it might be that you're really pushing a barrow uphill, so if there is another argument it would be nice to hear it.

MS McCARTNEY QC:

I'm talking about the outcome. I'm talking about the just division. In terms of the outcome, the Act has worked. What has been found to be separate property has increased in value by about $7 million.

ELIAS CJ:

But nobody really is arguing against the concept of separate property. No one is arguing against the concept of relationship property. The question is how it's classified in this particular case. So of course the Act works, but partly we're being asked how it works in this particular situation.

MS McCARTNEY QC:

Well, my position, our position is we go back to the jurisdiction. The jurisdiction is section 9A. It tells us how it works, and 9A says it is the increase in value which is the relationship property.

WILLIAM YOUNG J:

We've already had this, I think.

MS McCARTNEY QC:

I know, I know, but we come back to it, I'm sorry, Your Honour. I'm not trying to be circular.

ELIAS CJ:

So any asset that was owned pre-marriage, its increase in value is separate property?

MS McCARTNEY QC:

No.

ELIAS CJ:

No?

WILLIAM YOUNG J:

She says it's an intangible item of relationship property but disconnected from the property itself.

ELIAS CJ:

Yes. Yes, I'd forgotten that argument.

WILLIAM YOUNG J:

Like a bubble floating above the property, effectively.

ELIAS CJ:

Yes, yes.

MS McCARTNEY QC:

And this may not help, and it may be the opposite, but if we – this was a long marriage of 20 years so Mrs Clayton gets half. Remember in *Rose v Rose* Mrs Rose got 40%, and in a short marriage, let's just assume five years, where the property had been there for many years. The people might be in their mid-fifties or sixties when they get married. It's a short marriage, five years, so there's been some contribution but not a lot, but it qualifies. You can't say you get half of the separate property. That's the beauty of the Act. It preserves the separate property but recognises the contributions during the marriage.

Page 23, the second scenario is if the Vaughan Road Property Trust is a valid trust, but this Court upholds the finding in relation to power of appointment. The Court's asked to treat the disposition as relationship property and the submission made is, well, it's not relationship – the distributions from the Vaughan Road Property Trust are not relationship property and we rely on the judgment of the Court of Appeal.

86, it's not a disposition that's been made by one of the partner's of the relationship. It's been made by the trustees of the Vaughan Road Property Trust.

And 87, Mrs Clayton's position hasn't been defeated by the disposition, because if it's not relationship property you're not taking that money out of the pool.

And then, finally, this is where I ended up before the luncheon adjournment, it's this question of the way in which we move forward to get a just division and what Ms Chambers asks is that the Court asks counsel to file memoranda to deal with the issue of what quantum's going to be, and at 89A the submission we make is the last thing these parties need is another dispute over quantum. We have quantum. It's in – I've adopted it from the valuation of Mrs Clayton's expert, Mr Lyne. At date of hearing the net equity in this Trust was 673,000. Mrs Clayton's claiming half of that, 336,500, and she says, "Take off from that the loan advances that Mr Clayton, that I'm entitled to," and the figure, it's the top of page 25, is somewhere between 150 – so I'll call it 155,000 and 306,000. And you'll see the submission that we make next. It's just not the economic of the claim that are negligible, nearly negative, it, it's the costs, it's the delay, it's the distress, it's the extremely detrimental effect this is having on Claymark's business over the intervening period.

And at B, just again resubmitting Mr Clayton put the income in gains. He didn't take them and throw them away. He put them back into the operating business. The operating business increased in value that's going to be shared. By the division, Mr Clayton takes the risk of being able to repay the $37 million debt associated with the business. He takes the risk that the business will remain viable.

And at D, Mrs Clayton's already had the benefit of distributions. They come from rent of the properties owned by VRPT. The rent's paid by Claymark operating business. The provision of that rent, the scheme, allows the properties to support the business and it's allowed the Claymark business to grow, and that's where the share comes in.

The discretion, this is at E, is to be exercised on the basis of an overall just division. It's not difficult, I submit, to accept that this ongoing litigation is affecting Claymark business. I rely on section 1N(d), the principle of the cheap, simple and swift resolution. This litigation has been going on since 2008 and while Mr Clayton gets blamed for it, in this Court the appeals substantively are Mrs Clayton's appeals. Mr Clayton wants the opportunity to settle.

And at F, relevant to the exercise of the discretion is the interests of the children of the marriage. They are adults now. They weren't at the time these people separated. They were 12 and 14. Mrs Clayton acknowledges it's in their interests that the business, Mr Clayton's able to retain a viable business.

And just the last – there are two more things I'd like to do. The last thing, Justice Arnold, in relation to the Claymark Trust and those advances were they by Mrs Clayton, M A Clayton? They're both M A Claytons and I think the answers is at page 1852 –

ARNOLD J:
1852.

MS McCARTNEY QC:
– which shows us – I'm hoping that that's yellow, I'm sorry. I'm sorry, I've got the wrong number. It's – I'm sorry, I can get the reference but at some stage in those Claymark Trusts they stop referring to the advances being "M A Clayton" and refer to it as "settlor", "advance from settlor", which pegs it to Mr Clayton.

ELIAS CJ:
Does that answer the query you had?

GLAZEBROOK J:
I don't think so.

ELIAS CJ:
Because yours was –

ARNOLD J:
Well, no, because the M Clayton one disappears in that year, so what you really need to know is what happened in the earlier years, and those, we don't have the accounts for those earlier years.

MS McCARTNEY QC:
Do you mean before 1999, Your Honour?

ARNOLD J:

Yes.

MS McCARTNEY QC:

Yes, that is true, and I regret I can't help in relation to that.

WILLIAM YOUNG J:

Can you – somewhere you refer in your submissions to Mrs Clayton's entitlement under the Court of Appeal judgment. What's the – of around six-odd million dollars. Where's that, what's the calculation that that's based on? Does that appear anywhere?

MS McCARTNEY QC:

The calculation is based on – it's the trustee's submissions, Your Honour, and the calculation is based on, because it hasn't been quantified, so as the Court read it's not less than, and the calculation is based on – I'm hoping I can do this from page 804 of red volume C. It's the trustee's submissions.

Well, I think we probably need page 804 and the trustee's submissions because page 804, which is their –

GLAZEBROOK J:

Which trustee's submissions? Where?

MS McCARTNEY QC:

This is the trustee's submissions of 26 August 2015.

O'REGAN J:

On SC38.

MS McCARTNEY QC:

SC38, thank you, Your Honour.

GLAZEBROOK J:

And what page of the trust –

MS McCARTNEY QC:

Page 12, paragraph 56 and 57.

WILLIAM YOUNG J:
What's the paragraph number of the trustee's submissions?

MS McCARTNEY QC:
56, Your Honour. It's on page 12. So in relation to the schedule that's shown there, the Claymark shares are shown about half way down, and the value of the Claymark shares show the difference between the parties still and their experts but it applies the Court of Appeal's finding of 6.75 million and the multiple of 6.25 and it takes off the debt and some other adjustments, and that way we're able to get to, after distributions to date, the second, the last entry before the balance to distribute. We're able to get a balance to distribute the range between the parties.

And the range between the columns depends on whether Vaughan Road Property Trust is in or out. So the range is between 6.598 million and 11.577 million, and that main difference as is set out in the next sentence is that the Court of Appeal –

GLAZEBROOK J:
Why is Lyne less if VRPT is in and Dent more if VRPT is in?

MS McCARTNEY QC:
No, the Lyne column, the Lyne column is, the column to look at is the 11 million 577. Mr Lyne –

GLAZEBROOK J:
Yes, but that's less than 12961.

MS McCARTNEY QC:
The first column, I'm sorry. I think there's a bit of confusion there. You can see in relation to both he's got Vaughan Road Property Trust in for both of them. If Vaughan Road Property Trust were to come out from his line, that, from his column, that 11.5 million reduces by that amount.

GLAZEBROOK J:
So what's the first column?

ARNOLD J:
It's the assets of the Trust.

MS McCARTNEY QC:

But the first column is just the way in which the table's been prepared. The first column I think can be ignored. It's just some adjustments that were made probably for the judgment of the Court of Appeal, but Mr Lyne has – Mr Lyne needs to have taken out of his column, Your Honour, Justice Glazebrook, is correct, the above, it's paragraph 47, the above table does not show VRPT out of Mr Lyne's calculation but VRP –

GLAZEBROOK J:

I don't really understand the Dent in and out. It's only 1 million-odd difference.

MS McCARTNEY QC:

I think, Your Honour, the answer is because the current accounts change.

GLAZEBROOK J:

Well, we're not doing quantification anyway so…

MS McCARTNEY QC:

No.

WILLIAM YOUNG J:

No, it's just I was just trying to – it's really a response to my question. I'm just interested as to where the money, how the figure was calculated.

MS McCARTNEY QC:

Yes, well, that's – and it's advanced on the basis that it is not less than for a share. Now, Your Honours, the only thing that I want to be able to address, and I haven't done it, is the Claymark Trust with reference to those particular clauses. I haven't been able to pull out the particular clauses but can I address the clauses generally as to the way in which – as to in practice the application of them, and the Claymark Trust deed is at yellow 1186, and if I may start with reference to page 1189, clause 5.1, the clause in relation to the discretion of the trustees, the ability to pay or reply to maintenance, education, advancement and so forth, and they may pay out the capital of the trust fund. That's clause 8, and this clause just generally deals with the ability of a trustee to distribute capital before vesting day. It's standard in trust deeds. I think Your Honours will find it's in clause 6 of the trust deed that's been passed out, and it allows trustees to distribute capital with such distribution, would it allow the trustees to fulfil the Trust's objectives, and a good

example is if there was a change of tax laws, for example, the introduction of a capital gains tax, there might be a need to vest the Trust asset, so it would be available to the trustee to pay it out because by paying it out you get it out of the Trust before the capital gains tax is introduced.

The next clause in relation to the Trust, the Claymark Trust, is clause 9 dealing with final distribution and the precedent has at 11.2 it's not the same as but it's equivalent to the precedent at 11.2(a) and (b), and this, this is typical in family and business trusts as the precedent shows. As with all trustee's powers, it has to be exercised reasonably and consistently with fiduciary duties. Its presence does not mean there's no trust at all.

And then in relation to, going over the page, 1192, resettlement of a trust fund, it's found in the precedent at clause 7. It's a standard clause in every modern trust fund. It would be highly unusual if a clause of this type was not in the modern family or business trust. There are just numerous reasons why a trustee may need to resettle and in the relationship property context, in settlements of relationship property where trust property is held in trust, it's very usual to utilise the resettlement clause to resettle the trust into either two trusts or a new trust and retain the last trust, and that is standard. There's a need for it applying to a business trust as much as a family trust. If a business trust had assets of shares in an operating company and also land, what may be required is you separate out the land for reason of creditor protection or capital raising, or even if you're in a situation where there was some animosity between the beneficiaries. Here's a way of dividing it up.

The next clause is clause 13, the – sorry, it's clause 14, the power of – sorry, clause 13, the exclusion of a discretionary beneficiary. This is the same as the power to appoint and remove beneficiaries. It doesn't give a power to remove final beneficiaries. The power of appointment and removal of discretionary beneficiaries still leaves in this trust deed the final beneficiaries and the fiduciary duties are owed to the final beneficiaries.

And then in relation to I think it's – I'm looking for "conflicts of interest" in this trust deed. I can't find it. I did notice that it was in the precedent at 14.1, and what that clause does is that, as I've said, if you've got the orchard that's owned by the company and you're a director in the company and you want to provide land that you own to the orchard to operate, you're allowed to do it. You aren't under strict laws of equity but you are in terms of the carving out of the fiduciary duties. What it means is

that the trustee can act and participate without any default, and there's the yardstick that's applied to it and it's the yardstick of reasonableness, and the two authorities are *Craddock v Crowhen, Craddock,* as in Richard Craddock, although of course it wasn't Richard Craddock, *v Crowhen C-R-O-W-H-E-N*, the reference is (1995) 1 NZSC 40,331 – it's the Supreme Court. It's the judgment of Tipping J, 1995, of course. It's the Supreme Court.

WILLIAM YOUNG J:
No, it's not the Supreme, it's the High Court.

MS McCARTNEY QC:
I'm sorry, yes, it would have been the High Court. Would it have been 1995?

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
I appeared and it's the High Court.

MS McCARTNEY QC:
All right. Is it your –

WILLIAM YOUNG J:
I appeared in it as counsel.

MS McCARTNEY QC:
All right, so Your Honour, in terms of the standard of reasonableness, I mean, trustees can't behave stupidly and irrationally. They can't do stupid – they can't think that they can go and do something completely irrational and unreasonable and outside the trust powers and not be dealt with, and the other authority is *Blair v Vallely*, V-A-L-L-E-L-Y, and the citation is 1999 1 NZTR 9-002, Justice Wild.

In relation to just the last thing, self-benefit, it's not in this Claymark Trust deed. It is in the precedent at clause 14.1(e). That allows a trustee who is also a beneficiary to exercise any power or discretion in his or her favour. There's several circumstances where that might occur. If the trustees of a family trust own the family home, and I've given the example of the grandchildren, you must be able to have some benefit out of

your own home without your grandchildren being able to ask you to account in the Court.

ARNOLD J:
It is, however, subject to the limitation in clause 12.1 in the sample.

MS McCARTNEY QC:
Well, yes –

ARNOLD J:
"No trustee who is also a discretionary beneficiary shall exercise or participate in the exercise of any power vested in the trustees in his or her own favour." So there's an explicit prohibition on the sort of self-interest and decision-making that is permitted in the Vaughan Road Property Trust.

MS McCARTNEY QC:
Yes, I think that that precedent, as I've said, is I think it may be because it was anticipating that there might – there would be two trustees, usually a husband and a wife. If the wife were to die, for example, you wouldn't want the husband being able to carry on doing what he wanted without some second, you know, participation. But as I've submitted, it really comes down to the extent to which you can carve out the obligations.

ARNOLD J:
Yes.

MS McCARTNEY QC:
But then you're left with that rump fiduciary duty and I really strongly submit that a Court of equity would definitely intervene if what is being – if the sort of behaviour, there was misconduct along the lines that hasn't happened in any of these trusts, but if it were to happen there would be accountability in the Court of equity.

Your Honours, I am sorry that I went past time. I am very grateful, thank you, Your Honours.

ELIAS CJ:
That's fine. Thank you. Mr Carruthers, do you want to carry on or…

MR CARRUTHERS QC:

Your Honours, no. I'm –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

I'm conscious that you've raised *Ward v Ward* and I need to have a closer look at that because you'll realise my submissions have proceeded on the basis that that satisfactorily sets the test, so I –

ELIAS CJ:

Yes, that's fine. We're not actually –

MR CARRUTHERS QC:

No.

ELIAS CJ:

– anxious to sit on, so that's fine. We're going to have to resume anyway.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

So that's fine. All right, we'll adjourn and resume on Tuesday at 10, thank you.

COURT ADJOURNS: 4.38 PM

COURT RESUMES ON TUESDAY 8 SEPTEMBER 2015 AT 10.06 AM

ELIAS CJ:
Yes Mr Carruthers isn't it?

MR CARRUTHERS QC:
Yes. Your Honours, Mr Butler is going to present the argument on the section 182 point.

MR BUTLER:
Good morning Your Honours. If I could just have a moment to set up.

ELIAS CJ:
Yes that's fine.

MR BUTLER:
Thank you. Now Your Honour would have received a copy of the schedule of, of assets or potential outcomes as requested

ELIAS CJ:
Yes, thank you.

MR BUTLER:
Thank you. Your Honours, when we were last before you there was a request from Justice Young for a copy of the judgment of Associate Judge Osborne in the *Penson v Forbes* [2014] NZHC 2160, Sep 8, 2014 case. We weren't quite sure which case it was but it's Penson. I have copies of that if that's helpful.

WILLIAM YOUNG J:
Thank you, yes.

MR BUTLER:
I think that was the judgment that Your Honour Justice Young was after.

WILLIAM YOUNG J:
I think it is, yes.

ELIAS CJ:

Sorry, what was this directed at? Which point?

WILLIAM YOUNG J:

It's the removal of tru – removal of beneficiaries.

ELIAS CJ:

All right.

MR BUTLER:

So you'll see that the relevant clause is set out at paragraph 17 of that judgment Sir. When I had a look at the judgment having found it I thought it was interesting that two other aspects were focused on in His Honour's reasons and they were the rule around impartiality or, put another way, the requirement that one does not have to be impartial in the context of a discretionary trust so that's dealt with at paragraph 38. And again in my submission would reflect the norm in terms of how trusts of this sort would expect to be treated. And then I also note that conflict of interests clause is dealt with at paragraph 43 of that judgment again. Just giving Your Honours a flavour of the sort of clauses that are out there in trust deeds. Your Honours, one other judgment came to my attention over the weekend that might be helpful and it relates just to this point about separate property. I'm not going to make submissions on it Your Honours because you've had the benefit of submissions already but the case is *Geddes v Geddes* [1987] 1 NZLR 303 which is a decision of the Court of Appeal. And what it touches upon is the concept of separate property and the co-mingling with separate property of borrowings, and I think Your Honours might find the judgment of Justice Somers helpful on that particular point, so I'm not going to make submissions on it as such but I thought it would be, it was proper having come across it to hand it up to the Court.

ELIAS CJ:

Thank you.

MR BUTLER:

So the sections referred to in the judgment so far as I can tell are on all fours with the provisions before us. And Your Honours, I just wanted to check. There was a request for a copy of the judgment about transfer as from the Family Court to the High Court. I just wanted to check that –

WILLIAM YOUNG J:

We've seen that. I have got that, yes.

MR BUTLER:

That's great, thank you. Your Honours, as indicated by my learned senior Mr Carruthers, I'm dealing with the section 182 arguments. I thought it would be helpful to have a short road map. What I've done with the road map is I've just – you can see with the road map what I did is I'm not making any new submissions on the material that's dealt with previously but I thought it would be just helpful –

ELIAS CJ:

For myself I find road maps going to two or maybe three pages, very helpful, but these are submissions Mr Butler.

MR BUTLER:

As I said, I was just trying to be helpful to the Court and put those – I'm proposing to go direction to page 7 where my road map begins, with section 182 of the Family Proceedings Act, so section 4 of this road map.

ELIAS CJ:

Well what are we to do with the rest of it? To read it, are we?

MR BUTLER:

It's simply there as a way of just gathering together in one place for Your Honours, if it's helpful, if it's helpful to you, in the one place the various points that were made.

ELIAS CJ:

Thank you.

MR BUTLER:

I'm not taking Your Honours to it, I'm just –

MS CHAMBERS QC:

Your Honour, the first few pages appear to be nothing to do with section 182. They appear to be new submissions, indeed I think they're based on the document that Your Honour's refused to accept last week in regard to powers being property et cetera. I object again Your Honours.

MR BUTLER:

As I indicated Your Honours, what this was trying to do was just to gather in the one place.

ELIAS CJ:

Well are they new submissions Mr Butler?

MR BUTLER:

No, they are not.

ELIAS CJ:

It's a summary of what we've already heard?

MR BUTLER:

It's a summary of what, in the one place, and the reason that's done is simply to be helpful to the Court because there was a lot of questions –

ELIAS CJ:

Well it might have been helpful to have it up front. Anyway we're going to page 7, para 4?

MR BUTLER:

Correct, so section 4, and as I said I'm dealing with the section 182 question. The first place where I want to begin, if I may Your Honours, is with the judgment under appeal, so that's the judgment of the Court of Appeal in the case. I think it's helpful if we just look at what it was that the Court of Appeal was dealing with and what actually the question is that the Court answers. So I'm at the case 266 Your Honours, paragraph 177. Your Honours will see at 177 what the Court does is it records the conclusion that it reaches. So it says that it doesn't accept Lady Chambers' submissions that the Courts below erred in deciding that the Claymark Trust was not an actual settlement and that therefore no order for provision should be made or for variation of the trust under section 182, and if you look at the way in which the Court has summarised my learned friend's submissions, that's set out in paragraph 172 to 174 of the Court of Appeal judgment, so that's at page 262 to 264 of the case. You'll see that my learned friend, the way in which her submissions are summarised is, as to the one part where the Claymark Trust was an actual settlement within the meaning of section 182, so that's at paragraph 172 of the Court of Appeal judgment, and then at 173 the submissions as to how the

section 182 power should be exercised in this case. And then finally at 174 if the exercise of discretion should occur, what the result of that exercise of discretion should be.

So in my submission when one looks at how it is that the Court of Appeal deals with the submissions of my learned friend what the Court holds, and this becomes clear at 178B over the page, that's at 267 of the case, the question before this, "Is Mrs Clayton entitled to provision from the assets of the Claymark Trust or to a variation applying section 182 of the FPA?" Answer, "No."

If we go to 177 we see what the reasons are that can be stated shortly and in my submission what the Court of Appeal does is it, in a sense, cuts to the chase. The Court at A notes that this Court in *Ward* had said that the focus under section 182 is on the expectations of the parties, especially –

WILLIAM YOUNG J:
That must be it's a relief not a capitalisation.

MR BUTLER:
So that's as to exercise of the discretion so if section 182 is engaged then one deals with, the focus is to be on the expectations of the parties.

WILLIAM YOUNG J:
So it hasn't got much to do with the first proposition, whether it's a nuptial settlement.

MR BUTLER:
Indeed, and I think the point I'm coming to Sir, why don't I make it now, if we skip down to B and we look at the last sentence of B. What the Court of Appeal says is the problem for Mrs Clayton is not the characterisation of the trust, but there are concurrent findings of fact that Mr and Mrs Clayton did not have the necessary expectations.

WILLIAM YOUNG J:
But we are, okay.

MR BUTLER:
So what, do you see what I'm saying, so what I'm saying Sir is –

WILLIAM YOUNG J:

It does seem to me they've got it mucked up.

MR BUTLER:

Well I think the way the Court has dealt with it, and that's why I say cutting to the chase, is they say, well look at the end of the day let's look at *Ward v Ward* and see *Ward v Ward* determined. Now what we do know is that in *Ward v Ward* in this Court the issue before the Court wasn't whether or not it was a settlement, because on that question leave had been denied, because this Court took the view that the decision of the Court of Appeal, and I think it was Justice Glazebrook in the Court of Appeal, was clear. So *Ward v Ward* was about dealing with the question of the exercise of the discretion and so that's why –

WILLIAM YOUNG J:

But why can't a nuptial settlement encompass a trust that includes or is addressed to dismiss the promotion of business.

MR BUTLER:

Well the question becomes really it's a question of fact and determination on the circumstances of the case.

WILLIAM YOUNG J:

No, but sorry, as to whether it's a nuptial settlement.

MR BUTLER:

It's the case that, of course, it's possible that a trust –

WILLIAM YOUNG J:

But what's it got to do with – what does the nature of the assets got to do with whether the settlement is a nuptial settlement or not? Was there any authority for the proposition that it makes a difference?

MR BUTLER:

It can make a difference in this sense Sir, that looking at the nature of the assets can be helpful in determining what the purpose or nature of the settlement is.

WILLIAM YOUNG J:

But isn't that to be determined, basically, by the terms of the trust? That if it's referable to a marriage, in reference to the issue of a marriage, it's a nuptial settlement. It doesn't matter whether the assets are land, shares or a business. I mean that would be, that's my understanding. Now I may be wrong. There may be authority. This isn't a new expression.

MR BUTLER:

No, it's not a new expression –

WILLIAM YOUNG J:

And if there's authority that says if it's got a business purpose it's not a nuptial settlement perhaps you should take us to that.

MR BUTLER:

I don't have an authority that says –

WILLIAM YOUNG J:

I'm not surprised.

MR BUTLER:

– in terms, that.

WILLIAM YOUNG J:

Well I'm not really surprised actually.

MR BUTLER:

No, but my point is equally there isn't a proposition that goes the other way, that simply says, with respect, there isn't a case that goes the other way which says a settlement is a nuptial settlement simply by dint of the fact that it's –

WILLIAM YOUNG J:

It's referable to a marriage.

MR BUTLER:

It makes reference to people who are in a marriage and they are beneficiaries of the settlement. In other words, what I'm saying is in my submission –

ELIAS CJ:

Well, is there any authority, though, that says that that's irrelevant? There couldn't possibly be. Doesn't it almost go without saying?

MR BUTLER:

Well, if there's no reference to the parties to a marriage then it's highly unlikely to be a nuptial settlement.

ELIAS CJ:

No, but if there is reference, if there is reference.

MR BUTLER:

No, not necessarily. That's the point. The point is that there are many forms of trust and many forms of settlement, trustees that are created in respect of which there could be a reference to parties.

WILLIAM YOUNG J:

But is there – from recollection, there are two lines of cases. One deals with settlements that are entered into a sense of the abstract where there isn't a marriage but it covers the possibility there might be. No one is in mind.

MR BUTLER:

Yes, correct, yes, indeed.

WILLIAM YOUNG J:

Okay, not a nuptial settlement on the existing authorities.

MR BUTLER:

Correct.

WILLIAM YOUNG J:

There are then settlements that are then referable to a marriage that has taken place, the children that are born, nuptial settlement.

MR BUTLER:

No, and I think that's the point, it's not as clean as that, Sir, so the point being that it's not sufficient for a settlement to make reference to spouses and children. All one's got to do is consider the full nature of the settlement and that's why, as I said in my

submission, where I'm coming at it from is that at the end of the day what the Court of Appeal did hear was cut to the chase. What it did was say the focus in *Ward* really is on expectations, so let's have a look at those expectations to determine –

WILLIAM YOUNG J:

Well, let's have a look at the authorities on it. Are there any – there must be authorities on this issue. I would have thought it was quite a simple issue but I may be wrong. I mean, are there any authorities that say, well, it's a settlement that inform is referable to a marriage and children and in accordance with ordinary principles if it was settled at, if the settlement was in relation to a passive investment or land there would be a nuptial settlement but it really matters what the assets are?

