IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 8/2022
[2023] NZSC 65

BETWEEN	TODD WILLIAM FRANK SUTTON First Appellant
	TODD WILLIAM FRANK SUTTON AND HOFFMANN TRUSTEES LIMITED AS TRUSTEES OF THE TODD SUTTON TRUST Second Appellants
AND	JOANNA ELISIA BELL Respondent

Hearing:	2 August 2022
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ
Counsel:	J R Billington KC, L J Kearns KC, Z L Wackenier and H P Short for Appellants V A Crawshaw KC, S M Wilson and J M Gandy for Respondent
Judgment:	1 June 2023

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs of $25,000 plus usual disbursements.

REASONS
(Given by O'Regan J)

Table of Contents

Introduction

[1] The first appellant, Mr Sutton, and the respondent, Ms Bell, were in a de facto relationship for about seven and a half years and had two children together. The

relationship ended on 1 September 2012. Just prior to the commencement of the de facto relationship, Mr Sutton transferred his residential property in an Auckland suburb (the Auckland property) to the second appellants (the Trustees). Ms Bell argued that this transfer was a disposition of property by Mr Sutton in order to defeat her claim or rights under the Property (Relationships) Act 1976 (PRA) and this came within s 44 of the PRA. She argued that the disposition should be set aside under s 44 and claimed a half interest in the Auckland property. She was successful in her claim in the Family Court,[1] the High Court,[2] and the Court of Appeal.[3]

[2] The appellants appeal to this Court against the Court of Appeal's decision, having obtained leave from this Court to do so.[4]

Issues

[3] The appeal gives rise to these issues:

(a) Can s 44 of the PRA apply to a disposition of property made prior to the commencement of a de facto relationship?

(b) If so, at what point does s 44 apply to a disposition made before the commencement of a de facto relationship?[5]

(c) If s 44 applies, was the disposition by Mr Sutton of the Auckland property to the Trustees made "in order to defeat the claim or rights" of Ms Bell?

---

1 *Cannon v Cox* [2019] NZFC 5363, [2019] NZFLR 556 (Judge Druce) [2019 FC judgment].

2 *Sutton v Bell* [2020] NZHC 1557 (Walker J) [HC judgment].

3 *Sutton v Bell* [2021] NZCA 645, [2022] 3 NZLR 152 (French, Clifford and Courtney JJ) [CA judgment].

4 *Sutton v Bell* [2022] NZSC 45 (O'Regan, Ellen France and Williams JJ). The approved question was whether the Court of Appeal was correct to dismiss the appeal to that Court. Ms Bell filed a notice that the CA judgment would be supported on other grounds, namely that the nature and status of the relationship between the disposer of assets and "party B" is relevant to whether the challenged disposition was made in order to defeat the claim or rights of party B, but is not a jurisdictional issue.

5 The same issue arises in respect of marriages and civil unions, albeit that the date on which a marriage or civil union commences will, in the normal run of things, be easier to determine.

[4] If the Court resolves those three issues against the appellants, it will then need to address further issues relating to the appropriate remedy under s 44, including whether relief should be denied wholly or in part under s 44(4).

Section 44

[5] The text of s 44 of the PRA is as follows:

> **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 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).
>
> (1A) The court may make an order under this section on the application of party B, or (in any proceedings under this Act or otherwise) on its own initiative.
>
> (2) In any case to which subsection (1) applies, the court may, subject to subsection (4),—
>
> (a) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for valuable consideration, or his or her personal representative, shall transfer the property or any part thereof to such person as the court directs; or
>
> (b) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for adequate consideration, or his or her personal representative, shall pay into court, or to such person as the court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property; or
>
> (c) order that any person who has, otherwise than in good faith and for valuable consideration, received any interest in the property from the person to whom the disposition was so made, or his or her personal representative, or any person who received that interest from any such person otherwise than in good faith and for valuable consideration, shall transfer that interest to such person as the court directs, or shall pay into court or to such person as the court directs a sum not exceeding the value of the interest.
>
> (3) For the purposes of giving effect to any order under subsection (2), the court may make such further order as it thinks fit.

(4) Relief (whether under this section, or in equity, or otherwise) in any case to which subsection (1) applies shall be denied wholly or in part, if the person from whom relief is sought received the property or interest in good faith, and has so altered his or her position in reliance on his or her having an indefeasible interest in the property or interest that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

[6] The term "de facto relationship" is defined in s 2D as follows:

2D Meaning of de facto relationship

(1) For the purposes of this Act, a **de facto relationship** is a relationship between 2 persons (regardless of their sex, sexual orientation, or gender identity)—

(a) who are both aged 18 years or older; and

(b) who live together as a couple; and

(c) who are not married to, or in a civil union with, one another.

(2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

(a) the duration of the relationship:

(b) the nature and extent of common residence:

(c) whether or not a sexual relationship exists:

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:

(e) the ownership, use, and acquisition of property:

(f) the degree of mutual commitment to a shared life:

(g) the care and support of children:

(h) the performance of household duties:

(i) the reputation and public aspects of the relationship.

(3) In determining whether 2 persons live together as a couple,—

(a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and

(b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) For the purposes of this Act, a de facto relationship ends if—

(a) the de facto partners cease to live together as a couple; or

(b) one of the de facto partners dies.

Background

[7] We start by setting out the factual background.

[8] Mr Sutton and Ms Bell met in July 2003. Mr Sutton had separated from his former wife some months before and was living in the Auckland property, which had been his former matrimonial home, with two flatmates. Mr Sutton and Ms Bell began a sexual relationship shortly afterwards.

[9] In October 2003, Mr Sutton received an unsolicited letter from his former wife's lawyers, advising in general terms on the reach of the PRA and how to protect separate property.

[10] On 23 February 2004, Ms Bell sent an email to Mr Sutton on the subject of the PRA (we will call this the "February 2004 email"). That email relevantly said:

> I have also been thinking about living together and the specifics of the new Relationship Property Law … The basics are: If two people live together in a property deemed as "The Family Home" for at least three years, the property can be divided if the relationship breaks up - irrelevant of who owned it originally! … The point being though – that it is after three years!! Also the Law covers any "property" the couple purchase together (eg household items, etc etc). Spouses or partners can agree between themselves on how to share the property. These agreements can be made at any stage of the relationship. Those agreements must be in writing and each spouse or partner must have independent legal advice. So – how I think we should work it is: – I only stay in your house for a short period of time (time limit to be defined - eg 6 - 9 months) – I don't invest any major amounts of money in the upgrade of the property – thereby not having any 'rights' in the property's value (ie not buying fencing etc). Gifts, cleaning, or helping you do the gardening, or the

> 'table' project doesn't count! – Over the next few months, when you get some money, you go to a Lawyer and tie up the property as a "separate property" – ie putting the property in trust and having it separate for the rest of your life. Then no matter what happens – for the rest of your life, you have the [Auckland] property as your own and it can never be counted as "Relationship Property" and won't ever be at risk of being divided again.

[11] Ms Bell moved into the Auckland property in February or March 2004 when one of the flatmates moved out. The couple slept together in Mr Sutton's bedroom from that time, though Ms Bell also had a separate room, from which she ran a business.

[12] In September 2004, Mr Sutton won a raffle. The prize included a free legal consultation with a lawyer. He met the lawyer on 24 September 2004. They discussed transferring the Auckland property into a family trust. After that consultation, Mr Sutton was advised by the lawyer to settle a trust and to transfer the Auckland property into it. The Todd Sutton Trust (the Trust) was settled on 9 November 2004. Mr Sutton was one of two trustees. The discretionary beneficiaries included any children of Mr Sutton and any de facto partner or wife. The final beneficiaries were Mr Sutton's children, both born and unborn.

