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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 14/2020
[2021] NZSC Trans 15

BETWEEN **TUV**
Appellant

AND **THE CHIEF OF NEW ZEALAND DEFENCE FORCE**
Respondent

HUMAN RIGHTS COMMISSION
Intervener

Hearing: 27 September 2021

Coram:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Arnold J
Appearances:	A J Douglass and A S Butler for the Appellant A L Martin and E G R Dowse for the Respondent J S Hancock for the Intervener (via AVL)

CIVIL APPEAL

MS DOUGLASS:

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Douglass te rōia mō te kaipirā māua ko taku hoa a Mr Butler.

WINKELMANN CJ:

Tēnā kōrua.

MR MARTIN:

E nga Kaiwhakawā, o Te Kōti Mana Nui, tēnā koutou. Ko Martin ahau, kei kōnei maua ko Ms Dowse mō te kaiwhakahē.

WINKELMANN CJ:

Tēnā kōrua.

MR HANCOCK:

Tēnā koutou, e nga Kaiwhakawā. Ko Hancock ahau, mō Te Kāhui Tika Tangata. May it please the Court, Mr Hancock for the Human Rights Commission.

WINKELMANN CJ:

Can you hear and see us fine Mr Hancock?

MR HANCOCK:

I can your Honour, thank you.

WINKELMANN CJ:

Excellent. Right, Ms Douglass.

MS DOUGLASS:

May it please the Court, if I may be permitted not to wear a mask.

WINKELMANN CJ:

That's right, yes please. When counsel are addressing us, no need to wear a mask.

MS DOUGLASS:

Thank you. E ngā Kaiwhakawā. The way we intend to proceed today, of course, is to focus on this supplementary hearing on the impact of Part 9A of the Protection of Personal and Property Rights Act 1988. Counsel are very grateful to the Court that these provisions have been drawn to the parties attention.

WINKELMANN CJ:

We have to express, I feel we have to express some surprise that they weren't identified at any earlier level but…

MS DOUGLASS:

Yes. What we have discovered, of course, is that they've been little used, or certainly not reported on, and perhaps a slightly hidden part to that Act. Of course your Honour has issued two minutes in relation to those provisions. First of all, back in November last year, and again this year. So the way we propose to address the Court's questions is, first of all, is that I'll do a summary of the appellant's oral submission and then we'll turn to the questions specifically directed by the Court, and Mr Butler will primarily address those, and then I will address the final questions around applying the sections to the facts of this case.

WINKELMANN CJ:

Thank you.

MS DOUGLASS:

So if I – but first of all, perhaps just to check that there are a number of papers obviously before you. In relation to this submission the key submissions of course are the supplementary submissions number 3 for the appellant, and that's dated 16 July 2021, and of course we have filed a memorandum on the legislative history of section 108B and Part 9A of, if I may call it, the PPPR Act, and your Honours should have that available to you as well.

We consulted with the respondent in terms of that, just to really set that out, by way of background.

WINKELMANN CJ:

So you consulted with the respondent in relation to the legislative history?

MS DOUGLASS:

Yes, and that was then filed with our supplementary submissions. Then, of course there is volume 6E are the authorities that the appellant has filed, which also sets out the main provisions in the PPPR Act, in terms of Part 9A, the entire Part 9A, as well as the applicable provisions in the Employment Relations Act and as well as the Public Trust legislation that supports the legislative history. So those are the key documents that we hope to be referring to today.

The actual structure of the submissions is that we've set out the context, in the first part of our written submissions, as to the issues around Part 9A, and a summary of the appeal as we find the context in which Part 9A has become applicable. And then, from about paragraph 13 onwards, we set out the appellant's view as to how the provisions in section 108A, B, and C apply, to this case.

Then further into the submissions, about paragraph 40, we then address the specific questions that the Court has raised with us. And finally, at the end, we have a summary of how the provisions apply to the facts of this case.

So that's the basic outline of our submissions and what I propose to do now is just to provide you with a summary oral submission of the appellant's position.

In the appellant's submission Part 9A is highly relevant to the appellant's argument that the so-called two limb test in *O'Connor v Hart* [1985] 1 NZLR 159 (PC) does not apply to setting aside of a section 149 settlement agreement for mental incapacity, and the section 149 agreement should be set aside upon proof of mental incapacity.

