**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTPS://JUSTICE.GOVT.NZ/ABOUT/NEWS-AND-MEDIA/MEDIA-CENTRE/MEDIA-INFORMATION/MEDIA-GUIDE/COURTS-WITH-SPECIAL-MEDIA-PROVISIONS/FAMILY-COURT.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 138/2016**
**[2017] NZSC 196**

| | |
|---|---|
| BETWEEN | MARK ALBERT HORSFALL<br>Appellant |
| AND | DIANA JANE POTTER<br>First Respondent |
| | 168 GROUP LIMITED<br>Second Respondent |

| | |
|---|---|
| Hearing: | 15 June 2017 |
| Court: | Elias CJ, William Young, Glazebrook, O'Regan and McGrath JJ |
| Counsel: | T G Stapleton QC and J H Coleman for Appellant<br>J R Billington QC and T F Cleary for First Respondent<br>R J B Fowler QC for Second Respondent<br>M Deligiannis for Attorney-General as Intervener |
| Judgment: | 21 December 2017 |

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## JUDGMENT OF THE COURT

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**A** **The appeal is dismissed.**

**B** **The appellant is to pay the first respondent costs of $25,000 together with reasonable disbursements. We allow for second counsel.**

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## REASONS



**WILLIAM YOUNG, GLAZEBROOK, O'REGAN AND MCGRATH JJ**
(Given by William Young J)

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### The appeal

[1] The appellant, Mark Horsfall, and the first respondent, Diana Potter, met in 1997. In September or October 1998, they started living together and they married in October 2002. There is one child of the marriage. They separated in April 2008. They were unable to agree upon a division of their property under the Property (Relationships) Act 1976 (the Act) and this resulted in litigation in the Family Court.

[2] One of the issues which the Family Court Judge was required to address related to a property in College Street, Wellington.[1] This property had been acquired in 2003 in the joint names of Mr Horsfall and Ms Potter. It was sold in 2004 and Mr Horsfall transferred virtually all of the proceeds of sale to the second respondent, 168 Group Ltd. Ms Potter claimed that this was in order to defeat her rights under the Act and that she was accordingly entitled to relief under s 44.

[3] Her case rested on the contention that she and Mr Horsfall had been the beneficial owners of the College Street property and that it was accordingly relationship property under s 8(1)(c) of the Act.[2] If the College Street property was relationship property, so too were the proceeds of its sale. And if Mr Horsfall appreciated that this might be so, it would be difficult to resist the conclusion that his transfer of the proceeds of sale to 168 Group was for the purpose of defeating Ms Potter's rights.

[4] The case for Mr Horsfall was that:

(a) the beneficial owner of the property was 168 Group (which seems to have been the primary submission) or, alternatively, 168 Group along with one, other or both of 88 Riddiford Holdings Ltd and Mr Horsfall, with the interest of the latter being his separate property;

(b) the legal joint ownership of the property was just a strategic ruse intended to limit the risk of later awkwardness with the Commissioner of Inland Revenue over the profits anticipated when the property came to be resold; and

(c) the property and the proceeds of sale not being relationship property, and Ms Potter thus having no claim on them, the transfer of the

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1 We will refer to this property as "the College Street property"; however, as will become apparent, initially this property was one of three neighbouring properties purchased. We will refer to the three properties as "the College Street properties".

2 Also see Property (Relationships) Act 1976 (the Act), s 2, which defines owner as: "in respect of any property, … the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity".

proceeds of sale to 168 Group was not for the purpose of defeating Ms Potter's rights.

[5] Ms Potter's claim was upheld by Judge Walsh in the Family Court.[3] His judgment was reversed by Simon France J in the High Court[4] but reinstated by the Court of Appeal on a further appeal.[5] In doing so the Court relied substantially on *Potter v Potter*.[6]

[6] A complicating feature of the case is that 168 Group was not a party to the proceedings in the Family Court. It has subsequently been joined as a party.[7] It was agreed in the Court of Appeal that if Ms Potter's appeal was allowed, the proceedings should be remitted to the Family Court to permit 168 Group to be heard as to relief.[8]

## The facts

*General background*

[7] Mr Horsfall has an extensive background in property development, management and investment and has also worked as a real estate agent specialising in commercial property. He separated from his first wife in October 1995. When he met Ms Potter in mid-1997, he was working as a real estate salesman but from late 1997 he traded on his own account as a real estate agent. At this time, Ms Potter was, along with her mother, operating a reasonably substantial business in Wellington. Over the nine years or so that Mr Horsfall and Ms Potter were a couple, they generally kept their financial affairs separate.

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3 *DJP v MAH* [2013] NZFC 4577 [FC decision].
4 *MAH v DJP* [2014] NZHC 1520 [HC decision].
5 *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 (Wild, Mallon and Williams JJ) [CA decision].
6 *Potter v Potter* [2003] 3 NZLR 145 (CA) [*Potter* (CA)].
7 This occured between the judgment in the Family Court and the hearing in the High Court. 168 Group could hardly claim not to have been aware of the proceedings. Its only director gave evidence and it appears to have funded, at least some of, Mr Horsfall's legal costs.
8 CA decision, above 5, at [46].

[8] The case concerns commercial activities which involved not only Mr Horsfall and Ms Potter but also three companies, 168 Group, Horsfalls Ltd and 88 Riddiford Holdings:

(a) 168 Group was incorporated in 1996. It is wholly owned by the Mark Horsfall Family Trust (MHFT), which was settled by Mr Horsfall on 18 March 1996. The company was formed to take ownership of a commercial property at Miramar. Mr Horsfall is neither a director nor a shareholder in 168 Group Ltd and likewise is not a trustee of the MHFT, although he is an "advisory" trustee. He is, however, a discretionary beneficiary and, prior to his marriage to Ms Potter, was the sole beneficiary.

(b) Horsfalls was established on 20 April 1998. Mr Horsfall has always been its sole director and shareholder. Mr Horsfall had, for the preceding four months or so, been working on his own account as a real estate agent. Horsfalls was a licensed real estate company and took over his business.

(c) 88 Riddiford Holdings was formed on 30 September 1999 to buy a property at 88 Riddiford Street, Wellington. Its only shareholder was the 88 Holdings Family Trust (88HFT) which was settled by Mr Horsfall on 28 September 1999. Mr Horsfall is not a director or shareholder of 88 Riddiford Holdings and likewise is neither a trustee nor an advisory trustee of the 88HFT. He is, however, a discretionary beneficiary.

[9] Mr Horsfall's explanation for the establishment of 88 Riddiford Holdings was that he intended to develop apartments on the roof of the Riddiford Street building and thought that a separate purchasing entity – that is, separate from 168 Group – was appropriate to avoid "tainting" the existing property investment of 168 Group. In other words, he did not want 168 Group to be viewed by Inland Revenue as a dealer in, or developer of, land. As we will see, he seems to have had it in mind that

transactions likely to involve liability to tax on land dealings or land development were best conducted by 88 Riddiford Holdings.

[10] In November 1998, Mr Horsfall and Ms Potter agreed to buy a house in Hall Street, Wellington. They moved into it April 1999. Title to this property was held jointly. It was eventually sold in April 2003. This sale and what happened to the proceeds of sale are, as we will see, material to the conflicting narratives of events surrounding the acquisition and sale of the College Street property.

[11] Prior to the marriage in October 2002, Mr Horsfall had attempted to persuade Ms Potter to sign a pre-nuptial agreement. Ms Potter declined to do so. It is unclear how significant this was in terms of their personal relationship but her refusal undoubtedly put Mr Horsfall on notice that, if the relationship eventually ended, there was the prospect of a dispute in respect of relationship property.

*The acquisition of the College Street property*

[12] In August 2001, Horsfalls acted for the vendor on the sale of a commercial property in Hutt Road. In December 2001 a contract was entered into for the sale of the property to Ascot Resources Ltd (Ascot), the principal of which was Mr Alastair Scott. The settlement date was 1 June 2002. The agreement was subject to conditions that depended on the commercial judgment of Ascot and was thus in the nature of an option to purchase. Mr Horsfall encouraged Ascot to confirm the contract by indicating that he, or an entity of his, would take a 50 per cent share of the property.[9] Acting on this assurance, Ascot duly confirmed the purchase.

[13] Pausing at this point, Mr Horsfall did not have the consent of his principal to become involved on the purchase side of the transaction. His legal position was thus precarious. Section 63(1) of the Real Estate Agents Act 1976 provided:[10]

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9 Mr Horsfall's affidavit evidence was that this assurance would apply if Ascot was required to settle without having found a tenant. As it turned out, Ascot was not required to settle on the Hutt Road transaction, but the transaction was nonetheless treated as a joint venture.

10 This Act has since been repealed: see Real Estate Agents Act 2008, s 157. The corresponding provisions in the Real Estate Agents Act 2008 are ss 132–137.

> No real estate agent shall, without the consent on the prescribed form of his or her principal, directly or indirectly and whether by himself or herself or by any partner or sub-agent,—
>
> (a) Purchase … or be in any way concerned or interested, legally or beneficially, in the purchase … of any land … which he or she is commissioned … by any principal to sell …

By reason of s 63(2) an identical prohibition applied in relation to employees of real estate agents or officers of real estate agents which were incorporated. As well, Mr Horsfall and his company were exposed to the possibility of civil proceedings at the suit of the vendor.

[14] When he gave evidence in the Family Court, Mr Horsfall was taxed on this aspect of the transaction. His responses were at a general level, admitting the possibility that there was a potential for litigation from the vendor but denying wrongdoing. He claimed that "his" interest was to be taken by 168 Group and that, for this reason, his double role in the transaction was unobjectionable. This is not a plausible justification for his conduct[11] and his actions at the time reveal an acute awareness of the legal difficulties he faced. The agreement between Mr Horsfall and Ascot in relation to the joint venture contemplated a payment being made by Mr Horsfall of $100,000 and he obtained a bank cheque in this sum. The bank cheque was paid for by 168 Group. This cheque, however, was not presented by Ascot. Instead it was paid back into the bank account of 168 Group. This was to avoid creating a trail of banking documents signifying Mr Horsfall's beneficial interest in the purchase of the property. In his evidence, Mr Horsfall explained the non-banking of the bank cheque in this way:

> … the vendor was looking to avoid paying the agreed agency fee … and it was agreed with [Ascot] that the cleaner the background of the transaction, the less chance of a convoluted court case.

[15] The joint venture interest in the Hutt Road property (and associated liabilities) was not recorded in the accounts of 168 Group for the year ending 31 March 2002.

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[11] As we will explain we are of the view that he was the person dealing with Ascot. But even on his claim that the party dealing with Ascot was 168 Group, he was (a) acting for 168 Group; and (b) the sole beneficiary of the MHFT which held all the shares in 168 Group.

[16] Ascot was never required to settle the purchase of the Hutt Road property. Instead a company which owned three properties in College Street took over the Hutt Road contract on the basis that Ascot was to acquire its College Street properties with settlement on 31 January 2003. In one of his affidavits, Mr Horsfall explained:

> The main benefit the Joint Venture obtained from the trade deal … was the greater chance of selling the College Street properties on to third parties for a profit because three smaller properties would be more saleable.

A deposit was required to be paid on the transaction and, associated with this, 168 Group paid $100,000 to 88 Riddiford Holdings which in turn paid this money on to Ascot. Neither company recorded this $100,000 as an investment. The payment out by 88 Riddiford Holdings presumably was, or should have been, debited to Mr Horsfall's current account. That 168 Group funded 88 Riddiford Holdings to make the payment is indicative of a likely intention that Mr Horsfall's half interest in the joint venture should be vested in 88 Riddiford Holdings. This is consistent with our observations above at [9] that Mr Horsfall saw 88 Riddiford Holdings as the best vehicle for property transactions with a potential for tax liability.

[17] On 12 June 2002, Mr Horsfall wrote to Mr Scott of Ascot, referring to a proposed marketing campaign in respect of the College Street properties, the associated role of Horsfalls and the related fee arrangements. The letter noted:

> The precondition to this agreement is that an entity of Mark Horsfall's choice is a beneficial owner of 50% of the contract to purchase the College Street properties.

[18] Following what were presumably further discussions, Mr Horsfall wrote to Mr Scott again on 18 June 2002:

> 88 Riddiford Holdings Limited will take a half share in the rights and obligations of the Contract for Sale and Purchase of [the College Street properties]. … Ascot Resources will be holding the 50% share in Trust until formal documentation can be arranged. 50% of the College Street costs will be paid for by 88 Riddiford Holdings. Ascot will publicly front the project.
>
> I will personally guarantee the obligations of the Sale and Purchase contract to the amount of $1.2m.

The letter then discussed the proposed marketing campaign and went on:

> Should 88 Riddiford and Ascot not be able to agree on a course of action after the offers received for sale or lease or for any other reason the "shotgun" clause discussed may be invoked by either party. Ie an offer for one to take out the other may be made in writing specifying a price, time and conditions for full or partial (must be a whole title) takeout. The offer must be accepted or rejected within 5 working days. If the offer is rejected the party rejecting the offer may reverse it and compel the original offeror to accept the same terms and condition originally offered. …
>
> Should 88 Riddiford end up taking over the contract, Mark Horsfall will personally guarantee the obligations of the contract.

Pausing here, the proposal that 88 Riddiford Holdings should take Mr Horsfall's half interest in the joint venture is consistent with the College Street properties being acquired for the purpose of sale.

[19] Two of the three College Street properties were on-sold reasonably promptly, indeed, before settlement was required.

[20] In January 2003, Ascot and Mr Horsfall agreed that an entity associated with the latter should buy out the former's interest in this third property. The agreed "purchase price" represented a figure arrived at by a reconciliation of who was owed what in terms of the joint venture. The reconciliation was based on an assumed "fair" value of the property of around $850,000 which contained a built in margin for the joint venturers. The possibility that the property may have been saleable at $1.1 million was recognised. Various adjustments were agreed (which are not entirely easy to follow but included fees not charged by Horsfalls) and produced a purchase price of $560,000. These calculations were predicated on the assumption that the joint venture's profits were taxable in the hands of the joint venture partners.

[21] No record of a half interest in the College Street property was recorded in the accounts of 168 Group or 88 Riddiford Holdings as of 31 March 2003. Nor is there anything in those accounts to indicate the existence of an agreement to purchase the College Street property.

[22] The conveyancing associated with Ascot's transfer of its interest in the College Street property to Mr Horsfall and Ms Potter was effected by Ascot's solicitors who thus acted on both sides of the transaction. As far as we can tell, the conveyancing file in relation to this transaction was not produced in evidence. This

is a pity as it may have thrown some light on the understandings of Mr Horsfall and Ms Potter at the time as to the basis upon which they took title. It is not apparent from the evidence we have seen whether Ascot became registered as owner and thus transferred title to the land to Mr Horsfall and Ms Potter or whether the land was transferred to them directly from the original owner. The only documents relating to this transaction which were produced in evidence were forms of agreement which Mr Horsfall printed from his computer.