MR BUTLER:

I've not been able to find anything in terms, Sir, because what the cases seem to focus on is really around this question of referability to a relationship. That seems to be –

WILLIAM YOUNG J:

How do they determine that by reference to the settlement itself?

MR BUTLER:

So they look to the terms of the settlement. They also seem to look at the surrounding factual matrix.

WILLIAM YOUNG J:

What are cases where they do that?

MR BUTLER:

So, for example you might say, well, something like *Van den Brink* would be something like that so if you look at both High Court and Court of Appeal, just looking at that one, one's looking there at what were the terms of the settlement but also what were the circumstances surrounding that particular settlement?

WILLIAM YOUNG J:

I think the problem with *Van den Brink* was that it was the settlements were not referable to that marriage or those children.

MR BUTLER:

Correct, so that –

WILLIAM YOUNG J:

So it's a difficult argument. They had to say, well, after settlement, subsequent to marriage settlements that turned meant that they were themselves nuptial settlements, so that as property came to be devolved onto the trust it involved further settlement.

MR BUTLER:

That's right.

WILLIAM YOUNG J:

But what authorities that really support your view that the nature of the asset is important or even leaves that in the ring?

MR BUTLER:

Well, my submission is that when one looks at the concept of a nuptial settlement part and parcel of determining what is a nuptial settlement must be what the expectations of the parties are, at least in part.

WILLIAM YOUNG J:

There must be cases on this.

MR BUTLER:

Honestly, Sir, I couldn't find any.

WILLIAM YOUNG J:

There must be English cases as to what a nuptial settlement is.

MR BUTLER:

Most of the cases are cases around this issue of temporality.

WILLIAM YOUNG J:

Are there any that suggest it's not just a matter of looking at the trust and looking at whether it's referable to an actual wife, an actual child?

MR BUTLER:

Not just in that simple way, Sir, I'm sorry. I'd like to be more helpful to you. But my point, I suppose, is what I want to stand back in my submission and ask the Court as a question of principle when trying to do some – because let me put it this way, Sir. If the concept is of a nuptial settlement –

WILLIAM YOUNG J:

It would be really good to have a black line ball, look at the settlement, does it refer to a marriage, to a child, it's nuptial, if not, it's not.

MR BUTLER:

So for instance – but that raises exactly my issue, Sir. So let's look at this particular trust deed, so this trust deed refers to children, right, and spouses or ex-spouses of children and, indeed, of grandchildren. Is that a nuptial settlement?

ELIAS CJ:

Why not?

WILLIAM YOUNG J:

Why not? It is if the –

MR BUTLER:

Well, that's what I'm asking.

WILLIAM YOUNG J:

But it is in relation to the spouse. It is in relation to the spouse to whom it refers who is a real person and not a hypothetical spouse at the time, and that's what I thought the English cases said.

MR BUTLER:

So the English cases, the difficult English cases are the ones that are pre the marriage and so that seems to be the area that's most vexing in that particular field, and they were the cases that are referred to, for example, in the judgment of Her Honour, Justice Keifel, in *Kennon v Spry*. They are the cases she's looking through to try and understand the approach that the English cases take, and those cases particularly arise in the ante-nuptial scenario.

WILLIAM YOUNG J:

Okay, I'll shut up.

MR BUTLER:

No, Sir, as I said, I'm trying to be helpful. If I had one, if there was one that went against me, obviously I would be providing that to the Court. I couldn't find something on terms, and what makes, as I said, what my submission is I just wanted to make sure that my submission's understood even if Your Honour doesn't agree with it, just so that it's been made and understood is that it's not simply a question of a bright line along the lines of what Your Honour has referred to, but rather looking at –

GLAZEBROOK J:

Well, 182 applies also to settlements made by other parties on the, on the parties of the marriage, doesn't it?

MR BUTLER:

Yes, yes, it does.

GLAZEBROOK J:

And historically that was probably what was being looked at, especially women not being able to hold property in their own right –

MR BUTLER:

Correct.

GLAZEBROOK J:

– so you had settlements based on that.

MR BUTLER:

Correct.

GLAZEBROOK J:

And actually I think somebody said that the earlier cases were cases of the husband getting his claws on the marriage settlement rather than the other way round.

MR BUTLER:

That's right.

GLAZEBROOK J:

But in many of those cases you may not have expectations of the parties in any event because it may well have been that it's one can imagine a situation where somebody, a father, decides to settle something on the daughter without, for instance, telling them because they don't want the husband getting their hands on it in some manner and so they would prefer to keep it totally outside just in case there is a difficulty later in the marriage.

MR BUTLER:

That's –

GLAZEBROOK J:

So how do the expectations – and it might be absolutely clear that it's a marriage settlement because that's the old-fashioned view of the marriage settlement. It might be even said in the recitals what the father or mother might be doing in that regard.

MR BUTLER:

Indeed. I –

GLAZEBROOK J:

So how can the expectations of the parties have anything to do with that, is the question.

MR BUTLER:

So that –

GLAZEBROOK J:

So it's not in that – so it's a marriage settlement or a nuptial settlement in absolutely old-fashioned terms, absolutely clearly on its face, but the parties have no expectation of it at all because they're not told about it.

MR BUTLER:

Certainly so, if I can come to that. So when talking on this particular right, expectations, the submission I'm making is on the facts here the only expectations that are relevant, it seems to me, because the only people who had any involvement in this exercise were the husband and wife, where you've got a traditional, let's call it – can I call it a Victorian settlement, for want of another term, because that seemed to be the classic ones out of Dickens and those sorts of cases – so if we're talking

about a Victorian settlement, of course in that context one would be looking to the expectations, for example, of the settlor, and there's nothing in our submissions that would seek to exclude that but again, in my submission, the appropriate phrase that I'm using is looking at the expectations of the settlor, what was it that the settlor intended, and to what extent, if relevant, were those intentions shared with the marriage parties?

WILLIAM YOUNG J:
The settlor's not going to say, "I intend this to be subject to section 182 of the Family Proceedings Act."

MR BUTLER:
No.

WILLIAM YOUNG J:
So what is the intention?

MR BUTLER:
Well, the intention is that which is set out in *Ward v Ward* because *Ward v Ward* records what the purpose of section 182 is.

WILLIAM YOUNG J:
But that's as to – isn't that – that's referable to remedy, not definition?

MR BUTLER:
No, because it – what it, with respect, Sir, sorry, what it's saying is it tells you what the purpose of the section is and it seems to me the purpose of the section must inform also what the triggering concept, ie, nuptial settlement, is. That stands to reason. Taking another context, if, for example, if one's looking at, say, a Bill of Rights' right, figuring out a right that gets triggered, you look at the purpose of the Bill of Rights. Again, I'm taking something just in terms of how one undertakes legal reasoning. One looks to the purpose of that particular right or the purpose of the particular of the Bill of Rights more generally to determine how you interpret the trigger event. So in my submission it's perfectly acceptable and, indeed, quite proper for me to submit that when trying to understand what a nuptial settlement is you look at the purpose that section 182 is trying to realise because you want to make sure you sweep within section 182 enough settlements to enable section 182 to do its job, but not include those –

GLAZEBROOK J:

Well, why wouldn't she –

MR BUTLER:

– which don't fall within –

GLAZEBROOK J:

Why wouldn't she have an expectation in this case? Her car was provided by it. She was a beneficiary of it and –

MR BUTLER:

She was.

GLAZEBROOK J:

– actually had distributions from it in terms of the use of her car.

MR BUTLER:

Well, of course, one of the points that's come up is the extent to which the provision of the car actually was the distribution from the Trust.

GLAZEBROOK J:

Well, it certainly was during the marriage because she didn't pay for anything. It was only after the marriage broke up that she paid for expenses. But, in any event, it is still a provision of a capital expenses. Paying for expenses doesn't actually make it any less of a distribution, does it? She's not paying rent.

MR BUTLER:

No, that's right, she's not. Exactly.

GLAZEBROOK J:

Even post-marriage, and pre-marriage she was paying nothing at all.

MR BUTLER:

Mmm, and what I –

GLAZEBROOK J:

Sorry, pre-break-up of marriage, I'm sorry, as I understand it. If that's not right, then let us know.

MR BUTLER:

Yes, no, that's – my understanding is I think that a car was provided during the marriage. As it happens, as I now understand it, just as a result of orders made in respect of maintenance in the Family Court in the last couple of months, the car is now being provided separately by Mr Clayton, and so that was something I was going to come to in terms of relief, in terms of how the expectation in respect of the car has been met. That's now been met through maintenance.

ELIAS CJ:

But the text of section 182 isn't very supportive of your emphasis on expectation of the parties because it's the trust aspect of it all, the settlement aspect of it is any ante-nuptial or post-nuptial settlement made on the parties.

MR BUTLER:

Mmm.

WILLIAM YOUNG J:

Can I just read you a bit, a passage I cited in *Van den Brink* from Lord Nicholls in *Brooks v Brooks* [1996] 1 AC 375 (HL)?

MR BUTLER:

Yes.

WILLIAM YOUNG J:

"These expressions," "ante-nuptial" and "post-nuptial", "are apt to embrace all settlements in respect of the particular marriage, whether made before or after marriage." Now can you go past that?

MR BUTLER:

Well, I can –

WILLIAM YOUNG J:

I mean, he doesn't leave any sort of room for, "Oh, but that doesn't include trust where the assets are business in nature." He just says "all".

MR BUTLER:

Yes, and I suppose the –

WILLIAM YOUNG J:

Have you got that case?

MR BUTLER:

Yes, I did have it indeed. I'm not sure where it is in my materials.

WILLIAM YOUNG J:

Well, how does that, how do you reconcile your argument with what Lord Nicholls said there?

MR BUTLER:

Because again, in my submission, when looking at what the phrase "in respect of" means, one takes –

WILLIAM YOUNG J:

What word? "Or"?

MR BUTLER:

No, I think "in" –

GLAZEBROOK J:

No, "in respect of".

MR BUTLER:

– "in respect of".

WILLIAM YOUNG J:

In respect of the particular marriages?

MR BUTLER:

Has Your Honour got the –

WILLIAM YOUNG J:

Well, why –

GLAZEBROOK J:

Sorry, in the case.

MR BUTLER:

In the case, so –

GLAZEBROOK J:

But not in the section though.

MR BUTLER:

Your Honour, would you do me the favour of just referring me to the relevant page and – of the *Brooks* –

GLAZEBROOK J:

Have we got it or –

WILLIAM YOUNG J:

It's at – no – it's at 392 of the report. That's the appeal cases report.

MR BUTLER:

Helpfully, I've got the All Englands, and, of course, it's before we had paragraph numbers.

WILLIAM YOUNG J:

I'm just citing it out of the judgment in *van den Brink*.

MR BUTLER:

All right, okay, thank you.

WILLIAM YOUNG J:

Which bundle?

MS CHAMBERS QC:

Your Honour, it's in our bundle, SC38.

GLAZEBROOK J:

So it's the 24 August one?

ELIAS CJ:

No, no, the other one.

MS CHAMBERS QC:

At page 121. The bundle for this appeal.

ELIAS CJ:

121?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

Thank you.

MR BUTLER:

And so that's –

GLAZEBROOK J:

So that's page 124. It's a particular passage.

MR BUTLER:

And here's the part, I think, the paragraph 7.

WILLIAM YOUNG J:

It's all right, I still haven't got it actually.

GLAZEBROOK J:

It's page 124 of the authorities for the wife dated 18 August on the – so they're in the 38 appeal.

WILLIAM YOUNG J:

I've got something different.

GLAZEBROOK J:

You're probably in the wrong bundle. It's the 38 bundle.

WILLIAM YOUNG J:

Yes, but I've got a 38 bundle and 124 –

GLAZEBROOK J:

Has it got 18 August on it?

WILLIAM YOUNG J:

No, that's what I'm looking for.

ELIAS CJ:

You can have a look at this anyway, I've looked at it, it's brief.

WILLIAM YOUNG J:

This is *Van den Brink*.

MR BUTLER:

Yes.

WILLIAM YOUNG J:

Sorry, I was looking for *Brooks v Brooks*.

GLAZEBROOK J:

Have we got *Brooks v Brooks*, I don't think we have.

MR BUTLER:

There's no *Brooks v Brooks*. I don't think it's in the bundle. So the way I read *Van den Brink* is paragraph 7, sorry, I should bring my microphone over here, in the High Court the Judges concluded that a settlement would only be relevantly ante-nuptial if premised on the existence and continuation of the marriage that is both its rationale and purpose. And so they saw this as consistent with the approach taken in *Brooks v Brooks*, and then as I read the rest of paragraphs 8 and 9, and indeed 10, if you look at 10 the Court there says, "If the application for leave to appeal rested on the ante-nuptial settlement argument, we would not grant leave." So if you were really interested in, if I can put it that way, you were interested in the well post-settlement could the addition of property –

WILLIAM YOUNG J:

Post-settlement – yes, devolutions of property on the trust post-marriage, right, yes.

MR BUTLER:

Post-marriage, sorry I meant to say, post-marriage, whether they would have a different character and so the point I'm trying to make, Sir, here is when I'm looking at paragraph 7 of this leave judgment, the key part of that that I'm relying on, and that reflects *Ward v Ward*, is this, the fact that the settlement is premised on the existence and continuation of the marriage. That is both its rationale and purpose. And why is that the touchstone? Well that's the touchstone because that's what relates to the purpose behind section 182.

ELIAS CJ:

So what do you say – sorry, I'm now a bit lost. Not your fault. What do you say is the purpose behind section 182?

MR BUTLER:

So it's the purpose set out in *Ward v Ward* which is to allow the Court to intervene. Let me see if I can find it. I'm trying to stay within the Court of Appeal judgment so as to mean that we're not going through too many volumes or tabs, so if we look at 167 of the Court of Appeal judgment, you see paragraph 138 of the decision of Justice Rodney Hansen, which I think fairly characterises what was said by this Court in *Ward v Ward*, "The scope and purpose of s 182 was discussed in *Ward v Ward*. In tracing the legislative history of the section..." It noted that, "Ante and post-nuptial settlements envisaged and were premised on the continuance of the marriage. if that premise ceased to apply, a fundamental change in circumstances came about which it was recognised could give rise to an injustice. Section 182 sought to remedy such injustice by giving the Court the power to review."

So it's that premised on the continuation of the marriage, so that's why one looks to the expectations be they of the settlor or of the parties to the marriage, or whatever expectations relevantly inform you as to whether this premise applies in respect of the particular settlement –

GLAZEBROOK J:

Where did you get continuation, premised on the continuation of the marriage?

MR BUTLER:

Of the marriage, so I'm looking at, I'm still within paragraph 167 of the Court of Appeal, and I'm within paragraph 138 of Rodney Hansen –

GLAZEBROOK J:

Sorry, so where does that come from?

ELIAS CJ:

From *Ward v Ward*.

MR BUTLER:

That comes from *Ward v Ward*.

ELIAS CJ:

But does that say anything more than the legislature saw a need to address the injustice that arises when property is settled for the benefit of parties to a marriage and the marriage doesn't continue. I mean it's really just indicating what the section does, doesn't it? And why does that matter apply here?

MR BUTLER:

So, the reason in my submission it doesn't apply here, it goes to what the expectations of the parties were, and as I said when I started all this aspect of the submissions I was saying what the Court of Appeal did in a sense was it cut to the chase and didn't directly address the question as to whether or not the settlement is or is not a nuptial settlement because in its view, consistently with the view of the Courts below, the answer to the question as to whether or not section 182 should be applied, as in given effect to on the facts of this particular case, was that when we look at the expectations of the parties here, the expectations around the settlement were not premised on the continuation of the marriage because it was not a purpose –

ARNOLD J:

But to some –

MR BUTLER:

Sorry if I could just –

ARNOLD J:

To some extent that's based on the existence of the pre-nup, isn't it? I think both Courts mentioned the – and one of the things that troubles me about that analysis is if the pre-nup is unclear, as in this case, and therefore not enforceable, is it really appropriate to look at the pre-nup as evidence of the parties' intentions?

MR BUTLER:

I think it is. Can I explain why if I may please? So I think what's interesting here in terms of this pre-nup, if I can use the phrase, the pre-nup here, remember the premise of the Family Court was that the pre-nup started off being fair. But by the time, when it arrived at hearing, there'd been accepted by Mr Clayton that it had become unfair. So my point simply is, there's nothing logically inconsistent about saying that the pre-nup can help inform, it's part of the factual matrix around which one can make an assessment of what the parties' expectations were, at the time at which the settlement was entered into .

WILLIAM YOUNG J:

But in fact the pre-nup has got nothing to do with family settlements.

ELIAS CJ:

No.

WILLIAM YOUNG J:

And in any event to give it effect is, as the way the Court of Appeal does, is effectively give it some validity when it's been held to be invalid. But can I take you back to *Brooks v Brooks*?

MR BUTLER:

Sure.

WILLIAM YOUNG J:

That was a pension scheme. In 1980 Mr Brooks' company set up a pension scheme under which he was the beneficiary but on his death discretionary benefits could be paid to a group of people including his widow, parents, grandparents, children, and anyone financially dependent him. It didn't look like a nuptial settlement at all but it's still within the scope.

MR BUTLER:

Yes, but I think what's interesting there is that aspect of reference to somebody being financially dependent on, so I think it's –

WILLIAM YOUNG J:

But that's right at the end. I mean this is only in retirement or after he dies. There's a section where the Judge, Lord Nicholls, and all the other Law Lords agree with him,

discusses marriage settlement, and it says, for these purposes, a wide meaning is given, no precise limitations. "The object doesn't dictate that settlement be given a narrow meaning. On the contrary, the purpose of the section would be impeded, rather than advanced, by confining its scope. The continuing use of the archaic expressions 'ante-nuptial' and 'post nuptial' does not point in the opposite direction." And then he refers to a reasonable old case. "Applying this approach, there is no difficulty with a disposition which creates interests in succession… nor is there difficulty where the interests are concurrent but discretionary." And then this is where he comes to in the end where he says "all". I just can't see that you've got anything in the authorities, any peg in the authorities to hand this argument on at all. I think it's a pity the Court of Appeal sort of missed the point because, you know, their reason, they haven't given a proper basis for rejecting the argument that this was a nuptial settlement.

MR BUTLER:

And what I say in response to that, Sir, is that when one reads paragraph 177 of the judgment of the Court of Appeal what it is doing, as I said earlier, it's not directly addressing the status of the settlement as a nuptial settlement as such.

ELIAS CJ:

But if it doesn't address it then you just have to tell us how we should address it. It's not of any help to us.

MR BUTLER:

What I'm saying Your Honour should do is that on this fourth instance appeal the conclusion reached by the Family Court, High Court, and indeed by the Court of Appeal, that in terms of the expectations held by the parties were not those, and were not the necessary expectations, the phrase in paragraph 177(b) of the judgment, that should be upheld.

GLAZEBROOK J:

Can I just – I really have difficulty because she did benefit during the marriage. She was intended to benefit during the marriage, and she did so. The Courts below seem to have said, because she couldn't have had that expectation on the dissolution of the marriage 182 doesn't apply but I don't see anything in *Ward v Ward* that says that, that you look at the expectation on a break up, because the idea is if you expect to benefit during the marriage, and you assume that the marriage is going to continue so you haven't had a this lasts for 10 years and that's it, and after that there is no

expectation of anything, when I would have thought expectations on the break up are irrelevant because 182 is specifically designed to deal with the fact that the marriage is now broken up and therefore the reasonable expectations during the period based on the trust deed can no longer be fulfilled, or may no longer be fulfilled. So why look at the expectations on break up and I don't see anything in *Ward v Ward* that suggests that.

ELIAS CJ:

That's what I was trying to put to you earlier but Justice Glazebrook has put it much better.

MR BUTLER:

Sorry, thank you that's helpful.

GLAZEBROOK J:

Well because this paragraph 15 it says that what you've got are ante and post-nuptial settlements that assume the continuation of the marriage so these, when people set these things up, as I say, they're not assuming that the marriage is going to break up necessarily are there? And, or in any event is that relevant anyhow even if they do anticipate that, because 182 says, well if it does break up and that happens, this is actually to redress that balance. So even if it says, as soon as this wife is no longer my wife, she's out. It doesn't mean that 182 can't apply, does it?

MR BUTLER:

Well –

GLAZEBROOK J:

Because she can't have had any expectations there in the sense of expectations on break up but she sure did have expectations during the continuation of the marriage, I'm speaking generally here, but in this case Mrs Clayton still had benefits from it being the car. If you need that.

MR BUTLER:

Yes, well I think coming to that last point first, I think one does need some sort of expectation or reality of benefit it seems to me.

ELIAS CJ:

When?

MR BUTLER:

At the time at which the settlement is entered into because they're the relevant expectations. What is it that this settlement is going to provide? What is it going to do? What is its purpose? What reasonable expectations can I have of this settlement during the course of the marriage and, if the marriage should end, post the marriage.

ELIAS CJ:

Well that's two times.

GLAZEBROOK J:

Yes, that's twice, that's what I'm unsure about.

MR BUTLER:

No, no, it's the expectations at the outset. Is this settlement –

ELIAS CJ:

About what will happen if a marriage fails?

MR BUTLER:

Yes, what expectations do I have from this settlement. Will this settlement be providing for me. Will I have a call on this settlement and that's why here the evidence about the business purpose and such like of the settlement is important because what the evidence showed, and this was accepted by the Family Court and the High Court and again by the Court of Appeal on the third go, is that the business purpose was the primary purpose behind this trust. So that –

GLAZEBROOK J:

Well it was a protection of assets purpose but in terms of what was going to happen to the assets, and what was going to happen to the income, don't you look at who the beneficiaries are?

MR BUTLER:

Yes, and those beneficiaries include, for example, the companies.

GLAZEBROOK J:

Right.

MR BUTLER:

So they are persons or corporations that could have been appointed by the trustees where appropriate. So my point –

GLAZEBROOK J:

But that's part of the marriage, isn't it? That's part of the marriage business. Leaving aside the separate property and the argument that Ms McCartney makes, certainly the increase in value, even if that's a separate asset, is part of the business and any distributions are going towards that, which if you want to put it is the enterprise of the marriage, isn't it?

MR BUTLER:

But the enterprise is not necessarily something which is going to be confined to, or premised on, the continuance or existence of the marriage as such.

WILLIAM YOUNG J:

But it doesn't have to be. I mean the whole thing is these settlements often provide for people other than the husband or wife or the children. They often, the reason why there is a section 182 and its precursors is because a settlement isn't going to work very well perhaps, or there's a need to reconsider it in light of a breakdown of the marriage.

MR BUTLER:

Well not quite that way because if you think of the classical one is you've got a settlement on husband and wife. When that person, when, say, wife and husband cease to have that status then, of course, by dint of ceasing to have that status what used to happen was you were no longer eligible to look to the settlement for the provision of your –

WILLIAM YOUNG J:

It depends on whether it's by reference to names or status.

ELIAS CJ:

And anyway, that's why section 182 was enacted because the legislature decided that that was unfair.

MR BUTLER:

Yes, that's right, and so what – but that's nonetheless why this Court and *Ward v Ward* that what one's got to look at is the expectations and the expectations, this Court said, you look not only at the terms of the settlement but also at how it is that the particular settlement has been run. That is exactly what the family –

ELIAS CJ:

Well I don't see anything in *Ward v Ward* which deals with expectations of what will happen after the end of the marriage relationship.

MR BUTLER:

But I didn't say that one was at the end of the marriage, what I was saying is, well, what are the expectations that the parties' had at the time at which the settlement was entered into and –

GLAZEBROOK J:

Whereabouts, what are you relying on specifically in *Ward v Ward* which –

MR BUTLER:

All right, let me just get *Ward v Ward*.

GLAZEBROOK J:

– which is at 47 of the volume we were just looking at. Well at least I'm at 47 because it's – which is about half way through *Ward v Ward* which maybe not where you are.

MR BUTLER:

All right, so if one looks, again I'm trying to keep within, keep it within a short compass. So if we look at page 260 of the case, 168, paragraph 168. And here conveniently the Court of Appeal sets out paragraph 35 to 27 of *Ward v Ward,* and we look at paragraph 26.

GLAZEBROOK J:

Well 25 doesn't say very much for you, does it, because it says, "What were the expectations at the start?" Then it contrasts those with the expectations under the changed circumstances –

MR BUTLER:

And that's – I wasn't saying anything different.

GLAZEBROOK J:

– that assumes that under the chain of circumstances the wife's going to be cut out but it doesn't say anything about at the beginning you look at what their expectations were on a dissolution.

MR BUTLER:

But I feel we're at cross purposes. My submission was that one looks at the expectations the parties' had at the time the settlement was made.

GLAZEBROOK J:

Well no, but you say the expectations include what is going to happen if the marriage breaks up and I don't see anything in 25 that says that. In that first part it's comparing two different things, what are you expectations at the beginning? Did you think you were going to benefit from it? Assuming a continued marriage, and you compare that to what's going to be your situation on a dissolution and if there's a difference then you might get a remedy under 25.

MR BUTLER:

No, with respect, that's not right. What I said was and what this passage says is you look at the expectations that the parties' had at the time the settlement was made. What are the –

GLAZEBROOK J:

Yes, but you say those include expectations if the marriage breaks up –

MR BUTLER:

Indeed, that's what I submitted.

GLAZEBROOK J:

– and I don't see anything in paragraph 25 that says that, so where –

MR BUTLER:

But they may be –

GLAZEBROOK J:

– so where does it say that in *Ward*?

MR BUTLER:

But they may be expectations that you had at the time the settlement was entered into.

GLAZEBROOK J:

But it doesn't say anything about looking at expectations when the marriage breaks up, it's talking about expectations of benefit during the marriage, isn't it? If you put it back with the premise that it's assuming a continued relationship which is the premise that the Court says at paragraph, sorry, I found it earlier, paragraph 15, sorry.