Part 9A of the PPPR Act, and in particular, sections 108A, B, and C, that are relevant, does provide a freestanding regime for Court approval of compromises and settlement of claims. A similar regime is in place for minors. These regimes are all an exception to the contract law test in *O'Connor v Hart* because the other party's knowledge is irrelevant to engaging the regime. Nowhere in the history of the legislative scheme is there reference to knowledge as a criteria for engaging or seeking the Court's approval.

Part 9A supports the appellant's submission that, first of all, a settlement and compromise of a legal claim is in a different class to ordinary commercial contracts.

Secondly, New Zealand law explicitly recognises a version of the United Kingdom compromise rule. The New Zealand version of the rule is both prospective and retrospective in its application, in keeping with the underlying principle of a presumption of capacity, or competence, and those terms are used interchangeably in the PPPR Act. And in keeping with the objectives of the PPPR Act, to protect and promote the rights of those who lack capacity to manage their affairs.

The section 149 agreement should be treated as not being a bar to TUV's personal grievance, her employment relationship problem, as filed in the Employment Court. The section 149 agreement is invalid since, firstly, the agreement relates to a claim for money or damages. Secondly, she is a specified person. Thirdly, the section 149 agreement has not been approved by a Court and unless the respondent successfully applies to the Employment Court for approval under section 108C.

It is acknowledged that, unlike the approach adopted in the United Kingdom, section 108C does not implement a purely invalidity response and it permits a Court, for example, to give conditions and approve a settlement or compromise. The approval procedure for validating settlement agreements in Part 9A is available to all courts in the civil jurisdiction. The remainder of the PPPR Act falls within the exclusive jurisdiction of the Family Court, as confirmed in section 2 of that Act in the definition of court and in my respectful submission that is possibly why Part 9A has fallen, hidden from view. Certainly there have been very few cases and only one recently, which we have brought to your attention where in fact the High Court used the section 108 procedure, Part 9A procedure, to approve a settlement agreement.

Nothing as a matter of policy or principal displaces the Employment Relations Act 2000. This procedure is available to all parties to a section 149 agreement. It is consistent with the scheme and the purpose of the ERA 2000. Part 9A of the PPPR Act supplements the section 149 process in the rare event of a party to a mediation who lacks capacity.

The recent judgment of this court, in *FMV v TZB* [2021] NZSC 102, reinforces the appellant's argument that the scheme of the Employment Relations Act is entirely compatible with the application of Part 9A of the PPPR Act and is observed in the judgment by Justice Williams. The theme of the Employment Relations Act is relational not contractual, at paragraph 46, and it fits with the theme of the institutions and the principals that they adhere to, at paragraph 54. This allows for the parties to resolve their own problems and, where possible, to ensure that a section 149 agreement is valid.

The appellant rejects the respondent's submission that the operation of Part 9A is inherently prospective. Part 9A allows a judicial body to review the compromise or settlement at any time and as set out in section 108 the three were never entered into. And the provisions can apply retrospectively to protect the interests of the specified person. It is a proportionate safeguard and protects both parties as it allows an employer in this context to confirm the validity or otherwise of a settlement agreement.

Finally, Part 9A of the PPPR Act is consistent with the convention on the rights of persons with disabilities, the CRPD, and measures for the exercise of legal capacity. Firstly, it provides support measures for courts to utilise in respect of people incapable of managing their affairs. A low and broad threshold that would encourage participation and supported decision making in accordance with article 12(3) of the CRPD. This is based on the presumption of capacity.

Secondly, and importantly in this case –

GLAZEBROOK J:
I'm having some difficulty, well, there's two issues that it might be that if it's going to be gone onto in more detail. The first issue is why settlements are in a different class to ordinary commercial contracts. The second issue is on what basis does the Court validate a settlement because if it just validates it on the basis of whether it's fair or not then it's not necessarily giving effect to a person's capacity, and I'm not entirely sure how, having the Court involved in this decision making is assisting capacity. I think other measures in the PPPR certainly do that because they provide that support throughout, but the Courts are not in the business of providing that support are they, so exactly how does that work, and that's three questions, I'm sorry, but…

WINKELMANN CJ:
It may be, Ms Douglass, that you want Mr Butler to answer those.