[13] The property was transferred to the Trustees by agreement for sale and purchase dated 29 November 2004 at a sum of $550,000. Ms Bell was aware of the transfer. After a refinancing of the mortgage, it was recorded that the Trustees owed $209,000 to Mr Sutton. Mr Sutton embarked on an annual gifting programme to the Trustees until the date of separation in September 2012. By that date, all but $20,000 of the debt owed to Mr Sutton had been discharged by gifts to the Trustees.

[14] The High Court Judge found that Mr Sutton and Ms Bell entered into a de facto relationship some time between December 2004 and January 2005.[6] We interpolate here that, given the transfer of the Auckland property to the Trustees occurred on 29 November 2004, the gap between the transfer and the commencement of the de facto relationship could have been a matter of days (if the earliest point of the date range for the commencement of the de facto relationship is taken). It may be that

---

6 HC judgment, above n 2, at [75]. As we explain later, the Family Court had determined that the de facto relationship began before the transfer of the Auckland property, but this was overturned by the High Court after new evidence was adduced.

another judge would have found the de facto relationship had begun by the time of the transfer: it appears that such a finding would have been open on the evidence. Nevertheless, as the finding that the de facto relationship began after the transfer is not challenged, we proceed on that basis.

[15] Mr Sutton and Ms Bell had two children: a boy born in 2005 and a girl born in 2009. They separated in September 2012.

[16] After the couple separated, Mr Sutton initially moved to a sleep-out on the Auckland property and Ms Bell remained in the house with their two children. The children continued to live with Ms Bell at the Auckland property until April 2017, when an interim parenting order was made granting Mr Sutton day-to-day care of the children. Ms Bell stayed in the Auckland property until January 2018.

[17] For all of the period between September 2012 and January 2018, Mr Sutton continued paying the outgoings on the Auckland property. During this period, Mr Sutton and Ms Bell were engaged in litigation relating to the care of the children, culminating in a judgment of the Family Court in December 2017.[7] The Family Court made a final parenting order giving Mr Sutton day-to-day care of the children, with alternative weekend and school holiday contact for Ms Bell. At the same time, the Family Court discharged an earlier occupation order relating to the Auckland property (in Ms Bell's favour), to allow Mr Sutton and the children to live at the Auckland property.

[18] Ms Bell's relationship property proceedings were commenced in July 2017, nearly five years after the separation. She sought a half share in the couple's relationship property and, as noted earlier, this included a claim for a half interest in the Auckland property, invoking s 44 of the PRA. We were told there is no relationship property of any significance so the s 44 claim is the only matter of substance in the proceedings.

---

7 *Bell v Sutton* [2017] NZFC 9697.

The procedural history of Ms Bell's PRA claim

[19] The procedural history of Ms Bell's PRA claim is complex. For present purposes a brief summary suffices.[8]

[20] There have been two relevant Family Court judgments relating to Ms Bell's PRA claim. The first, the 2018 Family Court judgment, dealt with a preliminary issue, namely when the de facto relationship between the Mr Sutton and Ms Bell began and ended. Judge Clarkson determined that the de facto relationship began in February/March 2004 and ended in September 2012.[9] The 2019 Family Court judgment dealt with Ms Bell's substantive s 44 application. It proceeded on the basis of the findings in the 2018 Family Court judgment, that is, on the basis that when the disposition of the Auckland property occurred in November 2004, Mr Sutton and Ms Bell were in a de facto relationship. Judge Druce upheld Ms Bell's claim under s 44.[10] He ordered the Trustees to transfer the Auckland property to Mr Sutton and Ms Bell as tenants in common in equal shares.[11] Counsel for Mr Sutton told us this will lead to the Auckland property being sold, in which case it would no longer be the family home of Mr Sutton and the two children. Mr Sutton gave evidence in 2018 that, if the Auckland property were sold, neither he nor the Trustees would be able to purchase another similar property.

[21] The appellants appealed to the High Court against the 2019 Family Court judgment and also applied for an extension of time to appeal against the 2018 Family Court judgment and to adduce new evidence for that purpose. The new evidence comprised emails between Mr Sutton and Ms Bell which had come to light after the 2019 Family Court judgment had been delivered. The High Court granted the extension of time and the application to adduce new evidence, finding that the new evidence was potentially relevant to the date on which the de facto relationship commenced.[12]

---

8 There is a more detailed account in the Court of Appeal's judgment: CA judgment, above n 3, at [8]–[14].

9 *Cannon v Cox* [2018] NZFC 5556 [2018 FC judgment] at [37]-[46].

10 2019 FC judgment, above n 1, at [57].

11 At [87].

12 *Sutton v Bell* [2020] NZHC 327, [2020] NZFLR 27 (Fitzgerald J).

[22] The substantive High Court appeal then followed. Having considered the fresh evidence, the High Court allowed the appeal against the 2018 Family Court judgment and made a finding that the de facto relationship commenced some time between December 2004 and January 2005, that is, after the transfer of the Auckland property to the Trustees.[13] Notwithstanding this, the High Court Judge found that the disposition of the Auckland property to the Trustees was a disposition to which s 44 of the PRA applied and therefore dismissed the appeal against the 2019 Family Court judgment.[14]

[23] We now turn to the issues identified earlier.

Can s 44 apply to a disposition made prior to the commencement of a de facto relationship?

[24] The appellants' case is that s 44 does not apply to a disposition of property made prior to the commencement of a de facto relationship. They say this is a complete answer to Ms Bell's claim and that the Courts below were wrong to find otherwise.

High Court

[25] In the High Court, Mr Sutton argued that he could not have had the intention to defeat a claim or rights in property of Ms Bell in circumstances where no such rights existed because he and Ms Bell were not yet in a de facto relationship. Ms Bell's argument to the contrary was that a disposition in anticipation of a de facto relationship could come within s 44 if, on the facts, it was established that an intention to defeat a future claim or rights existed.

[26] The High Court Judge was satisfied that, on an objective basis, Mr Sutton knew that the transfer of the Auckland property to the Trustees would avoid relationship property interests in that property arising in the future.[15] She did, however, find that Mr Sutton may have subjectively (and reasonably) thought that Ms Bell had no

---

13 HC judgment, above n 2, at [75].
14 See [95], [101] and [132].
15 At [94].

relationship property interest at the time of the disposition.[16] Despite this, the Judge concluded that as the couple were "on the cusp of a de facto relationship", and Mr Sutton knew of the future effect of the disposition on Ms Bell, the disposition was "made in anticipation of the deepening of their commitment to one another".[17]

[27] The Judge relied on two High Court decisions, *Ryan v Unkovich*[18] and *Gray v Gray*.[19] Those cases concerned dispositions made prior to the coming into force of the legislation that brought de facto relationships within the ambit of the PRA (the 2001 amendments).[20] In both cases the High Court found that, although the claimant had no rights at the time the disposition occurred, this did not create a jurisdictional bar to a claim under s 44.[21] We will discuss these cases in more detail later.