MR BUTLER:

Paragraph 15, thank you. Sorry Your Honour, I'm just finding that passage now. That's right, so if the premise, and that's what I've referred to in the submissions and indeed my road map, is that important premise, is that settlement envisaged and was premised on the continuance of the marriage. I'm looking at the correct passage, paragraph 15 of *Ward v Ward* –

GLAZEBROOK J:

Well so you're saying it's not a marriage settlement if you say if we divorce there's no longer, she's no longer a beneficiary, or he is no longer a beneficiary, is that the submission?

MR BUTLER:

Yes, that's right, that must be right because your expectation of the settlement is, I'm not going to be relying on this post the marriage, so therefore your expectations –

GLAZEBROOK J:

But doesn't that defeat the whole purpose of section 182?

MR BUTLER:

No, no it does not, no, and the reason it does not, with respect, the reason it does not, with respect, is that what the Court is being asked to do by section 182, and this is important, what is being asked to do by 182 is to say, is there a mismatch between expectations. So if the expectation at the outset was, and this must in principle be

right, that I can only look to this settlement for as long as I am married to you, then when the marriage comes to an end it cannot defeat your expectations and there is no cause to intervene by the Court if indeed you cannot enjoy the fruits –

ELIAS CJ:

Well I just don't see any indication in section 182 about the emphasis on expectations that you are relying on, and the passage in *Ward v Ward* isn't directed at this submission.

MR BUTLER:

Well I am referring to paragraph 15 and trying to extrapolate paragraph 15 simply because Her Honour Justice Glazebrook has drawn it to my attention and I simply wanted to make the point that when one thinks about the fundamental premise of section 182, being the continuance of the marriage, it is not a surprise that if it was contemplated that provision from the settlement would cease post-dissolution, or post-separation, then of course one wouldn't have looked at the settlements. I'm simply just responding to the point that's been point to me by Justice Glazebrook. And it's because the premise ceases to apply, as the Court explains in paragraph 15, that the unfairness arises, and that's why the expectations of the parties are important.

GLAZEBROOK J:

So the submission is if you can't expect to benefit from a trust post-settlement 182 has no application –

MR BUTLER:

Post-settlement or post –

GLAZEBROOK J:

Either on break up?

MR BUTLER:

Break up, yes.

GLAZEBROOK J:

Yes.

MR BUTLER:

It must be right.

GLAZEBROOK J:

Well you might like to explain why, again.

WILLIAM YOUNG J:

Well why can't she expect to benefit post-separation?

MR BUTLER:

Because if her expectation was that I only enjoy the fruits of this settlement for as long as the marriage is in place, then when that fundamental premise comes to an end, then not intervening is entirely consistent with what her expectations were. The point of section 182 is to deal with disappointed expectations –

WILLIAM YOUNG J:

But why should she not be entitled to expect that the trust would continue to run dispassionately between her and the other discretionary beneficiaries?

MR BUTLER:

Sure, so now we're shifting away from the abstract –

WILLIAM YOUNG J:

No, no, I know, I'm just wondering –

MR BUTLER:

– to this particular case, so I'm dealing with –

ARNOLD J:

It does refer, by the way, this trust to former wives whom are listed beneficiaries.

MR BUTLER:

Yes, sorry, they're two different questions, three coming at me, so I'm happy –

WILLIAM YOUNG J:

It does, it's at page 1189.

MR BUTLER:

Yes.

WILLIAM YOUNG J:

So why shouldn't she expect to continue to benefit post-settlement?

MR BUTLER:

Exactly, and so, that's right –

WILLIAM YOUNG J:

I thought you were saying she couldn't expect to benefit post-settlement?

MR BUTLER:

No, no, the proposition was put to me that that is how the section operates and I'm simply dealing with the, I could have said, look, that's not relevant here but it seemed to be that the Court wants to tease, wants to use this case to tease out aspects of how this section works, and I'm happy to assist the Court if that's what it's wanting to do is tease those out, but I'm –

ELIAS CJ:

But are you relying on expectations?

MR BUTLER:

Yes, I do rely on expectations.

ELIAS CJ:

Yes, well I need to put to you that I just don't see that section 182 is premised on the expectations of the parties. It provides the circumstances in which the Court can exercise jurisdiction. All that is required is a pre-nuptial settlement –

MR BUTLER:

It's a nuptial settlement.

ELIAS CJ:

Is a nuptial settlement.

MR BUTLER:

Mhm.

ELIAS CJ:

Once that is in place then the Court can make such order as it thinks fit.

MR BUTLER:

Yes, I accept the steps Your Honour has gone through and my submission has been, contrary to the submission of my learned friend Ms Chambers is that the Court of Appeal, far from not correctly applying a two-stage test, cut to the chase, that was a phrase I used when I opened. They noted that an argument had been made around nuptial settlement and what the Court said was, look, we can state the reasons why there will not be provision made under section 182 –

WILLIAM YOUNG J:

But they said it wasn't a nuptial settlement.

MR BUTLER:

– shortly.

WILLIAM YOUNG J:

Just pause there.

MR BUTLER:

Where?

WILLIAM YOUNG J:

Didn't they say it wasn't –

MR BUTLER:

No.

WILLIAM YOUNG J:

– they disagreed that it was a nuptial settlement?

MR BUTLER:

No, they didn't deal with it. That's my whole point.

ELIAS CJ:

But listen, if they didn't deal with it, can't we move on and look at what the correct analysis is because you say they should have looked at it, and if they had I

understand your argument to be that there is not a nuptial settlement and you make that argument on the basis of the circumstances that these were business assets and you make that argument on the basis that there's no expectations of benefit, a proposition that is difficult to reconcile with the terms of the trust.

MR BUTLER:
No, I don't accept that last proposition.

ELIAS CJ:
All right, but the area of argument that we're in here is simply that area of the characterisation of this trust is a nuptial settlement, isn't it?

MR BUTLER:
So what we have been debating the last wee while is exactly that characterisation.

ELIAS CJ:
Yes.

MR BUTLER:
The point that I made when I opened was to say that this is an appeal against the Court of Appeal's decision. The Court of Appeal in my submission to you did not deal directly with the question of whether this is or is not a nuptial settlement because it didn't need to. What it did was –

WILLIAM YOUNG J:
It's a matter of interpretation of para 177. I had actually read it as saying it's not a nuptial settlement.

GLAZEBROOK J:
Well the first part certainly does say that. It's only 177(b) that talks about characterisation that they say they don't accept that the Courts below erred in holding it wasn't a nuptial settlement.

MR BUTLER:
But I think a fair reading of 177, because all of 177 needs to be read in a context with the Court of Appeal is saying well look we can deal with this relatively quickly, is to say here are the submissions that were made to us by Lady Chambers. She submitted the following things. Her submissions were that the Court below erred in

deciding that Claymark was not a nuptial settlement and that therefore no order for provision should be made.

GLAZEBROOK J:

But if Mrs Clayton appeals against this we can't be bound by the findings of the Court below that it's not a nuptial settlement because otherwise her appeal is useless. So we'll say, well, if it was a nuptial settlement but we can't decide that we would have given her a share, but as – so obviously she's appealed against a finding that it's not a nuptial settlement, hasn't she?

MR BUTLER:

Well I'm not criticising her in that regard. I'm simply trying to –

GLAZEBROOK J:

Well then you have to deal with it, don't you?

MR BUTLER:

Well I have, I have. What I'm trying to say is how do we correctly read the Court of Appeal paragraph 177. I say, again I know I'm repeating myself, I say the Court of Appeal does not in terms deal with nuptial settlement, why not –

GLAZEBROOK J:

But what's it matter if we have to deal with nuptial settlement?

MR BUTLER:

Sure, and that's why I've been happily engaging with you on this particular thing because I apprehended from early on that Your Honours felt that this might be a case where actually dealing with the concept of nuptial settlement might be useful guidance for the Courts below that have got to interpret this legislation, particularly since it wasn't addressed in *Ward v Ward*, so I'm trying to assist Your Honours in that regard, but please don't misapprehend my –

WILLIAM YOUNG J:

So is your argument that it's not a nuptial trust?

MR BUTLER:

Yes. So I have put up argument, because – to help Your Honours focus, since this issue of nuptial settlement seems to be one that troubles you, I'm doing what I should

do which is try to argue that it's not so that you can test for yourselves your own conclusions if you want to make a ruling, if you want to address this issue as to what is or is not a nuptial settlement.

GLAZEBROOK J:

But we have to because we've got an appeal in front of us saying apply 182. If it's not a nuptial settlement we can't apply 182 so we've got to decide whether it's a nuptial settlement or not.

MR BUTLER:

No you don't, you could apply the same approach that the Court of Appeal, with respect, applied which is to say it doesn't really matter, we don't care, because frankly we agree with the Family Court, the High Court and the Court of Appeal when they concluded at the end of the day, looking at the evidence in the round –

GLAZEBROOK J:

Well, we could but you will have to deal whether it's a nuptial settlement because there is always a risk that we won't take the same view as the Court of Appeal.

MR BUTLER:

Sure, and that's –

GLAZEBROOK J:

So you do have to do both.

MR BUTLER:

And I have. I have said, as you see in my remit, I have put forward reasons why, if you want to tackle the question as to whether this is or is not a nuptial settlement, why you should reject the proposition that it is a nuptial settlement and I have said, submitted rather, that the reason you should reject that is because in order to be a nuptial settlement, and under paragraph 4.9 of my roadmap, because the concept of a nuptial settlement is, in my submission, intimately tied to the expectations of the parties. That's the submission I'm making to you and myself and Justice Young had quite an exchange as to whether my approach is correct or should be accepted or rejected. I apprehend that His Honour would reject it but we have been having that discussion around whether or not this is or is not a nuptial settlement.

GLAZEBROOK J:

Well then why – then you need to deal with the factual situation as to why the expectations of the parties in this case are that it isn't a nuptial settlement.

MR BUTLER:

Yes, and so that's –

GLAZEBROOK J:

And one of them was because it was set up for business purposes and there are business beneficiaries, is that right?

MR BUTLER:

Correct.

GLAZEBROOK J:

Anything else?

MR BUTLER:

So if we look –

ARNOLD J:

Well the other thing you indicated, I think, earlier in your submissions is that it was appropriate to look at what had happened under the trust.

MR BUTLER:

Yes.

ARNOLD J:

Now Justice Glazebrook has raised the question of the vehicle but there's also the question that the 1999 accounts reveal an advance from Mrs Clayton to the Trust of $86,000 or something. Now we don't know the background to that and we don't know how long the advance was in place.

MR BUTLER:

No we don't, and I thought, yes, and I remember there was the exchange with my learned friend, Ms McCartney, hopefully I'm recollecting. It's a week ago in my life, that's quite a long time, but my recollection –

ARNOLD J:

Yes, no, no, I understand, but it's clear that it was an advance from her because –

MR BUTLER:

Sir, that's what I wasn't sure where that's where we actually, whether we actually landed on that. So that was the distinction between M A Clayton and M Clayton –

ARNOLD J:

Well just let's take a moment and establish that it is from her and then you can tell me whether it's relevant –

MR BUTLER:

Yes.

ARNOLD J:

– on your view to the issue. If you look at 1220.

ELIAS CJ:

What volume?

ARNOLD J:

That's in volume D.

ELIAS CJ:

Thank you.

ARNOLD J:

The yellow one, so that's the, really, two entries are.

GLAZEBROOK J:

Sorry, yellow, page?

ARNOLD J:

1220.

MR BUTLER:

Yes, I remember these.

ARNOLD J:

And then if you look in that volume at 1182.

MR BUTLER:

1182.

ARNOLD J:

And that's the evidence of Mr Giesbers.

MR BUTLER:

Yes.

ARNOLD J:

And if you look on paragraph 9 he says, “In the year ended 31 March 1999 Mark had advanced 166,000-odd to Claymark Trust.

MR BUTLER:

Yes.

ARNOLD J:

If you go back to one hundred and – 122 –

MR BUTLER:

I see what you're doing, matching up those two, exactly.

ARNOLD J:

That's right.

MR BUTLER:

So you'd say those two correspond.

ARNOLD J:

So M Clayton must be an advance from Melanie Clayton. I mean that's the only other possibility I guess. Now we don't know the background to it. We don't know how long it was for their – was there for but on the assumption that it was an advance from her it must have been from relationship property, there’s no evidence that she had any independent wealth. Now does that, would that be relevant to the question of whether this was a nuptial settlement or not?

MR BUTLER:

I think not and can I say why?

ARNOLD J:

Yes.

MR BUTLER:

Because here what one is looking at here is an advance that's made. So the expectation that she had as against the Trust was that that advance would be repaid. The same way that one lends money to another person the expectation one has, that does create an expectation of receiving a distribution or something of that sort. What it simply indicates is, "I've leant you money, I'd like to be repaid at an appropriate point." That would be my submission on that.

GLAZEBROOK J:

But an interest free loan? That would be slightly odd, wouldn't it, that you would lend interest free to something you have nothing to do with?

MR BUTLER:

Not necessarily, I've been the beneficiary of interest free loans and people are not my family.

GLAZEBROOK J:

Lucky you, but I can't imagine that it's very common.

MR BUTLER:

Well, what's to say that it isn't? I mean, this goes to the point about evidence being directed to the point. I mean, I'm just standing in front of you and on the fourth go –

ARNOLD J:

Yes. No, that's fine. I just wanted to hear what you had to say about it.

MR BUTLER:

Yes, so again, I'm not asking whether you agree or not but do you understand what I'm saying? I think it's fair to say that all that creates in terms of an expectation is money of some sort or other and we don't know the extent to which, to what's, extent of his money, whether it's a journal entry or something of that sort. We just don't

know, so, for me, I think it would be putting an inordinate amount of weight on that entry, with respect.

GLAZEBROOK J:

Well, what else are you relying on to say she didn't have any expectations? The pre-nuptial agreement, is that…

MR BUTLER:

Yes, I think I've set out in my road map, again I'm at page 8, the –

GLAZEBROOK J:

What do you say about the vehicle in terms of an expectation realised?

MR BUTLER:

Again, with respect –

GLAZEBROOK J:

An expectation of benefit realised, what do you say about that in terms of her likely expectation at the time the trust was set up?

MR BUTLER:

So –

GLAZEBROOK J:

That that would have come as a surprise to her?

MR BUTLER:

Which? Getting the vehicle or not getting the vehicle?

GLAZEBROOK J:

Well, that she benefited during the marriage from the trust would have been a surprise to her on your analysis because despite it being a trust of which she was a beneficiary she couldn't possibly have expected to have a benefit, either during the marriage or on its dissolution.

MR BUTLER:

Well, can I just have a quick moment because the question of this car is a little bit opaque and, as I said, the essential point I want to come back to if, is it, if it's the car is the tipping point as a reason to intervene, the present –

GLAZEBROOK J:

Well, it may not be. I'm just trying to get at whether it's a nuptial – we're on the whether it's a nuptial trust, as I understand –

MR BUTLER:

Yes.

GLAZEBROOK J:

– and you say it can't be a nuptial trust if she doesn't have an expectation of benefit during the marriage and after it's finished.

MR BUTLER:

Yes.

GLAZEBROOK J:

So we're trying to work out why she didn't, couldn't have an expectation and one is because it was set up for business purposes and there was a business beneficiary.

MR BUTLER:

Yes.

GLAZEBROOK J:

Another is the pre-nuptial agreement.

MR BUTLER:

Yes.

GLAZEBROOK J:

And then I'm just asking you why, if you are a beneficiary and did benefit during the marriage, and this is not whether it should be exercised but just whether you did benefit, why that means you didn't have an expectation at the beginning of the marriage, assuming, of course, that expectation is relevant for it being a nuptial trust.

MR BUTLER:

Yes, that's right. So I accept the premise, yes, that that is the assumption, and what I'm saying in terms of the car, and I would like to just check whether Ms McCartney's got – is a bit more familiar with the status of the car than I am just, just for a moment.

ELIAS CJ:

You can just deal with it though in terms of principle.

MR BUTLER:

Yes.

ELIAS CJ:

I would have thought your argument has to be one of substance, doesn't it, because there clearly was benefit and that must have been expected. So then you have to minimise it, don't you?

MR BUTLER:

Yes.

ELIAS CJ:

You have to say, well, overall –

MR BUTLER:

Correct, and that's –

ELIAS CJ:

– there's a different overall purpose –

MR BUTLER:

Correct.

ELIAS CJ:

– but you're already having to retreat a bit and from that very broad statement made by Lord Nicholls which was put to you, that's perhaps a little difficult. Anyway, where are we heading? You seem to be –

MR BUTLER:

I'm just a bit anxious on exactly that because –

ELIAS CJ:

I see, yes, yes. Well –

MR BUTLER:

– because I'm looking at time, 11.15.

ELIAS CJ:

Well, go back to Justice Arnold's question.

MR BUTLER:

Yes. No, no, sorry, I was only – I wasn't meaning to point to His Honour. I was just pointing at the clock because I've just seen it's a quarter past 11 and –

ELIAS CJ:

I see, the time, right. I thought you hadn't finished with Justice Arnold.

WILLIAM YOUNG J:

You haven't got past your first sentence.

GLAZEBROOK J:

Well, is there anything else –

MR BUTLER:

That's right. That's the joy of a hearing in this Court, a good debate.

GLAZEBROOK J:

I'm really just trying to get is there anything else as to why she didn't have an expectation? I've got the business settlement.

MR BUTLER:

Correct.

GLAZEBROOK J:

The pre-nup and the business beneficiaries.

MR BUTLER:

Correct.

GLAZEBROOK J:

Is that all?

MR BUTLER:

That's it. Well, that, in my submission, is quite a bit, yes, but –

GLAZEBROOK J:

No, no, that's fine.

MR BUTLER:

– that's right. That's –

GLAZEBROOK J:

So are we –

MR BUTLER:

– the class of factors.

GLAZEBROOK J:

– now moving on to the discretion?

MR BUTLER:

Yes, exactly, so –

GLAZEBROOK J:

So now we assume that it is a nuptial settlement and move to the discretion?

MR BUTLER:

Yes.

GLAZEBROOK J:

Is that right?

MR BUTLER:

That's right. And so here the submission is reflected in the way in which the Family Court, High Court and Court of Appeal analysed this particular question, so my submission is where at fourth instance and that for the Court to interfere with the concurrent findings in the Family Court, High Court –

WILLIAM YOUNG J:

The Family Court basically did say it's not a nuptial settlement.

MR BUTLER:

It's a bit opaque in that, Sir, I would say.

WILLIAM YOUNG J:

It's closer – I think it's – well, she doesn't go to the discretion really, just it's not crystal clear but I read it as saying there's not a nuptial settlement. The judgments of the High Court and the Court of Appeal possibly just bundle it up all together and say, "We're not going to give relief," but both, to me, rather read as though they're saying it's not a nuptial settlement but that we've had that debate.

GLAZEBROOK J:

And 177 seems to think that the Court of Appeal read it that way too –

WILLIAM YOUNG J:

Yes, and then –

GLAZEBROOK J:

– beginning of 177.

WILLIAM YOUNG J:

But, I mean, surely if they were going to do it right, they had to say, "Is it a nuptial settlement and if it is what are we going to do about it?" rather than simply say, "Here's a big pile of factors and we're not going to do anything."

MR BUTLER:

Sure, but in fairness to the Court of Appeal it's a long judgment anyway and on one of the other issues, which I think was one of the section 44C issues, they just said, "Look, this may or may not be relationship property. We're not going to go there because, for the reasons we give, we're not just going to exercise the discretion under section 44C." My point simply being –

WILLIAM YOUNG J:

Well, if they've said that here, that would be, you know, perhaps fine, if they've said, "It may or may not be a nuptial settlement but we're not going to do the exercise for these reasons," and then at least we would know what they're saying.

MR BUTLER:

Well, sure, I mean, that's the benefit of hindsight, one can always write a judgment, just somewhat better refine it. My point is I think a fair reading of the judgment means that the judgment should be interpreted in the way in which I've suggested that it should be interpreted, and just coming back to your point, Sir, in relation to the Family Court, I'm not sure that I accept quite how you've put it. Paragraph 71 is the relevant part of the Family Court's judgment as you know –

GLAZEBROOK J:

Does it matter, though, when they use –

WILLIAM YOUNG J:

It only matters to this point that he's saying that we're now dealing with are three exercises of discretion –

MR BUTLER:

Yes.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

– for all the same –

MR BUTLER:

Correct, correct.

WILLIAM YOUNG J:

– and I'm saying, well, I'm not sure –

GLAZEBROOK J:

Oh, I see, yes.

WILLIAM YOUNG J:

– that they really –

MR BUTLER:

Yes, exactly.

WILLIAM YOUNG J:

– did get off the point.

MR BUTLER:

And so, as I said, it's paragraph 71 of the Family Court –

ELIAS CJ:

What paragraph do you rely on –

GLAZEBROOK J:

But it's not a –

MR BUTLER:

So when the case –

GLAZEBROOK J:

It's not a discretion, is it? You're not arguing that we can only interfere on those –

ELIAS CJ:

I think he is.

GLAZEBROOK J:

– narrow *May v May* (1982) 1 NZFLR 165 (CA) grounds, are you? Are you saying that?

MR BUTLER:

Yes, because it is a discretion.

ELIAS CJ:

So can you take us to – what is the paragraph you rely on in terms of the correct exercise of the discretion in the Court of Appeal judgment?

MR BUTLER:

In the Court of Appeal, that's paragraph 177.

ELIAS CJ:

I see.

MR BUTLER:

And it's A, B, C and D.

GLAZEBROOK J:

Well, I just say that I don't accept it's a discretion in a *May v May* sense. It says "discretion" but it's an evaluative decision that is susceptible to appeal, not on the narrow *May v May* grounds. So if you say it's *May v May*, you should tell me why.

MR BUTLER:

Okay, well, I say it is *May v May* and I say that adopting a *May v May* approach is entirely appropriate here because we are at fourth instance, otherwise –

GLAZEBROOK J:

It doesn't matter whether you're fourth instance because if it's *May v May* the High Court couldn't overturn the District Court except on the very narrow grounds, so forget fourth instance. If your submission is the appeal is just on *May v May* grounds because it's an at-large discretion, then you're going to have to say why, not on a fourth appeal ground but just generally.

MR BUTLER:

Okay, so the premise I'm working on, sometimes making reference to the various cases and it's a little bit unhelpful in terms of deciding what their, what the jurisdiction is that this Court can exercise on an appeal. Can I start from the premise that we are on a fourth appeal but that the jurisdiction of this Court is confined to questions of law? That's what you've given leave on. So really what I'm trying to say is what one is looking for is not for this Court to undertake its own evaluative exercise as such –

GLAZEBROOK J:

Why are we confined to questions of law? That's not right either.

MR BUTLER:

Well, that'll be my – the premise upon which I'm proceeding. If I'm proceeding on the wrong premise –

ELIAS CJ:

Well, you'd acknowledge that even if it is a discretionary decision, this Court could interfere if there's an error of law –

MR BUTLER:

Yes, absolutely, of course.

ELIAS CJ:

– or the discretion's been exercised on a wrong principle or –

MR BUTLER:

Plainly wrong, yes, all that.

ELIAS CJ:

– or something like that.

WILLIAM YOUNG J:

I just note, looking at the main submissions, that they are premised on the assumption that the Court of Appeal did say this wasn't a nuptial settlement.

MR BUTLER:

Yes, I know Sir, and I was dealing with the submissions as I understand advanced by my learned friend. Of course in the usual way when refining and preparing for an oral argument one does as always, and I hear my learned friend snorting, for want of another term, so the point is made.

WILLIAM YOUNG J:

I'm just saying that it does rather appear that your lot, as it were, interpreted the Court of Appeal judgment in the same way as I did.

MR BUTLER:

Sure, the only point I'm making is they –

WILLIAM YOUNG J:

Right, and now you've re-interpreted.

MR BUTLER:

– engaged with the argument as advanced,

WILLIAM YOUNG J:

Yes, sure, I understand.

GLAZEBROOK J:

But there's no point in Mrs Clayton appealing if she's only appealing on the discretion if in fact we're bound, but now you say the, now you're saying that the Family Court didn't make a decision on the nuptial settlement but there's no point in Mrs Clayton appealing or us giving leave if in fact it's not a nuptial settlement.

MR BUTLER:

It's not a nuptial settlement, yes.

GLAZEBROOK J:

So that has to be before us, doesn't it? Whatever the Courts below said, there is no point in giving her leave if we're going to say, oh sorry, we're bound by the decisions below that it's not a nuptial settlement.

MR BUTLER:

I accept that and –

GLAZEBROOK J:

Right.

MR BUTLER:

– argue to the contrary, all I've been trying to say is how it interpreted what it is that the Court of Appeal actually did. That's all.

GLAZEBROOK J:

All right.

MR BUTLER:

And that's why I've happily engaged with –

GLAZEBROOK J:

All right so you say this is a *May v May* discretion?

ELIAS CJ:

And indeed as the Court of Appeal in paragraph 177 suggests it approached it. No good reason to depart. So that might be something that this Court would think was a wrong approach. Although it's, you know, probably not.

MR BUTLER:

Oh, yes I see, you're referring to (d) is it Ma'am?

ELIAS CJ:

Yes. And certainly the, whether even in terms of the discretion it is necessary to have expectations, must be something that we should look at. Because just on the wording of section 182 it's very difficult to know where that comes from.

MR BUTLER:

Yes I know that was something that Your Honour raised I think on day 1 I think it was about where does the phrase "expectations" come from and as I said, I've put in the relevant passages from *Ward v Ward*, but that concept of expectations in my submission is a key driver in the *Ward v Ward* decision itself. So even if I am wrong in the submission I have made that it is not, expectation is not relevant to the classification of a settlement as nuptial, even if I'm wrong on that I think, with respect, that as regards how you go about exercising the discretion –

ELIAS CJ:

Well it may well be relevant. I'm not saying that it's wrong to say that it's not relevant –

MR BUTLER:

Right.