GLAZEBROOK J:
I'm just heralding them now really because I'm not really expecting –

MS DOUGLASS:
Yes, no, we do go into that in some more detail, but just to say in principle Article 12(3) is providing about support measures for people with impaired capacity in this context and a specified person, it's a very low threshold, of being unable to manage your affairs, and so it does offer the opportunity in some circumstances to support that person in participating in a mediation and recognising –

GLAZEBROOK J:
Yes, I can perfectly understand that, it's just it was the Court bit at the end that I was having some difficulty with.

MS DOUGLASS:
Well and the second part of this submission is that that is where Article 12(4) comes into place, which is that Part 9A provides appropriate and effective safeguards intended to respect the rights, will and preferences of a specified person in accordance of Article 12(4) of the CRPD, and when we come to the submission about how this might apply, the point about section 108C if a court approval required, is that it's very discretionary, and the appellant is proposing that there can be a whole range of non-exhaustive factors that would go into the equation of how a Court would assess approval for that, and that would require the Court, in my submission, to take into account the person's rights, will and preferences. So not necessarily a fair and reasonable test, one which takes into account the specified person's own views and values. Perhaps we'll come to that further on.

So just to really sum up, the appellant says that the section 149 agreement is not binding on TUV, not having been approved by a court, and that's under section 108B(2), and that TUV, having brought proceedings in respect of her claim, the settlement is invalid because it is not court approved, and the

process there would be under section 108B(3), to go under section 108C for court approval when proceedings have been issued.

WINKELMANN CJ:
I suppose it's not invalid, it's unenforceable until approved.

MS DOUGLASS:
Yes, yes your Honour. Therefore it is not a bar to TUV's personal grievance to move forward in the usual way in the Employment Court, and the appellant submits the matter ought to be remitted back to the Employment Court for her to progress her claim. That is the summary for the appellant and I'll now turn to Mr Butler to begin the questions and come back later to address the later questions on the application to TUV's case. Thank you.

MR BUTLER:
Mōrena e ngā Kaiwhakawā. If I can just have one moment just to set up. Thank you your Honours. So Ms Douglass has outlined the basic thrust and direction being advanced by TUV in relation to the Part 9A matters. So what I'd like to do is take your Honours, if I may, just through some of the detail of Part 9A and how it is that we say Part 9A should be construed. I will from time to time make reference along the way to some of the case law, some of which we've already considered in the previous hearing, but some of which is a bit new. The new items, just to flag, would be reference to the *FMV v TZB* decision of the Court, recently issued, and then a decision of the English Court of Appeal that is referred to in *FMV*, being *Irwell*, and which has been supplied separately by email to the Court.

Your Honours, we turn to Part 9A itself, your Honours, I'm sure have had a chance to read and have been studying it before the hearing today. And your Honours will understand that in broad outline, you can consider Part 9A as being split into two halves. The first set of sections, so that's section 108A through to C, deal with the issue of settling claims brought by specified persons, and then sections 108D through to 108F deal with the holding of

money or damages that have been awarded to a specified person. So we're just looking at the first part of Part 9A.

As your Honours will know from the legislative history that we have filed, Part 9A has its analogue in what used to be the Minors' Contracts Act 1969, and I'll still just probably refer it as the Minors' Contracts Act provisions, if I may? Those provisions inserted into the law in 1969 dealing with the settlement of claims and it was three years later, in 1972, with an amendment to the Public Trust Office Act 1957 that we get similar provisions brought into that Act dealing with the settlement or compromise of claims and Court approval.

So I'd like, if I could then, just to turn to the detail of section 108A for a moment. If we look at just two things starting: "Of Court," so the definition of "Court" and what it means, and here we're looking at where: "(a) court means where a claim of a specified person could be the subject of proceedings in New Zealand, a court in which proceedings could be taken to enforce the claim."

And, of course, just stopping there and picking up a point that's been made by Ms Douglass a little bit earlier in her outline, for every other provision of the Protection of Personal and Property Rights Act 1988, "court" means the Family Court but for the purposes of Part 9A we've got an expanded definition of "court" and that's set out in section 2 of the Act. But, obviously, the reason why you've got an expanded definition of "court" makes sense when you look at the breadth of reach of Part 9A. And then, of course, we've got the definition of "specified person".