[23] Mr Horsfall claimed that there was an agreement for sale and purchase under which 88 Riddiford Holdings agreed to acquire the College Street property from Ascot with settlement on 16 April 2003. In his evidence, he described 88 Riddiford Holdings as the "effective buyer". He was able to produce what was, or could have been, a copy or a draft of such an agreement printed from a file on his computer. Mr Horsfall said that 88 Riddiford Holdings was not able to settle as it could not raise mortgage finance without the trustees of the 88 Trust giving personal guarantees, which they were not prepared to do.

[24] Mr Horsfall also produced what looks like either a copy or a draft of an agreement for the purchase by Ms Potter and him which was also printed from a file on his computer. This agreement is dated 18 March 2003 and provides for settlement on 28 April 2003. It is expressed to be conditional on the sale of the Hall Street property by 5.00 pm on 18 April 2003. This document, however, was not created until 2 May 2003 and was modified on 23 May 2003. The incongruities in respect of the dates suggest that the document was not genuine and Mr Horsfall himself said that the document had been created "for the purposes of a paper trail for the IRD".

[25] Between 30 April and 16 May 2003, Mr Horsfall received $425,448 as the proceeds of the sale of shares which he maintains were his separate property. As well, on 8 May 2003, Ascot paid 88 Riddiford Holdings $166,250 which Mr Horsfall described as money "that had been invested in the Joint Venture". This funded a payment by 88 Riddiford Holdings of the same day to Mr Horsfall of $170,000. Settlement of the College Street properties purchase occurred on 8 May 2003. Mr Horsfall funded this with two payments, one of $200,000 on 1 May 2003 and the

second of $360,000 on 8 May 2003. These payments came out of his personal bank account. As Mr Horsfall explained, the net amount required to be paid to Ascot, after allowing for the $170,000, was only $390,000.

[26] Mr Horsfall's claim that the shares he sold to fund settlement with Ascot were his separate property seems to have rested primarily on the basis that the money used to buy them had come from his separate property. This contention was not well fleshed out in his evidence. There was no complete analysis tracing, acquisition by acquisition, the use of separate property to fund the purchases of the shares. To the extent that the purchases were funded by advances from 168 Group or 88 Riddiford Holdings or salary, they would have been relationship property. In his judgment, Judge Walsh noted that there was a dispute whether the shares were separate property but did not resolve it.[12] The point was not addressed by Simon France J in the High Court but the Court of Appeal, without giving reasons, accepted that the shares were separate property.[13] On the approach we take to the case, there is no need for us to resolve this issue.

[27] We should note in passing that in the course of his argument for Mr Horsfall, Mr Stapleton QC contended that the payment of $390,000 identified in [25] was paid by 168 Group from "the proceeds of sale of Mr Horsfall's separate property shares". We were not given an explanation of the basis for this contention.

*Modification proposals*

[28] Amongst the documents produced in the Family Court is a report from engineers of 4 July 2003 as to the seismic strength of the College Street property. The report noted that the building has a "minimum transverse strength of 16% of the current code" but did not require strengthening unless there was a change to the type of occupancy. The associated invoice was addressed to Horsfalls.

[29] Mr Horsfall responded to the report and invoice by letter of 31 October 2003. In it he noted:

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12 FC decision, above n 3, at [187]–[188] and following.
13 CA decision, above n 5, at [10]–[11].

> … the invoice should be in the name of 88 Riddiford Holdings Limited (as per Newton Project) as it is the party investigating the possibility of building on the property.

He also asked a fee proposal:

> … on the engineering fees for the following options?
>
> 1. Design and supervision; Re-strengthening existing building to allow Residential use of the third floor and possibly above. With and without lift well outside existing structure.
>
> 2. Design and supervision; Re-strengthening existing building to allow Residential use of the third floor and building 3 levels of residential above. With lift well outside existing structure.
>
> 3. Design and supervision; New residential building on 180m$^2$ of carpark including ground floor showroom first parking and 5 levels of apartments. With either 1 or 2 above.

*The sale of the College Street property and the application of the proceeds of sale*

[30] The College Street property was eventually sold, with settlement on 1 April 2004, for $1.575 million (GST inclusive). This price was arrived at on the basis that the purchaser would recover an input tax credit of $175,000 (meaning a net cost of $1.4 million) but with the intention that Mr Horsfall and Ms Potter would not pay output tax. The agreement seems to have been entered into in December 2003. In a letter of 11 March 2004 to the legal executive acting on the transaction, Mr Horsfall noted:

> As the property was intended to be our house, we had not claimed GST on purchase. We are selling it on the basis of "including GST if any" so therefore we will not be required to pay GST.

This letter is consistent with Ms Potter's narrative and she relies on it as evidence of the truth of its contents. Mr Horsfall's explanation at trial was that the letter was untrue. As it happened, settlement occurred on 1 April 2004 and no GST was paid on the sale.

[31] We heard some argument as to the appropriateness (or otherwise) of the GST treatment (or non-treatment) of the sale proceeds. Because we do not see the GST issue as particularly material to why the property was originally placed in joint

names, we do not propose to engage with this issue, save to note that when Judge Walsh later came to address this aspect of the transaction, he referred to a "loophole" which was a reference to his view that GST was not payable providing the property was acquired with the intention of using it as a home.[14]

[32] The proceeds of sale were dealt with as follows:

(a) The deposit ($147,500) was paid in to a bank account styled "15 College Street", a joint account in the names of Mr Horsfall and Ms Potter which received rent payments in respect of the property, $150,000 (representing the deposit and some rent receipts) was then paid from this account to 168 Group.

(b) The money received on settlement was paid to Mr Horsfall. He in turn paid, by two instalments, $1.35 million to 168 Group. The references on his bank statements beside the record of these payments (reflecting the internet banking entries made by Mr Horsfall when he was transferring the money) are "repay loan" and "loan".

(c) The balance of the proceeds of sale were disbursed by Mr Horsfall for his own purposes.

[33] In the aftermath of the sale Mr Horsfall and Ms Potter entered into an oral agreement in relation to a loan they had made to her brother of $240,000 from the proceeds of sale of the Hall Street property. A note in relation to the agreement shows that they revised their shares in this loan so that it was treated as being held as $70,000 by Mr Horsfall and $170,000 by Ms Potter.[15] This represented an adjustment of $50,000 in her favour.

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[14] FC decision, above n 3, at [200](b)(i). We have reservations whether the Judge's view was correct but, in our general approach to the case, there is no need to explore this issue.

[15] The note is in Ms Potter's handwriting and is not dated. The text, however, suggests that the agreement was on 1 April 2004, which was when the sale of the College Street property was settled.

[34] The payment of $560,000 to Ascot is apparent from the bank statements of Mr Horsfall.[16] Payments as between Mr Horsfall, 168 Group and 88 Riddiford Holdings are presumably encompassed in the inter-entity current account balances. The accounts of 168 Group for the year ending 31 March 2005 record a "capital profit" in a figure which broadly represents the difference between $560,000 and the amount received by 168 Group, albeit that there is nothing in the accounts for that year, or the preceding year, to suggest what the capital profit related to.

*The conflicting narratives*

[35] Ms Potter's position was that the College Street property was put in joint names because she and Mr Horsfall intended to build an apartment on the top floor which would serve as the matrimonial home and would replace the Hall Street house. As it happened, the College Street property was sold. The adjustment in relation to the debt owed by her brother was to mollify her in respect of the change of plans – that is the decision to sell it rather than develop it.

[36] Mr Horsfall's position is that the College Street property was put in joint names to limit the risk of scrutiny from the Commissioner of Inland Revenue and thus any adverse consequences of such scrutiny. As part of this narrative he asserted that the copy or draft agreement for sale and purchase between Ascot and him and Ms Potter on his computer was an after-the-event concoction intended to link the sale of the Hall Street property with the acquisition of College Street and thus to provide an apparent justification for it being owned jointly. He thus acknowledged that this document was in the nature of a sham. He gave similar explanations for his letter of 11 March 2004. Thus in one of his affidavits he said: "I also wanted to keep the paper trail orderly with the IRD should they check the transaction." In another affidavit, he commented:

> The letter was a 'covering letter' as an extra layer of 'insurance' to complete the 'effect' that the property was to potentially be 'our' house, to reduce the likelihood of any capital gains being taxed as income if the IRD decided to investigate whether any sale for a 'profit' warranted further investigation … .

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16 See above at [20].

His broad position was that 168 Group had been Ascot's joint venture partner and that it was beneficial owner of the College Street property, albeit that at times he also suggested that he and 88 Riddiford Holdings may have had beneficial interests in the property. The reason for the adjustment in relation to the $240,000 owed by Ms Potter's brother was to provide her with an allowance of $50,000 for the use of her name.

[37] Mr Horsfall vigorously denied the suggestion that he and Ms Potter had ever envisaged that they would live in an apartment in the property:

> The fact Hall Street was sold provided a serendipitous opportunity to create the suggestion that College Street [property] was our home for IRD purposes as we didn't have a home any longer. …
>
> The only discussion Diana and I ever had about College Street [property] pertaining to her was my asking to put it into her name as well as mine given the property was likely to be onsold in short order for a profit. I told her if it was in our joint names the IRD would view any profit on sale as capital gains and no tax would be liable to be paid. …
>
> If the company which already owned 50% of College Street [property] bought and sold [it] in short order it could incur a tax liability and furthermore if a tax liability was incurred it would "taint" the company's other assets for the purposes of Section 66 of the Income Tax Act. This was too great a risk when weighed against the property being in our joint names.
>
> …
>
> Specifically if Diana really had a discussion with me about putting a dwelling on the roof, she would have been told by me that for a commercial building to be used as a residential dwelling it needed to meet strict fire and earthquake regulations.
>
> Fire requirements for a residential dwelling require two means of egress or stairs in a multi-level building. … The current owner is a well-known residential apartment developer. Even he hasn't applied for residential use in that building because it is not feasible.
>
> …
>
> We couldn't have had the discussion Diana claims as it was never going to be a feasible proposition.

[38] As will be apparent from the passages from his evidence that we have cited, Mr Horsfall was explicit as to why the property was acquired in joint names (that is for revenue advantages) and also explicit in his denials that there had ever been an intention of creating an apartment which would become the matrimonial home. But

in contradistinction, his evidence as to what he claims to have told Ms Potter was rather less explicit, and varied, at least in terms of detail and perhaps in substance.

[39] In the passage of his evidence set out at [37], Mr Horsfall said that he told Ms Potter that if the property was in "our joint names the IRD would view any profit on sale as capital gains and no tax would be liable to be paid". If this accurately represented the substance of what he told Ms Potter and the basis upon which title was obtained jointly, the corollary would be that the two of them were also beneficial owners. This is because: (a) the taxation advantages which were the purpose of the arrangement, if achievable at all, were dependent on beneficial ownership according with legal ownership; and (b) there would have been no occasion for Ms Potter to think that Mr Horsfall was distinguishing between apparent (that is legal) and real (that is beneficial) ownership.

[40] In another of his affidavits, Mr Horsfall gave a slightly different account of what he says he told Ms Potter:

> 50. When Diana and I decided to sell … Hall Street around the same time, it became apparent that the widest range of options for the College Street property (all dependent on whether alternative accommodation could be found for the sitting tenant) could be preserved by putting the property into our joint names.
>
> 51. When I discussed this proposal with Diana, her concerns were twofold. First, she wanted to know what her risk was. Secondly, she wanted to know what she would get out of it. I told her there was no risk for her as we were going to live in France for a year and the Inland Revenue Department would not worry as we did not have an alternative house. I told her I would pay her for her name on the contract. I told her that the amount of the payment would be at my discretion, but based on how much profit was made on the deal when the property could be sold. If the property could be sold for around $1.1m, then that would give a nominal profit of $250,000 on the initial value of $850,000, and I thought at that level I would pay Diana $10,000. Diana was more than happy with the arrangement. ….

Although it might be implicit in this account that the arrangement involved a pretence, that is that Mr Horsfall and Ms Potter would pretend to be the beneficial owners and that actual ownership would lie elsewhere, this proposition is not advanced explicitly. There is also the related point that Mr Horsfall did not claim to have told Ms Potter about 168 Group's role in the transaction. It was thus never

suggested that she had agreed to hold the property on trust for that company. Nor did he claim to have suggested to her that 88 Riddiford Holdings may have had a beneficial interest in the property. In short, Mr Horsfall did not claim to have said anything to Ms Potter to suggest that the College Street property and its proceeds of sale were to be outside the pool of relationship property.

[41] When cross-examined, Mr Horsfall's answers were at times euphemistic and at other times evasive.[17] Thus when it was put to him that his expression "create the suggestion" (in the passage set out at [37]) indicated that his purpose was one of disguise, he responded by suggesting that what he had in mind was "augmenting the reality". More generally, he denied impropriety. The most he was prepared to accept was that placing the property in joint names meant that there was "less likelihood of someone wanting to make a decision that [it] was a taxable activity". He did not assert that he had told Ms Potter what he claimed was the "true" position as to beneficial ownership. His position instead seemed to be that beneficial ownership was "established presumably by law and what actually happened, and where the money came from" and that it was his "money [that] was put into the deal originally and 168 [Group's money]", an approach which, on occasion, led him to claim that beneficial ownership lay with him as well as 168 Group.

*Accounting flexibility*

[42] In his oral evidence, Mr David Underwood, the accounting expert called on behalf of Mr Horsfall said in relation to the accounting treatment of the transactions involving the College Street property:

> What did not surprise me was that [the College Street property] was deemed to be an off balance sheet item, because I can think of a lot of accountants who would say, "Hey, that's too complicated for me, we'll just leave it out until the chickens come home to roost and we'll record the outcome." It's not the appropriate way of doing it, but it is an acceptable way of doing it under some circumstances where you could take forever to sort it out.

And in relation to different aspects of the accounting but with the same general theme:

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[17] By way of example he would not accept that the account styled "15 College Street" referred to above at [32](a) was a joint account.

> … many instances I have come across where interest will be payable if it's called for and people are concerned about the tax consequences, and you can't make a decision now because the consequences might not show up until two or three years later, so it's all very open ended and the less documentation there is, as far as some people are concerned, the better it is.

[43] These remarks are a fair description of the approach taken to the accounting records maintained in relation to the College Street property transaction. We are, however, surprised that Mr Underwood appears to have viewed the accounting approach as an acceptable treatment of the transactions in issue.