ELIAS CJ:

– but to say that it is a necessary condition before the discretion could be exercised, seems a little bold, given the statutory language.

MR BUTLER:

Given, with respect, I'm not sure that that's necessarily right.

ELIAS CJ:

Well what I'm querying is that last little portion of (b), that there are concurrent findings of fact that they did not have the necessary expectations. It's pretty fundamental to the decision that the Court of Appeal comes to.

MR BUTLER:

I don't think that's necessarily right, that's why I was just, and just pausing for a moment, because I think if you look at (b), the first sentence of (b), what the Court really, that last sentence and that last part that Your Honour refers to really is another way of expressing what's set out in the first sentence of (b). "Here both Courts below found that the expectations of Mr and Mrs Clayton when the Trust was established where that it was formed for business purposes and not as a means by which Mrs Clayton would acquire an interest or expectation in business assets. The problem for Mrs Clayton – "

ELIAS CJ:

Okay. Well, I think we're probably just going over old ground but in terms of this emphasis on expectations the authority you rely on, because you don't rely on the text in section 182, and I query whether you can rely on the purpose because I would have thought that was spelled out by the text, so your authority is simply *Ward*. Is there any authority you're relying on?

MR BUTLER:

I have to say for myself I kind of thought that …

GLAZEBROOK J:

If you are going to take us to *Ward* I think you have to look at the context in which that statement was made because if you're looking at 21 when they're talking about the history they say things like to make an order which will give the parties the same benefits as they practically would have had if the conjugal relation had continued, they should put the – in 22 the applicant party in the same position as far as possible as if family life had not been broken up. Page 49. If you're looking at the build-up to paragraph 25 which is relied on –

ELIAS CJ:

Well, this is the point that I made the first day. It seems to me that *Ward* is being taken out of context.

GLAZEBROOK J:

The correct view is that the fact of the divorce which enabled a view of the settlement, this whole matter is regarded as being at large in the whole of the relevant circumstances are taken into account. I'm just picking bits out of the case. Paragraph 21, it's on page 44 over the page. That's the bit I was picking there, and

22. It's about third and fourth line into 22. Basically what they're looking at is you look at what would have happened if the marriage had continued and compare it to what would happen if the marriage broken up, so that's the significance of the continuation of the marriage, so you say what would have happened had the marriage continued and you compare that to what was going to happen on the breakup and then you make an order as is just to redress that balance.

MR BUTLER:

The part that I'm relying on in *Ward* is that passage at paragraph 25 which brings together, really, the discussion because what's happening in these paragraphs that Your Honour has referred me to is working through some of the cases and here in my submission –

GLAZEBROOK J:

Well, working through some of the cases is you look at what would happen had the marriage continued and compare it with what's going to happen or likely to happen when it breaks up, and then you make an order to redress the balance. Against the context of the discussion of the cases, isn't that what paragraph 25 is saying?

MR BUTLER:

Well, what it seems to be saying to me is the proper way is to identify all relevant expectations with the parties and in particular the applicant party had of the settlement at the time it was made first thing. Those expectations should then be compared with the expectations which the parties and then, in particular, the applicant party have of the settlement and the changed circumstances brought about by the dissolution.

GLAZEBROOK J:

Yes, but if you look at 21, et cetera, they say, "What would have been the expectations had the marriage continued?" Which is not the same as saying, "What were the expectations if the marriage broke up?" In fact, that's what you're comparing it with. So if you – I mean, you might want to just have a moment to read 21, et cetera, to see what the background was.

MR BUTLER:

Yes, and that's fine. I will. I just see we're at 11.30. My point being that in terms of when I'm being asked, "Where have you drawn your lines or your reference to reasonable expectations?" my submission to you is, and I'll come back and deal with

paragraph 21 and so my submission is, is that passage in paragraph 25 which, as I read it, is the bringing together of –

GLAZEBROOK J:

Yes, but you're saying reasonable expectations should the marriage break up is encompassed in that first inquiry.

MR BUTLER:

Mhm.

GLAZEBROOK J:

What I'm putting to you on the basis of the background they're discussing is that's not what they were talking about. They were talking about reasonable expectations should the marriage continue, and comparing that with what actually happened. So what you're – what you are wanting us to compare is reasonable expectations to what would happen if the marriage broke up to what actually happened and if the reasonable expectations if the marriage broke up was that she would be cut out then she has no relief under 182.

MR BUTLER:

Mmm.

GLAZEBROOK J:

And what I'm putting to you is that's not what the Court was saying, especially if you read it in the context of the cases. They were saying you look at the reasonable expectations of what would have happened had the marriage continued and compare that to what's actually happened.

MR BUTLER:

Yes, I hear what Your Honour's saying and so my point simply was, to make was in a situation where one has evidence as to expectations and the expectations include that I have no expectation of a settlement upon dissolution then that –

ELIAS CJ:

But that's based on the pre-nup, to adopt Justice Arnold's terminology.

MR BUTLER:

Well, I just want to make the submission first in the abstract so if one has evidence of that sort then I cannot see –

ELIAS CJ:

But when you say you have evidence of that sort, that is the pre-nup is it? The evidence you're referring to?

MR BUTLER:

So that's absolutely relevant evidence –

ELIAS CJ:

Yes.

MR BUTLER:

That is relevant, a relevant part of the factual matrix, absolutely.

ELIAS CJ:

Well what else is there? That you're relying on in terms of that expectation as to what will happen on dissolution?

MR BUTLER:

That's the principal piece of evidence which –

ELIAS CJ:

Well is there any other evidence?

MR BUTLER:

Well the other evidence, in my submission, is the evidence as to what the parties' expectations and understanding of the purpose of the trust was so that, that that overriding –

ELIAS CJ:

Yes, I see.

MR BUTLER:

– purpose behind the trust is highly relevant –

WILLIAM YOUNG J:

Was there evidence as to that or is it to be inferred from what we know about the case as a whole?

ELIAS CJ:

I think there was some evidence, wasn't there, about putting –

MR BUTLER:

There was, there was evidence –

GLAZEBROOK J:

No, is there evidence about her knowing about that?

MR BUTLER:

Yes, that's my understanding, absolutely.

GLAZEBROOK J:

Was there because I thought she didn't know what was happening and didn't know what the trust was and actually he doesn't seem to have known very much about what the trust was either, didn't even remember signing it, or was that the Vaughan one?

WILLIAM YOUNG J:

Who says –

GLAZEBROOK J:

That was the Vaughan one.

WILLIAM YOUNG J:

– sorry, does Mr Cheshire speak about the Claymark Trust?

MR BUTLER:

Yes, Mr Cheshire does speak and he, for example, his evidence is referred to in the judgment of Rodney Hansen J and he says that the purpose was, the primary purpose as Rodney Hansen J said in his judgment, the primary purpose was to take the property outside the circle of the guarantees, and I've referred to that in my road map. Your Honours, I see it's 11.33 and I'm just wondering if that's a convenient time?

ELIAS CJ:

Yes, we'll take the adjournment now. How much longer do you think you'll be on your submissions?

MR BUTLER:

Well look, as I said, where I'm coming at things I'm trying to be of assistance to the Court because I apprehend that you're wanting to kind of explore some of these particular issues for myself. I'm not sure that I'm going, in order to be able to make my submissions that I want to be able to make that I need a huge amount of extra time. I wouldn't have thought I'd need more than 10 minutes but, what I'm saying I'm somewhat in Your Honour's hands because I know that this issue seems to be one that you want to explore.

ELIAS CJ:

I understand.

GLAZEBROOK J:

Are you going to say anything more on the *May v May* point?

MR BUTLER:

Yes, I'll explore that at the break if I may.

ELIAS CJ:

And then Mr Carruthers, are you to follow?

MR CARRUTHERS QC:

No I've got nothing to follow. We divided the argument deliberately between the two appeals.

ELIAS CJ:

Yes, thank you. We'll take the morning adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.50 AM

MR BUTLER:

Thank you Your Honours. As I indicated before the break I'll not be long. So in terms of the questions asked in terms of this Court's jurisdiction and the approach it should take, obviously you've got *May v May*. I think probably the authority most helpful is the decision of this Court *Kacem v Bashir* [2011] 2 NZLR 1, which I know Your Honours will be very familiar with, and Your Honours will know the distinction that was drawn at around paragraph, I think it began at appellate approach in that particular case, if I refer just to paragraphs 31 –

ELIAS CJ:

Sorry, where is it?

MR BUTLER:

So I don't, haven't been able to rustle up a copy for Your Honours in the time I had, so I'm just simply going to refer you to that relevant – but I know Your Honours will know it.

ELIAS CJ:

Well, except we called it something else here, didn't we? But anyway.

MR BUTLER:

Kacem v Bashir.

ELIAS CJ:

No, we called it something different. We called it by its name until we realised we were stuck with the made up name.

MR BUTLER:

Okay, I beg your pardon. If you want the citation, if that's helpful –

WILLIAM YOUNG J:

I think it is *Kacem v Bashir*, that's what it's reported as.

ELIAS CJ:

Yes, I know it is, but that wasn't the way that –

MR BUTLER:

It doesn't resonate. It's not the way Your Honour recalls it.

ELIAS CJ:

No, it's not the way I remember it. What's the –

MR BUTLER:

So the citation is [2011] 2 NZLR 1. At page 1.

GLAZEBROOK J:

So what's the distinction?

MR BUTLER:

And so the distinction that's drawn, and I'll look at Your Honour Justice Glazebrook, because you've raised the issue about evaluative judgment and such like, so what the Court in that particular said, what this Court said in this particular case was what it was dealing with was a decision about family, it was about relocation, child relocation, that had been through the Family Court, the High Court the Court of Appeal and then it came to this particular Court, and so the issue that arose on the appeal in this Court was whether or not the Court of Appeal had adopted the correct approach itself when it was considering the appeal from the High Court and the point that was made in, there was two points made in *Kacem* and the first thing was to say that when leave was granted by the Court of Appeal from the High Court, once leave had been granted it was a general appeal before the Court of Appeal and so therefore because the appeal before the Court of Appeal was general appeal then *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141 would apply and so an appellant will be entitled to the benefit of the view of the Court of Appeal on that appeal. So it's the first point to make.

And the second point that's made in the decision is that *May v May* still is good law. The question becomes, in any particular case, determining whether or not the decision is a discretionary decision. Paragraph 32 gives some indicia as to how you determine whether or not what you've got before you is a decision that is discretionary and it makes the comment, which I think resonates, Your Honour, with what you were putting to me, it says, at paragraph 32, "The fact that the case involves factual evaluation and a value judgement does not, of itself, mean the decision is discretionary." I think that's the part that Your Honour was picking up on. I must, obviously, being responsible counsel, point that out, that's what, I think, Your Honour was referring to.

GLAZEBROOK J:

Well I think the Court's made that, made the distinction between evaluative decisions and other decisions so that in the evidence arena, which overseas is treated as a discretionary decision but under (inaudible 11:55:16) is treated as a question of law even if, in fact, it's based on factual findings. And then I think there's been other decisions that call them evaluative decisions as against discretionary decisions so I wasn't thinking specifically of that paragraph but –

MR BUTLER:

Specially, okay, so I'll – but if that is helpful – and when I was looking through I was trying to, I was pretty sure in this judgment there was something along – akin to what Your Honour had put to me so that's what I found.

And the submission that I make, having set all that out for you, hopefully, helpfully, the submission I make nonetheless is that when one looks at the terms of section 182, in my submission, subsection (3) it is, of the statute, refers to the discretion, that's my point, that's how it reads.

GLAZEBROOK J:

Well it says it's a discretion but this Court has interfered in, for instance, damages assessments, which have been traditionally thought of as a discretion in *Hansen*, it interfered with damages assessments. Here you're actually looking at something akin to that aren't you so, so…

MR BUTLER:

I don't, with respect, I don't think so, and part of what I think is looking at the overall context within which this – the exercise of this power might arise because, of course, and this again is, it goes back, in a sense I suppose, to the gatekeeper role that the Court will want to apply in determining what sorts of appeals it will take or not, and again I say that entirely just putting it out there as knowing it's a relevant factor to be taken into account and because part of the context, of course, is that typically section 182 applications would not be made on their own, they'd be part of a package of applications, just like here, that have been made. So why do I make that point? I make that point simply to say that obviously if the Court is indicating that being able to delve down and remake, almost as if on a general appeal and treat as a question of law, a decision that is a discretion –

GLAZEBROOK J:

But once it gets here, isn't that what *Kacem v Bashir* were saying, once it gets here, or once it gets to the Court of Appeal, now it may be that we would refuse leave because it is essentially a factual matter that is only relevant to the particular parties, but if we didn't refuse leave on that ground, once it gets here we can't be artificially constrained can we?

MR BUTLER:

And so my submission, well that's a question for the Court to determine but it's my submission –

GLAZEBROOK J:

But your submission is it's *May v May*.

MR BUTLER:

– my submission to you is by the fourth instance, really what the task of this Court is, in my submission, is not to be going digging down in the entrails, if I can put it that way, of the case, but to say, has there been any misdirection by the lower Courts, bearing in mind, that there will, in effect, have been three appeals, three opportunities to raise these arguments. That's my submission. So I hope that's helpful and again, in the time available, I'm sure Your Honour's Judge's clerks will do a better job than I in the time available. I hope that's helpful to you on that particular question that you raised with me.

In terms of Your Honour Justice Glazebrook's question about the reading of paragraph 21 of *Ward v Ward* and how it relates to and unfortunately, in the time available, I haven't been able to go back and just obtain a copy of the judgments that are relied on here. I actually, in preparation, had read them just to get a sense of my, if I can submit again, –

ELIAS CJ:

Sorry, which cases are you referring to?

MR BUTLER:

So these are the cases referred to in paragraph 21 of the…

ELIAS CJ:

Of?

MR BUTLER:

Of *Ward v Ward*. So that's this bundle here Your Honour, at paragraph 49, sorry, page 49 I mean to say.

ELIAS CJ:

What, *Coutts v Coutts* [1948] NZLR 591 (CA)*, Benyon v Benyon* (1890) 15 PD 54 and –

MR BUTLER:

Coutts, Benyon and those, and so, so the submission simply is that what the Court has done here, and again it may be that, Your Honour, since I'm not able to do it here now that when one has the opportunity to go back and look at those particular statements that have been in a sense, if I can use this word, I'm trying to use it non-perjoratively, cherry-picked or just plucked out of the judgment, it still seems to me, and that, in my submission, is what they're about, I still think the distillation that's been brought to bear by this Court in 25, that is this Court's distillation of what the purpose of section 182 is, having had the benefit of looking at that jurisprudence.

GLAZEBROOK J:

That jurisprudence doesn't suggest you look at the settlement at the time it was entered into, does it, and so could one see that comment in 25 as being related to the particular case when, in fact, there was no suggestion that expectations had changed over the course of the marriage and, in fact, where there were quite detailed intentions set out as to how it would operate over the course of the marriage, because, in fact, the cases suggest you look at the expectations had the marriage continued with no indication that you do that at the time of entry into it, as far as one can read from the way they – because I must say I haven't gone back either to look at those just before this…

MR BUTLER:

And…

GLAZEBROOK J:

Because what they're looking at is to enable them to have the same benefits had the marriage continued rather than concentrating on when the settlement was set up, which when the settlement was set up may, of course, be, and probably is, of particular relevance for whether it's a nuptial settlement.

MR BUTLER:

Sure, okay, I can see Your Honour's point there.

GLAZEBROOK J:

Yes.

MR BUTLER:

I suppose my point is, for example, if one looks at paragraph 23, just take that, for example, there's a reference there to the decision of the Court – because my recollection was that around this period there were, there was two Court of Appeal, four bench Court of Appeal decisions, *Coutts v Coutts*, if I remember rightly, and then *Preston v Preston* [1955] NZLR 1251 (CA), and in *Coutts* there'd been a little bit of disagreement. I think the Court had split two/two on one of the particular issues that arose, and so, again, if one just looks at the way in which this Court refers to and summarises *Preston*, you'll see at the very bottom Their Honours indicated – this is Their Honours in *Preston* – that when the application before, before the Court, the whole matter is regarded being at large and the whole of the relevant circumstances as they exist at the time of the hearing are taken into account, in particular will have regard to any change in circumstances of either party and the relevant financial positions, my point being there's bits, you know, and the proposition put to me was, well, you can't be looking at, in necessarily those circumstances, at post, post the settlement, but I think –

ELIAS CJ:

But isn't it clear from paragraph 26 of *Ward v Ward* that the Court, in referring to expectations, is referring to expectations objectively assessed?

MR BUTLER:

No, I'm not sure that that's necessarily right.

ELIAS CJ:

Well why does it say, "Section 182(3) makes this point by directing the Courts attention to the circumstances of the parties," and then goes on to discuss how these circumstances are to be compared at the time of settlement and then at the – later, the source and character of the assets.

MR BUTLER:

Sure.

ELIAS CJ:

You know, these are all objective circumstances. The Court may use expectations as a shorthand but it's really, it's not a subjective enquiry that's being undertaken here.

MR BUTLER:

I'm not sure that I necessarily, with respect, I'll submit contrary to that. I think when one reads that opening sentence of paragraph 26 I think it takes quite a bit of its colour from the last sentence at paragraph 25.

ELIAS CJ:

Well it's explaining why.

MR BUTLER:

The Courts task is just as how best.

ELIAS CJ:

It's explaining section 25 by reference to the provisions of section 182(3) and all the objective background.

MR BUTLER:

I'm not saying that there's no role for objective considerations, that's true, but fundamentally the purpose is to look at those subjective expectations and, of course, as the Court typically would do, in looking at some of those subjective expectations, it may decide well, look, that may have been your subjective expectation but to some degree that expectation's not a reasonable one to have in the circumstances, for example.

GLAZEBROOK J:

But don't you look at the expectation if the marriage continued? That's what's specifically said at the end of paragraph 24, where the Court says, "We're adopting the English cases," and then refer back to one of the earliest decisions, which says, "We look at what they would have occupied, as regards to the settlement, if the marriage had not failed." So you look at it as if the marriage had not failed and compare that to the probable position, that's what 25 says, if it, if the marriage did fail. So at 21, that's what they say they'd practically have had if the conjugal relationship had continued, looking at that case at the top of page 44 of the report.

The next one in the same position, if it had not been broken up a bit, down 22. Then looking at *Preston v Preston*, all of the changed circumstances.

MR BUTLER:

Okay, let's, if I can just draw on that particular reference there to Lord Penzance's, what he said in that particular case. Again, my point is when looking, when trying to assess, the Court said, Lord Penzance said that, "The Court would look at the probable pecuniary position the parties and their children would have occupied as regards the settlement if the marriage had not failed." Now I'm trying to figure out, what is that probable pecuniary position. One of the things you would look at is to see, well, what expectations did you have, because that is one way of working out what the probable pecuniary position would have been.

GLAZEBROOK J:

I don't mind looking at what the probable pecuniary – well, I might, but I can understand saying you look at the expectations that you would have had if the marriage had not failed. What I don't understand is to say that you look at the expectations you would have if the marriage had failed, because that seems to be totally contrary to the test that's set in all of those cases and that's your submission, as I understand it.

MR BUTLER:

Yes, and there's two parts to my submission. The first part is you look at what the expectations were at the outset. And the additional submission that I have made is that, if there is evidence that shows that part of that suite of expectations was that my ability to call on that settlement extends only for as long as I am married to you, then there is no injustice –

WILLIAM YOUNG J:

But why would you say that anyway because former spouses are included as beneficiaries so why do you make that submission?

MR BUTLER:

Because I think again I –

WILLIAM YOUNG J:

You're responding but sorry, in this case, I mean, there is the fact that the trust includes former spouses as beneficiaries.

MR BUTLER:

And that I accept so, again, remember I'm having put to me a proposition, in the abstract, as to why it may or may not be relevant. So in this particular case, you're right Sir, there is reference to former spouses at law indeed, spouse or a former spouse or the children and grandchildren and such like, so I accept that that appears here, and what I have said, in the context of this particular trust, is that you look at that category of people who are contemplated, people to whom, with whom you might have a spousal relationship, people with whom you may have had a spousal relationship, you look at persons, corporations, and so you look at the whole of the terms of the settlement and you look at actually how it is that the trust has been operated and what its purpose was and on those points, we have those findings from the Family Court, the High Court and the Court of Appeal, which have reached that view, in terms of what it was, what the probable pecuniary position was in respect of this settlement.

Mr Miller Senior has just asked me to emphasise, quite properly, I was, I had been getting there and you might remember, Your Honour, I'd made reference to the bottom of paragraph 25 and so I was coming to that, I'd started the second to last sentence, I hadn't quite got to the last sentence, and so this goes back to the question of subjectivity. "So if the dissolution has not affected the implementation of the applicant's previous expectations there will be no call for an order."

ELIAS CJ:

And what do you take from that because on the discussion we've been having, previous expectations could be previous expectations in the continuing marriage.

MR BUTLER:

Yes but my point would be that those expectations that are referred to are the expectations of the applicant so on your point around subjectivity, subjective expectations, the reference here in my submission at the bottom of paragraph 25 is a reference to subjective expectations, the applicant's previous expectations, in this case her actual expectations.

ELIAS CJ:

Well I'm not sure that that follows but anyway I'll consider that.

MR BUTLER:

That's the submission, that's the submission. So in my submission, the Court of Appeal in that paragraph, 177, did undertake the exercise as envisaged by *Ward v Ward.* It consistently, with the Family Court and High Court, reached a view that Mrs Clayton did not have an expectation of acquiring an interest or expectation in the business assets. The dissolution of the marriage did not affect her expectations, that's at C.

ELIAS CJ:

Sorry, C of 27?

MR BUTLER:

Yes.

ELIAS CJ:

Does that, where's that, sorry – you've taken us to this before.

MR BUTLER:

I have, 266 of the case.

ELIAS CJ:

Which, but which – that as you say is the summary. Where's the paragraphs that are drawn on for that?

MR BUTLER:

Right, so what the Court of Appeal does in dealing with the claim under section 182, that begins at page 258 of the case, Your Honour. As you'll see, it sets out the section, it sets out the Family Court findings, the High Court findings, in quite some detail. Paragraph 168 notes the guidance from *Ward* had been relied upon and then importantly, in my submission, records from paragraph 171 to paragraph 174, the submissions that had been put by my learned friend.

ELIAS CJ:

Sorry, just insofar as the reasoning of the Court of Appeal is concerned, it relies simply on the findings in the Family Court and in the High Court which are both based on the prenuptial agreement and therefore indicate that the approach has been to look to the expectations at dissolution.

MR BUTLER:

They are, that, the reference – I should probably just deal to that very briefly because His Honour Justice Arnold had raised the relevance or otherwise of the prenup. When one looks at the reasoning of both the Family Court and High Court it is true to say that reference to the prenup appears. But if one looks at the reasoning, the principle reason advanced is the reason for the business purpose around the trust. So again, prenup certainly features as part of the reasoning process.

ELIAS CJ:

But just in terms of what the Court of Appeal is adopting, because you're making the submission that there are concurrent findings which don't indicate any error in approach, and those relied upon by the Court of Appeal are dependent on the prenuptial agreement and therefore are based on the submission that you've made to us that expectations of what will happen at dissolution are critical.

MR BUTLER:

Not quite, that's the point, I must have made it inadequately. My point is that when one looks at the Family Court and High Court and then one looks at the submissions advanced by my learned friend in support of her appeal on this whole section 182, you will see that the primary –

ELIAS CJ:

Well they may be inadequately rehearsing the reasons, they've left out the importance of the business purposes.

MR BUTLER:

And so what the Court of Appeal – the point I'm making is that when one actually looks at the Court of Appeal's judgment, at 177(b), what is focused on by the Court of Appeal in 177(b) is the expectation was it was formed for business purposes. So Ma'am, my point is, when the Court of Appeal comes to deal with the question on the appeal it's clear to me, in my submission, that the emphasis is placed on the business purposes, the primary emphasis is placed there. And that –

ELIAS CJ:

But the necessary expectations buys back into the expectations as to what will happen on dissolution.

MR BUTLER:

Yes, but those expectations are those expectations as at the point at which the settlement was entered into, the point of the lower Court, and including this Court, the Court of Appeal I mean to say, being that she, Mrs Clayton, had no expectation in respect of those of the trust.

GLAZEBROOK J:

But doesn't she have an expectation that as business assets of the family, the protection from creditors or from the guarantee, is going to keep those assets in the family and during marriage that she will benefit from that business because effectively those are family business assets aren't they? If you're looking at it in terms of what, where is the source of wealth of this family part of it is in a settlement, because we're assuming for these purposes that it is a prenuptial settlement, because I think otherwise it doesn't make any sense because there's no discretion otherwise.

MR BUTLER:

Indeed, quite, accepted.

GLAZEBROOK J:

So we assume, for these purposes, it is, so the wealth of this family. And part of it is hived off into a trust to protect the wealth of the family and is used for business purposes for the benefit of the family, under the trust.

MR BUTLER:

So there's a –

GLAZEBROOK J:

So had the marriage continued then that would continue wouldn't it in accordance?

MR BUTLER:

Well, not necessarily, because I think part of the premise, with respect, behind Your Honour's analysis is you've used the phrase part of the family wealth was hived off into the trust, which rather suggests an assumption that the assets in Claymark are somehow relationship property or something of that sort.

GLAZEBROOK J:

No, no, no, I'm talking in a most generic sense.

MR BUTLER:

Okay.

ELIAS CJ:

(inaudible 12:17:46).