Now, if we look and see how is it that section 108B, which is the next section I'd like to take you to applies, if we look at subsection (1). But before we go to the subsection itself, I think there's some assistance from the perspective of our case in the section heading, "Approval of court required to settle claims of specified persons."

So section 108B applies, “where money or damages are claimed by or on behalf of a specified person, whether alone or in conjunction with another person.” So the first point I want to make there is, the section has application simply by dint of the fact that money or damages are claimed by or on behalf of a specified person.

Now, your Honours, I will make reference to *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933 from time to time as invited to for the purposes of question B, but your Honours will recall that that phraseology, “by or on behalf of a person”, they don’t use the phrase “specified person” but they’ve got the equivalent in their statute, was regarded by the Court as significant.

So then we look at subsection (2). “If the claim is not the subject of proceedings before a court, an agreement for the compromise or settlement of the claim entered into by the specified person, or on his or her behalf by a person who, in the opinion of a court, is a fit and proper person to do so, is binding on the specified person if the agreement, or a release of the claim, is in writing and is approved by the court under section 108C.”

So we submit that when you're looking at this subsection it deals with a quite specific scenario. The claim is not the subject of proceedings before a Court. The agreement is binding if it's in writing and is approved by the Court.

Then we move to subsection (3) and we’re told that: “If the claim has not been compromised or settled in accordance with subsection (2), and has become the subject of proceedings before a court, the settlement compromise or payment or acceptance of money paid into court, whenever entered into or made…”, those are important words in our submission. “…whenever entered into or made, is valid so far as it relates to the specified person’s claim only with the approval of the court under section 108C”.

So the first point I want to make when you look at those provisions is knowledge of the other party, as to whether or not the person is or is not a specified person, is not a requirement for the application of the section

therefore we say you can put *O'Connor v Hart* to one side. We're in a self-standing regime here.

Secondly, we say that Part 9A establishes two rules. Well, this part of Part 9A, sorry, I'll colloquially just refer to it as Part 9A, if I may your Honours, as opposed to the first part of Part 9A. The first rule is that a settlement entered into where proceedings have not been brought is binding on the specified person if in writing and approved by the Court. The second rule applies where the first rule is not satisfied. That rule is set out in subsection (3). It says that: "Where the first rule is not satisfied then a settlement for the specified person is valid insofar as a specified person's claim only with the court's approval." Now your Honour picked up my friend, Ms Douglass, by saying – because she'd used the word "invalid" and your Honour's point was well, is it necessarily invalid, it may just be simply unenforceable. So there may or may not be significance that attaches to the difference between unenforceability or invalidity. I haven't quite thought through that.

WINKELMANN CJ:
No, it's probably not a significant point. What we can say is it's not void but it's not valid until approved.

MR BUTLER:
Yes, and the point I suppose I would make in that regard, and that's why, and you'll have heard Ms Douglass say, in her opening remarks, what we say is that Part 9A is the New Zealand equivalent of the compromise rule with a kiwi twist. The twist being that unlike the rule, the compromised rule in the UK, which as your Honours will recall from our previous hearing deems everything to be invalid, just straight invalid. The way we read this Part 9A is that section 108C gives the Court an ability to validate the settlement agreement. That's a possibility, as your Honours will recall from *Dunhill v Burgin* that is not open under their rule.

ARNOLD J:

I thought maybe Hale had said you could get validation in *Dunhill*. Nobody had asked. Is that a different –

MR BUTLER:

I think that goes to a different point. One of the criticisms that's been made of *Dunhill v Burgin* in some of the commentary in some of the cases is a concern that it's a strong statement or there's a strong probability of invalidity which attaches to it. And the only point I want to make is if that is so, let's just proceed on that premise, that that is so, then all I'm trying to say is that is not the case under Part 9A.

1035

WINKELMANN J:

Yes, because if you look at the rule in question, which is rule 21.10 sub-rule (1) of the Civil Procedure Rules 1998 (UK): "No settlement, compromise or payment… and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, or on behalf of or against the child or protected , without the approval of the court." So, it doesn't seem to be necessarily expressed in different terms to our provision.