***Potter v Potter***

*Overview*

[44] Since at least the 1725 decision in *Everet v Williams* (more commonly known as the *Highwayman's Case*)[18] the courts have often been required to address the extent to which legal rights arise out of, and can be enforced in respect of, illegal or fraudulent transactions or ventures. In the *Highwayman's Case* the plaintiff issued proceedings on the equity side of the Court of Exchequer seeking an account of profits in respect of the proceeds of robberies he and the defendant had carried out, a claim which the Court was not prepared to entertain.[19] Most of the later cases involve circumstances in which one person (A) has placed property in the name of another person (B) for fraudulent purposes; perhaps to defeat A's creditors or to facilitate A fraudulently obtaining social security benefits, but with the understanding that A was to remain the "true" owner and might recover the property when the coast was clear. A recurrent problem for the courts has been whether A can insist on the underlying bargain if B will not return the property. This is what we will call the "paradigm case".

[45] Up until recently, the courts have routinely dismissed claims by A. Latterly, however, more nuanced approaches have been adopted in the United Kingdom and Australia and courts in those jurisdictions are now willing to entertain such claims:

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[18] *Everet v Williams* Exch, 13 November 1725, discussed fully in the note "The Highwayman's Case (*Everet v Williams*)" (1893) 9 LQR 197.

[19] The Court peremptorily dismissed the proceedings as "scandalous and impertinent", fined the plaintiff's solicitors £50 each for contempt of court and required the plaintiff's counsel to pay the taxed costs of the defendant.

see the judgments of the House of Lords in *Tinsley v Milligan*,[20] the High Court of Australia in *Nelson v Nelson*[21] and most recently the United Kingdom Supreme Court in *Patel v Mirza*.[22]

[46] One of the authorities in this general line of cases is *Potter v Potter*,[23] a case which was relied on by Judge Walsh and the Court of Appeal in finding in favour of Ms Potter. The continuing applicability of the approach taken in *Potter v Potter* was the subject of much debate in argument before us.

*Potter v Potter*

[47] Mr and Ms Potter (who were not married but shared the same surname) had agreed to purchase a property. The purchase price was funded by Mr Potter but title was taken by them both as tenants in common. Around the same time as the purchase, they had entered into a property sharing agreement. Under this agreement it was envisaged that the property would be transferred to a family trust. They, however, separated before the family trust was established and there was a dispute as to their entitlements to the proceeds of sale of the property.[24] These were claimed by Mr Potter on the basis, inter alia, that:

(a) the intention at the time of purchase was that the proposed sale of the property to the family trust would result in a debt back from the trust which was to be forgiven over time;

(b) the only reason for allocating a half interest to Ms Potter was to facilitate a quicker gifting programme than would otherwise have been the case; this on the basis that she as well as Mr Potter would be able to take advantage of exemptions from the gift duty regime which was then in force; and

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20 *Tinsley v Milligan* [1994] 1 AC 340 (HL).
21 *Nelson v Nelson* (1995) 184 CLR 538.
22 *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.
23 *Potter* (CA), above n 6; and *Potter v Potter* [2004] UKPC 41, [2005] 2 NZLR 1 [*Potter* (PC)].
24 See *Potter* (CA), above n 6, at [2]–[8].

(c) accordingly the property was held on resulting trust for Mr Potter.[25]

[48] The Court of Appeal was unimpressed by this argument:[26]

> [19] … It was said that the half-interest in the property was conveyed to Ms Potter solely for revenue purposes without prejudice to Mr Potter's retention of the entire beneficial interest. The difficulty is that gift duty could have been legitimately reduced only if Ms Potter's half-interest had been a beneficial one. A bare legal interest as trustee would have provided no basis for personal participation in a gifting programme for the purpose of the Estate and Gift Duties Act 1968.
>
> [20] As a general principle a party will not be permitted to adduce evidence that in transferring legal title to another he or she intended to retain the beneficial interest if the effect of the evidence would be to disclose that the transfer had a fraudulent purpose. For example it would be fraudulent to hold out that a wife was the beneficial owner if in reality the husband had retained the relevant beneficial interest. Accordingly, in cases where property had been transferred by a husband to a wife to gain revenue advantages premised upon her new beneficial interest, the husband has been precluded from averring in later proceedings that his real intention was to retain the beneficial interest, for example, *Re Emery's Investments Trusts* [1959] Ch 410. The same principle applies where a husband has put property into his wife's name as a protection against creditors: *Gascoigne v Gascoigne* [1918] 1 KB 223; *Tinker v Tinker* [1970] P 136; and see further *Preston v Preston* [1960] NZLR 385 (CA) (evidence disclosing breach of statute rejected) and *Stadniczenko v Stadniczenko* [1995] NZFLR 993. In this situation the settlor is the unwilling beneficiary of a compliment to his honesty. It is assumed that he would not have intended to defraud others by pretending that his wife had a beneficial interest when in reality he had intended to retain the beneficial interest all along.

[49] An appeal from this judgment to the Privy Council did not challenge this aspect of the Court of Appeal's reasoning, albeit that the Privy Council nonetheless referred to it:[27]

> It was argued … that the arrangement under which the respondent was to take a half-share in Inlet Road was solely in order to achieve certain fiscal advantages and that it had not been intended that she would hold her half-share beneficially. This latter argument was an impossible one. The fiscal advantages could only be achieved if the respondent did hold her half-share beneficially. As to the resulting trust argument, it was clear from the terms of the agreement that the respondent was intended to take a beneficial half-share in Inlet Road. Chambers J had so held and the Court of

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25 It is not entirely clear whether the asserted resulting trust was simply a consequence of the reasons why the property was placed in both names or alternatively it was claimed that the revenue considerations provided the context in which it was agreed that the property would be held beneficially by Mr Potter.

26 *Potter* (CA), above n 6.

27 *Potter* (PC), above n 23, at [13].

> Appeal agreed. Inlet Road was owned legally and beneficially by the appellant and the respondent in equal shares. So there was no room for a resulting trust.

*The cases referred to in Potter v Potter*

[50] With one exception,[28] the authorities relied on by the Court of Appeal in *Potter v Potter* (in the passage quoted at [48] above) were all paradigm cases, involving transactions between husband and wife and attempts to rebut the presumption of advancement[29] with evidence of a collateral purpose (such as placing the property out of the reach of actual or future creditors) which could only lawfully be achieved if the transaction was bona fide. In such a case, there may be scope for factual dispute as to whether there was an explicit (or perhaps implicit) agreement that the property would, on request, be transferred back. The much cited remarks of Lord Denning MR in *Tinker* address this situation.[30] This case concerned the transfer of a house by a husband to his wife in the context of him starting up a new business and wishing to protect the house from creditors should the business fail. He had taken legal advice before he completed the transaction. Lord Denning said:[31]

> Accepting that in the present case the [husband] was honest—he acted, he said, on the advice of his solicitor—nevertheless I do not think he can claim that the house belongs to him. The solicitor did not give evidence. But the only proper advice that he could give was:
>
> > "in order to avoid the house being taken by your creditors, you can put it into your wife's name: but remember that, if you do, it is your wife's and you cannot go back on it."
>
> But, whether the solicitor gave that advice or not, I am quite clear that the husband cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to *him*. As against his creditors, that it belongs to *her*. That simply will not do. Either it was conveyed to her for her own use absolutely: or it was conveyed to her as trustee for her husband. It must be one or other. The presumption is that it was conveyed to her for her own use; and he does not rebut that presumption by saying that he only did it to defeat his creditors. I think it belongs to her.

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28 *Stadniczenko v Stadniczenko* [1995] NZFLR 993 (DC).

29 The presumption of advancement is that property transferred without consideration between close family members (typically from a parent to a child or between spouses) is by way of gift. Where the transferor and transferee are not related in that way, the presumption is one of resulting trust – that is that property is held on resulting trust for the transferor. These presumptions are of distinctly less significance than formerly and no longer apply as between parties whose relationships are subject to the Act: see s 4, discussed below at [55].

30 *Tinker v Tinker* [1970] P 136 (CA).

31 At 141 (emphasis in original).

[51] *Potter v Potter* was perhaps susceptible to the analysis provided in the first paragraph of the quotation.[32] The revenue benefits hoped for could only be lawfully achieved if Ms Potter beneficially owned half the property. If the evidence as to the asserted trust was equivocal and/or disputed (as we assume it was) it would be reasonable to construe the transaction in such a way that the purpose could be achieved legally. This seems to us to be consistent with the language used by the Privy Council (quoted in [49] above).

[52] In cases involving unsuccessful attempts to rebut the presumption of advancement, courts have sometimes used language suggesting an evidential rather than a substantive approach. Thus in *Preston*, North J commented:[33]

> The law is clear that parol evidence will not be received if that evidence discloses that the person or persons asserting the trust were engaged in effecting what amounted to a fraud of the law.

It is this line of thinking that was picked up in [20] of the Court of Appeal decision in *Potter v Potter*.[34]

*Tinsley, Nelson and Patel*

[53] In *Tinsley* A and B had acquired a property which was placed in the name of B to facilitate social security frauds by A.[35] A was nonetheless held to be entitled to a half interest in the property. The conclusions of those in the majority proceed on the basis that the principle exemplified by the cases referred to in *Potter* could be confined to circumstances: (a) where the presumption of advancement applies; and (b) where A can only rebut that presumption by evidence of the underlying fraudulent purpose.[36] In *Tinsley*, A could show that she had contributed to the purchase price of the property and there was a common understanding was that it was to be owned equally. The presumption of advancement not applying, this was sufficient to establish that A had a half share in the house and, it being irrelevant to

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32 So too is *Stadniczenko v Stadniczenko*, above n 28.
33 *Preston v Preston* [1960] NZLR 385 (CA) at 404.
34 Set out above at [48].
35 *Tinsley v Milligan*, above n 20.
36 Lord Jauncey, Lord Lowry and Lord Browne-Wilkinson dismissed the appeal. Lord Keith and Lord Goff dissented.

her case to show why the house had been put in B's name, the underlying fraudulent purpose was irrelevant.

[54] In *Tinsley* the House of Lords laid down a general principle of illegality, applicable not only in respect of trusts but also more generally, that a party who had to rely on his or her own illegality to prove a case was disqualified from relief. Although this principle was not inconsistent with a fair and sensible outcome in *Tinsley*, it proved to be problematical in other contexts, particularly in intra-familial cases which were on all fours with *Tinsley*, save that the presumption of advancement applied. *Nelson v Nelson* was just such a case. There the High Court of Australia did not follow *Tinsley* and A was permitted to assert an interest in the property concerned.[37] And more recently, *Tinsley* was over-ruled (in terms of its reasoning) by the United Kingdom Supreme Court in *Patel v Mirza*, with the Court replacing the reliance principle established in *Tinsley* with a more open-textured principle under which illegality is a bar to relief only where the court is satisfied that the public interest would be harmed by enforcement of the illegal contract.[38] In deciding this issue, courts are to consider the purpose of the prohibition in question, any other relevant public policy and whether the result contended for would be proportionate to the illegality.

*The Illegal Contracts Act and the continuing applicability in New Zealand of Potter v Potter*

[55] *Tinker, Preston*, *Tinsley* and *Nelson* were determined in a legal context associated with the presumptions of advancement and resulting trust. But by reason of s 4(3) of the Act,[39] these presumptions have no application as between parties to relationships addressed by the Act. As we will shortly explain, we are of the opinion that the College Street property was acquired out of the property of Mr Horsfall. Given s 4, the presumption of advancement which would otherwise have been engaged by the conferring on Ms Potter of a half interest in the College Street property is of no application. It follows that Mr Horsfall's claim that the College Street property was acquired by Ms Potter and him as trustees for 168 Group should

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37 *Nelson v Nelson*, above n 21.
38 *Patel v Mirza*, above n 22.
39 See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) [*Fisher*] at [1.31].

be addressed in terms of what the documents say and an assessment of the common intention of the parties.[40] On the face of the documents, Ms Potter obtained a half interest in the property. In the absence of a common intention – that is one shared by Ms Potter – that the property be held on trust for 168 Group (or some other party), Ms Potter also acquired a joint beneficial interest in the property.

[56] A right to property which depends upon the common intentions of two parties has a contractual flavour. Further, in this case there is the added apparently contractual dimension that Mr Horsfall says that he agreed to pay Ms Potter for the use of her name. This brings into play what was once the Illegal Contracts Act 1970 but is now sub-pt 5 of pt 2 of the Contract and Commercial Law Act 2017,[41] ss 73, 75 and 76 of which relevantly provide:

> **73 Illegal contracts have no effect**
>
> (1) Every illegal contract is of no effect.
>
> (2) No person is entitled to any property under a disposition made by or under an illegal contract.
>
> (3) This section and section 74 apply—
>
> (a) despite any rule of law or equity to the contrary; but
>
> (b) subject to the provisions of this subpart and of any other enactment.
>
> …
>
> **75 Who may be granted relief**
>
> Relief under section 76 may be granted to—
>
> (a) a party to an illegal contract; or
>
> …
>
> **76 Court may grant relief**
>
> (1) The court may grant to a person referred to in section 75 any relief that the court thinks just, including (without limitation)—
>
> (a) restitution; or
>
> (b) compensation; or

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40 See *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

41 For ease of reference we will refer to this sub-part as the Illegal Contracts Act.

(c) variation of the contract; or

(d) validation of the contract in whole or in part or for any particular purpose.

(2) The relief may be granted in the course of any proceeding or on application made for the purpose.

…

The word "disposition" which appears in s 73(2) is defined in s 9(1)(f) as including:

> … a transaction that a person enters into with intent to diminish, directly or indirectly, the value of the person's own estate and to increase the value of the estate of any other person.

This definition (which is taken from s 6(2)(f) of the Illegal Contracts Act) suggests strongly that s 73 is applicable in what we have called the paradigm case where the illegal purpose is to defeat creditors. In light of that s 9(1)(f) seems to us to be applicable in a paradigm case where there are other illegal purposes, such as, for instance, the purpose of defrauding the revenue.

[57] On Mr Horsfall's best case, he and Ms Potter acquired the College Street property pursuant to an informal oral agreement amongst themselves that they would do so jointly so as to conceal the identity of the true owner and thus to mislead the Commissioner of Inland Revenue. Section 73 renders such a trust of no effect. It thus follows that, subject to the possibility of relief under ss 75–82, Mr Horsfall and Ms Potter were the beneficial owners of the property.[42]

[58] We consider that cases akin to *Tinsley* and *Nelson* (both paradigm cases) should be addressed in terms of the Illegal Contracts Act. Given that relief can be granted, it follows that a party to such a transaction may advance a claim for relief; this notwithstanding that such a claim can be said to be based on his or her own fraud and despite what was said in *Potter v Potter* and the other cases to which we have referred.