GLAZEBROOK J:

How assets of the family that during the marriage the family would expect to benefit from under the trust and just generally in respect of business assets, that's how they lived, there was no other income or income generating assets were there? Certainly for Mrs Clayton, she was reliant on her husband, well, actually she did have – I think she worked but didn't get paid but…

MR BUTLER:

Yes, to – again that brings us back to some of the issues and I'm loathe to kind of go and reopen –

GLAZEBROOK J:

In any event let's just look at it in a total generic sense in terms of what this family were living on and expecting to benefit from.

MR BUTLER:

I mean the point of the trust, in my submission, wasn't to provide support to the family as such, because when one looks at what actually the trust, the activities undertaken by the trust, there was a very limited focus on supporting the family members. The point being that that trust could have been used in other ways, certainly it was used to support, you're right, from time to time, the businesses, Claymark associated businesses. But, of course, what would happen down the track was an open question, but the expectation that the purpose of the trust will be to support the family in that way and that her expectation, when I say "her" I mean, I want to be respectful, Ms Clayton's expectations, were not of support for her.

GLAZEBROOK J:

And you're using that, what, in the sense of distributions or income or what are you using it in the sense of?

MR BUTLER:

In distributions for sure.

GLAZEBROOK J:

Distributions.

MR BUTLER:

Or even in terms of the actual support that came, the car and the overall, and this, the Chief Justice put to me, "Well, if you're in this space you might wish to minimise the level of assistance that's provided by the car," so that's a right to the extent that the car can be associated with the trust. It's really down at the de minimis level and the point I wanted to make, well I think I made, was that in any event the way in which support for a car for travel purposes is now being provided for doesn't, it does not need to be provided out of the, out of the trust because there has been the subject of settlement, it's a maintenance, it's now required to be provided as part of a maintenance package relatively recently agreed between the parties and that's relevant to, so to the extent that the car is something that's of interest in terms of expectation, my point is the Court's discretion whether or not to unlock this trust so as to make good on her expectations around, on her car, is not required because that expectation is being met now through the maintenance order that's the point I'm trying to make.

Now, if Your Honours are minded to look at this question and get into the entrails of it notwithstanding the submissions I've made, in terms of what orders the Court might make, I'm not sure whether the extent to which that's been traversed or that you require me to go into anything on that. I've done –

ELIAS CJ:

Well, do you want to make submissions to us on that?

MR BUTLER:

I've made the submissions I've made in terms of the car and I think that's one way of saying, well, in this, in these circumstances it's not required to be, not required to be made.

GLAZEBROOK J:

If we did think of making orders would there be any difficulty in making orders splitting the, the trusts between the two?

MR BUTLER:

Yes, that was the very point I was going to come to in Ms McCartney's note. Reminds me – you might recall that the land in the trust is land upon which the business is located so that splitting or accessing that land and, for example, providing it to, making orders in respect of it in favour of, for example, of Mrs Clayton could see the sale of that land or the interference with the value of the land, in other words, the landown – the land, the value of the land is its association with the business because it's upon the land that the business sits so that, when considering whether or not it is just to exercise –

GLAZEBROOK J:

Is there a market rental paid, do we know?

MR BUTLER:

That I'm not sure of. My understanding of just – I was hoping, hoping, I never had the detail, so my recollection is that there is rental, there is some rent paid. I'm not sure that it's necessarily a market rental. I'm just seeing whether I can get some more accurate information for you on that.

GLAZEBROOK J:

Because if it's a market rental it should be a matter of total indifference to the business whether it's owned by Mrs Clayton, Mr Clayton or, indeed, a third party.

MR BUTLER:

Not necessarily because it depends on what the third party may or may not wish to do with the land.

GLAZEBROOK J:

Well, you set up a long-term lease –

MR BUTLER:

Sure.

GLAZEBROOK J:

– at market value with appropriate rental adjustments and the third party takes it or leaves it.

MR BUTLER:

And somebody's got a long-term interest in supporting the business would do exactly that.

GLAZEBROOK J:

So there isn't a long-term rental agreement –

MR BUTLER:

So –

GLAZEBROOK J:

– at the moment it's informal?

MR BUTLER:

I can't answer that straightaway. My point simply is that once it moves out of the hands of the trust into either a third party, then what is happening is that that interest in that land is at risk in terms of its continued disassociation and ability to support the business, that's the point I'm making and that is a relevant consideration.

GLAZEBROOK J:

But how could it possibly be if you have a long-term market rental –

MR BUTLER:

Well, unless the Court's going to order that another must enter into a long-term rental in respect of the land.

GLAZEBROOK J:

Well, there's been that opportunity to do so hasn't there? If there is a rental agreement you sell it subject to the rental agreement. It's an interest in land. You can't sell the land and have the new owner of the land say, "Oh, I don't really like that lease. I think I won't bother."

MR BUTLER:

Sure, then what's, what value is it because its value then gets –

GLAZEBROOK J:

Well, what I'm asking you is why does the business collapse if the land goes into a separate party and if the answer is, well if the land goes into a separate party, the business can't use the land at an under rental, I can understand the submission.

MR BUTLER:

Mhm, yes, so that's in effect –

GLAZEBROOK J:

But if it's at market rental there's no difficulty.

MR BUTLER:

Yes, but, of course the point I'm, in terms of market rental, is some other third party might see another use to which the land might be able to, might be able to put –

GLAZEBROOK J:

Might have a bit of difficulty if there's a dirty great sawmill on there, but.

MR BUTLER:

Sure but I mean people live next to the Exide factory in Petone, I mean there's people –

ELIAS CJ:

I think it really is, I don't think the Court could be making orders as specific as are being discussed without a lot more –

GLAZEBROOK J:

I wasn't suggesting it was an order. I was just –

ELIAS CJ:

No, no, no, I'm just really indicating that, I mean others on the Court may have different views but if we come to that, there's going to have to be a mechanism for sorting it out.

MR BUTLER:

And that was what I was trying to draw out from Your Honours. It wasn't apparent to me from the interchanges that had happened previously that you were necessarily in that space but I just wanted to make sure that that issue of what orders might be

made, if Your Honours were not to be persuaded by my substantive submission, what those orders would be. The point I wanted to make was –

ELIAS CJ:
Well for myself I haven't got that far.

MR BUTLER:
It's a complex case.

ELIAS CJ:
And I'm not sure that the parties have helped us very much, if we get to that position.

GLAZEBROOK J:
It's just a submission that there's a real difficulty if this happens has to be backed up by something rather than assertion and at the moment it's assertion. But it might be that it's better to ask for submissions on that a bit later down the track.

MR BUTLER:
Okay, message understood, Your Honours, again trying to be helpful because I'd feel bad if I didn't make reference to this and an order was made, so –

ELIAS CJ:
I mean otherwise if it's all –

GLAZEBROOK J:
No, no, it's not – it wasn't your brief, I don't –

MR BUTLER:
No, no, no. So my point, the way I often think about these things is the cause of action is a step that as lawyers we're already interested in but for the client what actually matters is the relief that's ordered, it's the "So what?" question, and I'm just simply saying, the "So what?" question here is actually a matter of real practical significance, certainly to Mr Clayton and to the business. I'm just wanting to make sure that that "So what?" question is not overlooked in the context where we've had such a strong focus on and whether the requirements of section 182 have been met and the discretion could be exercised. '

I may have an answer for you in the question that was put to me. There is some rent, I've got a bundle reference if I just simply provide it to Your Honours so you have it and that's at, in the case at page 1287, it's the Claymark Trust statement of financial performance to the year ended 2003, it's in the yellow volume, and what you'll see on that page is three years worth of rents.

ELIAS CJ:
Sorry, what years?

MR BUTLER:
So it's page 1287.

ELIAS CJ:
No, what years?

MR BUTLER:
Sorry, 2003, 2002, and 2001.

ELIAS CJ:
A long time ago.

MR BUTLER:
So I'm just, I'm again trying to do my best.

ELIAS CJ:
Yes.

MR BUTLER:
So yes, there is some evidence of rent, I wasn't making it up. Now, Your Honours, I have taken quite a bit of your time. I have no particular further submissions to make. There were just two minor issues of confusion that had arisen earlier which I would like, on behalf of Mr Carruthers, to point out and then I'll sit down, and they're on my roadmap at page 10. First you might remember there was some criticism of Mr Cheshire.

WILLIAM YOUNG J:
There was, the Family Court Judge said there was an element of fraud in what happened.

MR BUTLER:

An element of fraud? I should have sat down.

WILLIAM YOUNG J:

Para 113 of the Family Court judgment, page 91 of volume A.

MR BUTLER:

And this, my recollection on this point in terms of Lighter Quay 5B Trust –

WILLIAM YOUNG J:

Yes but it's, that finding's reversed but for reasons that don't engage with the comment as to fraud. I understand that the Lighter Quay Trust is just ignored anyway because it's a constructed trust and it doesn't change anything.

MR BUTLER:

No, I think it's constructed with something, the bare trusteeship, something of that sort.

WILLIAM YOUNG J:

And here, but here it's the comment that I didn't understand anyone to challenge Judge Munro's comment that there was an element of fraud in the transaction.

MR BUTLER:

Where, where is she – could you just point that out?

GLAZEBROOK J:

It's about the third line from the bottom, 113.

WILLIAM YOUNG J:

"However, section 44," sorry, just –

MR BUTLER:

113, thank you.

WILLIAM YOUNG J:

Yes. "Clearly there's an institutional constructive trust in favour of Mr Clayton and there is an element of fraud to this trust." I didn't understand anyone disagreed with that (inaudible 12:30:14) –

ELIAS J:

Well, except is fraud really used in the sense of sham?

WILLIAM YOUNG J:

No, well, it's fraud, it was also in terms of non-disclosure –

ELIAS CJ:

Oh, yes, yes.

WILLIAM YOUNG J:

– and they're not entirely satisfactory evidence we were taken to. Now, the evidence did rather suggest that Mr Cheshire is Mr Clayton's man.

MR BUTLER:

Well, I don't, I don't know that that's accepted.

WILLIAM YOUNG J:

Well, no, but if you – well, it probably isn't accept but say it is true, might that not be material to relief under section 182 that if Mrs Clayton can't really expect an entirely dispassionate view to be taken of the situation because one of the trustees is her husband's man, might that not be material to what relief should be granted?

MR BUTLER:

I mean I would have thought if it's the approach to – normally one will be looking for some form of replacement of the trustee if there was some doubt of that sort.

WILLIAM YOUNG J:

Why? I mean it's two or three years since it became, what happened over the Lighter Quay Trust became apparent. No one's done anything.

MR BUTLER:

Mhm. Well, could I just have a moment because I know this is …Look, when phrases like "fraud" are used, Your Honours will understand the sensitivity around those sorts of things. I think it's better, so long as my learned senior is okay with that and Your Honours are that he should talk, that he should talk to that.

ELIAS CJ:

All right.

MR BUTLER:

I just think –

ELIAS J:

I think it is important to try to – yes, so you finish now, thank you.

MR BUTLER:

I've finished. There was just the explanation of the table in the trustee submissions.

ELIAS J:

Yes, I think this does get into the facts. We'll hear you on this, Mr Carruthers.

MR BUTLER:

I was just simply to provide clarification to Her Honour Justice Glazebrook and I've just pointed out how it is that you get to those numbers so I'm not trying to get into the fact, sorry.

GLAZEBROOK J:

I didn't think I asked anything about that.

WILLIAM YOUNG J:

I did I think.

MR BUTLER:

I think, I think it – I'm sorry, I thought it was. So I've just tried to explain –

ELIAS J:

I asked – but we've now got a table so.

MR BUTLER:

Yes, so I was just wanting to make sure the question had been answered. You're trying to correlate the two tables, I just wanted to provide that clarification on that particular because I know numbers are everybody's –

GLAZEBROOK J:

Right, thank you. That wasn't anything to do with this part of it?

MR BUTLER:

No, no, not at all.

GLAZEBROOK J:

Okay, thank you.

ELIAS J:

Thank you. So, Mr Carruthers briefly on this point.

MR CARRUTHERS QC:

Your Honours, can I invite you to look at the whole of Mr Cheshire's evidence in relation to that comment that Your Honour Justice Young made because it's certainly not accepted that he did Mr Clayton's bidding at all. In fact, he goes through the process as to how he and then later Mr Warden went through the way in which they administered the trusts.

Coming to the Lighter Quay 5B Trust bear in mind that that was a post-separation trust in which the Court of Appeal said that, found that Mrs Clayton had no, no claims so it's not even in an environment where Mrs Clayton can be concerned at all about the way in which the post-separation trust was administered by Mr Cheshire in what was really a bare trusteeship. On that question of –

ELIAS J:

So you're saying that whether or not the word "fraud" is accurate, it's not a fraud in respect of Mrs Clayton?

MR CARRUTHERS QC:

I'm saying that to start with but I'm also going to deal with this question of fraud. I actually thought there was something in the written submissions that dealt with that, but I'm not sure that I didn't take it out before they were filed, but that issue is actually dealt with in the High Court judgment and if I can go in volume A to page, to page 145 where the Lighter Quay 5B Trust is being discussed at paragraphs 125 onwards and relevantly at 127 Justice Hansen finds the, Judge Munro said, "It's clear that Mr Cheshire held the property for Mr Clayton. That finding is not in dispute. The Judge concluded that section 44 applies by virtue of the advance from Vaughan

Road Property Trust which defeated Mrs Clayton's interests in those funds. She held that Mrs Clayton is entitled to one half of the net sale proceeds. As with the," and this is important at 128, "As with the Chelmsford Trust I have doubts whether a finding of intent to defeat under section 44 is available or that the order made is effective if it is," and then it goes back to the Family Court, but the point of that analysis is that –

GLAZEBROOK J:

And where you say the Court of Appeal, sorry, can you just give me the reference where the Court of Appeal dealt with that?

MR CARRUTHERS QC:

The –

GLAZEBROOK J:

Was that at issue in the Court of Appeal?

MR CARRUTHERS QC:

– where the, sorry, Your Honour, where the Court of Appeal made the finding about the Lighter Quay 5B Trust? Oh, yes, I can.

WILLIAM YOUNG J:

It's essentially at 235/236 and it's by reference to an earlier finding in relation to Chelmsford Trust at 227.

MR CARRUTHERS QC:

Yes, that's right, yes.

WILLIAM YOUNG J:

And there are two, the two reasons they give in the Chelmsford Trust are first that because of the, that Mrs Clayton, Mr Clayton would not have regarded Mrs Clayton as having rights to claim against the assets of the Vaughan Road Property Trust and, secondly, that in any event the asset was captured in any event because she got half interest in the assets of the Vaughan Road Property Trust.

MR CARRUTHERS QC:

Yes.

WILLIAM YOUNG J:

I don't know that that really engages with the idea that this asset was nonetheless hidden which is I think what the comment that Judge Munro has addressed at that it's a trust that doesn't actually tell the truth on its face. It doesn't – because there's the trust but there's no suggestion on the face of a document as to who the beneficial owner is. I think that's what the Judge was talking about.

MR CARRUTHERS QC:

Yes, but the point, and the point really in the analysis that was being made for the trustees of those trusts is that they were all post-separation trusts that –

ELIAS J:

But they would have a bearing on the, the secrecy would have a bearing on application of section 44, would it not?

MR CARRUTHERS QC:

Yes –

ELIAS J:

A matter not yet determined as I understand it because it's been sent back.

MR CARRUTHERS QC:

No, it's only in relation to Chelmsford and to identify the source of the funds in Chelmsford but Lighter Quay has actually been dealt with by the Court of Appeal.

ELIAS J:

Oh, yes.

MR CARRUTHERS QC:

That is the, that's – they're the factual matters that really relate to Mr Cheshire's position and the necessity to look at his, look at his evidence as a whole.

ELIAS J:

Yes, thank you.

MS CHAMBERS QC:

May it please Your Honours, I thought I would start with 182 because that's what we've been discussing this morning and I've only got five points to make on that. I

wanted to start with *Ward v Ward* and go to my bundle of authorities where *Ward v Ward* is. We start of first of all at page 47 with the wording of section 182 and 182 starts off, in my submission, very clearly with that two stage process. First of all there has to be an anti-nuptial or post-nuptial settlement made on the parties. That's number 1. Then if that is established, the Court may make such orders. That is the discretion. So that's why my submissions just say that's the two stage.

And looking at the discretion, I want to emphasise sub paragraph 3 because subparagraph 3 gives that very wide provision in terms of the exercise of the discretion, the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the Court considers relevant. So the wording anticipates, in my submission, a very wide discretion.

When we go to paragraphs 25 and 26 of Their Honours' ruling, 25 is, of course, clearly about the discretion. We can see that by the language. "We consider the proper way to address whether an order should be made." It's talking about the discretion. It's not talking about whether it's a nuptial settlement. But I do suggest that there is a problem with the way paragraph 25 has been worded because, of course, 26 is much broader. It looks at subparagraph 3. It says you can look at all the parties' circumstances, both as regards to the settlement and generally, that is, what happens during the marriage? Do people actually get assets from this particular trust?

But the academics, to some extent, and certainly the lower Courts have rather focussed on 25 and they focused on this test because I think 25 is not well worded is the short point. They've focused on this test. The expectations at the time the settlement was made and that, in my submission, is too narrow. It's not what the section says and read in the context of *Ward v Ward* it's not the only test because of the previous decisions and paragraph 26. So I do see this case as an opportunity to resolve that. And you can see that kind of focus and obsession on what did they expect at the time of settlement coming through in the Family Court's findings at A76. She looks at what did Mrs Clayton expect at the time? And she says, well, it's at paragraph 71 and she says, "Well –

ELIAS CJ:

Sorry, what page number is this?

MS CHAMBERS QC:

It's A76 Your Honour and it's paragraph 71. Now – so the first problem is, if you look at 71, she's muddling the test because she's applying 25 of *Ward v Ward* to whether it's a nuptial settlement. Well we say that's wrong. 25 is about the discretion. So there's a mistake for a start and it's the same mistake made all the way through, with respect, in the Family Court, the High Court and the Court of Appeal.

But even then, even if we say, "Okay, well, let's have a look at what Her Honour engaged with in regard to the discretion?" well, it is a focus on the trust being set up for business purposes and including buying the land, the buffer land round the mill and, therefore, she goes on to say, "It is unclear whether Mrs Clayton was aware of the formation of the trust. The intention was not to provide for Mrs Clayton. Indeed, at the time the trust was set up and throughout the marriage, they were aware of the section 21," and so she goes on. But she is focused on that expectation at the beginning and my submission is that's too narrow and 25 in *Ward v Ward* actually is slightly out of sync with 26 and the decisions quoted by Their Honours and section 182. Read as a whole *Ward v Ward* is fine but this kind of focus to 25 because of the language of 25 is resulting in unfairness in regard to the application of section 182. The better test in terms of the discretion is to look at the expectations if the marriage continued and I do suggest that my learned friend's argument that you focus on the expectations at the point of settlement is too narrow.

ARNOLD J:

Can I just ask something?

MS CHAMBERS QC:

Certainly Your Honour.

ARNOLD J:

At paragraph 15 of *Ward* they make the point that anti and post-nuptial settlements have one fundamental thing in common, they both envisaged and were premised on the continuance of the marriage. Now here the Trust arguably contemplated the marriage might end because it makes provisions for a former wife, does that enter the analysis in any way?

MS CHAMBERS QC:

I don't think it does Your Honour because she's also there as a continuing wife so that's sufficient in my submission to meet that nuptial test because I'm suggesting

that the test in regard to nuptial and it's at paragraph 71 of my written submissions which I've tried to distil down *Ward v Ward* is that a nuptial settlement and character is an arrangements that makes some form of continuing provision for both or either of the parties to the marriage in their capacity as spouses. That's my summary of nuptial settlement from *Ward v Ward* and the cases. So I'm suggesting only some form is sufficient and that's what the cases say.

ARNOLD J:
Okay.

MS CHAMBERS QC:
Just finally on this point of expectations, to the extent that there is any evidence of expectations, even meeting my friend's test at the time, the relevant evidence is, Melanie's evidence, Ms Clayton's evidence at D895 and 896 where she talks about, "Well I expected that I would benefit from any trust formed during a marriage and of course Mr Clayton's evidence which I took you to at the beginning of my submissions, his first affidavit you might recall where he said he was setting up the structures genuinely to protect Melanie from creditors and Melanie was to be protected and not disenfranchised. Those are the two bits of evidence in my submission which are most relevant to even that narrow test of looking at what they expected at the beginning.

Now the second point is in answer to Justice Young's point about has there been any cases that looked at the nature of the assets in considering whether it was a nuptial settlement? Well as I say in my submissions at 79, we did a thorough search of all of the UK cases and to look particularly at whether any of them considered the nature of the assets owned, there were no cases that we were able locate. So we specifically did that search.

The third point is briefly on the pre-nup. Remember that *Ward v Ward* there was a pre-nuptial, there was a section 21 agreement during the marriage and Their Honours do deal with that very clearly in *Ward v Ward.* You will see it perhaps most succinctly stated in the head note where Their Honours say at head note 2, it's in my bundle at 38 that because section 182(6) says you can't use 182 to cross across a section 21 agreement and they were looking particularly at that in *Ward v Ward* and what this Court held was that unless it was a legal ingredient of that agreement, that is the establishment of the trust was term of the relationship property agreement or if the trust was incorporated by reference into the relationship property agreement by

some mechanism then it doesn't make any difference to section 182, thus where a trust was executed separately and without reference to it in the relationship property agreement, it would not be rendered presumptively invalid by the absence of independent legal advice and that is, in my submission a good result because what it means is that if you want to contract out of section 182 you can but you have to say it clearly, in regard to this trust we agree you've got no expectation of an interest in it and therefore you've got no ability to claim under 182 and of course you get independent legal advice by your own solicitor before you sign such a document, that's fair.

Now my learned friend, Mr Butler, suggested that the Family Court said that the agreement was fair at the beginning. She did not in my submission. The relevant pages are page 67 of volume A onwards. She makes no comment at all about the agreement being fair at the beginning. She merely holds that the – so it starts at page 63 through to 66 and she sets out the terms of the agreement, you'll remember that was 10,000 for the first year, 10,000 for the second year and any year after the year 3 Mrs Clayton got $30,000. She sets out the grounds that Mrs Clayton sought to set aside the section 21 agreement at the top of page 65 and she finds under the third ground, 21(j)(4), it's seriously unjust and she says at page 66, 35, "I do not consider it necessary to make findings in regard to the other grounds put forward by Ms Clayton, the agreement set aside under 21(j)(4).

The fourth point is a small point Your Honour Justice Arnold, the interest free loan by Ms Clayton back in 1999 of 86,000. The other relevant evidence is Ms Clayton's evidence that she worked during the marriage, including on this trust and was not paid and that evidence is all in the blue volume at 311, 412 and 413 and I suggest it's a logical deduction that her wages accumulated and that is the $86,000 that was used because they would have paid her for tax reasons.

The fifth point is that in terms of this issue and the appeal point Ms Clayton's submission is that whether or not this was a nuptial settlement is evaluative and this the straight application of Austin Nicholls and her submission is that none of the Courts got to the discretion, they only dealt with whether or not it was a nuptial settlement and they decided that wrongly.

And just finally on the vehicle, Mr Butler suggested that the car has been made available to Ms Clayton pursuant to a maintenance order. That's wrong. The car has continued to be supplied to Ms Clayton for her use since separation and we know

that from the accounts that I took you through last week. The first maintenance order isn't made till March 2010, four years after separation and of course it was an order against him personally not the trustees, he's just using the Trust to meet his maintenance obligation.

As to the underlying land asset, remember this trust owns buffer land around the mills, not the actual land that the mill's on. So if you look at volume G, 1848 with the accounts, this trust receives about $300, just under $300 a week for two houses. Yes, sorry, for each house, $300 for one house and $300 for another house in terms of rental income. They are residential houses. There's also the avocado orchard but that's in the company. So it's difficult to see how that is going to cause a collapse of the business, and a rational owner, we can assume, will enter into a lease arrangement which suits and brings in the biggest return. So that is 182.

Now I want to move on in reply to my learned friend Ms McCartney's submissions, and I do have a road map and I do have, just because it's more efficient, and I hope Your Honours don't mind. I know you're getting an awful amount of paper but it is more efficient in terms of being able to focus I think.

GLAZEBROOK J:
Are you going to comment on the schedule?

MS CHAMBERS QC:
We've done our own schedule, Your Honour, which has just been handed up, so I will be. This is the pink one.

GLAZEBROOK J:
Thank you.

MS CHAMBERS QC:
Yes. So, starting with the road maps.

WILLIAM YOUNG J:
This is going to take a little time isn't it?

MS CHAMBERS QC:
It's going to take a little time.

ELIAS CJ:

All right, we will take the adjournment now. We will start this after lunch.

MS CHAMBERS QC:

As Your Honours please?

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.19 PM

ELIAS CJ:

Thank you.

MS McCARTNEY QC:

If it pleases the Court I am stepping forward to speak in relation to the two documents just passed to the Court by my learned friend Ms Chambers.

ELIAS CJ:

Well are you just going to object to them?

MS McCARTNEY QC:

I'm going to object to them Your Honour and may I just set out the grounds for the objection. In relation to the –

ELIAS CJ:

I should say that while some of my colleagues may have taken them out at lunchtime I haven't so you shouldn't assume that we've all read them.

MS McCARTNEY QC:

Thank you Your Honour. In relation to the first document which is the purpled document, the mauve document which has the intituling "Road map number 2 for Melanie Clayton in reply", I just want to go back to where I started when I first addressed the Court in relation to Mr Clayton. Mr Clayton is seeking to have the appeal addressed on the basis of principle, evidence and record and what he's very, extremely concerned about is that it doesn't proceed on the basis of prejudice and ambush.

WILLIAM YOUNG J:

You don't really need to say that to us actually.