MR BUTLER:

To how ours is put, that's why I was grateful for what his Honour Justice Arnold said because that might clarify my understand of reading some of the authorities which have looked at *Dunhill v Burgin*, for example, if you look at some of the authorities that have been referred to in the Australian cases, they seem to suggest that they have understood the rule in *Dunhill v Burgin* to be very, very strict.

WINKELMANN J:

Yes, because I hadn't understood that because Lady Hale does say that they were not asked to validate it, so…

MR BUTLER:

Correct, and then in terms of the section 108C, you're looking at the criteria to be applied. Of course, unsurprisingly, bearing in mind the wide range of circumstances that might come before a court, under Part 9A, Parliament has sought fit to not circumscribe the set of factors that a court should have regard to when exercising its jurisdiction, its powers under 9A. Now, as you will know your Honours, we've set out what is plainly a non-exhaustive list of factors that we would regard as being the sorts of factors that a court would have regard to in many cases, and I think it would be fair to say that it is likely that there will be many circumstances which will pop up in the future that people couldn't possibly have anticipated, and the open-ended nature, I think, of the discretion makes sense, particularly if you bear in mind that on our interpretation, which we believe to be correct, you're look at both prospective and retrospective application of the provision. You'll see, of course, that in section 108C the Court is given, in terms of the powers the Court has, let's put to one side now the factors that are taken into account, the powers given to the Court are broad. You can refuse the application, you can grant approval unconditionally, or grant approval with conditions or directions. As to the terms of the agreement, compromise or settlement for the amount, payment, security, application, or protection of the money paid, or to be paid, or any other relevant matter.

WINKELMANN J:

As to the discretionary factors is it relevant, this seems to be, obviously, a statutory implementation of the parens patriae jurisdiction? How does that inform the Court's approach?

MR BUTLER:

I think it informs the Court's approach in this sense, that jurisdiction of the parens patriae as a jurisdiction of ancient lineage exercised by the Court on behalf of those sorts of people who are subject to the parens patriae jurisdiction of the Court. My understanding of that jurisdiction has been that it is always a jurisdiction that has been exercised in a very broad way. The courts have been resistant to the idea of constraining the powers that

they have in the exercise of that jurisdiction or the factors that will be taken into account.

WINKELMANN J:
Yes, but isn't there law in relation to the parens patriae jurisdiction, that it is to be exercised in a protective manner?

MR BUTLER:
Correct. And if your Honour would like one or two authority references, I'm sure we can grab those at the break. But that's absolutely my understanding of how it's done.

The only comment I would make, which I'm sure it would reflect a more modern understanding of the way in which the jurisdiction would be exercised, I'm sure if I'm wrong in this I'll be contradicted by my friend, Ms Douglass, who's more knowledgeable about these matters. But from my reading, I think the way in which you go about exercising that protective function is in a less necessarily paternalistic way. So while it's a protective function, I don't think it's necessarily one that's to be exercised in an entirely paternalistic way. That doesn't mean that you're not looking out for the interests of the person.

ELLEN FRANCE J:
In relation to that, although you say we don't need to look at 108D through to F.

MR BUTLER:
Yes.

ELLEN FRANCE J:
108B, for example, is in the more paternalistic mode isn't it?

MR BUTLER:
Yes, it is by dint of the procedure that it puts in place for the management of the money that's been paid out. But of course what's interesting, it's slightly

by the by in the general run of the mill cases, but actually of relevance here in one sense, could have been of relevance here, which of course is it recognises that in certain instances the individual in respect of whom these orders a statutory trust is required to be created, could regain capacity at a later point. At which stage then this structure that's put in place comes to an end. That's section 108A(1), yes.

GLAZEBROOK J:

Why does that help with the point that was just made? Because, obviously, if people regain capacity you're not going to continue treating them as if they haven't got capacity.

MR BUTLER:

It just simply shows the fact that Parliament is aware of the fact, for example, that when we're talking about mental incapacity, mental incapacity is not necessarily permanent, it can be temporary, that's all, and of course it will be consistent with the least restrictive approach consistent again with the CRPD.

ELLEN FRANCE J:

Wouldn't there be potentially some oddity though, if this section had been relied on at the time in the money then being paid to, any money or damages being paid out on trust, on a trust scenario. I mean, how, I'm just not sure how that fits with the more modern-day approach to these matters.

WINKELMANN CJ:

Hasn't it been criticised as not fitting with the modern-day approach to these matters?