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[42] We suspect that it would be impracticable to go back further with the unwinding of the transactions. On this basis, the transfer of the College Street property to Mr Horsfall and Ms Potter would have to stand.

[59] *Potter v Potter* (particularly in terms of what was said in the Privy Council) and *Tinker* nonetheless are of continuing relevance. In cases such as the present, the circumstances surrounding a transfer of property and the associated direct evidence are often somewhat equivocal. Thus it may be that the case for a trust rests substantially on the basis that the only reason for putting the property in the name of the transferee was to secure a tax advantage. In such a situation, it is open to a court to conclude that, since the hoped for advantage could legally be obtained only if beneficial as well as legal ownership were transferred, the understanding between the parties should be construed accordingly.

[60] In *Tinker* and *Potter v Potter*, the hoped-for advantages (protection from creditors in *Tinker* and a double set of gift duty exemptions in *Potter v Potter*) were legally obtainable, providing beneficial ownership accorded with legal ownership. In the present case, however, it is far from clear that Mr Horsfall's revenue purposes were achievable. This, however, is of limited moment. This is because the case falls to be determined on the basis of the common intention of the parties which requires us to look at the case in terms of their understandings and particularly the understandings of Ms Potter. If Ms Potter was led to believe that the rationale for title being taken in joint names was that joint ownership would result in favourable tax treatment, she would have been entitled to conclude that what was proposed was genuine joint ownership.

**The decisions of the Courts below**

*The Family Court judgment*

[61] The reasons of Judge Walsh on this aspect of the case were as follows:[43]

> [200] After reviewing the evidence relating to the acquisition and sale of the College Street property and considering the submissions of counsel, I make these findings:
>
> (a) *At the point of completing the purchase of the College Street property, the respondent determined the parties in their personal capacities, would complete the purchase in their joint names.*

[43] FC decision, above n 3.

(b) The decision to purchase in their joint names personally was made by the respondent -

(i) to take advantage of a loophole in GST legislation which enabled the parties to retain the GST component, $175,000, without being required to pay this amount to IRD; and

(ii) to provide a layer against "tainting" the property transactions of 168 Group Limited. This was confirmed by the respondent's evidence as to why he had written the letter on 11 March 2004 to his solicitor indicating the College Street property had been purchased with the intention of it becoming a home for the parties.

(c) The applicant maintained the parties had purchased College Street with a view to it becoming their home. There is a conflict in the evidence on this issue. The respondent denied that claim despite stating in the letter, 11 March 2004, the parties intended the property to become their home.

(d) Although the respondent claimed what he wrote in the letter was untrue, he nevertheless effectively represented to IRD, the parties owned the property beneficially when he took advantage of the tax benefit which could only be obtained if the parties owned the property personally.

(e) *The funds required to complete the purchase were advanced by the respondent, 168 Group Limited and 88 Riddiford Holdings Limited, to the parties who then completed the purchase in their personal capacities and obtained beneficial ownership of the property.*

[201] Given the findings I have made in [200] as to how and why the parties acquired the beneficial ownership of the College Street property, I do not consider Mr Stapleton's argument that the parties held the property under a resulting trust for 168 Limited, 88 Riddiford Holdings Limited and the respondent can be sustained. I do not find there are grounds to uphold the resulting trust argument.

[202] I am satisfied it can be reasonably inferred from the evidence the respondent was aware of the provisions of the Act; in particular he was aware when the parties purchased the College Street property in their joint names it became relationship property. It can be argued, in those circumstances, he agreed to pay the applicant $50,000 possibly to safeguard against any subsequent claim being made by her. I do not consider such payment prevents the applicant from pursuing a claim under the Act. No issue arises as to whether there was an agreement within the meaning of s 21 of the Act which may have prevented the applicant from making the claim.

[203] I accept Mr Newberry's submissions that the respondent "cannot have it both ways" by asserting he and the applicant owned the property personally in order to obtain the GST tax advantage, as discussed, but then assert when the property was sold, the parties owned the property in their

> capacities as trustees under resulting trusts in favour of 168 Group Limited, 88 Riddiford Holdings Limited and the respondent. *I do not find there is any evidence to uphold a finding the applicant was fully aware of the position and that she held her interest in the property as a trustee under the alleged resulting trust.*
>
> (original emphasis removed and our emphasis added)

Then after referring to *Tinker* and *Potter v Potter*, the Judge went on:

> [209] I am satisfied the principles of resulting trust do not apply in this case. When the respondent elected to take advantage of the GST tax payment and the parties purchased the property in their joint names, at that point neither he nor the companies retained a beneficial interest in the property under a resulting trust to the extent of their respective contributions. For reasons already set out the beneficial interest in the property was acquired beneficially by the parties and it was such beneficial ownership that enabled them to take advantage of the tax advantage. In these circumstances I find [the College Street property] was relationship property.

[62] To the extent to which Mr Horsfall contended that the property was acquired on trust for another entity, the Judge rejected his evidence. We consider this to be effect of the passages which we have emphasised. The Judge was not explicit as to whether he accepted Ms Potter's evidence about the apartment/matrimonial home proposal but such acceptance would appear to be implicit in his reference to her evidence, the absence of any criticism or rejection of that evidence, his reference to the 11 March 2004 letter and the discussion of the GST "loophole" which, as noted, he considered existed if the property had been purchased with a view to providing a home.

[63] Although the *Potter v Potter* and *Tinker* analysis was directed very much to the 11 March 2004 letter and the GST issue, the findings as to why title was taken in joint names encompass the consideration that the tax advantages hoped for by Mr Horsfall could only be legally achieved, if achievable at all, if beneficial ownership of the property accorded with its legal ownership. On this basis, the Judge's analysis is consistent with the approach of the Privy Council in *Potter v Potter*.

*The High Court judgment*

[64] Simon France J summarised the explanation offered by Mr Horsfall in this way:[44]

> [15] … Due to the serendipitous sale of the matrimonial home shortly before settlement of the College Street property, the couple owned no joint property. Furthermore, they were intending to travel overseas for a year. This presented an opportunity to maximise future options by putting the College Street property into their joint names. If the property was sold quickly it would be less likely to be viewed as dealing if it was in their names and was the only joint property they owned. Additionally, if despite this it was classed as dealing and the profit liable to tax, it would still be much better if the ownership was not in the name of any of the family companies. If one of them was the owner and held to have been dealing in property, the risk would be that other properties owned by that company would become tainted.

[65] He also accepted that the original joint venture partner was 168 Group.[45] Apart from a reference to the evidence of Mr Horsfall on this point, there was no explanation for this finding.

[66] Of the conclusions of Judge Walsh, he commented:

> [20] In addressing this conflict between the parties, I note that the judgment under appeal does not make a definitive finding on it. Inferentially it can be argued that Ms P's version has been preferred but this seems to be because the Judge considers that a form of estoppel is in operation that prevents Mr H from denying Ms P's beneficial interest. I will return to this later but for the moment note that the topic has not previously been addressed to the extent which follows.

[67] He then identified the features of the case which favoured the evidence of Ms Potter – the fact that the property was in joint names, the timing of the sale of the Hall Street house, the letter of 11 March 2004 and the absence of any contemporaneous record in the accounts of 168 Group which supported Mr Horsfall's explanation.[46] He then went on:

> [23] First, the overall context is consistent with Mr H's version. The College Street property was originally purchased sometime prior to Mr H and Ms P becoming the registered owners. It was one of three owned by a joint venture which had nothing to do with the parties as a couple.

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44 HC decision, above n 4.
45 At [11].
46 At [21]–[22].

*Further, the 2003 purchase was only for half the property, in that 168 Group Ltd was already the beneficial owner of the other half.*

[24] Next, not only was the site a commercial building when initially bought by the joint venture, it was still that when Ascot Resources were bought out, and again still that when ultimately on-sold by Ms P and Mr H. *Related to this, Mr H gave unchallenged evidence that development to add residential living facilities was not feasible. There were difficulties with adequate options for access to the roof in terms of safety requirements for getting off in an emergency. Further, if a permit had been sought, earthquake strengthening obligations would almost certainly have been triggered. Mr H also makes points about the sufficiency of the space on the roof top for a residence. He testifies that there is simply not enough room.*

[25] The whole idea of a residence would represent quite a change from the basis on which it was originally bought, would require considerable endeavour if it was possible, and would mean that the building was no longer to be sold, but instead retained. In terms of the couple needing a place to live, the building could not immediately provide that and the evidence suggests they were intending to live overseas for a year.

[26] The next objective fact is that Ms P did not contribute any funds, despite the matrimonial home having just been sold. Instead, the proceeds from that sale were kept separate. Equally significant, no arrangement was put in place recording their respective interests or suggesting that any equalisation was planned. This is not necessarily unusual for a couple, but it is quite different from the arrangements that were made in relation to the prior matrimonial home. Further, the way that the funds from the matrimonial house were later lent on a formal recorded basis suggests that their habit of carefully recording respective interests had not totally been abandoned. If the College Street property was to be the next joint project, the lack of any accounting between them is surprising. Finally, a small but related point is that Ms P does not seem to have taken any objection when the money was dispensed after the sale, again surprising if the building was a joint matrimonial home project. Overall, I regard Ms P's version of what was happening with the College Street property as suggesting quite a departure from how money was otherwise accounted for in their relationship.

[27] Next, I consider a payment by Mr H to Ms P of $50,000 at the time of the sale of [the College Street property] is significant. Mr H says this payment is realisation of the agreement struck that Ms P would be paid for the use of her name. Ms P explains the payment by saying it was made to placate her because she was unhappy that the College Street property was being sold rather than being used for the matrimonial home. One must always be wary about commenting on what is normal conduct, especially when it is based only on the record, but having read numerous affidavits as well as oral evidence, it is a surprising proposition to me that Mr H would make the payment for the reasons alleged by Ms P. *The College Street property was not the matrimonial home, nor on the evidence could it ever be.* It was not as if its sale meant there would not be a matrimonial home, just that the College Street property would not be that home.

> [28] The Judge held this $50,000 was a payment which Mr H "agreed to pay the applicant … possibly to safeguard against any subsequent claim being made by her". There is no evidential basis for this conclusion. It was not asserted by Ms P as being the reason for the payment and not suggested to Mr H for comment. In these circumstances, I do not consider it is sustainable. One is then left only with the competing explanations given by the parties, and of these, for the reasons given, I prefer that of Mr H. …

[68] Of the 11 March 2004 letter, Simon France J observed:

> [29] … It is never immediately convincing to have it explained away as a now inconvenient untruth but the overall circumstances already discussed lead me to accept Mr H's explanation – namely, it was a quick explanation to a new lawyer made in circumstances where its accuracy did not matter. The Judge alluded to this explanation but did not conclude whether he accepted it or not. I do accept it. Mr H was obviously aware of tax issues, and was constantly taking steps to try and preserve his position. Many of these actions appear optimistic at best in terms of their likely effectiveness, but there is no doubt they were matters to which Mr H was alive.

[69] Responding, no doubt to the GST reference by Judge Walsh when dealing with *Potter v Potter*, Simon France J confined his consideration of this aspect of the case to the implications of the letter of 18 March 2003:

> [40] I consider the focus on the GST treatment when the property was sold was incorrect in this case in terms of the resulting trust issue. It could be in a particular case that activity some time down the line legitimately supports an inference as to the arrangements that were made at the time of purchase. But once it is established that at the time of purchase a resulting trust was created, I do not consider *Potter* to be saying later tax treatment changes the beneficial ownership or prevents evidence being led as to the true ownership arrangements. It is also to be observed that here the beneficial ownership is held, at least in part, by a third party entity, again a quite different situation from *Potter*.

*The Court of Appeal judgment*

[70] Given the approach we propose to take, we can deal with the substantive Court of Appeal judgment briefly. There is, however, a procedural issue which we must discuss.

[71] Leave to appeal to the Court of Appeal was declined by Simon France J[47] but was granted by the Court of Appeal.[48] In doing so, the Court of Appeal indicated that leave was granted on what it described as question of law which it described in this way:

> Was the High Court correct to find that the disposition of the proceeds of sale of the College Street property was not made by the first respondent in order to defeat the claim or rights of the applicant for the purposes of s 44 of the Property (Relationships) Act 1976?

The grant of leave was under s 67(1)(a) of the Judicature Act 1908.

[72] The right of appeal under s 67(1)(a) of the Judicature Act 1908 was not confined to questions of law. And while the Court of Appeal would not grant leave to appeal unless it could discern an argument which warranted a second appeal, once leave was granted, the appeal to the Court of Appeal was by way of rehearing and was not restricted to the argument identified when leave was granted.[49] More particularly, in this case, although the question was referred to in the leave decision as being one of law, as stated, it opened up all issues as to the correctness of the decision of Simon France J. The Court of Appeal would appear to have dealt with the appeal on this basis as it engaged generally with all issues in the case.

[73] In his submissions for Mr Horsfall, Mr Stapleton contended that the terms on which leave to appeal was granted meant that the Court of Appeal was not entitled to review the factual conclusions of Simon France J. As will be apparent, we disagree.

[74] The Court of Appeal accepted a number of the factual findings of Simon France J. Thus it referred to, but did not apparently accept, Mr Billington QC's submission for Ms Potter that the College Street property was largely acquired out of relationship property. It likewise asserted that 168 Group was the joint venture partner with Ascot, albeit it did not explain this conclusion. It nonetheless reversed the judgment of Simon France J and gave three reasons for doing so:[50]

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47 *DJP v MAH* [2014] NZHC 2850.
48 *DJP v MAH* [2015] NZCA 230.
49 See generally *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [J67].
50 CA decision, above n 5.

> [15] First, … Mr Stapleton conceded joint registration in the parties' names was effected to avoid a potential liability on the part of the two companies to income tax. That could only be achieved legitimately if the parties became the beneficial owners of the College St property. So the very purpose of joint registration in the parties' names was antithetical to a resulting trust.
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> [16] A similar situation arose in *Potter v Potter*, and was fatal to Mr John Potter's argument that Ms Louisa Potter held her half interest in the family home on a resulting trust in his favour. This Court explained:
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> > [19] Central to a resulting trust is the absence of any expression of intention on the part of the settlor that the beneficial interest pass to the legal transferee: *Gillies v Keogh* [1989] 2 NZLR 327 (CA). With Chambers J, we do not see how that requirement could have been satisfied in the present case. But on appeal there was a further difficulty. It was said that the half interest in the property was conveyed to Ms Potter solely for revenue purposes without prejudice to Mr Potter's retention of the entire beneficial interest. The difficulty is that gift duty could have been legitimately reduced only if Ms Potter's half interest had been a beneficial one. A bare legal interest as trustee would have provided no basis for personal participation in a gifting programme for the purpose of the Estate and Gift Duties Act 1968.
>
> [17] Secondly, Mr Horsfall contributed a portion of the purchase monies from his own personal, separate property. The two companies thus did not provide all the purchase monies. Mr Horsfall also effectively controlled the two companies that provided the balance of the purchase monies. Yet he chose, deliberately, to use all those monies to purchase a property that was registered in the parties' joint names. These facts do not support a resulting trust in favour only of the two companies, but rather point away from one.
>
> [18] Thirdly, there is none of the sort of evidence a court might expect if there was the resulting trust contended for by Mr Horsfall. …
>
> (footnotes omitted)

The Court expanded on these reasons and, in doing so, placed considerable reliance on *Potter v Potter*.