MS McCARTNEY QC:

I know Your Honour but it's happened again. This –

GLAZEBROOK J:

Well why don't you point to exactly the passages you're concerned about.

MS McCARTNEY QC:

Well this road map, it's not a reply it's a new set of submissions introducing evidence that just isn't before this Court.

ELIAS CJ:

Well just tell us which paragraphs do that and we'll just note them. Because we are anxious to conclude the case, so if we can move on and hear the substance of the appeal and you've noted what you're objecting to, that will help us.

MS McCARTNEY QC:

I would really like, my submissions is I would really like this road map taken off the file and I'll Your Honours why. Paragraph numbers 2(a), something I've never heard of before, 2(b) something that has a whole background that's not before the Court, 2(c) something I don't know about and not before the Court. This is all –

ELIAS CJ:

Well yes I understand that actually, I hadn't realised these are acquisitions following the case, yes.

MS McCARTNEY QC:

Alleged acquisitions that I know nothing about, 4, in relation to the bankruptcy judgment with submission on the top that Mr Clayton refused to pay. There's a whole background to this that hasn't been put forward and a reference to what Ms Hoskings submitted which is quite different that what's recorded in the bankruptcy judgment. Come down to paragraph 6. And I will say the opening and closing submissions that was available to Ms Clayton to put in her written submissions she didn't, she made it orally, so that I had to respond orally. Paragraph 6, third bullet point, Mr Hagen's approach to valuation, it was inconsistent with the valuation evidence of the other two valuers and the other two valuers' evidence was adopted by the Court. Number 8, that Ms Clayton relied on Mr Clayton's concession. She couldn't have possibly done that, she had her own valuer valuing for her, who valued on a particular basis.

GLAZEBROOK J:

Well this is an answer to those. That's nothing to do with whether it was before the Court and you don't have an answer to the right of reply. So all you need to do is to point us to the paragraphs that you say go beyond the evidence or go beyond reply.

MS McCARTNEY QC:

I just thought the Court might like to know what part of it goes beyond the evidence and beyond the reply. Paragraph 9, the argument that the issue of separate property was not before the Family Court when clearly it was.

GLAZEBROOK J:

But that's again replying to the reply.

MS McCARTNEY QC:

It's a reply that doesn't follow the record. This is my concern. It's – we're trying to keep this principled and in a reply this Court is being told –

ELIAS CJ:

Well there are references given.

MS McCARTNEY QC:

To 9A, yes there are but it's the narrative that I'm worried about. That's not the worst one, number 9 is not the worst one. Paragraph 10 I suppose is a reply but then in relation to it the submissions continue – sorry I should go over here, paragraph 13 is a reply, paragraph 17 I suppose is a reply. I've made the reference in relation to income or gains. Paragraph 21, in relation to the memorandum from Mr Carruthers, that's available to the Court, taking the objection available to my learned friend. Paragraph 25, in relation to the table which was the trustees' table – which is Mr Clayton's table, the schedule. So that's the first part. That's the new submissions that aren't anchored into the evidence.

ELIAS CJ:

Sorry which? I thought you – I've only noted that you're objecting to 2.

MS McCARTNEY QC:

2A, B and C.

ELIAS CJ:

Yes. Four.

MS McCARTNEY QC:

Four.

ELIAS CJ:

And 6, the third bullet point.

MS McCARTNEY QC:

The – 6, the third bullet point.

ELIAS CJ:

And the sentence, "Mrs Clayton relied on Mr Clayton's concessions."

MS McCARTNEY QC:

Concessions, in 8, and then I went through the rest of it and I said –

ELIAS CJ:

I thought you said that they were required submissions.

MS McCARTNEY QC:

Yes, I did, the rest of it. I did, Your Honour. I'm sorry, I was just going through and checking for myself.

ELIAS CJ:

Yes, so it's just those – it's just 2, 4, 6 third bullet point, the sentence in 8 and 9, I think you slightly backed down on.

MS McCARTNEY QC:

I did slightly back down on it because Your Honour pointed out something, yes.

ELIAS CJ:

Yes, well it is a reply and it is referenced.

MS McCARTNEY QC:

Now is Your Honour going to hear about the schedule as well because that's submission, too, in pink?

ELIAS CJ:

Well, all right, perhaps we'll deal with this one first and hear it.

Ms Chambers, 2A, B and C do seem to be – it does seem to refer to material that's not been referred to.

MS CHAMBERS QC:

Yes Your Honour. The – it was in response to my friend's submission, "There is no money," which appeared to be talking about now.

ELIAS CJ:

All right, well, I think we should just ignore that.

MS CHAMBERS QC:

Yes Your Honour. Just the $3.3 million apartment owned by Medford and that Mr Medford, and that the Medford Trust is, in fact, Mr Clayton is all in the evidence. He was cross-examined on that and there's findings on it and just B, 2B is all in the judgment of Associate Judge Matthews as referenced about how Mr Clayton guarantees that loan, even though it appears he's got nothing to do with the company that acquires the sawmill. He's the only person guaranteeing the loan. And there's the reference, it's paragraph 59.

ELIAS CJ:

So this is in reply to the submission that there's no money?

MS CHAMBERS QC:

Yes.

ELIAS CJ:

Yes, and the paragraph 4?

MS CHAMBERS QC:

Relates just to the decision of Associate Judge Matthews and the submission is based on what His Honour finds at paragraphs –

ELIAS CJ:

What is it in reply to?

MS CHAMBERS QC:

It's – you'll recall my learned friend said, "Well look at the Matthews – look at His Honour's decision. In that decision Ms Hosking said that he had no money," and that's what it's in reply to. She relied on one paragraph of it and the paragraphs – and, in effect, what Ms Hosking was saying, "Well, that's in the Family Court and he now says he's worth 29 million. In the Family Court he said he's worth nothing."

ELIAS CJ:

But it's a side show for us –

MS CHAMBERS QC:

It is a side show and I'm happy just to leave it at that and not make any oral submissions.

ELIAS CJ:

"Mrs Clayton relied on Mr Clayton's concessions."

MS CHAMBERS QC:

Well, happy to delete that sentence, it's irrelevant.

ELIAS CJ:

Thank you.

MS CHAMBERS QC:

Happy to delete the Mr Hagen's evidence really. Again it's probably not worth going there. The bullet point under number 6, Your Honour. I think that's it.

ELIAS CJ:

All right, yes, thank you.

All right, Ms McCartney?

MS McCARTNEY QC:

I'm very happy with Your Honour, and in relation to this – I'm sorry.

ELIAS CJ:

Yes.

MS McCARTNEY QC:

I didn't come to this. The Court asked for a schedule.

ELIAS CJ:

Yes.

MS McCARTNEY QC:

We provided a schedule just in the way the Court asked us to provide it. We based it on the evidence before the Family Court, which is how the Family Court Judge addressed all issues. We relied on the Family Court judgment of date of hearing as at the date that the matter was heard, which was July 2011, the nearest date, balance date was March 2011, and we put together a schedule to show the effect of the – how that would affect the issues before the Court. The Court asked for a single page schedule which we provided and we provided it to Ms Clayton, we sent it to her. Mr Dent, the valuer, has been trying to get hold of Mr Lyne to discuss it and hasn't been able to do so. This that's been provided to the Court is now the schedule that the Court asked for. What it is, is a rehash, trying to cherry pick different dates after a finding from the Family Court that the date is March 2011 and trying to put forward a better position for Mrs Clayton based on some dates date of separation, some dates date of hearing, and we still don't know what the overall result of the judgment is and what Mr Clayton, I've been trying to ask for, is some substance behind what the amount of money is that we're talking about and how any discretion or changes that this Court might make in relation to what my learned friend calls the pool of property is going to affect the overall just result. In the absence of that provision of the single schedule, again, I would submit that this is not what the Court has asked for and it's just a whole new set of submissions.

ELIAS CJ:

Yes, thank you Ms McCartney. We'll take time just to discuss it. It is the case that I don't think any of us envisaged that we would get a submission in this form. On the other hand, it may be better to consider whether we receive it and give you and opportunity to respond to it but I'll discuss that with my colleagues, thank you.

COURT ADJOURNS: 2.32 PM

COURT RESUMES: 2.35 PM

ELIAS CJ:

Right I think it's fair to say that we have questions about the schedule that's been put in, as well as the schedule put in on behalf of Ms Clayton, so the sensible thing, Ms McCartney, we think, is to hear you on the schedule, because we have some questions about what it means and what can be taken from it. We'll hear, we'll hear Ms Chambers then as to her suggested approach in the schedule and any submissions on it, because they inevitably entail submission. Your schedule entails a submission too and we'll hear you in reply if need be.

MS MCCARTNEY QC:

Now, Your Honour, the schedule's been prepared in response to this pre-Court's minute and it, it values all items at date of hearing. There was a reason why the parties in the Family Court adopted date of hearing for valuation. It's because of the interconnectedness of all the entities. So it's not a situation where you have a current account in the form of a bank account. What you have is there's a current account, movements in the current account have involved moving towards other entities where at date of hearing they have been valued as an asset in that entity and therefore have been taken into account.

So in the Family Court judgment, and I think it's paragraph 114, the Family Court Judge recorded the agreement of the parties that everything's going to be valued at date of hearing. Now, in relation to the figures in the schedule, in order for this Court to be able to make determinations, having regard to what the effect of those determinations will be on the overall outcome in the relationship property proceedings, the trustees, and their submissions, I think by memory I think it's paragraph 56, set out their understanding of where we're at, at this moment.

And in according their understanding, they effectively invited Ms Clayton to say what her understanding is of where we're at, at the moment, because only by Ms Clayton showing what her understanding is of the division are we to know whether we're all agreeing or whether we're slightly apart. The submission by the trustees show what they thought Mr Lyne's position was for Ms Clayton.

ELIAS CJ:

Sorry, we'd better look at that.

MS McCARTNEY QC:

Paragraph 56.

GLAZEBROOK J:

56 of what?

MS McCARTNEY QC:

Of the trustees submissions in appeal –

GLAZEBROOK J:

Sorry it's just we've got a number of submissions and it's quite difficult to –

MS McCARTNEY QC:

38, 2015.

GLAZEBROOK J:

Sorry?

MS McCARTNEY QC:

Appeal 38, 2015.

GLAZEBROOK J:

And then what paragraph?

MS McCARTNEY QC:

It's paragraph 56 I understand.

GLAZEBROOK J:

No that seems to be a doubling up.

WILLIAM YOUNG J:

Page 12.

MS McCARTNEY QC:

It's the reply submissions.

ELIAS CJ:

You're going to have to give us a –

GLAZEBROOK J:

Page 12?

MS McCARTNEY QC:

Page 12.

GLAZEBROOK J:

I haven't got those, I'm in some other submissions.

O'REGAN J:

Is there a reply submission in SC 38?

ELIAS CJ:

Sorry, say that again?

GLAZEBROOK J:

The trustee submissions, is it?

O'REGAN J:

Yes, trustee submissions.

ELIAS CJ:

Page 12 is it? Oh yes the table, yes.

MS McCARTNEY QC:

Yes, the table. So at that table the Court can see that the trustees set out what their understanding of the division is and that included on the two left-hand columns, "Lyne" is reference to Mr Lyne who acted for Mrs Clayton. On the right-hand "Dent" who is acting for Mr Clayton and the Dent two right-hand columns showed Vaughan Road Property Trust out and Vaughan Road Property Trust in, and Your Honour Justice Glazebrook asked me, "Why are the figures almost the same at the bottom whether in our out?" And the answer I gave was in relation to the current account movements.

WILLIAM YOUNG J:

Sorry, why are the Claymark shares so different?

MS McCARTNEY QC:

The reason why the Claymark shares are so different, Your Honour, is essentially that the Court of Appeal in addressing EBITDA ruled that the earnings of the American entity which the Family Court Judge said there was no claim against, the Court of Appeal ruled that those earnings were in and they included them at 2.66 million. So, therefore, we're satisfied that the EBITDA of 6.75 million was correct rather than the date of hearing EBITDA that Mr Dent put forward of 5.75 million. As it turned out and as an aside, the financial accounts relied on there were wrong but we're stuck with that finding in relation to the EBITDA.

WILLIAM YOUNG J:

So I'm just looking at page, paragraph 56, Claymark shares are –

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

– 14.7 million.

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

And they're 9.5 million on the tables.

MS McCARTNEY QC:

Yes.

WILLIAM YOUNG J:

Why is that?

MS McCARTNEY QC:

And the reason for it, Your Honour, is that if the US earnings are in, Mr Dent values on the basis that the debt associated with those earnings must also be taken into

account and Mr Lyne says you don't take the debt into account. So that's really what the main difference is.

WILLIAM YOUNG J:
I see.

MS McCARTNEY QC:
It's really debt. The other main difference between –

WILLIAM YOUNG J:
Oh, I see, I'm sorry, you've effectively replicated the Dent, of course, the Dent figures –

MS McCARTNEY QC:
Yes.

WILLIAM YOUNG J:
– whereas the first two columns are the Lyne figures?

MS McCARTNEY QC:
That's correct Your Honour, and that's what the difference is. The second main difference between the parties, the Court will see, is current accounts and the reason for that is although the Family Court directed that all valuations be at date of hearing, Mr Lyne subsequently elected to value current accounts at date of separation.

So those are the main differences, there are also some mistakes in the accounts but it's unsatisfactory, I know we've got to the Supreme Court, we haven't had quantification hearings and there's a difference between the parties as to quantum. When the Court asked for a schedule, from my point of view, I was very pleased because I thought that we would finally get Mr Lyne's figures based on date of hearing and the Court could see what the difference was between the parties and what the effect of the issues before the Court is going to be but Mr Lyne and Mrs Clayton have elected not to put that schedule before the Court so we're in the position we were back in the Family Court, we've got no level of quantification and it is very, very hard to talk about exercising a discretion in what really is a vacuum.

So when I come to the schedule that's been filed on behalf of Mr Clayton, as the Court can see that, the two options, one is in blue and one is in pink. Blue is the RPT

out, pink is the RPT in. And then on the far right-hand side there's a column "Probability Percentage" and that deals with the RPT being in but being valued on the basis of the chance or lack of chance that Mr Clayton as trustee will use the powers in the trust deed in the way in which Ms Clayton claims.

ELIAS CJ:
Where's the 10% from?

MS MCCARTNEY QC:
It's just a figure, Your Honour.

WILLIAM YOUNG J:
It's just illustrative.

MS MCCARTNEY QC:
It's just to illustrate.

ELIAS CJ:
Oh I see.

WILLIAM YOUNG J:
It's illustrative, so if you say it's a 10% chance, then at 609,000, and there are various intermediate points –

MS MCCARTNEY QC:
That's 10%.

WILLIAM YOUNG J:
– that we could work out with a calculator.

ELIAS CJ:
I see.

MS MCCARTNEY QC:
But the interesting thing in that regard is that the Court comes down to the current account balance on the 10% probability, you see the current account has to go in at 90% of the current account because it will still be there. So the bottom line figures on the way in which Mr Dent has prepared the figures, very interestingly, you know, the

range is quite small and that's why we were hoping to see Mr Lyne's figures put forward in the same schedule way so that we could know, finally, what does he say these, these issues are worth.

GLAZEBROOK J:

Well what do you say is the value of the Vaughan Trust?

MS MCCARTNEY QC:

The value of the Vaughan Trust is at the top of –

GLAZEBROOK J:

Forget the current accounts, what's the value of the Vaughan Trust?

MS MCCARTNEY QC:

6.097 at the top, right-hand side.

GLAZEBROOK J:

Right. And what's the value of the Claymark Trust?

MS MCCARTNEY QC:

No value.

GLAZEBROOK J:

Why's that?

MS MCCARTNEY QC:

Because it's addressed as a, as an adjustment.

GLAZEBROOK J:

No, I want to know what the value of the Claymark Trust is.

MS MCCARTNEY QC:

The value, the net equity –

GLAZEBROOK J:

I don't want to know what the net equity is. Why is it net equity? Forget the current accounts. What's the actual value of the assets in that trust?

MS McCARTNEY QC:

It's in Mr Lyne's affidavit and I think it's 637,000 as at date –

GLAZEBROOK J:

That's the value of those two residential properties and the avocado farm or is that not there now?

MS McCARTNEY QC:

That's the value of all the assets in the trust which are the surrounding property and Kaimai Developments Limited.

GLAZEBROOK J:

And that includes the avocado orchard, doesn't it?

MS McCARTNEY QC:

Including the avocado orchard. The figure is –

GLAZEBROOK J:

Some 600,000 – I don't need an exact –

MS McCARTNEY QC:

789.

WILLIAM YOUNG J:

It's set out there, there's a reference in option 3 with some –

GLAZEBROOK J:

That's what I thought, it's half of the –

MS McCARTNEY QC:

Yes.

GLAZEBROOK J:

So 673, is it?

MS McCARTNEY QC:

673 is the total net equity, page 789 of Mr Lyne's date of hearing valuation.

GLAZEBROOK J:

When you say “net equity” what does that mean?

MS McCARTNEY QC:

Well that's how it's been valued.

GLAZEBROOK J:

No, no, I understand that but that’s not taking off the current accounts or as debt of the trust, is it, or is it?

MS McCARTNEY QC:

I'm just going to have a quick look because I think that the current accounts don't make any difference.

GLAZEBROOK J:

Well net equity usually means assets less debt so the question is, did they take off the current accounts because I don't want them taken off. I want to know how much is actually in there as assets.

MS McCARTNEY QC:

Well is this – I think is at page 688.

GLAZEBROOK J:

Page 688.

MS McCARTNEY QC:

There’s no recorded current account on page 688 but that loan advanced by Mr Clayton as at March 2011 is shown there at 64,000.

ELIAS CJ:

Sorry, page?

MS McCARTNEY QC:

688.

ELIAS CJ:

Thank you.

MS McCARTNEY QC:

Page 7.2 – paragraph 7.2.

O'REGAN J:

So which volume are you talking about?

MS McCARTNEY QC:

The volume C, red C.

ELIAS CJ:

So this schedule that you have produced is entirely based on Mr Dent's calculations, his figures?

MS McCARTNEY QC:

Yes, and the figures come directly from this table produced by the trustees.

GLAZEBROOK J:

Well as far as I can understand there's no difference at to the value of the Vaughan Trust assets, is that right?

MS McCARTNEY QC:

That's correct.

GLAZEBROOK J:

And there's no difference, or do we know if – there's certainly a difference as to what happens – is there any difference as to the – we can ask Ms Chambers this – but any differences to the value of what's in the Claymark Trust that you know?

MS McCARTNEY QC:

Yes because in the submission that I've just been reading in the –

GLAZEBROOK J:

Apart from the issue of the current accounts.

MS McCARTNEY QC:

I think it's, I think that it's an increase in value that's been relied on but it's not a lot of money, I think it's about 130,000 or something.

GLAZEBROOK J:

So not much difference there.

MS McCARTNEY QC:

Not much. I think that's correct.

ELIAS CJ:

And what about the figures you say are wrong in the schedule in the submissions?

MS McCARTNEY QC:

From Mrs –

ELIAS CJ:

Yes, are you saying that –

MS McCARTNEY QC:

– Clayton, because –

ELIAS CJ:

– you want to have those re-done, that this is the Lyne figures?

MS McCARTNEY QC:

I'm sorry it is the pink one. What Mr Lyne is doing or what Mrs Clayton is doing is making adjustments as she goes through to the current account by taking it back to 31 March 2006.

ELIAS CJ:

Date of separation.

MS McCARTNEY QC:

Date of separation without taking into account the movements between date of separation and date of hearing and without having any regard to the Family Court judgment that for consistency in this case all parties agreed that we had to get a single date which was 31 March 2011.

GLAZEBROOK J:

Now that's not before us in any manner, is it, so what are we supposed to do with that? Is it going back to anyone to sort out?

MS McCARTNEY QC:

Well it is, Your Honour, it's going back to the High Court for the –

GLAZEBROOK J:

And that's, sorry.

MS McCARTNEY QC:

Yes.

GLAZEBROOK J:

That's going back explicitly under the Court of Appeal ruling, is that right?

MS McCARTNEY QC:

Yes, and it's –

GLAZEBROOK J:

So what are we supposed to do with that information because we don't know what the result of that will be so what are we supposed to do with that?

MS McCARTNEY QC:

Well I can respond to it on the basis that the trustees have put before the Court their understanding of the judgment and their understanding of Mr Lyne's position. That's based on all the evidence before the Family Court and the methodologies adopted in the Family Court.

GLAZEBROOK J:

So there's going to be a difference between one side says it's seven million and the other side says it's 12-ish.

MS McCARTNEY QC:

That's what we think, that's what the trustees think and Mr Clayton thinks but we haven't heard from Mr Lyne and what we're very concerned about, what Mr Clayton is very concerned about is having told this Court what he thinks Mr Lyne's position is, we go back to the High Court and we find that Mr Lyne actually has quite a different position and he's asking for something a lot higher than what we're able to tell the Court our understanding of his position is. So we're asking the Court in terms of its exercise of discretion to deal with it on the basis that this is the range, paragraph 57

of the trustee's submission, and in relation to Mr Lyne or Mrs Clayton, if she's saying something different, in our submission, she needs to, in a table form, in a form that's really easy to understand, show how her position is different is different from that which we understand it so that the Supreme Court in exercising discretions and considering a just outcome actually knows what the figures are.

GLAZEBROOK J:

Can you say – what has Mrs Clayton got so far, you say? Do you say she's already got what?

MS McCARTNEY QC:

If she's already received, does Your Honour mean or she will already be entitled to?

GLAZEBROOK J:

Well it's already received in the sense of the judgment so far –

MS McCARTNEY QC:

Yes.

GLAZEBROOK J:

– clearly say she has whatever X number of dollars.

MS McCARTNEY QC:

Yes.

GLAZEBROOK J:

I know there's some quantification to come, but...

MS MCCARTNEY QC:

Yes, on the basis of Vaughan Road Property Trust being in, which is the way in which the Court of Appeal has dealt with this matter the figure is 6.598 million. The right-hand side of the Dent schedule on page, at paragraph 56 of the trustee's submissions. That's after, I'm sorry because the figure is above that, it's 8.318, she's had 1.72 million.

ELIAS CJ:

Distributed to date? Yes.

MS McCARTNEY QC:

That's been distributed to date.

GLAZEBROOK J:

Why is the VRPT out only one million less than that because of the current accounts, is it?

MS McCARTNEY QC:

It is because of the –

GLAZEBROOK J:

That's right.

MS McCARTNEY QC:

It's because of the current accounts.

GLAZEBROOK J:

Thank you.

MS McCARTNEY QC:

That's that movement. So then if I may come back to the schedule that's been provided to the Court. The figures on that schedule, two-thirds of the way down, "Balance to distribute," that's after taking into account the 1.72 million, we then show the balance depending on which scenario is yet to be paid to Mrs Clayton. And then under that heading are the adjustments and the adjustments under the first three columns, section 44C fails, obviously nothing is paid. If section –

ELIAS CJ:

Sorry, the adjustments, where –

MS McCARTNEY QC:

Just up here.

ELIAS CJ:

Yes I see, thank you.

MS McCARTNEY QC:

Under, “Adjustments,” section 44C, option 2, the option the Court can see is down further below the notes just the heading, “S44C PRA option 1.” No award made, option 2, is if the Court were to make an award based on the loan advances, that date of separation which are – and the net equity of the Claymark Trust, 154,562, that's under the section 44C award that Mrs Clayton is seeking. If the Court remembers she says, “Well Mr Clayton made these advances to Claymark Trust and it enabled the trustees to buy land, the value of the land is now this, 673,000. I'm entitled to half of that less half of the loan advances.” So that's the figure that would be paid under section 44c on that scenario.

On the next scenario –

ELIAS CJ:

Sorry, is that the 150 –

MS McCARTNEY QC:

It is, Your Honour.

ELIAS CJ:

– 4562?

MS McCARTNEY QC:

On the next scenario which is option 3 is if the Court adopts the date of hearing advances from Mr Clayton which was the figure before the Family Court and that's taken off the net equity if the Court were to find that that is a section 44C at disposition and which meant the figure to be paid was 306,000 and the same on the other side, it doesn't make any difference whether it's in or out. If the Court is exercising its discretion under section 44C it's – the only difference is quantum.

And then in relation to section 182 there are three options. The left-hand option, section 182, claim fails, nothing to be paid. The section option is the Court finds that the settlement is a nuptial settlement. Looks at expectations and sees the expectation of the Claymark Trust was that Mrs Clayton would receive a car. Here’s the value that we place on the car, $20,000 based on the fact it was bought in 2000 and it was depreciated by 2006. That's the value that Mr Dent put on it, 20,000.

Option 3 is what Mrs Clayton is seeking. She wants half of the net equity of Claymark Trust under section 182 and that's 336,000 based on Mr Lyne's evidence before the Family Court. The reference which I've given Your Honour in the bundle already. And then following that through, if it's in it's the same figures depending on how the Court seeks to address these two issues.

So as the Court can see, if I could just add just one last submission in relation to this, in terms of the big numbers in this claim, the big numbers are in the Claymark shares and in the current accounts of the RPT is out. If VRPT comes in the big numbers are in the shares. There's nothing in the current accounts but there's money in Vaughan Road Property Trust. The adjustments, for all of the argument that we've been having, the adjustment is actually relatively small.

Is there anything else?

ELIAS CJ:
I'm now a little lost in terms of what valuation questions are going back to the High Court.