Court of Appeal

[28] The Court of Appeal considered an important part of the scheme of the PRA was the contracting out regime set out in s 21.[22] Section 21(1) specifically provides that parties may contract out of rights and entitlements before, but in contemplation of, the commencement of a marriage, civil union or de facto relationship.[23]

[29] The Court saw this as significant because it showed a parliamentary intention that couples should be able to contractually avoid rights which, under the PRA, would come into existence in the future.[24] The Court saw the relationship between the s 21 contracting out regime and the s 44 avoidance provisions as providing the basis for the resolution of the jurisdictional issue.[25]

[30] The Court of Appeal referred to *Ryan v Unkovich* and *Gray v Gray*, as the High Court Judge did. The Court of Appeal also referred to *SMW v MC*, where the

---

16 At [100(g)].
17 At [101].
18 *Ryan v Unkovich* [2010] 1 NZLR 434 (HC).
19 *Gray v Gray* [2013] NZHC 2890.
20 Property (Relationships) Amendment Act 2001.
21 *Ryan v Unkovich*, above n 18, at [40]; and *Gray v Gray*, above n 19, at [40].
22 CA judgment, above n 3, at [28].
23 At [29].
24 At [33].
25 At [37].

High Court observed that there was nothing in s 44 which expressly required that the rights and interests at issue exist at the time of the disposition.[26] The Court of Appeal noted that, while those cases concluded that s 44 could apply to a disposition made in order to defeat future rights, they did not consider whether the same could be said of a disposition made prior to the commencement of the relevant relationship.[27]

[31] The Court of Appeal saw it as significant that, if s 44 did not apply to any disposition made before the qualifying relationship began, "there would be considerable potential to 'hollow out' s 21".[28] The Court thought it would be strange if mutual attempts made before the commencement of a relationship to lawfully contract out of equal sharing under s 21 could be set aside under s 21J, but that unilateral attempts made at the same time would fall outside the jurisdiction of the courts under s 44. The Court considered that Parliament could not have intended this.[29]

[32] The Court of Appeal also considered it was significant that the PRA provides that a relationship which has commenced but does not endure for three years or more does not trigger the equal sharing regime under the PRA. This was seen as significant because there is no suggestion that a challenge to a disposition made during the first three years of a relationship (in circumstances where the relationship endured beyond three years) would face any jurisdictional or evidential challenge on the basis that the claim or rights said to have been defeated had not yet come into existence.[30]

[33] The Court concluded that a claim under s 44 could be made where the property was disposed of before the start of the relevant relationship.

Appellants' submissions

[34] For the appellants, Mr Billington KC took issue with the Court of Appeal's approach of determining the scope of s 44 by reference to s 21. He pointed out that

---

26 At [47], referring to *SMW v MC* [2013] NZHC 396, [2014] NZFLR 71 at [64].
27 CA judgment, above n 3, at [48].
28 At [57].
29 At [57].
30 At [59].

s 44 was the successor to provisions that date back to s 13 of the Divorce Act 1898.[31] Mr Billington pointed out that in its 124-year history, neither s 44 nor its predecessor sections has contained any language addressed to the application of the provision to prospective or anticipated claims or rights that did not exist at the date of the disposition. He contrasted this with s 42 of the Property (Relationships) Act 1984 (NSW) which is similar to s 44 but specifically refers to a disposition made "to defeat an existing or anticipated order relating to [an application to the court under the Act]".

[35] Mr Billington pointed out that s 21 was a new provision in the PRA as enacted in 1976.[32] While s 21 referred to agreements in contemplation of marriage, there was nothing which indicated that it was intended that s 21 would have any impact on the interpretation of s 44.

[36] Mr Billington emphasised that, as the Court of Appeal itself had noted, the cases relied upon by the Court of Appeal addressed the unusual circumstances created by the 2001 amendments. The cases concerned couples who had been in a de facto relationship at the time the dispositions of property had been made. So these cases were not authority for the proposition that s 44 could apply to a disposition made before the commencement of a de facto relationship. Mr Billington argued they supported the appellants' position that s 44 did not apply to a disposition made before a de facto relationship commenced. He drew support for this from another case referred to by the Court of Appeal, *Genc v Genc*.[33] In that case, Potter J observed that s 44 did not apply to the disposition in issue because it was made before the commencement of the parties' de facto relationship.[34]

[37] Mr Billington argued that, given the broad definition of de facto relationship in s 2D and the significant consequences of a finding that a de facto relationship

---

31 Section 13 of the Divorce Act 1898 was essentially replicated in s 43 of the Divorce and Matrimonial Causes Act 1908 and s 34 of the Divorce and Matrimonial Causes Act 1928. It was replaced by s 81 of the Matrimonial Proceedings Act 1963 which, in turn, was replaced by s 44 of the Property (Relationships) Act 1976 [PRA]. Section 81 of the Matrimonial Proceedings Act was largely replicated in s 184 of the Family Proceedings Act 1980 to deal with attempts to defeat claims or rights relating to maintenance, child support or costs.

32 The PRA was originally called the Matrimonial Property Act 1976.

33 *Genc v Genc* [2006] NZFLR 1119 (HC).

34 At [96]. *Ryan v Unkovich* cited *Genc v Genc* as authority for the proposition that s 44 applies only to dispositions that occur when the parties are in a relationship: *Ryan v Unkovich*, above n 18, at [38].

existed at the time of a disposition (or, as in this case, a finding that the parties were so close to being in a de facto relationship that s 44 was engaged), there was a need for some precision and certainty.[35] He argued that the effect of the Court of Appeal's decision was to create a new category of relationship, that is, a couple contemplating entering into a de facto relationship. He described this as social engineering that was better left to Parliament.

[38] Mr Billington also argued that the interpretation of s 44 taken by the Court of Appeal meant that it was, in effect, retrospective legislation. He said it involved applying s 44 retrospectively to set aside a disposition that was lawfully made and could not have been set aside at the time it was made.

Respondent's submissions

[39] For the respondent, Ms Crawshaw KC argued there was nothing in the wording of s 44(1) to suggest that it applied only to dispositions that take place after a qualifying relationship has begun. She noted in particular that s 44 refers to a "person" (rather than a "spouse" or "partner") transferring "property" (rather than "relationship property") in order to defeat the claim or rights of another "person" (not "spouse" or "partner") under the PRA. She contrasted this with ss 44C and 44F, which specifically refer to "relationship property" and therefore apply only to dispositions that take place after a qualifying relationship under the PRA comes into existence. Both s 44C and s 44F also apply to dispositions made by "spouses or partners".

[40] Ms Crawshaw argued that the Court of Appeal's approach was consistent with *Ryan v Unkovich* and *Gray v Gray* as well as being consistent with the approach taken in the context of creditors' rights in *Regal Castings Ltd v Lightbody*.[36]

[41] Ms Crawshaw argued there was nothing in the legislative history of s 44 to support the position of the appellants. She argued that the provisions like s 44 in earlier legislation were associated with divorce, rather than with relationship property

---

35 Citing the decision of the High Court in *B v F* [2010] NZFLR 67 (HC).

36 *Ryan v Unkovich*, above n 18; *Gray v Gray*, above n 19; and *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

claims. This meant they were focused on dispositions of property that could otherwise be used to satisfy maintenance claims, damages or costs orders.

[42] The enactment of the present PRA in 1976 represented a radical change of approach, including the presumption of equal sharing of matrimonial property. She argued that the fact that s 44 was not changed when the present equal sharing regime came into effect (and the use of trusts to avoid the consequences of the PRA became common) was not an indication that Parliament intended that s 44 apply only after a marriage or relationship existed. Rather, it reflected the fact that there was no need to change s 44 because it had the very effect that the High Court and Court of Appeal found it had in the present case.