**Was the College Street property relationship property?**

[75] Mr Horsfall's case proceeds primarily on the basis that the College Street property was owned beneficially by 168 Group (albeit that, as we have noted, he has sometimes attributed beneficial interests to himself and 88 Riddiford Holdings). Stripped of euphemism, his evidence was that title was taken in the joint names of Ms Potter and himself so as: (a) to conceal the involvement of 168 Group with the

property; and (b) to limit the possibility that taxes have to be paid on gains anticipated when the property came to be on-sold.

[76] On Ms Potter's evidence, the College Street property was purchased with a view to creating an apartment in or on the building which would become the matrimonial home. If this were the purpose for which the property was acquired, it would not necessarily have precluded the imposition of income tax. For instance:

(a) Mr Horsfall's half interest in the joint venture[51] with Ascot was clearly on revenue account; and

(b) there would appear to have been a profit crystallised on the acquisition, for a net outlay of only $390,000, of a property worth at least $850,000 and probably more.

That said, however, there would have been some scope at least for the view that some of the profits (perhaps those attributable to Ms Potter's half share, or perhaps those representing the difference between $850,000 and the sale price) were on capital account.

[77] As we have explained, the case does not turn on Mr Horsfall's intentions in respect of the property. Instead, the position is that beneficial ownership in the property was acquired jointly unless this was inconsistent with the common intention of Mr Horsfall and Ms Potter. And, if, as is possible, Mr Horsfall had never intended to put an apartment in/on the building, it remains possible that he nonetheless told Ms Potter that this was what he intended to do. This would be consistent with:

(a) what he said in his letter of 11 March 2004;

(b) his creation of a sham agreement relating to the acquisition of the property to provide apparently contemporaneous support for the matrimonial home explanation; and

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51 See below at [82]–[84].

(c) his going to the trouble of seeking a fee estimate from an engineer for an exploration of the possibility of creating such an apartment.[52]

If Ms Potter believed that an apartment was to be created she would have been all the more likely to back up his account if the transaction came to be scrutinised by the revenue authorities. To use the language of Mr Horsfall's explanation of the 11 March 2004 letter, telling Ms Potter that an apartment would be built would have been an "extra layer of 'insurance' to complete the 'effect' that the property was to potentially be 'our' house".

[78] As we have indicated, Mr Horsfall's evidence as to what he actually told Ms Potter was limited. He did not claim that there was an arrangement that they were to hold the property as trustees for 168 Group (or anyone else); indeed he never suggested that he had mentioned to her the alleged interest of 168 Group in the transaction. At its most explicit, his evidence indicates that it was agreed that her entitlement to the proceeds of sale would be in the order of $10,000 and, thus by implication, that the balance would be applied as he determined. But he never claimed to have told her this money would be taken outside the pool of relationship property. There is, in fact, nothing in his evidence as to what he said to Ms Potter which would be inconsistent with the property and the proceeds of its sale being relationship property. That Mr Horsfall and Ms Potter generally kept their affairs separate had the effect that, while their relationship continued, each retained legal ownership and practical control of the separated assets. Such separation, however, did not preclude such assets being relationship property.

[79] 88 Riddiford Holdings was seen as the entity associated with Mr Horsfall that was most exposed to being treated by the revenue authorities as a dealer in land; this because it developed apartments on the building it owned in Riddiford Street. If profits associated with the acquisition and sale of land were to be returned as income, it made sense for the associated transactions to be conducted through it. It was presumably for this reason that Mr Horsfall at times envisaged that his half interest in the joint venture would be vested in 88 Riddiford Holdings.

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[52] As will become apparent, there are a number of possible explanations for this request: see below at [91].

[80] His account of events in relation to the reasons why 88 Riddiford Holdings did not wind up as what he called "the effective buyer" of the College Street property – essentially because it could not arrange finance without guarantees which were not forthcoming – was not supported by the production of contemporaneous documentation. It also seems a little odd in that, as it happened, outside funding was not required for the purchase anyway.[53] It is also of some interest that in October 2003 when Mr Horsfall was dealing with engineers over possible development of the property, 88 Riddiford Holdings was named in a context suggesting that if development occurred (along with likely tax consequences) the entity he envisaged as being involved was 88 Riddiford Holdings.[54]

[81] Inherent in all of this is high degree of flexibility. Mr Horsfall's arrangement with Ascot allowed him to decide what entity would take the benefit of his interest in the joint venture. He was able to slip from entity to entity without difficulty. Part of "his" interest in the joint venture represented fees not charged by Horsfalls. No-one raised any objection to him dealing in this way with fees owing to Horsfalls. 88 Riddiford Holdings raised no objection when it was taken out of the agreement to purchase the College Street property, initially in favour, ostensibly at least, of Mr Horsfall and Ms Potter or later in favour of 168 Group. And, prior to the 31 March 2005 accounts of 168 Group, the accounts kept by the various entities gave no indication of anything approaching an irrevocable decision as to the identity of Ascot's joint venture partner.

[82] Both Judge Walsh and Simon France J were prepared to accept that Ascot's joint venture partner was 168 Group. So too was the Court of Appeal. But in none of the judgments were reasons provided for this conclusion. And, as will probably be apparent by now, we disagree with it. This is a point of at least contextual relevance and warrants brief explanation.

[83] Prior to settlement of the acquisition of the College Street property, Mr Horsfall retained complete flexibility as to: (a) the identity of Ascot's joint

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53 This is on the assumption that Mr Horsfall could have advanced to 88 Riddiford Holdings the money he used to settle.

54 Another possible explanation is that he just wished to ensure that the engineer's fee could be treated as tax deductible.

venture partner; and (b) who was to take ownership of the College Street property. The money which was put into the joint venture (in particular the $100,000 deposit) was not treated as an investment by either 168 Group or 88 Riddiford Holdings and must therefore have been accounted for within the current accounts of those companies and Mr Horsfall. As such it must be treated as his money. In all other respects, the joint venture interest represented what Mr Billington fairly called the "sweat equity" of Mr Horsfall. By way of example, when he and Mr Scott were formalising arrangements in respect of the acquisition of the College Street properties, Mr Horsfall, accepted personal responsibility (as between him and Ascot) for a half share of what was required to be paid on settlement.[55]

[84] As the joint venture interest was Mr Horsfall's to dispose of as he chose, it must be regarded as his property. And as it was acquired after marriage, it was therefore relationship property by reason of s 8(1)(e) of the Act.[56]

[85] A s 8(1)(e) argument was advanced on behalf of Ms Potter in the Family Court by her counsel. He did not accept that the proceeds of the sale of shares which enabled the 8 May 2003 settlement of the acquisition of the College Street properties were separate property.[57] He also advanced an argument which was broadly akin to the "sweat equity" argument which Mr Billington put to us[58] relating to the profit which Mr Horsfall and Ascot had built into their notional fair value figure of $850,000 for the College Street property and which formed the basis of the calculation of what Mr Horsfall and Ms Potter paid for it.[59] Judge Walsh recorded counsel as submitting that, on this basis:[60]

> [The interest in the College Street property] was property acquired by him in the course of their relationship in terms of s 8(1)(e) of the Act and subsequently became their relationship property pursuant to s 8(1)(c) when he chose the purchasing entity to be himself and the applicant in their personal capacities.

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55 See the correspondence referred to above at [18]. At this time, it was proposed that 88 Riddiford Holdings take a half share in the proposed acquisition of the College Street properties but Mr Horsfall gave his personal guarantee in respect of what was a half share of the purchase price.

56 This is notwithstanding the contribution of what may have been some separate property to the payment made to Ascot, as to which see *Fisher*, above n 39, at [11.22]–[11.23].

57 See FC decision, above n 3, at [186].

58 Above at [83].

59 See FC decision, above n 3, at [182].

60 FC decision, above n 3, at [182].

[86] As we have observed,[61] Judge Walsh and Simon France J noted that there was a dispute whether the proceeds of sale of the shares were separate property but did not resolve it and the Court of Appeal, without giving reasons, accepted that the share sales were separate property. Providing Ms Potter's contention that beneficial ownership of the property was acquired jointly, this dispute did not require resolution. It is, however, not entirely easy to see how her s 44 claim could be fairly dismissed without reasoned engagement with this issue. On the basis that the sweat equity was relationship property, as we have held it was, property acquired out of it (that is the College Street property) was likewise relationship property.[62] Again we cannot see how Ms Potter's claim could be fairly dismissed without reasoned engagement, a requirement which was not satisfied by conclusory dismissals.

[87] Although the findings and reasons of Judge Walsh were not as explicit as they might have been, we consider that he must be taken to have accepted the critical evidence of Ms Potter and thus rejected the narrative advanced by Mr Horsfall. It nonetheless remained open to Simon France J to reach a different view of the facts and in doing so, to rely on his assessment of the objective facts and associated probabilities. But, as will become apparent, we are of the view that his assessment was not complete and, in some respects, faulty.

[88] In the first place, Simon France J did not address the vagueness of Mr Horsfall's critical evidence, in particular that he had never claimed to have identified to Ms Potter a "true" beneficial owner, or to have secured agreement from her to hold the property on trust for such an owner. The closest he came to asserting such an arrangement is in the passage from his affidavit evidence set out in [40] above. But we see this evidence as insufficiently explicit given: (a) that Mr Horsfall's case rested on Ms Potter being a party to an arrangement to mislead the revenue; and (b) the absence of evidence that he told her that beneficial ownership was to be outside the pool of relationship property.

[89] We consider that Simon France J did not come to terms with the marked inconsistency between Mr Horsfall's evidence as to beneficial ownership and the tax

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61 Above at [26].
62 See above n 56.

advantages he sought to obtain. On what appears to have been Mr Horsfall's view of the law, those tax advantages could not be achieved lawfully if beneficial ownership did not accord with legal ownership. An intention to obtain those advantages despite 168 Group being the beneficial owner could have been realised only by concealing the true beneficial ownership from the Commissioner of Inland Revenue, a point which Simon France J did not square up to.

[90] Simon France J's approach was at least influenced by his view that 168 Group had been the joint venture partner. As we have noted, his conclusion on this point was not explained.[63] He did not address the context which we have discussed above. As will be apparent, we are of the view that it was Mr Horsfall who was the joint venture partner of Ascot.

[91] Simon France J was also influenced by the view that it would have been impracticable to provide an apartment in the building. He did not refer to Mr Horsfall's October 2003 request for a fee estimate from engineers for a feasibility assessment of just such a proposal. Why Mr Horsfall sought this fee estimate is not apparent. It may be because he had in mind putting in such an apartment. If so, this is consistent with Ms Potter's evidence. Alternatively it may simply have been because he was generally exploring possible development options for the building. If so, it is inconsistent with the drift of his evidence set out at [37] above. A third possibility is that it was just another attempt to create a paper trail for revenue purposes. If the third explanation is correct, it, along with the sham sale and purchase agreement and the letter of 11 March 2004, illustrates the lengths he was prepared to go to create a false story. Given these factors, there is no reason to think that he would necessarily have told a different story to Ms Potter.

[92] It will be recalled that in his evidence, Mr Horsfall denied that he had ever had any discussion with Ms Potter about putting an apartment in the building. The emphatic nature of this explanation and the extent to which he detailed it sit rather oddly with his letter to the engineers. As well, Ms Potter advanced her apartment/matrimonial home explanation for the purchase in joint names in her affidavit of 27 November 2009 (which was filed in support of an application for

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63 See above at [82].

discovery). At this stage she did not have access to the documents to which we have referred. If it is the case, as Mr Horsfall claims, that he had never discussed the apartment/matrimonial home idea, it is a strange coincidence that Ms Potter independently came up with an account of events which so closely matches the documents which he had created but to which she did not then have access.[64]

[93] The $50,000 adjustment was also relied on by Simon France J. The money owed by Ms Potter's brother was undoubtedly relationship property prior to the adjustment. The adjustment in respect of the debt as between Mr Horsfall and Ms Potter was of some practical significance in terms of control while the marriage subsisted. But the adjustment did not have the effect of transforming the debt into separate property. Both portions therefore remained relationship property. In the absence of any suggestion that Ms Potter was told that the proceeds of sale were being placed outside the relationship property pool, we do not see this adjustment as having the significance which Simon France J placed on it.

[94] As will be apparent, we consider that Judge Walsh made a credibility finding which, on the evidence, was well available to him. And given the issues which we have discussed, we consider that Simon France J's assessment of the probabilities did not provide an adequate basis for reversing that finding. The factual findings of Judge Walsh must be restored.[65] It follows that when the property was placed in joint names, there was no resulting (or other) trust in favour of 168 Group or any other party.

**Were the payments made in order to defeat Ms Potter's rights?**

[95] Section 44(1) of the Act provides:

> **44 Dispositions may be set aside**
>
> (1) Where the High Court or the District Court or the Family Court is satisfied that any disposition of property has been made, whether for

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64 Mr Horsfall did not suggest that there was an arrangement between him and Ms Potter that they would pretend that an apartment was to be created and to become their home. The furthest he went on this aspect of the case is in the passage cited in [40] above where he claims that he told Ms Potter that, in view of the fact that they did not have a house, the revenue authorities would not challenge the bona fides of the joint purchase.

65 Other than as to Ascot's joint venture partner.

> value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person (**party B**) under this Act, the court may make any order under subsection (2).

[96] Judge Walsh found that Mr Horsfall was conscious of the potential rights of Ms Potter when he transferred the proceeds of sale of the College Street property to 168 Group and that he must have known that his actions exposed her to the substantial risk in terms of her rights in respect of those proceeds.[66] In the High Court Simon France J accepted that on the findings of fact made by Judge Walsh, there was a "solid foundation" for the application of s 44.[67] And, as we have restored Judge Walsh's critical findings of fact, we see no escape from the conclusion that Mr Horsfall's actions were for the purpose of defeating Ms Potter's claims.