MS McCARTNEY QC:
It's quantification of the judgment of the Family Court based on the findings made in the Courts, from the Family Court finding right up to the Supreme Court finding. I – my understanding – no it's my wish is that we can really narrow it down based on if we can confirm the agreement and I haven't been able to get this confirmation, I doubt that I will, that date of hearing is the relevant date. We can really narrow it down and the issues, the way in which Mr Clayton sees it will be the valuation of the Claymark shares. By that time, if we've got a date of valuation for the current accounts, they should not be an issue. The main issue will end up simply being whether the debt that gave rise to the earnings in the US that have been taken into account in the EBITDA of Claymark is to be taken into account in the quantification and if could be narrowed down to that small focus, it may even be possible that we don't have to go to the High Court for quantification, which would then mean that these parties who have been in litigation for so long would be able to move forward.

GLAZEBROOK J:
What I don't understand is – what I understand one of your arguments was, was that she's already had everything, this Court should not make findings because she's already had everything and there's not much money there anyway. The trouble is, if

quantification hasn't taken place I don't know how we can possible accede to that submission. Isn't the best thing for us if we're minded to make orders in relation to those trusts, and then whatever comes out in the wash further down comes out? Because that was what I understood your submission to be, don't make orders because she's already had too much and you can see that's in the figures. Well I can't see that from the figures because she's only 1.7 anyway and even on your figures she's entitled to 5.4.

MS McCARTNEY QC:

Yes – no I haven't said she's already had too much, referring to the 1.72.

GLAZEBROOK J:

No, no I understand that but I don't see how we can say we're not going to make an order because she has already got enough. What is the submission on that? Maybe I've misunderstood you.

MS McCARTNEY QC:

No Your Honour the submission isn't that she's already had enough, the submission is that understanding of Mr Clayton is the same understanding as the trustees, that the figures are as set out at paragraph 56 of the trustees' submissions and in the schedule. On the basis of that range, the different between the Court making orders exercising discretions or confirming discretions and not doing so is a figure of about $1.5 million.

GLAZEBROOK J:

Well why does that mean we don't make orders?

MS McCARTNEY QC:

And that means that if the Court operated on the basis of these figures, the Court would be operating with knowledge of what the effect of the orders would be. The concern –

GLAZEBROOK J:

But if it's one dollar that should be shared, does it make any difference to the point of principle?

MS McCARTNEY QC:

Well the difference that it makes to the point of principle and the way in which the Court is going to address the matter, is the Court has been addressed on the basis that Mr Clayton is a ratbag who put everything into trust so that he didn't share it with his former wife.

GLAZEBROOK J:

Well I don't think that's the basis. It's been put on the basis that it's matrimonial or relationship property and so it should be shared equally. If we accept that it should be shared equally, if we don't then the trust's property is not shared equally but does it matter whether it's one dollar or 1.7 or 10 million to that point of principle?

MS McCARTNEY QC:

Well it does matter if it's $10 million because if it's $10 million that will affect the overall viability of the division in terms of what Mr Clayton receives. So if Mr Clayton is required to pay, the figures shown as adjusted total, plus $10 million, obviously he's not going to be able to do that without, on the evidence that the Court has heard in the bankruptcy Court and on the evidence of the land assets being integral the operation of the business, he's not going to be able to do it. His shareholding as Ms Hosking told the bankruptcy Court, his shareholding has no value and he will be left with nothing out of the division and Ms Clayton will be receiving 10 million plus this figure at the bottom, six million. So the Court has to constantly bring the division back to does this provide for a just division? Which ordinarily means, in relationship property cases, an equal division subject to adjustments.

GLAZEBROOK J:

Well why doesn't it in this case, assuming that the trust come in?

MS McCARTNEY QC:

Assuming that, Your Honour, that the trust –

GLAZEBROOK J:

Well assuming that you lose on that and the trust come in, why doesn't it just mean a 50/50 division of whatever's there?

MS McCARTNEY QC:

Because if it's a 50/50 division of whatever's there, it's as Mr Dempsey, in his second affidavit, there will be a cascading effect on the whole of the Claymark operation and

that figure there for Claymark shares, the Court can put a line through it, it doesn't exist anymore. That will be the effect of it. So the just division won't be a balance of $16 million, it will be $16 million less the value of the Claymark shares, they're gone and that's what the concern is. We have been operating in a vacuum in addressing value. Now if Mr Clayton had known, I wasn't acting for him obviously, but if Mr Clayton had known that this was going to be advanced through the Courts and the Courts would take different views on the ways as to whether we shame or lose and all the rest or power of appointment, Mr Clayton's expert may have been instructed, well look value the whole operation. They say the whole operation is now to be addressed, none of it is separate property, none of it is trust property, it's all relationship property, you'd go back to the value and say value it on a capitalisation of earnings basis and introduce whatever is surplus asset and then you'd get the whole lot come in on a basis where a completely different methodology is adopted but it would show then what exactly was available for sharing. So we keep moving through the course, Your Honour. It's like Justice Hammond said I think *M v B*, the sand shifts as you go.

GLAZEBROOK J:

I'm sure there's never been any shifting of sand, because this argument about the trust being relationship property was before the Family Court right at the start.

MS McCARTNEY QC:

Yes and rejected.

GLAZEBROOK J:

Well it might have been rejected but it has to be on the table and it can't come as a total surprise that Courts might take a different view, can it?

MS McCARTNEY QC:

Well all I can say in relation to that, Your Honour, is that Courts trying to achieve a just division, it's open to them to say, look now that we look at this and we can see that all of this is before the Court, we can see that the approach to methodology hasn't reflected the reality. That's what could be said.

GLAZEBROOK J:

Well it might be if we had any basis for saying that but at the moment we've just got assertion.

ELIAS CJ:

It is going back to the High Court for everything to be, well for most of it to be looked at. It shouldn't be too difficult to decide the point in principle and to maintain the position so that the ultimate orders can be made in the High Court which will then be seized of everything. The part that I'm struggling with is whether we have sufficient perspective for the section 44C claim. That it seems to be to me is the more difficult part because that turns on all the circumstances and until there is some resolution of what the position is between the parties, I'm just not sure about that, that jurisdiction. That seems to be a little difficult on what we have and yet we're being asked to do a section 44C to make an order.

MS McCARTNEY QC:

Yes and section 182 is dealt with as a discretion. It's in a similar bracket.

GLAZEBROOK J:

Well, I'm not sure about that because 182 is a totally separate discretion, isn't it, a total separate section?

MS McCARTNEY QC:

It is but it's, it is, it operates if one look at the farming cases on the basis is has the expectation been met to date and if it hasn't then it is. If the provision provides the applicant with what the trust was providing her with or him with then the Court doesn't exercise its discretion, so I'm sorry to introduce all these new things, Your Honour, but it's, it really –

ELIAS CJ:

But it still has to be in that trust, doesn't it?

MS McCARTNEY QC:

Yes.

ELIAS CJ:

Yes, all right, I understand that.

MS McCARTNEY QC:

Thank you, Your Honour.

ELIAS CJ:

Yes, yes, thank you Ms McCartney. Mr Chambers, do you want to do your reply submissions first or would you prefer to …

MS CHAMBERS QC:

I would, I would like to, Your Honour. So if Your Honours are content, I'd like to go back to my road map number 2 and then go to the pink form?

ELIAS CJ:

Yes, thank you.

MS CHAMBERS QC:

Right, so and I'll try and get this, through this fairly quickly because the road map's fairly full but Ms McCartney made the submission there is no money, that's a direct quote and I'm referring Your Honours first of all to the finding at paragraph 19 of the Family Court Judge who specifically addressed this very issue in her credibility finding where she says, and it's at page 60 of the bundle, "Mr Clayton has given a personal guarantee of some 35 million to ASB. I do not accept that in these circumstances he could be so unaware and so lacking understanding the financial legal structure. I find his evidence to be disingenuous and somewhat self-serving. In many respects he lacks credibility as an example of this is his evidence relating to the precarious state of his business that it was unable to meet its obligations to creditors and the fact that trading conditions have never been more difficult. He says can't pay his bills, 'We're scrambling to the bank and see if they'll support us.' Then, however in March of this year, Mr Clayton purchased an apartment for himself the cost of $3.3 million," and so she goes through – …

O'REGAN J:

This is the stuff we said we weren't going to deal with, isn't it?

MS CHAMBERS QC:

Well, not quite, Your Honour, because remember by the time we go to trial, Metford Trust which is another one of these –

O'REGAN J:

No but it was the material that Ms McCartney objected to and I thought you accepted you wouldn't deal with it.

MS CHAMBERS QC:

I'm going to need to explain. The Metford Trust, by trial date, had bought the $3.3 million apartment, referred to in paragraph 20, and all that evidence is at volume D, page 1084, he gets cross-examined on it because even though it appears to be in Mr Giesbers' trust, as it turns out it's a Mr Clayton trust. It's the same, same, exactly the same methodology, put a trust in place with other people's names on it, in fact it's him.

O'REGAN J:

I'm just really not quite sure why we're dealing with this at all. I mean, in the end, the Court either makes an award or it doesn't. The Court's not going to say, "We would have made an award but because he hasn't got any money, we're not going to, we're going to let him off."

MS CHAMBERS QC:

Right, Sir, thank you, Sir. I'll move on, Your Honour. And we've dealt with the decisions of Matthews J and those paragraphs there. If you look at the decision, you'll see how it came to be that the arguments were in regard to particular assets in his name, so I'm not going to labour that either. And it is of course Ms Clayton's case that Mr Clayton is a very wealthy man but does not wish to share.

Now, the concession, my learned friend Ms McCartney made the submission that Mr Clayton did not make a concession that the advances to the trust were relationship property and a separation date. Now I have given you his opening and closing submissions. It's a matter for you but in my submission they do not at all relate or have a proviso that the concession is only made in relation to his arguments on section 21, the section 21 agreement, they are simply broad concessions, it's abundantly clear and then of course there was Mr Clayton's affidavit evidence which I have taken you to, I've given you the reference there where again he concedes that the advances to these trusts are relationship property and that they should be valued at separation date because they're like a bank account.

On Ms McCartney's argument there is a serious injustice because there is a huge of sum of money involved here and I'll take you to that because between separation date and hearing date he pulls out $5 million.

ELIAS CJ:

Are you not accepting the Family Court decision that all assets were to be valued at hearing date, hearing date in the Family Court?

MS CHAMBERS QC:

No Your Honour and I don't think the Family Court decision says that. The Family Court decision does not deal with the valuation of the advances. There is no finding to regard to that and that is in paragraph 8 of my roadmap.

ELIAS CJ:

Well can you take us to the Family Court decision about – because the Family Court would not have to deal with the advances to make –

MS CHAMBERS QC:

Because she wasn't dealing with quantification.

ELIAS CJ:

Yes.

MS CHAMBERS QC:

That's right.

ELIAS CJ:

But was there – I thought there was a determination that the property would be valued at the date of hearing.

MS CHAMBERS QC:

In general yes, but not the advances.

ELIAS CJ:

Well can I just see what she said, can you just tell me where I find it.

MS CHAMBERS QC:

She doesn't.

ELIAS CJ:

Anyone, what paragraph is it?

GLAZEBROOK J:

Well is this going to the High Court, this issue?

MS CHAMBERS QC:

It is. In the Family Court they agreed and I think very unwisely but they agreed somewhere along the line I think during the hearing, at the beginning of hearing that it would only – in regard to – that quantification would not be dealt with at that first hearing, just classification.

ELIAS CJ:

There is agreement that the valuation should be assessed at hearing date and for convenience that is the end of the 2011 financial year.

MS CHAMBERS QC:

Yes.

ELIAS CJ:

But this all property held in the various trusts and entities?

MS CHAMBERS QC:

Yes this is – sorry Your Honour, Ms Clayton's argument on this is that the advances were not included in that agreement and –

ELIAS CJ:

But how could they have been excluded? I'm just looking at the way it's expressed in paragraph 114, they must be included in what the Judge was saying.

MS CHAMBERS QC:

I don't think so Your Honour and I must be right because Mr Clayton's own closing submissions say the advances are to be valued at separation, which is normal, which is the standard practice. You treat advances at separation for obvious common sense reasons. It's like a bank account. If at separation –

ELIAS CJ:

Oh yes I recall your submission.

MS CHAMBERS QC:

Yes.

GLAZEBROOK J:

And the submission that Smith gave to you that those advances went back into the business and therefore affected the business but again that presumably is going to be a matter for the High Court.

MS CHAMBERS QC:

I'm going to deal with that now too. So I think Her Honour's statement there is subject to the concessions made by Mr Clayton in his affidavit, his cross-examination and his own counsel's submissions, including opening submissions, that advances are in a different category. That statement by Her Honour is too broad because we know he agreed advances were to be valued at separation and that that was fair. He got cross-examined on it, he agreed. So the whole Family Court hearing operates on the basis that that's the concession. That's why there's no huge cross-examination and that is also what you'd expect, that's how we deal with it.

So very little emphasis on those current accounts during the hearing because of those concessions and that's why I say that last sentence in paragraph 114 is wrong in terms of the current accounts. I mean bank accounts are done at separation as well obviously, it would be ridiculous to do them at date of hearing. Cars are usually valued at date of separation but things that grow with inflation or the market or deflate, date of hearing.

ELIAS CJ:

I just wonder how realistic that is when you're really talking about a business. Anyway.

MS CHAMBERS QC:

Yes the Act says that the general rule is you value it date of hearing but there's always been the exceptions for those kind of things that people can so easily change.

ELIAS CJ:

Well I can see that in the usual sort of case but effectively really, as Ms McCartney was saying, this is a business that's being valued and it seems slightly artificial to take a snapshot for some purposes at the date of separation but not for other purposes.

MS CHAMBERS QC:

Well the reason why you have to do that Your Honour is fairness because let's have a look at this issue, Ms McCartney's submission that this money just got taken out of one current account and put into another. It's volume G, the yellow volume, and it is at 1988, I'm at paragraph 10 of my roadmap. So this is exhibit 14(1), it was put to Mr Clayton in the evidence.

GLAZEBROOK J:

Do you have a page number for where it's got to?

MS CHAMBERS QC:

Yes that's in the – that is correctly indexed in the volume. It is at the beginning of the index Your Honour. So just looking at – this is just the movements in Mr Clayton's current accounts. So if we go to the total in March 2005, Mr Clayton has leant $9 million to the various trusts, nine million and they separate in December 2006 and in March 2005 you can see, so it's pre-separation, he's already leant the company, Clayton Holdings Limited, five million. Do you remember Ms McCartney said, "Oh he's taken the money out just to put it back in the company." Well before he even reduces his Vaughan Road Property Trust loan, which is running along nicely at about three million for 2003, 2004, 2005, he's already leant the five million to the company. It's got nothing to with him stripping out the three million from the Vaughan Road Property Trust whatsoever. Do you see my point?

What he does, by 2006, he's already reduced the Vaughan – so this is March 2006, they separate in December 2006. During that last year of the marriage he's already repaid himself a significant sum and then he keeps on pulling it out so that by date of hearing he actually owes these trusts $2.4 million and he, of course, is saying that's a relationship property debt and Ms Clayton should have to pay half of it. He has not put it into the company at all. If anything he has taken money out of the company as well post-separation and he has no explanation and you know I gave you that evidence, as to what he did with the money. It's in my roadmap, it's volume D, 1031 to 1038 but I took you through that last week. Where did the money go? I have no idea.

Now if Your Honours say no, no, no its valuation date of hearing for the current accounts, that is the difference, it is enormous. He's taken the money, he has not put it back into their little business, into their business, if anything he's reduced the money out. He has no explanation for where it's gone and Ms Clayton ends up about

three or $4 million worse. That is why it is important in terms of the principles of this Act for Your Honours to say well the current account is like a bank account, it must be valued at date of separation. There's a big figure riding on that.

Now as I say in my submissions, in the Court of Appeal this issue didn't even arise. It wasn't addressed in counsel's submissions. The fact that there was a concession in regard to the valuation date in the submissions by Mr Clayton didn't arise because we were arguing about section 44C applied and section 182 applied. So when Their Honours said well the advances were 60,000, that was made without reference to the concessions in regard to the valuation date on the advances or the fact that Ms Clayton's case was that the advances get valued at date of separation because that money has gone and it's gone to Mr Clayton.

Now paragraph 9 of my roadmap just talks about the section 21 aspect because my friend, Ms McCartney, was trying to say that the concessions in regard to these advances were related to the section 21 agreement but in fact, and I don't know whether I need to take Your Honours there, if Your Honours read Her Honour's – the Family Court decision at 33 and 35, what Her Honour is actually saying is well his position is very, very contradictory because he seems to want to hold the agreement and say that it's fair and yet he's conceded that various other – that other items of property are relationship property. Well it was contradictory but that was his position and it remained his position in the High Court and the High Court, as recorded in the decision of His Honour Justice Hanson, he said his position all along was that the section 21 agreement which gave Ms Clayton $30,000 was fair and that's a direct quote out of His Honour's decision and I've given you those references.

I now move on the 9A argument which is a further category of documents, category of property argued on behalf of Mr Clayton which is unnamed. Now effectively Ms McCartney's argument relies on paragraph 42 of the Family Court's decision which is that decision, that paragraph, which in my submission Her Honour Justice Glazebrook correctly describes as "idiotic". It is idiotic and it's all on the wrong premise. They should've been focussing on what happened to the shares he owned pre-separation and on that aspect Ms Clayton gives blow by blow evidence in her affidavit of February 2011 which is at volume B, page 404, going through all the searches, all the company shares about what happens to them. She's not cross-examined on them. You don't have the full affidavit because we weren't anticipating a 9A argument. If you want it, of course it can be supplied. It is a very big affidavit

but it does have – we do have in the bundle the original two titles in regard to the two pieces of land that were transferred to the Vaughan Road Property Trust.

In any event Ms Clayton has accepted 500,000 stays separate property and all the rest is relationship property and she simply accepted the Family Court Judge's just kind of general roll up, let's give him $500,000 as separate property and she's accepted that.

Now 42 is also, in my submission, in the context of dealing with the business assets rather than anything else and I also want to remind Your Honours that Mr Clayton argued this same issue in regard to 9A in the High Court and he was unsuccessful on that and you'll see that volume A, page 120, paragraph 33, the criticisms in regard. Basically they appealed the Family Court Judge's application of 9A and said there was not evidence supporting the contribution, there was not evidence of contributions by Ms Clayton or of relationship property. They argued that the separate property value was wrong and His Honour finds that there was ample evidence to support the Judge's finding that Mr Clayton had directly and indirectly diverted income into his business and so the evidence goes through and the $7 million, the acquiring of that, the value, how it all came relationship property. Paragraph 39, "I am fully satisfied that the Judge was right to find the requirements of 9A(1) were met." And he discusses the contribution and paragraph 42 is exactly in accordance with what Your Honours have said during discussion that the Family Court Judge explicitly proceeded on the basis that the agreed position was that the separate property was $500,000 and 43, "To the extent that the increase in value of an income or gains derived from the separate property were attributable, even in part, to the application of relationship property. Those increases, income gains are relationship property and prima facie should be shared equally." And he says, "No criticism of the Judge's findings on 9A(1) or (2)."

So the same arguments run there unsuccessfully. Mr Clayton seeks to leave to argue about the 9A arguments to go to the Court of Appeal, the same arguments he's resurrected here. Leave is declined and yet he's still coming along saying that the whole of the increases et cetera are to be treated as something different.

Now in terms of 9A, Mr Clayton has failed to provide relevant documents or evidence to establish any of the 9A increase in the value of the properties as anything other than relationship property. There was no evidence he borrowed from separate property, there was no evidence this was a passive investment and the gains and

increases came from that property. So if someone has Telecom shares before they start a relationship and they keep those shares during the relationship, they're separate property, they then use dividends from the Telecom shares to buy a block of flats which they keep entirely separate from the marriage, there's no contribution by the other person, there's no relationship property money going in, then it's separate property from separate property. Here there is nothing like that because the business, he pours all the money back into it and the wife contributes. It's not a passive situation and I've referred to the evidence at D938 but I'm not going to take you there because His Honour Justice Young has already referred to it. It's about how he buys the business assets.

A191 is the decision of His Honour Justice Dobson which summarises the six findings of Courts from the Family Court, High Court and Court of Appeal that Mr Clayton has involved himself in tactical litigation and not to produce documents and they're all footnoted with him appealing the Adams decision and seeking leave to appeal and then failing in that in the High Court, seeking leave to appeal from the High Court, refused seeking leave to appeal to the Court of Appeal, refused. Whole series of findings, not just Judge Adams, there have been a series of findings against Mr Clayton.

If you look at the Court of Appeal decision in volume A209, sorry at page 279, you'll find similar findings by Their Honours in regard to, at page 275, paragraph 209, the failure of Mr Clayton to give full disclosure in regard to the Sophia Number 7 Trust, of all the relevant information and therefore they drew inferences against him. It's not open to Mr Clayton to rely on the absence of relevant evidence when he's failed to provide it and the same kind of finding at 279, paragraph 225, this time in regard to the Chelmsford Trust, "We do not accept the approach of the High Court Judge that it was for Ms Clayton to establish where the personal advance from Mr Clayton came from. Given the absence of any further relevant information relating to the source of funds from Mr Clayton, adverse inferences may be drawn." The Family Court made similar findings and I've given you those references.

And the trial Judge, "These proceedings", page 164, "were unduly protracted and significantly frustrated by the way in which Mr Clayton conducted his defence. There were ongoing and significant delays in regards to discovery, Mr Clayton being reluctant and to a degree obstructive in disclosing relevant information. A box of documents was found during the trial", she says in inverted commas, "no realistic reason given for the information, had to be adjourned. Mr Clayton's conduct can only

be described throughout these proceedings as obstructive as he is quite clear that he embarked on an exercise of causing maximum expense and delay and frustration to Ms Clayton with a view to depriving her of entitlement to property which he quite clearly regards as his own."

So *Nation v Nation* of course it's in Ms Clayton's bundle. The Court should look at matters in the round and not take an overly technical approach to 9A. There is also Judge Adams' decision where Mr Clayton is told prior to the hearing and it's referred to in A1(2)(1) in the bundle that, "Well to the extent you don't provide documents then there will be – assets will be deemed not to have been acquired out of separate property." That's at a point where His Honour Judge Adams finds Mr Clayton is refusing to provide information. So he's told that very clearly and my point is he has not established that the increase in value came from separate property.

Prest v Petrodel Resources Ltd is the UK Court of Appeal decision. It is an important decision because it was a case where there were properties owned in companies which were off-shore companies and the UK Supreme Court said, "We're not lifting the corporate veil but we are going to impose a resulting trust because the properties had been bought by the companies with Mr Prest's money," and that crucial finding meant that the ordinary trust law principles applied but that's also the case relied on by the Court of Appeal where they say we're going to treat matrimonial property proceedings as quite different and we're going to have a different rule in terms of disclosure because the preference has to be if you don't disclose then we just make adverse findings against you and the Court of Appeal applied *Prest*, that's a really important decision for this area and Your Honours have refused leave on appealing that because Mr Clayton sought to appeal that as well. It's very important in dealing with litigants like Mr Clayton and my point is he has not proved that any of this money came from his separate property in terms of these advances.

So Ms McCartney's argument that the Court simply directed an amount to be paid and the rest remained Mr Clayton's separate property is, in my submission, contrary to the language used by the Family Court and the High Court and contrary to the wording of 9A and section 19 says that during the marriage people are free, parties are free to deal with the assets as they wish until division but it does not say that the Court, once there is separation and it's looking at classification, that you don't go back to assess where that property came from and whether it's become relationship property or not. That's how it works and that's why 44C is worded the way it is. It

contemplates looking during the marriage at whether or not property is relationship property when it's disposed to trust. So you still classify it on the way through.

Ms McCartney suggested that if 44 or 44C doesn't apply, 182 is the answer. Well of course Ms Clayton's made that application as well but Mr Clayton is still opposing that as well.

To the argument that Ms Clayton didn't rely on the same dispositions of relationship property. Well I don't think it really matters. I think Ms Clayton is free to argue whatever dispositions she wishes to in this Court and I would make the point that in terms of the jurisdiction, how big the acorn is, is irrelevant in terms of getting jurisdiction. As long as there has been a disposition of relationship property to the trust under 44C. Even if you take those first three gifts a jurisdiction exists the issue will be what is the fair compensation order?

I don't need to go through 21 and 22. It's simply a point that that was always Mrs Clayton's argument in the Court of Appeal.

Mr Carruthers is saying 22 is wrong. Well, I couldn't find any objection to that. It was the Vaughan Road Property Trust that there was an issue in regard to, not the claim interest.

Now claim that Mr Clayton's advances didn't pay for the land. Well, I took Your Honours right through all of the accounts and although at some particular points there were acquisitions using third party lending, you'll recall that as we went through, we saw Mr Clayton introducing monies which repaid third party debt. I don't think you can just look at a few years and in any event in the 1999 accounts, which are the earliest accounts we have, Mr Clayton has lent a very significant amount to the trust as has Mrs Clayton.

So then the evidence, the argument that it wouldn't be just to make an order under 44C, well, Ms McCartney says Mrs Clayton's claim in regard to this trust is only $306,000. Well, I'll come to that, and the pink form is probably the best place to deal with that but her total claim in regard to this trust, including the advances, is about seven or $800,000.

The further claim that these proceedings have had a negative effect on the Claymark business and, therefore, Your Honours shouldn't exercise a discretion is dealt with in

paragraph 25. It's a simple point. I don't think at this time of day I need to take Your Honours through it. I would point out that Mr Carruthers' table, which you've been referred to already, shows the stark contrast in regard to the value of property now under Mrs Clayton's control versus Mr Clayton. I think she's got 1.5 million according to Mrs Clayton, which is the actual value, which takes into account the actual sale price of the formal family home. My friend's figure takes into account the valuation for that rather than what she actually got for it when she sold it and he has the rest. So he has, on her case, some $28 million under his control, and they separated nearly 10 years ago. Mr Clayton's position that he wants to simply be able to retain a viable business is not a legal principle, nor would it be fair given the value of the business.