[43] Ms Crawshaw also supported the Court of Appeal's approach of linking s 21 and s 44 in the course of its interpretation exercise. She supported the Court of Appeal's observation that there would be considerable potential to hollow out s 21 if s 44 were interpreted to allow for a soon-to-be partner to unilaterally dispose of property and thereby shield it from the PRA regime.[37]

Our approach

[44] We start with the words of s 44(1) itself. There is nothing in s 44 that requires an interpretation that only dispositions made after the commencement of a marriage, civil union or de facto relationship are subject to the section. In fact, the indications are to the contrary, given the terminology used (person, not spouse or partner, and property not relationship property). We agree with Ms Crawshaw that the comparison between s 44 and ss 44C and 44F is significant.

[45] We also agree with the Court of Appeal that there would be considerable potential to hollow out s 21 if s 44 were interpreted to allow for a soon-to-be partner to unilaterally dispose of property and thereby take it outside the scope of the PRA regime. We see no error in interpreting s 44 with reference to s 21: both are part of the overall statutory scheme.

---

[37] See CA judgment, above n 3, at [57].

[46] We consider *Ryan v Unkovich* and *Gray v Gray* support the respondent's submission that s 44(1) can apply to a disposition made when "party B" has no existing claim or rights to defeat but there is an anticipation that a claim or rights will come into existence.[38] We accept they are not directly on point because they are both cases where the disposition occurred at a time when the parties were already in a de facto relationship. However, they both deal with a disposition made when the claimant partner had no existing rights. The fact that the reason there were no existing rights to defeat in this case (because there was not yet a de facto relationship) differs from the reason in *Ryan v Unkovich* and *Gray v Gray* (because the legislation was not yet in effect) is not an adequate basis to differentiate those cases from the present case.

[47] The observation made in *Genc v Genc* (adopted in *Ryan v Unkovich*) referred to earlier (that s 44 does not apply to a disposition made before the commencement of a de facto relationship) was made in passing and, in any event, is not binding on this Court.[39] We take a different view.

[48] We do not consider that the New South Wales legislation assists in the interpretation of s 44(1) of the PRA: it focuses on defeating a claim made in an action already before the court or about to be filed. That is much narrower in scope than s 44(1).

[49] Interpreting s 44(1) in a way that does not rule out its application to dispositions made prior to the commencement of a marriage, civil union or de facto relationship does not create a new category of relationship and does not involve social engineering, as the appellants suggest. It merely reflects this Court's interpretation of s 44(1) in accordance with its text and in light of its purpose and its context as required by s 10 of the Legislation Act 2019.

[50] We do not think there is anything in Mr Billington's retrospectivity argument. On its face, s 44(1) applies to any disposition made with the requisite intent to defeat

---

38 However, we do not see *SMW v MC* as of assistance because, in that case, the parties were married (but temporarily separated) when the disposition occurred: *SMW v MC*, above n 26.

39 See above, at [36]. An observation to the effect that s 44 did not apply to a disposition made before the commencement of a de facto relationship was also made in *JEF v GJO* [2012] NZHC 1021, (2012) 3 NZTR 22-010 at [87]. However, no authority in support of the proposition was cited and, like *Genc v Genc*, the decision is not binding on this Court.

the claim or rights of party B. The interpretation that we favour simply admits of a possibility that such a disposition can occur at a time when the parties have not yet entered into a de facto relationship but have committed sufficiently to doing so. That does not make the provision retrospective: rather, it is an interpretation that gives effect to the words of the statute. Other sections in the PRA allow reference back to events prior to the beginning of a qualifying relationship: see, for example, ss 8(1)(d) and 16.

[51] Nor does it interfere with the freedom of the party making the disposition to deal with his or her property. It simply provides that if the disposition occurs in the circumstances contemplated by s 44, then the disposition becomes vulnerable to challenge under s 44. That is no different in principle from the equivalent provisions in relation to the interests of creditors (formerly s 60 of the Property Law Act 1952, and now pt 6, subpt 6 of the Property Law Act 2007).

[52] We conclude that there is no reason to restrict s 44(1) to dispositions made after the commencement of a marriage, civil union or de facto relationship.

At what point does s 44 apply to a disposition made before the commencement of a de facto relationship?

[53] The appellants' case is that this issue does not arise because s 44 does not apply to such a disposition.

High Court

[54] The High Court Judge did not consider this aspect of the case as a separate issue, but rather proceeded directly to consider whether the disposition was made by Mr Sutton with the intention to defeat Ms Bell's interest in the Auckland property.

Court of Appeal

[55] The Court of Appeal considered that it was necessary to consider this aspect of the case as a separate issue, guided by the jurisprudence on the approach taken under

s 21 as to what constitutes "in contemplation" as the pre-condition for valid contracting out agreements.[40]

[56] The Court noted the difficulty in applying the "in contemplation" criterion to a de facto relationship as opposed to a marriage or civil union, which commence with a formal step that is officially recorded. In contrast, a couple is in a de facto relationship when they "live together as a couple", which, as the Court noted, means that such a relationship can commence without "contemplation".[41] Once a couple mutually contemplates a de facto relationship, it may already have come into existence.

[57] The Court considered that authorities on the approach to "in contemplation" when applied to a marriage required adaptation in the context of a de facto relationship.[42] The Court said that in most cases the decision of a couple to live together creates a strong but rebuttable presumption of a mutual contemplation of entering a de facto relationship (rebuttable because an analysis of the contextual factors in s 2D(2) of the PRA may indicate that, even where two people agree to live together, they are not doing so "as a couple").[43] Having analysed the facts, the Court concluded that, by the time Mr Sutton made the disposition, he and Ms Bell were in contemplation of a de facto relationship.[44]

Appellants' submissions

[58] The appellants did not directly engage with this issue, given their stance that s 44(1) did not apply to a disposition made before a de facto relationship existed. Mr Billington did, however, emphasise the need for a high evidential burden to be satisfied before finding a de facto relationship has begun or is sufficiently close to beginning in order to bring the PRA into play, particularly given the significant impact

---

40 CA judgment, above n 3, at [61]. At [65], the Court noted "in contemplation" is used in other sections of the PRA: in s 8 (in the definition of "relationship property") and in s 16.

41 At [62].

42 At [70]. The leading authority, *M v H*, said "in contemplation of their marriage" means a "marriage actually intended" at the time the agreement was entered into: *M v H* [2018] NZCA 525, [2018] NZFLR 918 at [51].

43 CA judgment, above n 3, at [74].

44 At [82].

on the property rights of the parties that the decision can have.[45] He also noted the High Court Judge's reference to the "impermanent and unsettled nature" of Mr Sutton and Ms Bell's living arrangement.[46] He argued this indicated that, even on the approach adopted by the Court of Appeal, Mr Sutton and Ms Bell did not have the required contemplation of entering into a de facto relationship in this case.

Respondent's submissions

[59] The respondent's position also meant that she did not directly engage with this issue. On her approach to the case, the essential issue was whether, when the disposition was made, there was an intent to defeat the claim or rights of party B. Ms Crawshaw argued that the Court of Appeal took too limited an approach in setting a requirement that there be a mutual contemplation of beginning a qualifying relationship at the time a disposition was made in order to engage s 44. She argued that there should be no such temporal requirement: rather, the question was whether the circumstances were such as to substantiate a finding that the disposition was made in order to defeat a claim or rights of the other partner.

Our approach

[60] We have some concerns about the Court of Appeal's approach, involving a strong but rebuttable presumption that s 44 will be engaged in most cases where a disposition is made when a couple have decided to live together (and can therefore be treated as having a mutual contemplation of entering into a de facto relationship).