[97] As will be apparent from the narrative we have given, Mr Horsfall's first marriage broke up in 1995. Starting with the formation of 168 Group, Mr Horsfall's business affairs were conducted on a basis which was intended to result in him having the ability to control assets of significant value and enjoy the benefits they generated but nonetheless having a low asset profile. This was to protect such wealth as he might build up from future claims by others. Although this strategy was no doubt primarily focused on possible liability to the Commissioner of Inland Revenue, it also encompassed other claims, including claims under the Act. Mr Horsfall treated the proceeds of sale of the College Street property as if it had been owned by 168 Group when that was not the case. In doing so he must be taken to have intended to defeat anyone who might have had claims in respect of the acquisition and sale of the College Street property, including Ms Potter. So if the case against Mr Horsfall just rested on our conclusion that 15 College Street was relationship property,[68] his actions in respect of the sale proceeds would still have resulted in liability under s 44.

[98] In his submissions, Mr Stapleton complained that in the Family Court, counsel for Ms Potter had not put it squarely to Mr Horsfall that the transfer of the

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66 FC decision, above n 3, at [217].
67 HC decision, above n 4, at [19].
68 On the basis explained in [83]–[84] above.

proceeds of sale to 168 Group had been for the purpose of defeating Ms Potter's rights. We see nothing in this point. That this was the allegation was well understood; indeed it had been pleaded. Mr Horsfall's general response to it was likewise well understood.

[99] Mr Stapleton advanced one other argument we should mention. It was to the effect that the classification of property as relationship or otherwise applies only from the point of separation and that prior to separation, rights in respect of property fall to be determined on the basis of the conventional principles of property law and that, in accordance with such principles, there was nothing objectionable in Mr Horsfall's actions. The contention seems to be that in 2004, Ms Potter had no rights or claims under the Act which Mr Horsfall could defeat. This argument is untenable. If correct it would have the practical effect of rendering s 44 a dead letter in respect of transactions which occur before separation. We have no doubt that the expression "claims or rights" in s 44(1) encompasses claims which would, but for the disposition, have been available on separation.

**Disposition**

[100] The appeal is dismissed. The appellant is to pay the first respondent costs of $25,000 together with reasonable disbursements. We allow for second counsel.

**ELIAS CJ**

[101] The appeal concerns an application under s 44 of the Property (Relationships) Act 1976 to recover property said to have been disposed of by the husband in order to defeat the interests of the wife under the Act. The property disposed of was the proceeds of sale of a commercial property in College Street, Wellington. The College Street property was originally acquired in the course of a joint venture between one of the husband's business interests and a third party, Ascot Resources Ltd, and was jointly owned by the husband and wife for 11 months (although subject to an agreement for sale for nearly four of those months) and sold four years before their separation. In the Courts below, the wife's interest in the property which supported the s 44 application was put primarily on the basis of s 8(1)(c) of the Act. That provision defines relationship property to include "all property owned jointly or in common in equal shares by the married couple or partners". The definition of "owner" in the Act is a reference to beneficial ownership.[69]

[102] The husband says that the wife had no beneficial interest in the commercial property. He said that the beneficial owner for whom the couple held on a resulting trust was a company associated with him, 168 Group Ltd, which provided the funds used in the acquisition of the College Street property, although he later said that some of the funds were provided by another company with which he was associated, 88 Riddiford Holdings Ltd, and some were provided by him to 168 Group out of his own separate property.[70] It was, however, 168 Group to whom the payment on which the s 44 application is based was made on settlement of the sale. The husband's case is that the couple took joint ownership to avoid the risk that any gain on on-sale of the College Street property would be assessed for income tax in relation to the company and to avoid accounting for GST on the sale.

[103] The wife relies on the joint ownership, which under s 8(1)(c) of the Act means that the property is relationship property if the couple were its beneficial owners.[71] The wife acknowledges that she provided no money for the acquisition of

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69 Property (Relationships) Act 1976, s 2.

70 See below at [122].

71 To the extent that other arguments were advanced, see below at [133]–[134].

the College Street property and that she received a credit of $50,000 from the husband on its sale. She says that the property was jointly owned because it was intended for use as the couple's home after conversion to residential use and that the $50,000 she received on settlement was to console her for her disappointment that the property had instead been sold. (The husband says the payment was for use of the wife's name in the transaction, because she had been worried about any personal liability she might have arising out of the property dealings and he had persuaded her that there was no such risk and she would receive a portion of any profit obtained on sale of the property.) The wife maintains that she knew nothing of the husband's claimed motive that putting the property into their joint names would prevent the Inland Revenue Department raising questions as to payment of GST or income tax if 168 Group was at risk of being treated as a company dealing in property.

[104] The wife's application for orders under s 44 was granted in the Family Court, which accepted that she had a beneficial interest in the property through her joint ownership.[72] Judge Walsh rejected the husband's contention that the couple were trustees for 168 Group.[73] He made orders under s 44 that 168 Group pay half of the proceeds from sale of the College St property to the wife together with interest at 7 per cent from 1 April 2004 to the date of full repayment.[74] On appeal to the High Court, the judgment in the Family Court was set aside.[75] Simon France J took the view that the wife was not a beneficial owner of the property and that she knew it. The basis for the s 44 orders fell away as a result. On further appeal to the Court of Appeal, the decision in the Family Court was reinstated, although the matter was remitted to the Family Court to enable 168 Group to be heard on the consequential orders under s 44.[76] The Court of Appeal held that the husband was precluded by the policy of law discussed in *Potter v Potter*[77] from maintaining that the property had been put in the joint ownership of the parties to protect against potential liability for tax in the hands of 168 Group.[78]

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72 *DJP v MAH* [2013] NZFC 4577 (Judge Walsh).
73 At [201].
74 At [223].
75 *MAH v DJP* [2014] NZHC 1520 (Simon France J).
76 *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 (Wild, Mallon and Williams JJ).
77 *Potter v Potter* [2003] 3 NZLR 145 (CA); aff'd [2004] UKPC 41, [2005] 2 NZLR 1. The appeal to the Privy Council was on slightly different grounds.
78 *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 at [32].

[105] On appeal to this Court, the parties maintain the arguments earlier raised.[79] The Attorney-General appeared as intervener to support the argument on behalf of the wife and accepted by the Court of Appeal that the principle of legal policy discussed in *Potter v Potter* prevented the husband from giving evidence that the joint ownership of the property was for the purpose of protecting against liability to tax.

[106] I would allow the appeal. In this conclusion I differ from the other members of the Court. In what follows I agree with the history of the facts and the litigation contained in the reasons delivered for the majority by William Young J at [7]–[43] and do not repeat that history except where necessary to support the different inferences I draw from it.

[107] I consider that the wife was not a beneficial owner of the College Street property. As a result, it was not relationship property under s 8(1)(c) of the Property (Relationships) Act. The property might have been treated as relationship property on application for division of relationship property on the basis of s 8(1)(e) or s 8(1)(ee) of the Act. But, although s 8(1)(e) was argued in the Family Court, no determination that the College Street property was relationship property on a basis other than s 8(1)(c) was made in the Courts below. In my view none can properly be made in this Court on the evidence and on the argument addressed to us. In addition to the difficulties in identifying contributions, remarked on in the Courts below, the application of s 8(1)(e) and s 8(1)(ee) is subject to the separate property provisions contained in s 9 of the Act which would require further consideration than is possible on the evidence and given the conduct of the case to date. The application of s 8(1)(c), on the other hand, is not subject to s 9.

[108] More importantly, the present appeal is not concerned with the wider application for division of relationship property. It is concerned with an application for orders under s 44 of the Act on the basis that relationship property has been disposed of in order to defeat the Act's equal sharing provisions. The inference drawn in the Family Court and in the Court of Appeal that the payment out of the

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[79] Leave to appeal was granted on the question whether the Court of Appeal was right to find that the disposition of the proceeds was made by the husband to defeat the claim or rights of the wife for the purposes of s 44: *Horsfall v Potter* [2017] NZSC 21.

proceeds of sale of the College Street property was in order to defeat the wife's relationship property interest was based on her joint ownership of College Street.[80] Without the fact of the joint ownership and the consequence provided by s 8(1)(c), I consider there is no secure basis on which it could be inferred that the payment of the proceeds of sale to 168 Group was made in order to defeat the relationship property of the wife, for reasons I later explain. If, as I think, the wife was not a beneficial owner of the College Street property, payment of the proceeds of its sale by the husband to a company with which he was closely associated, 168 Group, cannot be treated as a disposition of property in order to defeat the wife's rights justifying an order under s 44 of the Act.

[109] I consider therefore that the Family Court was wrong to make orders under s 44 requiring half the proceeds of sale together with interest to be paid by 168 Group to the wife. The Court of Appeal was similarly wrong to reinstate that order on appeal from the High Court (subject to reference back to the Family Court to allow 168 Group to be heard). In what follows I give my reasons for this factual conclusion, in which I am in general agreement with the views expressed by Simon France J in the High Court.

[110] I agree with the other members of this Court that the misdescription in the Court of Appeal judgment granting leave to appeal[81] as one of law is immaterial.[82] Appeal to the Court of Appeal was available, with leave, on fact as well as law.[83] It is not therefore a valid ground of appeal against the decision of the Court of Appeal that it overturned the decision of the High Court on a question of fact.

**The decision in the Family Court**

[111] In the Family Court, the wife was successful in her claim that the payment of the proceeds of sale of the College Street property to a third party was a disposition to defeat her interests in relationship property. Judge Walsh determined that the proceeds were relationship property on the basis of s 8(1)(c) because the property

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80 *DJP v MAH* [2013] NZFC 4577 at [217](b); and *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 at [43].
81 *DJP v MAH* [2015] NZCA 230.
82 See above at [71]–[73].
83 Judicature Act 1908, s 67(1)(a).

was jointly owned by the husband and wife and because he was satisfied that it was owned beneficially by the couple.[84] In reaching this conclusion, Judge Walsh did not resolve the factual dispute between the parties as to whether the property had been acquired jointly because they intended to make it their home,[85] but rather proceeded on the basis of the form of estoppel discussed in *Potter v Potter*.[86] Judge Walsh made an order under s 44 of the Act requiring half the proceeds of the sale together with interest to be paid by 168 Group to the wife.[87]

**The decision in the High Court**

[112] In the High Court, the Family Court decision was reversed on the facts by Simon France J. He also took the view that the principle in *Potter v Potter* did not apply.[88]

[113] On the evidence, Simon France J concluded that the property had not been beneficially owned by the parties.[89] The Judge acknowledged that there was no record of any trust, there was no record of the acquisition in the company accounts, and there was a contemporaneous representation made by the husband to the solicitors acting in the later sale of the property that GST had not been claimed on the purchase "as the property was intended to be our house". That was a statement the husband explained in evidence as an untruth, given as a quick explanation why GST was not payable on the sale to a solicitor unfamiliar with the background and as part of the paper trail to forestall any tax inquiries.[90] Despite these indications, Simon France J took the view that the indications against beneficial ownership were more compelling.

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84 *DJP v MAH* [2013] NZFC 4577 at [199]–[201]. Although at [199] the Judge refers to both s 8(1)(c) and s 8(1)(e), he does this simply by reference to the fact that the parties were joint owners. There was no distinct engagement with the reasons why s 8(1)(e) applied.

85 Judge Walsh merely recorded that there was "a conflict in the evidence on this issue": at [200](c).

86 See from [205]; applying *Potter v Potter* [2003] 3 NZLR 145 (CA) at [20].

87 At [223].

88 *MAH v DJP* [2014] NZHC 1520 at [39]–[40].

89 At [30].

90 At [21]–[22].

[114] First, he thought the overall context in which the property had been acquired was consistent with the husband's account.[91] Secondly, the property remained throughout a commercial one and "[r]elated to this" the husband had given "unchallenged evidence that development to add residential living facilities was not feasible".[92] The couple were planning to live overseas for a year and in any event the conversion of the building, even if feasible, meant it was not an immediate prospect to house them.[93] Thirdly, the wife had contributed no funds, even though the funds she had received from sale of the former matrimonial home were available to her and kept separate. Since the parties had in all other property matters kept their interests separate and accounted to each other and recorded use of their separate property, the arrangement in respect of the College Street property was quite different from their usual practice. Nor had the wife objected when the money was dispensed to 168 Group after sale, which in the context of the other dealings between the parties was unusual. In those circumstances, the Judge took the view that the wife's account suggested "quite a departure from how money was otherwise accounted for in their relationship" [94]. Finally, the Judge considered the payment by the husband to the wife of $50,000 at the time of the sale was "significant".[95] Simon France J thought the wife's explanation that the payment was made to placate her because she was unhappy at losing the prospect of its being used as the matrimonial home was implausible, based on his reading of the evidence:[96]

> The College Street property was not the matrimonial home, nor on the evidence could it ever be. It was not as if its sale meant there would not be a matrimonial home, just that the College Street property would not be that home.

Nor was there evidence to support the Family Court's view that this was a payment possibly to "safeguard against any subsequent claim being made by her".[97]

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91 At [23]. Simon France J pointed out that property had originally been part of three properties purchased in a joint venture with Ascot Resources Ltd "which had nothing to do with the parties as a couple". When the full title was acquired from Ascot, therefore, half of the property was already in the beneficial ownership of 168 Group.

92 At [24].

93 At [25].

94 At [26].

95 At [27].

96 At [27].

97 At [28].

[115] Once these explanations were eliminated, the Judge thought that there remained only the competing versions of the parties. He preferred the husband's:[98]

> I consider the history of the College Street property is significant and tells very much against the version advanced by [the wife]. It is important that the property had first been acquired by the joint venture, and was already half owned by 168 Group Ltd at the time [Ascot, the joint venture partner,] was bought out. It is also important that it was and remains a commercial building. It is not a property that is suitable for the family home purpose [the wife] ascribes to it. The arrangement alleged by [the wife] would represent both quite a shift in the previous approach to financial matters, and a complete turnaround in the purposes for which the building was acquired. Finally the $50,000 payment is consistent with [the husband's] overall version of events, and would be a surprising event as explained by [the wife].

[116] Of the letter written at the time of sale, giving the explanation as to why GST was not payable, the Judge said that the overall circumstances led him to the conclusion that the husband's explanation should be accepted.[99] He therefore concluded that the husband had not bought the property as a home and accepted the explanation that it "was put in joint names as a matter of convenience to maximise tax options depending on what happened in the future".[100] The Judge pointed out that the husband was constantly taking steps to preserve his tax position. He found that the wife "was a party to this and knew it was not her property":[101]

> Having been satisfied as to the lack of risk to her in allowing her name to be used, she agreed to the arrangement for payment of an undetermined fee which ended up being $50,000.

[117] Simon France J took the view that, for the purposes of the s 44 application, the conclusion that the wife was not a beneficial owner was fatal, even though he accepted it was not shown that 168 Group was entitled to all the proceeds received. He considered it did not matter:[102]

> The case is not about which of [the husband's] family's associated entities owned the interest. It is about whether the [wife] could satisfy the Court that [the husband] disposed of the money to 168 Group Ltd in order to defeat her interest. My earlier conclusion that there was a joint venture such that 168 Group Ltd already owned a half share of the property at the time [the

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98 At [28].
99 At [29].
100 At [30].
101 At [30].
102 At [34].