MR BUTLER:

Yes, yes, 1I think a number of people active in the area would say that an automatic assumption that it must be put on trust is something that is, that will be, will require revisiting on a going forward basis, but to be honest I would have thought this would be one of quite a number of statutory provisions that

are on the books that operate in quite a binary way to be honest and I think one of the big –

GLAZEBROOK J:
It's a bit of a shame they've done it in the very statute that is to be dealing with this though.

MR BUTLER:
There is an irony in that.

GLAZEBROOK J:
I can understand the legacy things and other statutes.

WINKELMANN CJ:
Although this entire statute's been criticised for not applying the best model, I think, hasn't it, in my recollection?

GLAZEBROOK J:
Yes, I think, but not to quite this extent.

WINKELMANN CJ:
Not quite that extent, yes.

GLAZEBROOK J:
I think one can make things work within the –

MR BUTLER:
That's right, and I think if we were all being really honest with ourselves, counsel, judges, the legal profession generally speaking, I think our understanding of mental capacity issues and so on is one that is evolving and one of the benefits I think, when we look back in 20 years' time, is the impact that hopefully the CRPD will have on introducing more nuance into the way in which some of these statutory provisions can operate but it seems to me there is room for nuance, at least in the first half of Part 9A, what I'm saying to you is in terms of section 108C, in terms of the open-ended nature of the criteria,

the factors that can be taken into account, that does provide an opportunity, it seems to me, for consideration of a more nuanced approach. Sorry, your Honour, I was –

ELLEN FRANCE J:

No, no, I was just going to say well, if you're looking at it in the context of the overall statutory scheme, might that not tell you something about the interrelationship between the Employment Relations Act and this legislation?

MR BUTLER:

Well, no, I'd like to, if I could come to that question of the relationship between the two, I'd like to do that a little bit later, but if I can just flag, just to leave the thought with you. My understanding of the respondent's position is that they accept, they accept that there is no necessarily inconsistency or incompatibility of the two statutes. The ERA, I'll just refer to it as the ERA. The ERA and the PPPR Act, Part 9A so long as, they say, Part 9A only operates prospectively. So they don't see any incompatibility between the two statutes, at least in that domain. They just say, you shouldn't interpret Part 9A as having potential retrospective operation. So for myself, the way I've read Part 9A of the PPPR Act, I see it as being a generic statutory provision which applies across the range of proceedings where money and damages could be claimed and has general application. So what I say, your Honour, just to leave the thought with you and we can come back to the detail of it no doubt later, is it's for those who say that it should not be available in the employment jurisdiction to show why, as a matter of statutory language on purpose, that should be so. So that's where I come at it from.

I'd like just want to come back to, there's just one point I did want to come back to, if I could, just in terms of section 108D, could I just come back to that just for one moment?

WINKELMANN J:

Yes.

MR BUTLER:

It was something that occurred to me when I was preparing for today, and I probably should've just raised it with you in terms of the premise underlying your Honour, Dame Ellen's, question to me about section 108D and whether it's dated and so on, because one of the things I'm interested in, in terms of 108D. So if we look at 108D, the assumption or the premise behind your Honour's question and the one, the premise I approached it with when I read it initially was, that it applies automatically and you might remember in my response to you that was the language I used to you. But I think it is interesting when you look at 108D, I wonder whether there's a way for it to be read down so that it doesn't apply automatically. So, if you look at the way, the provision is written, you've got without limiting section 108C, so I read that as referring back to, well, here's a way in which you can conditionalize, so one of the things a court could do is this: "Without limiting section 108C, this section applies where the court directs…".

So rather than saying the Court must direct, what it seems to suggest to me on one reading of it is that the section applies where the Court choses, in other words, to direct: "… directs that all or part of any money or damages awarded to a specified person… must be held on trust for the person under this section."

So then I think there is a way, even though I think the, you know, the assumption had been that it applies automatically, I think there is a way of saying, of making it where I'm trying to say is more modern, it's more CRPD compliant. It's not something that must always be done.

ELLEN FRANCE J:

I think you've covered the ground but, for myself, I'm not sure how that fits with 108D(5). I think we've probably spent enough –

GLAZEBROOK J:

Or whether you'd even need the section if the Court could direct what it wanted.