[61] Practical problems arise from taking a narrow approach to this issue, but equally practical problems arise from taking a broad approach. If the Court were to determine that s 44(1) was not engaged in relation to dispositions made before a de facto relationship actually commenced, that would logically require the Court to also determine that s 44(1) would not apply to a disposition made before a marriage occurred. Taken to its extreme, this would mean that a disposition made the day before the parties were married (assuming they were not in a de facto relationship at that time) would be outside the scope of s 44(1). That would mean that party B would be unable

---

45 He cited as authority for that proposition *B v F*, above n 35, at [48].
46 HC judgment, above n 2, at [67].

to challenge the unilateral disposition made under s 44(1) but if party A and party B had entered into an agreement under s 21, a challenge would be available under s 21J if the effect of the agreement was to cause serious injustice. There is no doubt that would be anomalous.

[62] On the other hand, it cannot be that a disposition made by one party in the early days of a relationship is vulnerable to attack under s 44. If the mere fact the parties have decided to live together makes a disposition by either party subject to s 44, that will make it necessary for the parties to obtain legal advice and enter into a s 21 agreement in circumstances where it is quite possible the relationship will not develop into a de facto relationship as defined.

[63] Similar policy issues arose in the context of a s 21 agreement entered into prior to a marriage.

[64] In *M v H*, the Court of Appeal was required to determine whether an agreement entered into by a couple prior to their marriage was an agreement entered into by the couple "in contemplation of their marriage to each other" for the purposes of s 21 as it stood at the relevant time (prior to the 2001 amendments). The Court of Appeal upheld the decision of the High Court that "in contemplation" meant that there must be specific contemplation of an imminent marriage to a particular person; "a clear and present intention to become married".[47]

[65] In his decision in the High Court in *M v H*, Brewer J specifically rejected a broader interpretation of "in contemplation": that marriage was a recognised possibility that may occur at some stage in the future.[48] He reached that conclusion despite the fact that the agreement in issue in that case made various references to the possibility of a later marriage of the couple and provided for their property interests in the event that the marriage occurred. However, the evidence was that there was no present intention to be married at the time the agreement was entered into.

---

47 *M v H*, above n 42, at [47] and [55], upholding the decision of the High Court: *M v H* [2017] NZHC 2385, [2017] NZFLR 751 at [24] and [47].

48 *M v H*, above n 47, at [29] and [37].

[66] Just as it is more difficult to identify when a de facto relationship began than it is to identify the date of a marriage, so it is also more difficult to identify when there is a "clear and present intention" to become parties to a de facto relationship than it is to determine whether there is a clear and present intention to become married. This flows inevitably from the nature of a de facto relationship, where there is typically no planned public event (as a wedding is a public event) to signal its commencement. It will be still more difficult to determine when the parties formed a clear and present intention to become de facto partners.[49] This will require close consideration of the facts. Nevertheless, we consider that it would be wrong to apply a less rigorous test to the concept of "in contemplation" to de facto relationships than to marriages.

[67] Section 2D(2) of the PRA sets out the matters that are relevant to assessing whether two persons live together as a couple for the purposes of determining whether they are in a de facto relationship. Those factors will also be relevant to determining whether two persons have a clear and present intention to become parties to a de facto relationship. Because of the nature of the definition of de facto relationship, it will often be the case that the parties are in a de facto relationship without having specifically made a decision to that effect, as the relationship may have developed over time and the precise point at which it became a de facto relationship will be difficult to assess.

[68] We acknowledge that the test in *M v H* deals with a provision found in the PRA that specifically refers to an action taken "in contemplation" of a marriage or other qualifying relationship, whereas s 44 has no such wording. But that does not dissuade us from taking guidance from it in the present situation.

[69] Our formulation of the test is as follows. For a disposition of property to have been made in order to defeat the claim or rights of party B, there must be sufficient certainty that party B will have a claim or rights to justify the application of s 44(1) to the disposition. So, if the disposition is made in circumstances where the parties are in a romantic relationship and/or are living together but do not have a clear and present

---

[49] As noted by Nicola Peart in "Enter a Relationship at your Own Risk! The vulnerability of trusts to claims on separation, dissolution, and death" (paper presented to ADLS Cradle to Grave Conference, Auckland, 5 May 2022) at 7.

intention to become parties to a de facto relationship, then we do not consider that it would be right to infer an intention to defeat a claim or rights that may, or may not, arise in the future, depending on how the relationship between the parties develops.

[70] Ms Crawshaw argued the Court of Appeal was wrong to require that party B prove that there existed a mutual contemplation of beginning a qualifying relationship when the disposition challenged under s 44 was made. She said there was nothing in s 44 requiring this. That is true, but, as Ms Crawshaw accepted, an inquiry into the status of the relationship is necessary to determine whether it can be inferred that a disposition by one party is intended to defeat the claim or rights of the other. Our formulation reflects our view that no such inference should be made where the parties do not have a clear and present intention to become de facto partners.

[71] We see our formulation as appropriately confining the scope of s 44 while avoiding the undesirable possibility of dispositions being made just before the commencement of a marriage, civil union or de facto relationship in circumstances where it can be inferred that the necessary intent to defeat the claim or rights of party B exists.

Application to the facts of this case

[72] We are satisfied that Mr Sutton and Ms Bell had a clear and present intention to commence a de facto relationship when the disposition of the Auckland property was made. They were, as the High Court Judge put it, on the cusp of a de facto relationship when the disposition occurred.[50] The factors cited by the Court of Appeal in support of its conclusion that Mr Sutton and Ms Bell were in contemplation of a de facto relationship at the date of the disposition also support the conclusion that they had a clear and present intention of entering into the relationship at that time.[51] In particular:

(a) they had been in an exclusive relationship for approximately 16 months by the date of the disposition;

---

50 HC judgment, above n 2, at [101].
51 CA judgment, above n 3, at [75]–[82].

(b) they had lived together for eight months;

(c) they were a serious and committed couple;

(d) they presented as a couple to their family and friends;

(e) before Ms Bell moved into the Auckland property, they had visited Mr Sutton's sister in Australia and spent Christmas with his family; and

(f) the evidence showed they were involved in each other's lives, encompassing both mundane and significant events.

[73] In addition, their actions soon after the disposition provide support for this conclusion. Within the two months after the disposition they had been on holiday together, their first child had been conceived and they had asked the flatmate in the Auckland property to leave so they were living there without anyone else.

[74] We agree with the Court of Appeal that the relationship showed signs of permanence. We do not accept Mr Billington's argument that the High Court Judge's comment that the living arrangement was "impermanent and unsettled" contradicts this.[52] The High Court Judge was describing the position as at February 2004, well before the date of the disposition.[53]

Was the disposition by Mr Sutton of the Auckland property to the Trustees made "in order to defeat the claim or rights" of Ms Bell?

[75] The appellants' case is that the disposition of the Auckland property by Mr Sutton to the Trustees was not made in order to defeat Ms Bell's rights. The fact that Mr Sutton knew that was the effect of the disposition does not suffice to meet the requirement that the disposition be made in order to defeat rights. The appellants argue that Mr Sutton had legitimate, plausible reasons for making the disposition.

---

52 HC judgment, above n 2, at [67].

53 At [66]–[67]. The Judge also saw later emails as indicative of the fact that the de facto relationship had not begun in February 2004, as originally found in the 2018 FC judgment. But this did not dissuade her from finding that, by the date of disposition, Mr Sutton and Ms Bell were on the cusp of a de facto relationship: at [69]–[75] and [101].