> wife's] name went on the title, and that [the wife] knew and agreed she had no beneficial entitlement in the property once the second half was bought, determines the s 44 application. A lack of clarity as to the true beneficial owner does not affect the analysis.

Although the Judge acknowledged that the lack of clarity in the accounts of the companies and other entities associated with the husband might be thought to have undermined his version, he was satisfied that the vagueness as to the exact beneficial ownership was "consistent with the general intermingling that seemed to go on".[103]

[118] Finally, Simon France J considered that the Family Court Judge had been wrong to apply the principle discussed in *Potter v Potter* to prevent the husband holding out that the wife was a beneficial owner for tax reasons while denying it for the purpose of relationship property.[104] This argument was advanced in the Family Court and the High Court only on the basis of the GST representation. It was rejected by Simon France J both on the basis that it was irrelevant as a matter of fact (since GST had not been claimed on the original purchase and was not accounted for on the sale) and because, in any event, cases such as *Potter v Potter* were distinguishable: "later tax treatment" could not change the beneficial ownership or prevent evidence being led as to the true ownership arrangements.[105] As a result, Simon France J was not deterred from the conclusion he had reached about s 44: the husband disposed of the proceeds of the sale not to defeat the wife's interest but because she did not have a beneficial interest in the property. Although it was open to "considerable debate" whether 168 Group was entitled to all the proceeds, that was "not an issue relevant to this stage of the inquiry" (and, as the Judge separately noted, 168 Group would have to be heard in any event): "The key point is that [the wife] was not entitled to them, and in my view knew that to be so".[106]

[119] As will be apparent, the Judge treated the key issue in the case as whether in fact the wife's joint ownership in the property was a beneficial ownership. He indicated that there would have been a "solid foundation for the application of s 44" if he had been persuaded that she had a relationship property interest under s 8(1)(c)

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103 At [35].
104 At [39]–[40].
105 At [40].
106 At [41].

in the property since the funds obtained from its sale had been distributed to a company in which the wife had no interest.[107]

**The decision in the Court of Appeal**

[120] On further appeal with leave of the Court of Appeal, the wife's appeal was allowed and the judgment in the High Court was set aside.

[121] The Court took the view that the question of GST was not relevant.[108] But it noted a concession on behalf of the husband by his counsel that the College Street property had been registered in the joint names of the parties to avoid "tainting" the companies as developers for income tax purposes. That, it thought, was "a concession that the two companies (both property companies) would have been liable to pay income tax on the profit they made when they sold the College Street property".[109] (Whether this was a fair characterisation seems to me to be doubtful if the tainting in issue was the treatment of the companies as property developers.)

[122] The Court rejected the resulting trust argument put forward by the husband for three reasons. First, the Court said the concession made by counsel for the husband that joint registration had been effected "to avoid a potential liability on the part of the two companies to income tax" meant that "the very purpose of joint registration in the parties' names was antithetical to a resulting trust".[110] The benefit sought "could only be achieved legitimately if the parties became the beneficial owners of the College St property". Secondly, the Court noted that the ultimate source of the funds used to purchase College Street was not clear and that it was likely that there had been intermingling between the husband's business and personal accounts, although it was unable to come to any concluded view on the point.[111] It found however that the immediate sources of the funds were from the husband's property and advances from 168 Group and 88 Riddiford Holdings.[112] Because the husband had contributed some of the purchase money from his separate property, the

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107 At [19].
108 *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 at [25]–[27].
109 At [24].
110 At [15].
111 At [17] and [19].
112 At [20](b), confirming a finding of the Family Court: *DJP v MAH* [2013] NZFC 4577 at [200](e).

facts did "not support a resulting trust in favour only of the two companies, but rather point away from one".[113] Finally, there was little evidence of the sort to be expected as to a resulting trust.[114]

[123] In the conclusion that the wife had a beneficial interest in the property through the joint ownership, it was a decisive point in the reasoning of the Court of Appeal that the line of authority discussed in *Potter v Potter* was applicable and should not have been distinguished by the High Court Judge on the facts. The principle was one of general application:[115]

> Having deliberately registered the College St property in the parties' joint names, the Court will not permit [the husband] to avoid the consequences of that by adducing evidence that joint registration was effected to avoid the two companies being assessed for income tax on their profits when they sold the College St property. In short, a court of law will not permit a party to avoid the consequences of a course of action deliberately taken, by adducing evidence that the course of action was taken for an unlawful purpose such as avoiding tax or defeating creditors.

[124] On the basis of its conclusion that the wife had a beneficial interest through her joint ownership of the College Street property, the Court of Appeal agreed with Simon France J[116] that an intention by the husband to defeat her claim could readily be inferred. There was no doubt the husband was aware of the relationship property rules. And the husband, "as a property developer who also had some experience with relationship property proceedings, would have known at the time he transferred the proceeds of sale that he was defeating [the wife's] rights to a share of the proceeds".[117] The Court noted that the point had not been "seriously" argued on appeal (although this characterisation was challenged by counsel for the husband in this Court).[118]

[125] The Court of Appeal accordingly allowed the appeal and set aside the judgment in the High Court. By consent, it directed that the proceeding be referred

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113 *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 at [17].
114 At [18].
115 At [32].
116 See above at [119].
117 *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 at [43].
118 At [43].

back to the Family Court for determination of remaining issues relating to 168 Group (which had not been a party to the proceedings in the Family Court).[119]

**The basis of the order sought under s 44**

[126] The case currently before us is not one for division of the relationship property of the parties, but rather is made under s 44 for restoration of relationship property said to have been removed by the husband from the pool available for division. Orders under s 44 may be made only where such disposal has been in order to defeat interests under the Act. As is relevant, s 44 provides:

> **44 Dispositions may be set aside**
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> (1) Where the High Court or the District Court or the Family Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person … under this Act, the court may make [an order setting aside the disposition].
>
> …

[127] Some care is necessary in application of s 44 to a transaction that occurred in the course of a relationship where there was dealing in commercial property, especially when it took place four years before the parties separated. The Property (Relationships) Act sets up deferred sharing as between the parties to the relationship, with each free to deal in assets which are separately owned until application for division is made, with the exception being for dispositions deliberately made in order to defeat the deferred relationship property interest. Particular care is prompted where, as here, the asset in issue was a commercial property and the husband's business was one of dealing in and developing such properties both on his own account and through corporate entities set up to hold his assets. A disposition of a property in the usual course and the payment of the proceeds obtained to an entity through which the business of the husband was partly conducted (and which was, at least probably, part-owner of the property)[120] does not of itself seem to me to justify an inference that the payment was in order to defeat a

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119 At [46].

120 As is explained below at [148].

relationship property claim, at least when it occurred in the course of the relationship and some considerable time before the parties separated.

[128] I discuss the background to the way in which the business activities of the husband were conducted by him during the relationship and the circumstances of the acquisition and sale of the property in the reasons that follow in explaining why I do not agree that the facts suggest that the wife was a beneficial owner of the property. But for present purposes, the point I make is that I think Simon France J was entirely correct to analyse the case as he did in terms of s 44.

[129] Unless the wife was a joint beneficial owner of the property, I do not think that there is any basis to infer that the husband intended the payment to 168 Group to defeat her interests in relationship property. An interest as co-owner under s 8(1)(c) of the Act is a present interest which would immediately be defeated by payment of the proceeds of sale to a third party. The Courts below accepted that the husband would have been aware of such consequence under the Act and that, as a result, a conclusion that the payment was in order to defeat the interest (if it existed) was available.[121] But the position is quite different if the wife's interest in the property at the time of disposition rested not on joint beneficial ownership but on the possibility that it would later be determined to have partly been purchased with relationship property.

[130] Because the issue on the appeal in my view turns solely on the application of s 8(1)(c), I agree also with Simon France J that the source of the funds provided to pay for the College Street property was largely irrelevant to the question whether the wife was a beneficial owner, at least once it was accepted that she did not herself provide any funds for the acquisition. I am unable therefore to agree with the view taken by the majority in this Court at [90] that Simon France J's approach was influenced by what the other members of the Court consider, on the basis of the analysis they conduct, was the erroneous view (shared, it should be noted, by all other Courts that have looked at the matter) that 168 Group was the partner in the joint venture with Ascot that had previously owned College Street and therefore

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[121] *DJP v MAH* [2013] NZFC 4577 at [217](d) and (h); *MAH v DJP* [2014] NZHC 1520 at [19]; and *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 at [43].

provided one half of the College Street property (left with it when the joint venture was wound up) as well as any funds provided to pay out Ascot.[122]

[131] On the approach of Simon France J, with which I agree, it was immaterial how the College Street property was acquired if the wife was not beneficially interested in it. Such information might have been of evidential value if there had been any question as to the wife's contribution. It would also have been material to a claim that the property was contributed to by the husband and was relationship property under s 8(1)(e) or (ee) (if not the husband's separate property under s 9). But that basis of claim was never resolved in the lower Courts and I do not think it can be attempted in this Court. Moreover, even if William Young J is correct in his analysis of the facts in the view that the source of the equity was relationship property under s 8(1)(e) (something I would be reluctant to conclude on the submissions addressed to us and given the uncertainty on the evidence), it was a claim that would not justify an order under s 44, for the reasons I give at [134] and [152]–[153].

[132] The appeal is not concerned with establishing the true beneficial owners of College Street once it is concluded that the property was not beneficially owned by the parties. Nor is it concerned with establishing whether in a relationship property division after separation the wife would have had a claim for the proceeds of sale of the College Street property under s 8(1)(e) or s 8(1)(ee). The appeal is based solely on the question whether the joint ownership of the husband and wife was beneficial ownership. That was the only basis on which application of s 44 was here justified.

[133] Other bases of claim under s 8(1)(e) and s 8(1)(ee) of the Act (turning on application in the acquisition of College Street of the husband's property acquired during the relationship) were potentially available and may have been within the scope of the application to the Family Court. They were not however relied on by the Courts below and there were no findings of fact made which justified reliance on any basis of claim other than s 8(1)(c). Although there was some discussion in the Court of Appeal that the College Street property might have been relationship property because of money contributed by the husband which was arguably

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[122] See below at [148].

relationship property, the suggestion was not the subject of full findings.[123] The Court recorded that the "primary submission" on behalf of the wife was that it did not matter where the purchase price came from because, "once the College St property was registered in the parties' joint names, it became relationship property: s 8(1)(c) of the PRA".[124]

[134] There was therefore no consideration in the Courts below of the application of s 44 in circumstances other than reliance on s 8(1)(c). Whether there was evidence that payment to 168 Group was in order to defeat the wife's relationship property interests was a more difficult inquiry if the basis of the interest was 8(1)(e), because the husband, to the knowledge of the wife and indeed with her participation, had dealings in similar properties during the relationship. Some of these dealings were held through 168 Group and 88 Riddiford Holdings but some may well have been obtained in part with the husband's property, both relationship property and separate property. Proper identification of the source of funds was necessary before there could be reliance on other provisions in s 8 as the source of the wife's potential relationship property interest. And s 8(1)(e) and (ee), unlike s 8(1)(c), are subject to the separate property provisions of the Act. There is evidence, accepted by the Family Court Judge, that some of the money for the College Street investment was provided by the husband.[125] In those circumstances the suggestion that the College Street property was the separate property of the husband held directly or through one of his business vehicles and taken outside the category of relationship property by s 9 of the Act is not something able to be dismissed out of hand without better tracing of the source of the property applied to it. The Court of Appeal found that "the sources of the funds provided by the two companies are not clear".[126] Even if established that relationship property had been applied to the purchase of the College Street property, it would need to be shown that the sale and disposal of the proceeds to 168 Group was in order to defeat a potential relationship property claim by the

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123 *Potter v Horsfall* [2016] NZCA 514, (2016) 31 FRNZ 160 at [9]–[11].

124 At [8]. See also at [12]: "Property acquired after the commencement of the relationship is relationship property (s 8(l)(e)) unless it was acquired out of one party's separate property after the commencement of the relationship in which event it remains separate property (s 9(2)). However, [the husband] has not maintained the College St property as his own separate property but registered it in the parties' joint names."

125 See *DJP v MAH* [2013] NZFC 4577 at [187] and [200](e).

126 At [19].

wife in the circumstances of the way in which the husband's business interests had been conducted during the relationship.

[135] It is clear that the husband's business dealings and the structuring of his development activities were chaotic and intended to leave him maximum flexibility to minimise tax exposure, preserve his assets, and obtain any business advantage going. It is not necessary to approve of the way in which his affairs were conducted. The appeal is however concerned with the interest of the wife and husband in the proceeds obtained from the College Street property four years before separation and the application of s 44. There is evidence that the husband and wife maintained their separate property distinctly during the relationship and that the wife was anxious not to be potentially liable for the husband's speculative dealings in land.

[136] Accordingly, unless the Court of Appeal was right in the view that the wife's interest arose under s 8(1)(c) on registration of the title in the joint names of the parties and (having rejected the husband's argument that it was held on trust) that she thus held a beneficial interest, I consider there is no basis for an order under s 44.

**Can the husband contend that the wife was not a beneficial owner?**

[137] In the Family Court, Judge Walsh accepted the submission on behalf of the wife that the husband could not have it "both ways" by asserting when it suited him that the couple were joint owners and then asserting for relationship property purposes that the property was held on trust.[127] This "estoppel" argument (as it was labelled by Simon France J)[128] was rejected in the High Court but was critical to the reasons of the Court of Appeal in allowing the appeal and reinstating the s 44 orders in the High Court. It is significant in the reasons of William Young J in this Court that the tax advantages the husband sought to preserve could only have been lawfully achieved if the legal and beneficial ownership coincided. Otherwise, he says, the intention to obtain tax advantages would have entailed concealment by the husband.[129]

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127 At [203].
128 *MAH v DJP* [2014] NZHC 1520 at [20].
129 See above at [39] and [89].

[138] I am unable to agree with this approach for two reasons. First, I doubt that admitting evidence of an arrangement that might later have allowed the husband to misrepresent the potential tax liability of 168 Group if the property was later sold is properly to be treated as an abuse of process in the claim between the husband and wife. I cannot think there is sound legal policy which compels adoption of what could be an unfair result as between the husband and wife unless the admission of the evidence would amount to abuse of process. An approach that treats the husband as hoist with his own petard in creating options for future exploitation which may or may not eventuate does not seem to me to be consistent with the purposes of a statute concerned to provide a "just division of the relationship property between the spouses or partners when their relationship ends".[130]

[139] Secondly, I would not apply the reasoning in *Potter v Potter*. I think the better view is that only proof of actual illegality or something amounting to abuse of process would justify preventing the husband asserting that the wife was not a beneficial owner of the property and would relieve the court of the obligation to determine that contention on the evidence. In this view I prefer the reasoning of the High Court of Australia in *Nelson v Nelson*[131] and the Supreme Court of the United Kingdom's decision of *Patel v Mirza*[132], cases where comparable arguments to those adopted in in *Potter v Potter* were not accepted.