Now I've looked briefly at *Geddes* handed up by my learned friend, Mr Butler. It's petty irrelevant in my submission. It relates to an inherited farm. It's largely about section 10 and it's under the old Act in the old 9(3) but in any event, I don't dispute that separate property can stay separate but I do say that once a 9A situation arises, and there has been an application of relationship property, or a contribution by the other spouse, and one looks back to see when it converted under 9A to relationship property.

So those are my submissions in reply. Dealing with the pink form in the schedule –

GLAZEBROOK J:
Can I just check, so I can see what is agreed? I understand you disagree in terms of the 300,000, you do agree in terms of the 6.097 for the Vaughan Family Trust?

MS CHAMBERS QC:
Yes. Your Honour Justice Glazebrook, I need to amend that slightly, Ms Clayton is at 6.5. Now the reason why it changes slightly is this, Mr Lyne's evidence which Ms McCartney is relying on for her figures was produced prior to trial. During the trial the March 2011 accounts were produced. We now have them because they came in as an exhibit and on the basis of valuation at March 2011 they are the relevant figures. So there's been adjustments.

GLAZEBROOK J:
Have we got a page number for that?

MS CHAMBERS QC:

For the 2011 accounts?

GLAZEBROOK J:

Yes.

MS CHAMBERS QC:

Yes if you look at my pink booklet.

GLAZEBROOK J:

It's in there is it?

MS CHAMBERS QC:

Yes, on the appendix 1 and appendix 2, on the top line is the references in Your Honour's bundle to where those accounts are found. So the Claymark Trust 2011 is at G1852. It's all set out there.

GLAZEBROOK J:

Thank you.

MS CHAMBERS QC:

So if start with Kaimai which is – because Claymark owns the shares in Kaimai Developments Limited and the land at Katikati and that Kaimai has to be valued. Kaimai's accounts are also in volume G, including the March 2011 accounts which is where table 1 is taken from and it is worth negative amounts which is slightly unusual for a company but because of the interrelationship in the entities and particularly given that the shareholder is Claymark Trust, there's an assumption that the entity will fund – that the Claymark would fund any shortfall. All of the land and buildings were valued by Mr Clayton's valuer, Mr Dent, puts in the valuations of the land as at date of hearing and there was no dispute with those by Ms Clayton, she accepted that and that's footnote 2. So the land is all agreed and it actually just happens to dip in value as at valuation date and she simply has to accept that because that's just the market.

Then the Claymark Trust, the summary is taken from appendix 1. It is simply all of the information from the accounts which is in the bundle collated and you can see though that current account is highlighted as at date of hearing and the Kaimai valuation is updated to 2011 because we now have those accounts. So obviously we

can expect that as at quantification those are the accounts that we will be using and there is the valuation of Claymark which is 927,000, taking into account the net equity, and the net equity, of course, deducts off the $5000 owed to Mr Clayton in regard to his current account. So there is no double up in regard to those two figures. The current account owed to him as at 2011 has been deducted to get the net figure.

WILLIAM YOUNG J:
I may be stupid but why is the claim under section 44C for $464,000?

MS CHAMBERS QC:
Because the –

WILLIAM YOUNG J:
Is 44C just interest?

MS CHAMBERS QC:
Because the value of the trust as – that's 50% of the equity of the trust assets.

WILLIAM YOUNG J:
But if a 44C claim in confined to income isn't it? It doesn't get the capital, is that right?

MS CHAMBERS QC:
No, 44C you can also make an order against the husband, Mr Clayton, that he pays 464,000.

WILLIAM YOUNG J:
I see. So as against the trust, it's only for interest?

MS CHAMBERS QC:
That's right.

So it would be a judgment against Mr Clayton for 464,000 being the oak tree that grew from the acorns, obviously plus interest, and presumably an order that if he didn't pay that, that the trust would also be liable to pay any income to meet that judgment.

And then Mrs Clayton says she'd also be entitled to half the advances at separation which is 364,000. Sorry, is 300,000 being the advances to the Claymark Trust and to Kaimai set out in table 2 which is simply assets in his hand. So that's very straight forward and, in fact, the two pieces of land, the two residential houses, if one of those was transferred to Mrs Clayton, one of the houses owned by the Claymark Trust, that would actually come pretty close to her getting the half of the trust assets, but that is a trust asset.

Now the Vaughan – I'm sorry, it's under 182. Paragraph 8 of the pink form, if 182 applies, then the assets get resettled into a his and her trust we suggest. That doesn't alter the position in regard to the current accounts. That would be a separate relationship property asset. So he would still – Mr Clayton would still owe Mrs Clayton half of those current accounts at separation. And so division of that trust into a his and her trust is actually very achievable because of the valuations of the two residential houses. In other words you could achieve a clean break because one of the residential houses is worth 530 and one is worth 385,000. So, subject to a minor adjustment, in terms of cash one way or the other, in fact dividing that trust under 182 is pretty simple.

The Vaughan Road Property Trust, again there is a summary of the accounts in appendix 2 with the highlighted current accounts as at separation, and we now know, with the 2011 accounts, the net equity has dropped slightly to 4.5 million and it's based on asset basis. The land and buildings are re-stated to market values per the independent property valuations, again based on Mr Clayton's valuations, accepted by Mrs Clayton as at the valuation date of March 2011. Goodwill is reversed and the resulting value of the equity is 6.496 million from table 3 and, in addition, there's the current account balance of Mr Clayton at date of separation of 1.5 million. So her 50% entitlement in regard to VRPT is 4 million as set out in table 3, being 3.2 million of the net equity and a further 759,000 in regards to current accounts.

Now if this Court finds that the Vaughan Road Property Trust is not a trust, then the position in regard to the dollar value of Mrs Clayton's interest should remain the same. The difference will be that she will have an interest in the land rather than just a claim against Mr Clayton. If the Court finds that the Vaughan Road Property Trust is not a trust, there remains unfairness to Mrs Clayton because he has advanced, through the Vaughan Road Property Trust as trustee, money interest free to the Lighter Quay Trust. The Lighter Quay Trust was sold at a profit of nearly $400,000 and because of the rulings of the Court of Appeal only Mr Clayton gets that increase

in value. And the same thing happens with the Kelmsford Trust but maybe there's nothing we can do about that because there's been increases in values of land with the interest free loans.

So the current accounts, just to finish that off, there were no accounts at the actual date of separation, so the best available information in Mrs Clayton's case is 31 March 2006. 31 March 2007 are closer to the separation date but 2006 represents a more accurate quantification because between March '06 and '07, the loan balances went from him being owed 1.5 million by the Vaughan Road Property Trust to him owing two million, a net withdrawal of 3.6 from which Mrs Clayton received no benefit. So we have used the March '06 as the separation date figures, given the evidence that he says he doesn't know where it went and there's no indication in the accounts of the companies or other businesses that it went back into the companies and, therefore, she got a benefit from it. And, in fact, by March 2011, as I say in 18, he'd actually drawn 4.7 million.

Now dealing with the schedule by Mr Clayton, let me start off by saying that the schedule at 56 in Mr Carruthers' submissions, is not accurate in terms of Mr Lyne's position and, indeed, I was surprised to have the submissions that Mrs Clayton has never set out her figures. Mr Lyne has filed an affidavit in the High Court in March 2015 saying what Mrs Clayton's claim is on the basis of the Court of Appeal decision. That affidavit was filed March 2015 and sets out exactly Mrs Clayton's position. I'm happy to supply it to the Court if Your Honours direct. And in short its says 16.3 million.

WILLIAM YOUNG J:
Sorry, what's the 16.3 million?

MS CHAMBERS QC:
That is Mrs Clayton's balance due to her - on her case.

GLAZEBROOK J:
And that's ignoring what might happen here?

MS CHAMBERS QC:
Yes, it's based on the Court of Appeal decision. So it's based on Vaughan Road Property Trust being in.

ELIAS CJ:

So it does depend on what happens here?

MS CHAMBERS QC:

Of course it does, Your Honour.

ELIAS CJ:

Yes. So that's overall?

WILLIAM YOUNG J:

That compares to the right-hand side of the schedule we got from Mr Clayton?

MS CHAMBERS QC:

From Mr Carruthers?

WILLIAM YOUNG J:

I think from Ms McCartney. The schedule, the big A5 or…

ELIAS CJ:

Yes, whereabouts are you looking?

WILLIAM YOUNG J:

Your $16 million figure compare issue should correlate to what's on the right-hand side of that schedule.

MS CHAMBERS QC:

Are we talking about this schedule?

WILLIAM YOUNG J:

No, we're talking about the one that's two – this one here.

ELIAS CJ:

The pink and blue.

WILLIAM YOUNG J:

That's if the Vaughan Road Property Trust is in, this should correlate to the left-hand column, section 182 claim fails, shouldn't that pick up where we are if the Court of Appeal judgment stands complete?

O'REGAN J:
It should but it doesn't.

ELIAS CJ:
It doesn't.

WILLIAM YOUNG J:
Well, where do you get the 10 million –

O'REGAN J:
There's a huge difference.

WILLIAM YOUNG J:
There's $10 million difference.

MS CHAMBERS QC:
The two big issues – just to clarify, Your Honour, the evidence of Mr Line in the High Court is that she is owed 16 million.

WILLIAM YOUNG J:
Yes, so instead of 6.598 million it's 16 million.

MS CHAMBERS QC:
The differences relate – so if we go back to Mr Carruthers' schedule as to the misaligned position and he's saying is that his position is she's owed 13 million the significant difference between 13 and 16 is interest to a significant extent between interest –

GLAZEBROOK J:
So the 13 is –

O'REGAN J:
Well, let's leave it. You're talking about interest after the date of hearing.

MS CHAMBERS QC:
Yes.

O'REGAN J:
Well, that's – this is date of hearing figure, isn't it?

MS CHAMBERS QC:
Yes.

GLAZEBROOK J:
So the –

O'REGAN J:
So are you saying otherwise it is the same?

WILLIAM YOUNG J:
No, because that's 13 and 6.9, then, isn't it?

O'REGAN J:
No, but the line figure in paragraph 56 is 12.9 million.

GLAZEBROOK J:
On the left-hand side.

MS CHAMBERS QC:
That's right and the big difference –

O'REGAN J:
And you're saying the difference between that and 16 is basically interest?

MS CHAMBERS QC:
It is.

So if we look at the schedule for Mr Clayton, option – section 44C option 1, that there's no 44C adjustment because Mrs Clayton has already shared in the value of the loans to Claymark Trust via her share of the current accounts in CHL and Mark Clayton at the date of hearing and a further adjustment is not just, well, of course we say that's complete nonsense because the loans as at the date of separation, as at 2006 already existed and the – and it would result in a very serious unfairness in terms of simply putting these trust assets, these valuable trust assets, to one side and not properly dividing the property in that trust.

Option 2, I just do not understand why the figure of 363,000 is deducted, being the loan advances. Nothing has been said as to why that could be or how you – on what possible basis you deduct the loans from the net equity. The figure of 673,000 in regard to net equity, as I have already said, that is based on the 2010 accounts. We now have the 2011 accounts and that is why it goes up to 927,000 as per my pink form.

Then there's this suggestion in 44(3) that the difference between the loan advances at date of hearing and the net equity, well, again, the net equity is 673 is out of date in terms of the figures we now have and of course we say that to value the loan advances at date of hearing results in a serious injustice to Mrs Clayton and is, in principle, wrong.

Section 182, the suggestion is option 1, no award on the basis Mrs Clayton's expectations are met by the divisions to date. Well, I don't understand that given that she has received, we say, 1.5 million, they say 1.7 million, given the total property pooled by both valuers.

Option 2, an award based on the provision made during the marriage, the use of the car. Now, how fair is that?

O'REGAN J:
These aren't submissions saying what should happen. They're just postulating what would be the result if it did happen?

MS CHAMBERS QC:
Okay. Well, I think that results in a $20,000 award in regard to this trust and I'm suggesting that that is a very unfair result.

Option 3, the equivalent of the net equity. Well, again, we say the net equity figure has been updated and the 2011 figures should be used into a separate trust. Well, we agree with that but we suggest the 2011 figures are used now that they are available.

I don't think I've got anything more to add. Unless I can be of further assistance, those are the submissions for Mrs Clayton.

ELIAS CJ:

Thank you, Ms Chambers.

MS CHAMBERS QC:

As Your Honours please.

MR CARRUTHERS QC:

Your Honours, in paragraph 22 of my learned friend's roadmap she raised an issue about the situation that arose in the Court of Appeal and in her submissions in dealing with the way in which the current accounts moved when she referred to G1988 and showed the way in which the accounts had moved down and pointed out a figure of 2 million by 2007, that was the, that related to an issue that the Court of Appeal issued a minute on and that there were then memoranda required and filed and it's arising out of that exchange that my learned friend made the comment in paragraph 22. I have copies of that minute and the two memoranda relating to the current account issues that the Court of Appeal raised and I can hand those in if you think that'll be helpful.

ELIAS CJ:

What's the point you make in response?

MR CARRUTHERS QC:

The point that I am making –

ELIAS CJ:

I just don't know that we necessarily need the piece of paper but unless it's contested.

MR CARRUTHERS QC:

No, the point that I make in response is that the Court of Appeal raised the question of whether relationship property was transferred by Mr Clayton to Vaughan Road Property Trust in relation to the various advances and the movements in the current account. Now, the difficulty with that submission, as is shown by the reference to the Claymark accounts at G1988 that my learned friend took you to is that they actually point out the interlocking financial arrangements through all of these companies and that was the issue that was drawn to the Court of Appeal's attention in the memoranda that were exchanged. So it is simply explaining that the point of the minute in the memoranda is simply explaining what the financial position was in

relation to first any question of relationship property being transferred but more importantly the way in which those interlocking financial arrangements arise in relation to the current accounts. Now if, if the Court is, is satisfied that it, it –

ELIAS CJ:

What, what is inaccurate in the, in para 22 that you are responding to?

MR CARRUTHERS QC:

My learned friend really passed over it. The, the issue that arose, the only reason I arise is because in the way in which he was addressing you on the way in which the current account balances moved in the accounts –

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

– really related back to the issue that the Court of Appeal raised in its minute and the subsequent memoranda that were filed. She, my learned friend said that no objection was raised. Well in fact in terms in the memoranda it was but that's not the point of my getting to my feet. The point is that some of the material that went to the Court of Appeal in response to the minute in fact explains the way in which those current accounts worked and interlocked and the, and if it helps the Court to see the information that went to the Court of Appeal then it have it available if that helps. That's, that's all that I –

ELIAS CJ:

Yes, all right. Yes, pass that up thank you.

MS McCARTNEY QC:

Your Honour, I'm sorry to rise but there are just four small points that were completely new that I haven't addressed.

ELIAS CJ:

Well I intended to, to offer you, we intended to offer you –

MS McCARTNEY QC:

That's very kind.

ELIAS CJ:

– a right of reply but… Sorry, are you finished Mr Carruthers?

MR CARRUTHERS QC:

Yes, yes I have. That was, that was the simple point I wanted to make.

ELIAS CJ:

Yes, thank you. Oh, this was the 44(c) point. Yes, thank you.

MS McCARTNEY QC:

Thank you Your Honour. They're small points but very important because of the prejudice that continues to be layered in this case. In relation to the claim that Mr Clayton was obstructive I need to point out that Judge Adams appointed Mr Lyne as Court-appointed accountant. Mr Lyne elected to act for Ms Clayton, not as Court-appointed.

ELIAS CJ:

I just struggle to know how that is going to assist us Ms McCartney.

MS McCARTNEY QC:

And, and, and –

GLAZEBROOK J:

And you actually should not have a right of reply on the right of reply. The only thing you do is on the schedule. There is nothing whatsoever on the right of –

ELIAS CJ:

I am sorry. I did not realise. This in relation to the right of reply?

MS McCARTNEY QC:

I do, I do apologise Your Honour. Can I, can I say in relation to the sche - there is just one other matter. May I file a memorandum on that $5million matter? It just hasn't been covered at all in any of the evidence.

ELIAS CJ:

Well, well, I struggle to see how it was, if it is, if it is important why it has not been covered.

MS McCARTNEY QC:

And I can explain it Your Honour which I was just about to. There was no notice that it was an issue. There was no evidence from Ms Clayton or Ms Lyne about it, Ms Clayton about it, Mr Lyne or Ms Clayton and as a result of that that arose without anyone being in a position to respond to it in cross-examination.

GLAZEBROOK J:

Arose where?

MS McCARTNEY QC:

In, in the course of the hearing. And the most that Mr Clayton could say was that he had no idea where it had gone to.

GLAZEBROOK J:

But we are not deciding it are we? It is nothing to do with us. Isn't it being decided by the High Court? So why do we need to even bother about it?

MS McCARTNEY QC:

It's, it's the paragraph 114 of the Family Court judgment that says date of hearing. We keep, we keep going past –

GLAZEBROOK J:

Yes but we are not deciding that, or, or do you want us to decide it? Well actually I think Ms Chambers does but, I am not sure it is really in front of us.

MS McCARTNEY QC:

Well it hasn't been appealed. Maybe that's just what I say in, in the Family – in the High Court Your Honour. It's just that we, we're rolling around without even a date on which we're doing the valuations. But, that was why I was hoping the schedule would be responded to, I'd get it.

ELIAS CJ:

Well, the response to you is that its date of hearing except in relation to the current account movements and that was covered in the submissions.

MS McCARTNEY QC:

And it is covered in the Family Court judgment to which there's been no appeal.

ARNOLD J:

Well, is it covered? I thought the point was that the Family Court judgment didn't address the advances.

MS McCARTNEY QC:

It's paragraph 114. It addresses everything. It addresses all property. There is a finding in relation to the date of valuation of all property.

GLAZEBROOK J:

Well, we understand that. It's not the submission your friend makes, though, so if we are supposed to decide it, well, I suppose we will.

MS McCARTNEY QC:

In relation to –

ELIAS CJ:

So what did you want to put in? Did you want to put in references? Is that what you were asking?

MS McCARTNEY QC:

To the five million dollars?

ELIAS CJ:

Yes.

MS McCARTNEY QC:

I would like to put in a memorandum that shows where the five million dollars went to.

ELIAS CJ:

But I don't think we are dealing with that at all.

MS McCARTNEY QC:

To the extent that – I agree, Your Honour, to the extent that my learned friend continues to make the submission of asset stripping. If the Court finds that submission relevant –

ELIAS CJ:

Well, the submission she made was that there was no evidence before the Courts below as to how the money was applied and she took us to the cross-examination in which Mr Clayton said he didn't know what had happened to it.

MS McCARTNEY QC:

Yes, and then the submission made is that he was stripping the asset out of Vaughan Road Property Trust for his own purposes.

ELIAS CJ:

Well, no, the point really is that it's not known what he did with it but it isn't available for division under the Relationship Property regime.

MS McCARTNEY QC:

Yes, the evidence shows it went back into the operating company and has been taken into account, but my learned friend Ms Chambers says that is not so, and so I ask may I have leave to file a memorandum to show that's exactly where the money went.

ELIAS CJ:

You say that there's evidence?

MS McCARTNEY QC:

There is evidence that shows where the money went.

O'REGAN J:

How does it relate to the decision we have to make?

MS McCARTNEY QC:

It means that it's already been taking into account in the valuation of Claymark Holdings Limited's shares.

GLAZEBROOK J:

But actually, how do we know that? Even if it went back in there, we don't really know that anyway. Isn't this what the High Court has to decide?

MS McCARTNEY QC:

Well, maybe it does. It's just when I sit back and listen to the submission I heard the submission as an asset-stripping submission rather than a valuation.

ELIAS CJ:

Well, we're not dealing with the valuation. It's going to have to go back to the High Court. I really don't think that – it's a peripheral issue and we certainly aren't going to resolve it.

MS McCARTNEY QC:

No. Well, it could be resolved if date of hearing was adopted, which is what the Family Court judgment found. That would resolve it. In relationship to my learned friend telling the Court that Mr Lyne has filed an affidavit and that will suffice as a schedule, I would have really liked to have had that schedule so that it could be contested and I could have advanced Mr Clayton's position in relation to it. Your Honours have heard for the first time that Mrs Clayton's position is she's seeking 16.5 million, I think.

ELIAS CJ:

But that's overall.

GLAZEBROOK J:

Including interest.

ELIAS CJ:

Including interest.

O'REGAN J:

It's essentially what Mr Carruthers said she was seeking at paragraph 56, except he didn't add in interest since the Family Court hearing date.

MS McCARTNEY QC:

Yes, but it's not since the Family Court hearing date. The affidavit of Mr Lyne proceeds on the basis each item of property is taken at date of separation and then you add interest from date of separation through to today. So that's not apparent from the submission.

O'REGAN J:

Well, again, it's not as if we can't deal with it.

ELIAS CJ:

But on the matters that we are seized of, is there really much between – well, is there really much more to be said on either side than is available in your schedule and the pink schedule? You understand the position on the matters that we're dealing with.

MS McCARTNEY QC:

I do understand it, Your Honour, and in relation to the pink schedule the Court will have seen the differences between the parties is that Mrs Clayton is now seeking to advance date of separation current accounts and update valuations based on some accounts that weren't the subject of evidence before the Court, and in relation to the treatment of the current account, paragraph 17 and 18, the Court can see again it's that issue of going back to date of separation. That's the main differences between the parties.

ARNOLD J:

Can I just be clear? So you don't accept that the values in your schedule which are based on the 2010 accounts should be updated to reflect the March 2011 accounts now that they're available?

MS McCARTNEY QC:

My understanding, Your Honour, is that in the Family Court updated registered valuations were available which were adopted by both experts who provided their evidence as at date of hearing, May 2011 and June 2011, with all the updated material in it. So in relation to the fact that they're new accounts now or updated accounts or finalised accounts I actually don't know anything about that. But what I can say that it wasn't the subject of any evidence before the Family Court.

ARNOLD J:

Well, obviously they weren't available.

MS McCARTNEY QC:

Yes, but Your Honour we need to draw the line somewhere and the experts were prepared to do that with their valuations. I don't know what these new figures, where they come from. As I say, I'm seeing it today for the first time.

GLAZEBROOK J:

Well, are you not acting in the High Court?

MS McCARTNEY QC:

I am acting in the High Court.

GLAZEBROOK J:

Well, then, it's an affidavit in the High Court that's been filed. How can you say you didn't know about it?

MS McCARTNEY QC:

Well, I do know about it but I'm able to contest it. If it had been here before this Court I would have shown the Court why it was so wrong.

GLAZEBROOK J:

Well, it's not before us. We don't have it. We were just told there is one.

MS McCARTNEY QC:

I know and the Court is told that the figure is 16 million dollars without anyone being able to see how it's made up.

ELIAS CJ:

But it was certainly not – we're not seized of that at all. That's by way of general background to give us a ballpark indication of what is being claimed. It's not material to what we have to decide.

GLAZEBROOK J:

And it was also an answer to your submission that you didn't have a clue what the line valuation was, to be fair.

MS McCARTNEY QC:

Well, not before this Court. I was hoping that valuation would come in responsive in the way in which Mr Dent had prepared his valuation.

ELIAS CJ:

But how are you left – what are you left, what's deficient from your perspective? You really know the substance of the difference between your schedule and what's being advanced here.

MS McCARTNEY QC:

Well, I know the alleged difference but I haven't seen the principal difference. That's what I was hoping for, a principled position as to what the difference in value was based on the evidence and the record in the Family Court, not based on some let's go back to date of separation and introduce new current accounts. Let's start putting interest on every item of property from date of separation rather than the balance that might be due and if that had been put before the Court I would have been able to say to the Court just carve all that off and come back to what the difference actually is and here's the figure.

ELIAS CJ:

Well, isn't the difference principally the date of valuation of the current accounts?

MS McCARTNEY QC:

And interest and the treatment of the US debt, those three items. Now, the Court may not wish to hear from me in this regard so please let me know, but my learned friend said that Mrs Clayton has had only this much and Mr Clayton controls this much and the answer in relation to that is that Mrs Clayton may take property if she wants to. She has not accepted property. So it's a cash sum she wants, so how does Mr Clayton –

MS CHAMBERS QC:

No, I object to that. It's totally evidence from the Bar.

ELIAS CJ:

It's unnecessary. We're not being assisted by this.

MS McCARTNEY QC:

Well, I'm sorry, Your Honour, but in terms of a settlement and the submissions that I've drafted and all –

GLAZEBROOK J:

I think the submission was that she's had 1.7 and he still had the use of the rest and that is clear from the schedule that you've just put into Court.

MS McCARTNEY QC:

Yes.

GLAZEBROOK J:
And it's really irrelevant why it's the case.

WILLIAM YOUNG J:
Well, it could be relevant to interest, perhaps.

GLAZEBROOK J:
It may be relevant to interest, but we're not dealing with that.

MS McCARTNEY QC:
And also in terms of a division, how the division can be implemented without following.

ELIAS CJ:
But we're not dealing with that.

MS McCARTNEY QC:
No, but I just – in terms of the way in which it's put, it's put on the basis that this control continues without any attempt to address.

ELIAS CJ:
There has not been a separation of matrimonial property.

MS McCARTNEY QC:
There hasn't been and that's all that it is, Your Honour. It's not a control issue. It's a practicality issue.

I'm sorry if that last part is something that irritates the Court but it is a practical –

ELIAS CJ:
No, we're just struggling to see how it helps us with what we have to decide.

MS McCARTNEY QC:
Yes. Well, I'm putting it before the Court for this reason, I think both parties would like a settlement sooner rather than later and that is the difficulty, that is the impediment. It's not the control. It's the number.

MS CHAMBERS QC:

I'm going to object again, Your Honour. I totally object to this.

MS McCARTNEY QC:

I have to apologise if I've taken it too far, Your Honour.

That's my reply.

ELIAS CJ:

Any questions? No. All right. Thank you, counsel. We will reserve our decision in this matter.

HEARING CONCLUDES