Family Court

[76] As indicated earlier, the consideration of the s 44 issue in the 2019 Family Court judgment was against the background of an earlier finding that Mr Sutton and Ms Bell were in a de facto relationship when the disposition of the Auckland property occurred. That finding that has been superseded by later developments.[54]

[77] The Family Court Judge referred to the authorities discussed in more detail below and concluded that an intention to defeat the rights of another party to a de facto relationship for the purposes of s 44 could be inferred from the disposing party's knowledge of the effect the disposal will have on the other party's rights; there was no requirement for proof of the disposing party's motivation to so defeat another's interest.[55]

[78] The Family Court Judge's conclusion on this issue was expressed as follows:[56]

> I am well satisfied that Mr Sutton had knowledge that the effect of his disposition of [the Auckland property] to himself as trustee and to his professional co-trustee would be to remove his home from his then "girlfriend's" claims if they continued to share their lives together and, for example, conceive a child and become "a family" as in fact occurred within a month or two thereafter.

[79] He concluded that the disposition was made by Mr Sutton in order to defeat Ms Bell's claim or rights in relation to the Auckland property.[57]

High Court

[80] The High Court Judge referred to *Ryan v Unkovich*, which had determined that this Court's decision in *Regal Castings* modified previous authority on s 44.[58] That was so, even though *Regal Castings* dealt with the application of s 60 of the (now repealed) Property Law Act 1952, which dealt with dispositions made with the intent

---

54 See above, at [20]–[22].
55 2019 FC judgment, above n 1, at [31].
56 At [54].
57 At [57].
58 HC judgment, above n 2, at [84], referring to *Ryan v Unkovich*, above n 18, at [33]; and *Regal Castings*, above n 36.

to defraud creditors, rather than with s 44 itself. Having considered the authorities, the High Court Judge concluded:[59]

> Thus, the inquiry for establishing intention is directed to the disposing party's knowledge of the effect of the disposal on the other party's rights. From this, intention may be inferred, and it is not necessary to show that the disposing party was motivated by a desire to bring about that consequence.

[81] On the facts, the Judge concluded the disposition was made by Mr Sutton with the knowledge that it would affect Ms Bell's future rights and in anticipation of the couple's deepening commitment to one another. Ms Bell had therefore established the disposition was intended to defeat her interest.[60]

Court of Appeal

[82] The Court of Appeal adopted the test articulated by the High Court Judge: knowledge of the effect of the disposition is sufficient; it is not necessary to show a conscious desire by the disposing party to defeat the other party's interest.[61] It said it was sufficient that the intent to defeat the other party's interest is merely one of the purposes of the disposition.[62] It was satisfied on the evidence that Mr Sutton did, in fact, know of the consequences of the disposition; that was sufficient to establish intent.[63]

[83] The Court then turned to the effect of Ms Bell's support and encouragement of the disposition, which it saw as her, in effect, agreeing to contract out.[64] But, as a party cannot contract out of their rights under the PRA other than in compliance with s 21F, which Ms Bell had not done, Ms Bell's support and encouragement did not influence the assessment of Mr Sutton's intent.[65] The Court of Appeal therefore upheld the lower Courts' conclusions that the disposition of the Auckland property to the Trustees by Mr Sutton engaged s 44.

---

59 HC judgment, above n 2, at [91].
60 At [101].
61 CA judgment, above n 3, at [98].
62 At [93], citing *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293 at [103].
63 CA judgment, above n 3, at [95].
64 At [97].
65 At [98].

Appellants' submissions

[84] Mr Billington argued that the Court of Appeal had misinterpreted this Court's decision in *Regal Castings*. At times he appeared to be arguing that *Regal Castings* did not apply to dispositions made under s 44, but ultimately his position was that the Courts below were correct to apply *Regal Castings* but had not understood the decision correctly and had misapplied it in the context of s 44(1).

[85] Mr Billington noted that prior to this Court's decision in *Regal Castings*, the requisite intent to be proved under s 44(1) was "a conscious desire to remove some item or items of matrimonial property from the reach of the [c]ourts" as decided in *Coles v Coles*.[66] But he accepted that *Coles v Coles* did not survive this Court's decision in *Regal Castings*.

[86] In relation to *Regal Castings* itself, he argued that the Courts below were wrong to find that knowledge of the effect of the disposition was sufficient to infer an intent to bring about that effect.[67] He argued that knowledge is only one element of the evaluative exercise. He suggested that *Regal Castings* considered a range of factors beyond mere knowledge in order to reach the conclusion that the disposition was made with the necessary intent. He submitted that, in the present case, factors such as Ms Bell's knowledge and initial support for the transfer of the Auckland property to the Trustees, the fact that there were alternative reasons for the disposition, ignorance of the effect of s 44, and the circumstances of the transfer were all relevant factors.

[87] Mr Billington accepted that in many cases, where the disposer has knowledge of the consequences of the disposition on the claim or rights of a person under the PRA, an inference of an intent to defeat such a claim or rights will naturally flow. He referred to this Court's decision in *Horsfall v Potter* as an example of this.[68] But he said there may be cases where a party has knowledge of the consequences of the disposition but has a plausible and legitimate reason for making the disposition.

---

66 *Coles v Coles* (1988) 4 NZFLR 621 (CA) at 624.
67 For example, see CA judgment, above n 3, at [98].
68 *Horsfall v Potter* [2017] NZSC 196, [2018] 1 NZLR 638.

Respondent's submissions

[88] Ms Crawshaw argued that the Court of Appeal had correctly interpreted *Regal Castings*. She said that the application of *Regal Castings* in the context of s 44 had been upheld by the Court of Appeal in both *Potter v Horsfall*[69] and *Dyer v Gardiner*.[70] She noted that the transfer of property in *Regal Castings* was done in secret from the relevant creditor, but said it would be inappropriate to treat secrecy as a relevant factor in the context of an intimate relationship. So the fact Ms Bell knew of the transfer of the Auckland property to the Trustees did not affect the analysis of Mr Sutton's intent.

[89] Ms Crawshaw refuted the appellants' argument that having a plausible or legitimate explanation for the disposition is sufficient to rebut a finding of intent to defeat. She said this was, in effect, an attempt to resurrect the test in *Coles v Coles*.

Our approach: Regal Castings *applies*

[90] It is at least arguable that this Court's decision in *Horsfall v Potter* adopted the *Regal Castings* test in a s 44 case, albeit without specific reference to *Regal Castings* in the judgment.[71] This Court's judgment did not express any doubt about the Court of Appeal's application of *Regal Castings* in the context of s 44. And the language used by the majority in *Horsfall v Potter* effectively echoed that used by Blanchard and Wilson JJ in *Regal Castings*.[72] It is also notable that the majority clearly distinguished the motive for a disposition from its intent.[73] While the majority accepted the transfer of property was primarily focused on potential liability to the Commissioner of Inland Revenue, this was no barrier to a finding that the disposition had been done with the intent to defeat the rights of the party B in that case, based on the transferor's knowledge of the consequences of the transfer.

---

69 *Potter v Horsfall* [2016] NZCA 514, [2016] NZFLR 974.

70 *Dyer v Gardiner*, above n 62.

71 *Horsfall v Potter*, above n 68, at [96]–[97] per William Young J. In *Blake v Blake*, the Court of Appeal expressed doubt as to whether this Court's decision in *Horsfall v Potter* specifically addressed the application of *Regal Castings* in the context of s 44: *Blake v Blake* [2022] NZCA 327 at [61], n 59.