[140] I am of the view that no illegality or circumstances amounting to abuse of process exist here such as would prevent the husband's claim as between himself and the wife that the wife was not a beneficial owner of the College Street property being assessed on its merits and on the evidence. There is no evidence of actual fraud or deception of Inland Revenue. At most, the joint ownership and paper trail set up by the husband may have provided a platform for future deception should a profit be made on sale of the property, but no such deception was clearly in contemplation. Given the fact that it is quite likely that 168 Group would not have been liable for income tax on the sale of the College Street property (since it had been a vehicle for holding property to that point), the husband's explanation that his concern was that

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130 Property (Relationships) Act, s 1M(c).
131 *Nelson v Nelson* (1995) 184 CLR 538.
132 *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

168 Group should not be "tainted" as a dealer in property by this sale transaction, making it liable to tax on revenue account for its dealings in property in the future (a motivation that had earlier led to the setting up of 88 Riddiford Holdings),[133] seems to me an entirely plausible motive for the joint ownership which is even more remote from actual illegality in the transaction in issue.

[141] I see therefore no basis for recourse to the Illegal Contracts Act 1970[134] or common law cases on illegality.[135] And I would want to consider in a case where it properly arises whether recourse to the Illegal Contracts Act is appropriate in the context of the Property (Relationships) Act's purpose and powers to achieve a just division of relationship property. More generally, I am of the view that it would be a retrograde step and unnecessary complication to reintroduce into the relationship property regime questions of "common intention" between the partners to the relationship and contractual analogies (such as may have been necessary in cases such as *Stack v Dowden*[136] where the sharing provisions of the applicable relationship property regime did not apply to de facto relationships).[137] I do not see that on any view there was an illegal contract here if the beneficial ownership of the property was not immediately apparent.

[142] I consider that the only question in application of s 44 was whether the wife was a beneficial owner of the College Street property at the time of its sale. If so, it was an available inference that the payment of the proceeds of sale to 168 Group were a disposition in order to avoid the application of s 8(1)(c) of the Act, even though the property was not in joint ownership at the date of separation. As already discussed, I do not consider that any basis other than the joint ownership of the property can found the s 44 claim.

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133 See below at [150].
134 Now sub-pt 5 of pt 2 of the Contract and Commercial Law Act 2017.
135 Compare William Young J above at [44]–[60].
136 *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.
137 Compare above at [55], [60] and [77].

**Was the wife a beneficial owner of the College Street property at the time of its sale?**

[143] The husband acknowledged in an affidavit in the proceedings "that my affairs have been structured so that I effectively own no assets, and have a small income only". The record keeping and accounts for the entities in which the husband's interest were held were inadequate. They appear to have been operated to preserve maximum flexibility including by suspending determinations about the ownership of assets until it was convenient to the husband that they came to rest. Much of this looseness in the accounting between the different entities in which the husband's interest were managed seems to have been to minimise the risk of assessment of tax.[138] It is not necessary to approve of this behaviour to hold the view, as I do, that it has little direct bearing on the substantive issues between the husband and wife.

[144] In this Court, the argument for the wife was that the sale proceeds were relationship property on three bases:

(a) The purchase of the College Street property was made with significant relationship property (an argument which was made in the Family Court but was not the focus of the case, which rested on s 8(1)(c)).

(b) The purchase was a joint project between the husband and wife and the property was intended to become the home of the parties.

(c) By obtaining tax advantages in the way the purchase had been structured, the husband was precluded from denying the beneficial ownership on which the advantages were based.

[145] As already discussed, the Court is not in the present appeal dealing with the extent of relationship property. The s 44 question in issue is whether the disposition of the proceeds of sale to 168 Group was in order to defeat the wife's relationship property interest. It may well be that other property of the husband or under his control is relationship property in application of s 8(1)(e) or s 8(1)(ee) of the Act and is not the husband's separate property under s 9, but the appeal is concerned with

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[138] As noted by the accounting expert called on behalf of the husband: see above at [42].

disposal to defeat a relationship property interest under s 8(1)(c) as already discussed.[139]

[146] I am unable to agree with the analysis adopted by the majority in this Court at [84] which relies on the joint venture with Ascot (from which the acquisition of College Street was substantially obtained) as having been relationship property. That might have been an outcome on application for division of the relationship property but it would have required closer consideration of the source of the funds for the acquisition and questions of separate property than the Courts below considered was available on the evidence in the proceedings. I do not think such analysis can be properly undertaken in this Court. More importantly, I do not think the prospect of a relationship property claim in the future supports an inference that the disposal four years before the parties separated was in order to defeat the wife's potential claim. The only basis on which such inference was accepted in the Courts below and which I think is available here is if the wife was a beneficial owner of the property when it was sold. That is a matter of fact for assessment. Because I am in substantial agreement with the reasons given by Simon France J in concluding that the wife was not a beneficial owner at that time and have already set out his reasons, I can be brief in indicating the factors that lead me to the same conclusion.

[147] It is not in dispute that the wife contributed no funds to the acquisition of the College Street property. Even if the source of the funds used in its acquisition was potentially relationship property, under the deferred sharing regime of the Act, they were not a contribution on her behalf at the time.

[148] The property was acquired as part of the winding up of a commercial joint venture between Ascot and the Horsfall entities. The husband, rather than 168 Group, may have been joint venture partner either alone or along with 168 Group or 88 Riddiford Holdings, although it is not I think possible to determine on the appeal the true position which would require consideration of the separate property claims of the husband. If the husband was the joint venture partner, the wife might well have had a potential relationship property claim in respect of the proceeds. But that is not how the present case had been run and it would run into the

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139 See above at [129].

difficulties of inferring that the disposition in the course of the relationship was in order to defeat the wife's potential relationship property interests against the background of how the parties conducted their business interests during the course of the relationship.

[149] The husband was a real estate agent who, by the time the relationship between the parties began, was dealing on his own account in commercial properties in order to set up a portfolio of properties from which he would obtain rental income. 168 Group was set up in 1996, some two years before the relationship began, for the purpose of holding commercial properties. Throughout the relationship the husband was actively engaged in property dealings as well as in some share trading. Some months before the relationship began, the husband incorporated his real estate business, through which his commissions and fees as a real estate agent were subsequently channelled.

[150] It seem clear that the husband became concerned that any dealings in property held by 168 Group should not be at risk of assessment to income tax. As a result, he established 88 Riddiford Holdings through which, as William Young J says, he seems to have intended to undertake any property developments.[140] Through these entities and the trusts which held the shareholding in the companies the husband had reasonably substantial assets before the relationship started. And he continued to conduct them as he saw fit during the course of the relationship.

[151] The wife, too, came into the relationship with an established business in clothing retail which she continued to run with her mother until the husband and wife went to live in France for a year from mid-2005 to mid-2006. Both partners kept their businesses distinct during the relationship, although the wife was after their return from overseas and following the birth of their daughter involved in maintaining the books for some of the rental properties and in some redecorating and building projects.

[152] In more personal property matters, too, the husband and wife maintained separate accounts of their interests. Thus, when they purchased a home in Hall

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140 See above at [8]–[9].

Street it was on the basis that each contributed equal shares (with the husband at first advancing the wife's share and then being repaid by her in two instalments after she received payment for her former home). It is striking that the parties' treatment of the ownership of the College Street property (a commercial property obtained in a swap and seemingly with a view to redevelopment or sale) was very different from the way in which they had earlier jointly acquired the Hall Street property which became their home in 1999 (after each had sold their separately owned former homes) and the way in which the net proceeds of its sale were disbursed when it was sold in April 2003. The purchase price for the Hall Street property was contributed equally by the parties and the proceeds of its sale were distributed to each of them on the same basis. When the couple advanced money to the wife and her brother for a separate venture of their own, it was treated by them as loan (with separate balances owed to each of them). The debt owed to the wife was reduced by $50,000 following the sale of the College Street property.

[153] It is correct to say that how the parties conducted their property arrangements during the course of the relationship does not affect the relationship property shares to which they were entitled on application for division. But one importance of this history is that during the course of the relationship the husband and wife dealt separately with their assets, including by disposals and exchanges, such as the swaps in relation to the College Street property before it was vested in the husband and wife as joint owners. The husband's properties and other assets were dealt with through the companies he had set up to hold them. Disposal of property in those circumstances by sale or transfer does not readily give rise to an inference that the disposal was with intention to defeat a relationship property interest. That is, I think, why the only basis for application of s 44 is if the wife was a beneficial owner of the College Street property.

[154] But the manner in which the parties conducted their property affairs during the relationship also bears significantly on the understanding the wife had in agreeing to take joint ownership of the College Street property. It is much more consistent with her assisting the husband in a matter represented to be of advantage to his financial interests (and theirs, during the subsistence of the relationship) than the dealings the parties had over the ownership and payment for the Hall Street

property in which she undoubtedly had a beneficial interest. In that connection it is significant that, although the wife had received her share of the Hall Street proceeds at the time the College Street property was put into her name, there was no suggestion that it should be applied towards the acquisition, something that, as Simon France J noted, is surprising in the context of these parties if College Street was seriously in prospect as the family home.[141]

[155] If s 8(1)(c) is the basis of the claim, then I do not agree with the majority that identification of the true beneficial owner was too vague to conclude that the property was held by the wife on a resulting trust.[142] I think Simon France J was correct to say that identifying the actual beneficial owner was unnecessary if it can be concluded that the wife was not a beneficial owner.[143]

[156] I do not find convincing the reasoning that, since the hoped-for tax advantage could not be obtained unless the husband and wife took beneficial ownership, it necessarily follows that they took beneficial ownership.[144] This is the *Potter v Potter* reasoning. In cases not amounting to abuse of process or reliance on illegality, such purpose may be evidence consistent with beneficial ownership. But it depends on the circumstances and is not a presumption of law. In that connection, I agree with Simon France J that there is reason to be sceptical of the wife's evidence that the College Street property was intended as the home. I do not think such scepticism is dissipated by the inquiries made of the engineer as to conversion of the property to residential purposes. That was clearly not an immediate prospect and its feasibility was never established and seems to have been a long shot.

[157] Given the background, I am not persuaded that the wife's evidence that the College Street property was bought as a home is to be relied on. Both parties, it seems to me, during the course of their dispute have adapted their accounts. It is striking that in the early affidavits the wife does not suggest that the joint ownership of the College Street property was because it was intended to be a home for the couple. In her principal narrative affidavit sworn on 6 March 2009, for example, the

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141 *MAH v DJP* [2014] NZHC 1520 at [26].
142 See above at [89].
143 *MAH v DJP* [2014] NZHC 1520 at [34]–[35].
144 See above at [89].

wife deals at some length with the contributions she made in working on the Hall Street property and the husband's former home before its sale and on a commercial building in Riddiford Street (owned by 88 Holdings Family Trust). The wife describes her role in the renovation of the Riddiford Street property (to add a floor with four residential apartments, one of which was occupied by the couple after sale of Hall Street). She says the building of the apartments and their marketing was "very much a joint project" in which she fully participated with the husband. But of the property in College Street she says only:

> We purchased a commercial property at 15 College Street, Wellington for $560,000. That property was sold in April 2004 for $1,575,000 and annexed hereto and marked with the letter "B" are copies of correspondence and a trust account statement which shows that the sum of $1,423,934.70 was paid into a BNZ account on settlement.

[158] The wife's affidavits indicate her involvement with and knowledge about the companies and the property dealings. She describes the year the couple spent in France, her decision to close her own business and study as a real estate agent and the expectation that she would work with the husband "in the property development companies owned by the Trusts". When the couple returned to New Zealand in August 2006 they purchased, through "our Trust" (the Mark Horsfall Family Trust), her mother's property in Owens Road. During her pregnancy she deposed that she continued to be involved in managing the tenancy in Riddiford Street, and in the "day to day activities of the Trusts", including in the development of a commercial property in Kent Terrace. "Whilst we had been overseas" the upstairs of a commercial property then held by one of the Trusts was vacant and there was talk of renovating it for their use as an apartment. The wife acknowledged that the husband always said that "if a tenant should come along then he would lease it". When such an opportunity arose, the wife described how she was involved in the renovation that was required and in a further renovation which preceded the letting of other space in the building. The thrust of this affidavit is that the wife made contributions to the Trusts and that it would be "profoundly unjust" if the husband could retain the benefit of the assets, including the companies owned by them. There was no complaint that the College Street property had been sold and the proceeds disbursed to 168 Group.

[159] Like Simon France J, I consider that the $50,000 reduction of debt was significant.[145] It was contrary to the careful equalisation of treatment of interests in the former home. It was unaccountably lavish in that context of dealings between the parties. If it was to console the wife for disappointment in the loss of a potential home (and the context that the parties were about to move to Europe for a year and that the property was an undeveloped commercial one does not suggest any particular attachment), it is not clear why the payment reflected a fraction of the profit made in the sale when the wife, if a joint beneficial owner, could have expected half the net proceeds. It makes sense if the reduction in debt was indeed a small share in the profits in acknowledgement of her involvement in a deal in which she did not understand herself to have a direct beneficial interest.

[160] I also consider that Simon France J was right to take the view that the history of the property was significant and that it "tells very much against the version advanced by [the wife]":[146]

> It is important that the property had first been acquired by the joint venture, and was already half owned by 168 Group Ltd at the time Ascot Resources was bought out. It is also important that it was and remains a commercial building. It is not a property that is suitable for the family home purpose [the wife] ascribes to it. The arrangement alleged by [the wife] would represent both quite a shift in the previous approach to financial matters, and a complete turnaround in the purposes for which the building was acquired. Finally the $50,000 payment is consistent with [the husband]'s overall version of events and would be a surprising event as explained by [the wife].

I do not think that this analysis is affected by the view taken by the majority in this Court that the joint venture partner was in fact the husband and that the money he invested in College Street was relationship property.[147] The question was not whether the wife had a claim to the College Street property under s 8(1)(e), for reasons already discussed. In those circumstances I agree that the source of the funds for the acquisition of College Street was irrelevant.

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145 *MAH v DJP* [2014] NZHC 1520 at [27].
146 At [28].
147 See above at [90].

[161] For these reasons, I conclude that the wife was not a beneficial owner when a joint owner of College Street. In those circumstances I consider that the s 44 order should not have been made.

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