MR BUTLER:

Yes, I understand what your Honour is saying in terms of that but, of course, one of the things that's, if I may, if you look at the heading to 108D money or damages "may be held upon trust" it doesn't say "must be". So the word "required" isn't used. It was that wording that suggests to me maybe I've been approaching it incorrectly by regarding as automatic. So one of the issues I think that arises then is in relation to –

WINKELMANN J:

Well, actually doesn't section 108D(5) help your argument then? Because it applies subject to any direction that an immediate payment be made for money or damages?

MR BUTLER:

And any other direction or condition given or imposed by the Court.

WINKELMANN CJ:

So it's subject to the other directions? Right.

MR BUTLER:

Correct.

O'REGAN J:

But you wouldn't need a direction if you didn't have to apply section 108D? You wouldn't have to do anything.

MR BUTLER:

No, I'm not sure I agree, sorry, if I can cut through the discussion between your Honours, but that's helpful to me because I think if you look at the structure of 108D, the way I read it, again with the benefit –

WINKELMANN J:

It’s not beautifully drafted.

MR BUTLER:

And I understand where your Honours are coming, because I read it the same way, so the journey for me was that the word “may” in the section heading. Then when I look at subsection (1) it doesn’t say “must”, what it says is “where the court directs”, so I read that as saying where the Court chooses to direct. And then, if you look at subsection (5), when it says “this section applies subject to…”, of course one way of reading that is what you've got is where the Court has decided to choose to direct under subsection (1), then as I read it, subsection (2), (3) and (4) are automatic. So they're the automatic features of the regime. So the decision as to whether you get into the 108D regime, is still a choice to be made by the Court. Once the Court goes into that then subsection (2), (3), (4) apply automatically, so as to speak, so subsection (5), I think really what it might mean is, how it might be better worded is: “Subsections (2), (3) and (4) apply subject to”, because that’s really what I think it's trying to say.

WINKELMANN CJ:

It's not a thing of beauty in terms of drafting.

MR BUTLER:

No. And, again, I would say that if that’s an available reading then again, if we go back to the jumping off point in respect of which this question was raised from her Honour Dame Ellen, it seems to me that’s a plausible reading of the statutory provision that is CRPD consistent.

So one of the other issues that’s arisen, and I could deal with it and the detail when I come to the questions, but the way I’ve thought about making this presentation to you is I am conscious of time and I know I say that often.

WINKELMANN CJ:

Yes, I’m conscious of time.

MR BUTLER:

Exactly, so I just thought I would just try and deal with them in the context of my consideration of Part 9A and then briefly come to answer the questions that you've enumerated A through to E, and hopefully pick up some additional points at that stage. So I just wanted to pick up this particular point, the concept of Court.

Now of course, on our reading of the statute, it's really for the other side to worry about where they go to get approval. So when we're making the argument about what's a Court, we're just simply providing something of assistance to this Court, in terms of it deciding well, where do you go to for an approval when you're dealing with something in the employment jurisdiction. So I accept that some of your Honours may say well getting a bit of a feel for how it might operate in the employment jurisdiction is important for the purposes of figuring out whether there's any inconsistency or incompatibility between the Part 9A and the ERA itself. I remember that being a point that was raised with me. I think it was your Honour Justice O'Regan who raised the question with me. Well, you know, how could we possibly clamp onto the ERA a set of provisions like the compromised rule. That's what I was arguing last time round, and I was saying well you can do it in principle and the Authority's got broad powers, which this Court has re-emphasised, in *FMV*, to look after its own procedure and process and everything like that, but I had a sense, from the interactions, your Honour wasn't wholly convinced. I think your Honour felt that was creating quite a big, new regime so Part 9A, in the one sense, helps me out in my argument I think because I can now say well, look, here's something that's pre-baked.

WINKELMANN CJ:

Well it very much helps your argument doesn't it.

MR BUTLER:

It does indeed. And so the question then, it seems to me, simply is well, so what then is a Court for the purposes of Part 9A, and how does that interact with the ERA. And you'll have the written submissions that I have made in

terms of what a Court is. We say the Court could and should be given a broad interpretation. In the case of *Irwell*, which I said to you I would mention to you, does exactly that. I don't know whether your Honours have that case.

WINKELMANN CJ:
Well you handed it into us didn't you, so yes, we have it.