72 *Horsfall v Potter*, above n 68, at [96] per William Young J, echoing the language in *Regal Castings*, above n 36, at [54] per Blanchard and Wilson JJ.

73 *Horsfall v Potter*, above n 68, at [97] per William Young J.

[91] Whether this Court's decision in *Horsfall v Potter* resolved the position or not, we are satisfied that it is appropriate to apply the approach set out in *Regal Castings* to s 44 cases. We do not accept the appellants' argument that caution is needed in applying *Regal Castings* in the context of s 44. It is true that s 60 of the Property Law Act 1952 referred to "intent to defraud" in contrast to "intent to defeat" in s 44. But that is not a material difference, given that this Court in *Regal Castings* held that "intent to defraud" means or includes an intent to "hinder, delay or defeat" creditors' recourse to property.[74]

[92] Nor do we accept that the Court of Appeal misinterpreted *Regal Castings* in the present case. The key paragraphs of the judgment of Blanchard and Wilson JJ in *Regal Castings* say:

> [52] The expression "intent to defraud" in s 60(1) of the Property Law Act 1952 was not happily chosen. But it has been regarded as shorthand for intent to hinder, delay or defeat a creditor in the exercise of any right of recourse of the creditor in respect of property of the debtor. That is how the concept is now expressed in s 345(1)(a) of the Property Law Act 2007. The existence of any such dishonest intent on the part of the debtor is a question of fact …
>
> [53] That much is clear. But what constitutes such an intent? … It is not necessary to show that the debtor wanted creditors to suffer a loss, or that it was his purpose to cause loss. It is, however, necessary to show the existence of an intention to hinder, delay or defeat them and that the debtor has accordingly acted dishonestly. …
>
> [54] Whenever the circumstances are such that the debtor must have known that in alienating property, and thereby hindering, delaying or defeating creditors' recourse to that property, he or she was exposing them to a significantly enhanced risk of not recovering the amounts owing to them, then the debtor must be taken to have intended this consequence, even if it was not actually the debtor's wish to cause them loss. …

[93] There are a number of important aspects of that quote. First, it is clear that Blanchard and Wilson JJ were equating "dishonestly" with an intention to defeat, hinder or delay recourse to property. They were not suggesting that it is necessary to establish a dishonest intent *in addition to* an intent to defeat, hinder or delay creditors' recourse to property.

---

74 *Regal Castings*, above n 36, at [52] per Blanchard and Wilson JJ.

[94] Second, it is clear that where a debtor must have known the disposition would have the effect of hindering, delaying or defeating creditors' rights to property, then that is a legal and sufficient basis from which to infer an intent to defraud (in terms of s 60) and thus, in the context of s 44, an intent to defeat. We do not accept Mr Billington's submission that more is required. There is nothing in *Regal Castings* to support that view.

[95] Third, it is important to distinguish "motive" and "purpose" from "intent".[75] Section 60 of the Property Law Act 1952 did not require that the debtor have a conscious purpose of defeating rights or causing loss. It was sufficient that they intended a course of conduct that produced that effect.[76] As French J observed in *Ryan v Unkovich*, the fact that *Coles v Coles* fails to distinguish between motive and intent means that decision is contrary to the reasoning of this Court in *Regal Castings* and therefore should not be followed.[77]

Application of Regal Castings *to the facts of this case*

[96] We agree with the Courts below that Mr Sutton transferred the Auckland property to the Trustees in the knowledge that this would defeat Ms Bell's future claim under the PRA, and therefore with intent to defeat that claim. In particular:

(a) Mr Sutton had just separated from his wife and settled their relationship property interests, and therefore would have appreciated that the Auckland property would be a family home that would be subject to the equal sharing regime in the PRA if there was a de facto relationship.

(b) Mr Sutton had received the unsolicited advice referred to above in October 2003.[78]

---

75 At [53]–[54] per Blanchard and Wilson JJ, [13] per Elias CJ and [104] per Tipping J.
76 At [53]–[54] per Blanchard and Wilson JJ and [104] per Tipping J.
77 *Ryan v Unkovich*, above n 18, at [33].
78 Above at [9].

(c) Mr Sutton had received free legal advice obtained as a result of winning the raffle referred to above.[79] The Family Court Judge inferred that the advice he received would have included advice on the effect of any disposition of his home on the rights of a future partner.[80]

(d) Mr Sutton did not have any children at the time the disposition was made.

(e) Mr Sutton had received the February 2004 email from Ms Bell.[81] Mr Sutton acknowledged in evidence that he knew at the time the disposition was made that a trust could protect a family home from being divided in a relationship property context.[82]

(f) The establishment of the Trust occurred about one month before the de facto relationship was found to have commenced.[83] The disposition occurred about three weeks later, so was even closer to the commencement of the de facto relationship.[84] The couple's first child was conceived soon after.[85]

[97] We see no error in the conclusion of the lower Courts that the fact that Ms Bell had sent the February 2004 email some nine months before the disposition occurred does not affect the s 44(1) analysis. It is clear that the nature of the relationship between Mr Sutton and Ms Bell had changed substantially in the intervening period. In any event, we do not think that the fact that party B knew of, or initially supported the disposition, would undermine a finding of an intent to defeat a claim or rights for the purposes of s 44. As Ms Crawshaw argued, it would be inappropriate in a relationship property context to find that party B's knowledge that a disposition is occurring prevents the disposition from engaging s 44. The situation would be different if Ms Bell had entered into a contracting out agreement that complied with

---

79 At [12].
80 2019 FC judgment, above n 1, at [50].
81 See above at [10].
82 HC judgment, above n 2, at [92]; and CA judgment, above n 3, at [85].
83 HC judgment, above n 2, at [100(k)].
84 See above at [14].
85 HC judgment, above n 2, at [65].

s 21F (including the requirements for parties to be given legal advice). But that is not what happened in this case.

Remedy

[98] The appellants' case is that, even if the Court finds that the disposition of the Auckland property was made in circumstances engaging s 44(1), the appropriate remedy is not to order the immediate transfer of the Auckland property to Mr Sutton and Ms Bell as tenants in common in equal shares as the Family Court Judge did.[86] They submit that:

(a) the Court should make no order under s 44, relying on ss 44(2) and 44(4), thereby leaving in place the status quo; or

(b) the Court should defer the order for vesting of the Auckland property in Mr Sutton and Ms Bell as tenants in common until the younger child turns 18 (in early 2027); and/or

(c) the Court should credit Mr Sutton with his initial contribution to the purchase of the Auckland property of $209,000.[87] It was accepted that, if this were done, allowance would also need to be made for the approximately $39,000 contributed by Ms Bell to the cost of renovations of the Auckland property. This was described as ringfencing Mr Sutton and Ms Bell's contributions to the Auckland property.

Relevant provisions of the PRA

[99] Ms Kearns KC, who argued this aspect of the appeal for the appellants, pointed out that both s 44(1) and s 44(2) of the PRA provide that the court has a discretion as to the orders it makes following a finding of a disposition made to defeat the claim or

---

86 2019 FC judgment, above n 1, at [87].

87 At the time of the 2019 Family Court judgment, the Auckland property had a rating value of $1.45 million and relevant property debt of approximately $550,000. At the time of the hearing of the appeal in this Court, we were told that the property's value had increased; its capital value was $2,235,000.

rights of a person.[88] Under s 44(2), the court may make an order only against a person who "received the property otherwise than in good faith and for adequate consideration". Section 44(3) gives the court broad powers to make further orders for the purpose of giving effect to any order it makes under s 44(2). In addition, s 25(3) gives the court a wide power to make any order that it thinks just in relation to the vesting of a property. And s 44(4) provides that relief should be denied wholly or in part if the recipient of the property that was subject to the disposition received it in good faith and has altered their position in reliance on having an indefeasible interest in the property, such that it would be inequitable to grant relief, or to grant relief in full.

[100] The appellants rely in particular on s 26(1) of the PRA, which provides as follows:

> **26 Orders for benefit of children of marriage, civil union, or de facto relationship**
>
> (1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.

[101] The appellants also rely on ss 26A and 33.

[102] Section 26A gives the court power, when making orders on the division of relationship property, to postpone the vesting of any share in relationship property until a specified future date or the occurrence of a specified future event. That power can be exercised if the court is satisfied that immediate vesting "would cause undue hardship for a … partner who is the principal provider of ongoing daily care for 1 or more minor or dependent children of the … de facto relationship". The court can postpone vesting only for the duration and extent that is necessary to alleviate the undue hardship.

---

[88] The heading to s 44, s 44(1) and s 44(2) all use the term "may".

[103] Section 33 sets out certain ancillary powers of the court. The appellants point to s 33(3)(d), which provides that, in certain circumstances, the court has power to make:

> … an order postponing the vesting of any share in the relationship property, or any part of such share, until a future date specified in the order or until the occurrence of a future event specified in the order.

Courts below

[104] The Family Court Judge found that the Trustees could not get relief under s 44(4) because they had not received the Auckland property in good faith.[89] He considered that there was no reason to treat Ms Bell differently from any other claimant under s 44 who had no knowledge of a transfer of a property to which s 44 applied.[90] As noted earlier, he ordered that the Auckland property be transferred to Mr Sutton and Ms Bell within two months of the date of his judgment.[91]

[105] In the High Court, the Judge reached the following conclusions:

(a) The Trustees could not avail themselves of relief under s 44(4) because they could not claim to have received the Auckland property in good faith.[92] The lack of good faith also meant that s 44(2) did not prevent the Court from making an order against the Trustees.[93]

(b) The Family Court Judge had made no error in the exercise of his remedial discretion under s 44.[94]

(c) In applying s 26 of the PRA, the stability for the children in being able to live with their father in the family home was important. But the Judge considered their best interests would be met by having a relationship with both parents, something that could not be achieved by

---

89 2019 FC judgment, above n 1, at [62].
90 At [63].
91 At [87].
92 HC judgment, above n 2, at [112].
93 At [110].
94 At [118].

> Ms Bell unless she obtained her relationship property entitlement.[95] The Judge did not consider there was a sufficient evidential foundation for the submission that there was no adequate rental accommodation in the same suburb as the Auckland property or that Mr Sutton could not afford to rent there. So she did not consider there was a case to defer the vesting of the Auckland property under s 26A of the PRA or to ringfence Mr Sutton and Ms Bell's contributions.[96]

[106] The Court of Appeal upheld the High Court Judge's findings.[97]

Good faith

[107] The Courts below rejected the possible application of s 44(4) because the requirement that the person from whom relief is sought (in this case, the Trustees) received the property in good faith was not met. We see that finding as unassailable, given that the transfer of the Auckland property was made in order to defeat Ms Bell's claim or rights under the PRA. Mr Sutton was aware of that and, as he was one of the trustees receiving the property, his knowledge applies also to the Trustees.[98] Additionally, there is no evidence that the Trustees, as recipients of the property, altered their position in reliance on having an indefeasible interest in the property. That is another reason why s 44(4) does not apply in this case.

[108] The lack of good faith also means that s 44(2) does not prevent this Court from making an order against the Trustees. As the requirements of good faith and valuable consideration under s 44(2) are conjunctive, there is no need to consider whether the Trustees received the Auckland property for valuable consideration.

Ringfencing and/or postponing relief

[109] Ms Kearns submitted that the making of an order under s 44 (and the consequent sale of the Auckland property) would jeopardise the stability the children have in the care of their father in their family home. She pointed to evidence of

---

95 At [123].
96 At [124].
97 CA judgment, above n 3, at [101]–[112].
98 *Regal Castings*, above n 36, at [70].

Mr Sutton's financial situation and argued this made it clear he would be unable to purchase a property in the same suburb as the Auckland property. She also said it would be difficult to afford renting in that suburb.

[110] Ms Kearns pointed to academic commentary to the effect that s 26 has been applied too conservatively to date.[99] She also noted that the Law Commission | Te Aka Matua o te Ture had recently recommended reforms to give greater significance to the interests of children in relationship property proceedings.[100]

[111] Ms Kearns submitted that, if Mr Sutton were to receive his half share of the value of the Auckland property plus $209,000 (his initial contribution to the property), this would enable the Trustees to acquire Ms Bell's share in the Auckland property, especially if the vesting of the Auckland property were postponed (as discussed below). She said that the Trustees would not be able to do so without Mr Sutton being awarded the $209,000. But there is no evidence before us that the Trustees could avail themselves of such an opportunity, if it existed, and on its face it is hard to see why depriving Ms Bell of a substantial part of her half share of the relationship property would be in the children's best interest.

[112] Nor do we consider that a case for postponement of the vesting of the property in Mr Sutton and Ms Bell as tenants in common is made out. Section 26A provides for such a postponement where immediate vesting "would cause undue hardship for a spouse or partner who is the principal provider of ongoing daily care for 1 or more minor or dependent children". In this case we do not consider there is any undue hardship to Mr Sutton from the vesting taking place immediately. It needs to be remembered that Mr Sutton and Ms Bell have now been apart for more than 10 years, so the adjustment to the situation caused by separation is not a new thing.

---

99 Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13 Otago LR 27.

100 See Law Commission | Te Aka Matua o te Ture [Law Commission] *Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) at ch 12; Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC IP44, 2018) at ch 7; and Law Commission *Dividing relationship property – time for change?* (NZLC IP41, 2017) at ch 29.

[113] Ms Bell's case is that, without the receipt of her half share of the relationship property, she is unable to obtain secure accommodation. The High Court Judge considered that it was important that the children have a relationship with both parents, and that this would be assisted by her receiving her relationship property entitlement and thereby improving her ability to care for the children. We agree.

[114] In those circumstances, we do not consider it has been established that, in regard to the interests of the children, the orders made by the Family Court were inappropriate.

[115] Ms Kearns also argued that the Court should consider the effect of an order under s 44 on the interests of the children in their capacity as beneficiaries of the Trust. We agree with the respondent that this conflates the needs of the children with their interest as beneficiaries. We do not see the interests of the children as discretionary beneficiaries (and final beneficiaries) of the Trust as a significant factor in the present case.

[116] That leaves s 33(3)(d) — the power to postpone the vesting of a share in relationship property if it is necessary or expedient to give effect (or better effect) to any order made under ss 25 to 32, or if the court decides to vary an order under ss 26 to 32. We do not see this as adding anything to s 26A in this case.

Result

[117] For the reasons given, the appeal is dismissed.

Costs

[118] The appellants must pay the respondent costs of $25,000 plus usual disbursements.

Addendum

[119] For the purposes of publication we have summarised the original paragraphs [109] and [113] of this judgment to comply with ss 11B–11D of the Family Court Act 1980.

Solicitors:
Tompkins Wake, Auckland for Appellants
Thomas & Co Lawyers Ltd, Auckland for Respondent