MR BUTLER:
But it is referred to in the judgment of his Honour Justice William Young in that *FMV* case at paragraph 209, where he summarises it, but if your Honours have it handy.

GLAZEBROOK J:
Sorry, which case again?

MR BUTLER:
So this is *Irwell Insurance Company Ltd v Watson & Ors* [2021] EWCA Civ 67 and as I said, it's referred to in the *FMV* decision by his Honour Justice William Young.

WINKELMANN CJ:
Have you had a look at the decision of the Employment Court *Samuels v Employment Relations Authority* which says it's not, the Relations Authority is not a court? Different context of course.

MR BUTLER:
And so that's all I wanted – so the starting, the jumping off point for me, I suppose, was this *Irwell* case which emphasises the point your Honour has just made about things being – it's the context is what's relevant. The *Irwell* case was about, and the English Act was the third party's right against Insurer's Act 2010, the 2010 Act, so that's the same, I assume, as our section 9 Law Reform Act 1936. That's probably been renamed now or something, I don't know. But your Honours know the provision I'm talking about.

WINKELMANN J:
Yes.

MR BUTLER:
So the question then became, in *Irwell*, is whether or not an Employment Tribunal is a court for the purposes of section 2 of the English 2010 Act, and at paragraph 23, and your Honours can, I'm sure, read this for yourselves, but there's a heading starting at paragraph 23 of that decision: "Authorities on whether a tribunal is a 'court'." Their Honours commenced by saying: "The authorities indicate that whether a tribunal is to be treated as a 'court' for the purposes of a statute or rule depends on context."

Then they go on and consider the context within which their equivalent of section 9 of the Law Reform Act 1936 should apply and conclude that an Employment Tribunal is indeed a court for the purposes, at least, of that provision.

So that seems to me to be an answer my friends for the Chief of Defence Force are going to refer you to the *Clayden* case later, that's the one about the abolition of what used to be the Employment Tribunal and its replacement with the ERA, sorry, the authority, under the ERA, and I say that's a classic example of just plucking a decision that defines a word like "court" in one context and seeking to apply it in another context. I say the correct context that we should be thinking about here is a provision, a set of provisions, Part 9A, the PPPR Act, which is designed to do two things, one to protect the interests of people who lack capacity. But second, equally, to provide an opportunity for both parties, where appropriate, to approach the decision-maker, let's use a neutral term like that, for approval of a settlement that they have reached.

ARNOLD J:

So, your argument is that the various tribunals, the Disputes Tribunal, Tenancy Tribunal, Motor Vehicle Tribunal, all of those are courts for this purpose?

MR BUTLER:

Correct, if we want to make those settlements and compromises by them. So the example I've given, for example, is we've included in the bundle of authorities the decision of one of the tenancy adjudicators back in 1992 because, for example, under what was then the Minors' Contracts Act, the Tenancy Tribunal had the jurisdiction to validate, or chose not to validate, to approve in part contracts that had been entered into by minors and exercise that jurisdiction. That jurisdiction is explicitly conferred on the Tenancy Tribunal by section 14 of the Residential Tenancies Act 1986. So the only point I'm trying to make is, why would one seek to give a narrow interpretation to the word "court" in the context of Part 9A. That's just the question I'm raising. I don't know what the policy reason is for why you would seek to narrow the availability of that mechanism.

ARNOLD J:

So the logic of that is that, I mean, we're going a long way from the sort of parens patriae concept that was really court-based in a traditional sense.

MR BUTLER:

Yes, it was. Correct.

ARNOLD J:

The Court of Queen's Bench and so on.

MR BUTLER:

Correct.

ARNOLD J:

We're moving beyond that and one can see a policy reason for doing that which is to bring an independent person to look at the circumstances and ensure that its appropriate given the vulnerability of one of the parties.

MR BUTLER:

That's what I'm saying. And the other point I'd like to make, if I can, just as a bit of an overlay is, if your Honour is thinking about, well, crikey, your Honour wouldn't say crikey, crumbs, looking backwards, you know, the parens patriae jurisdiction is something, you know, that the High Court, Queen's Bench exercised, which I understand, I think one of the things in terms of a modernising, of a modern understanding of the rule is, of course, since that jurisdiction commences, we've now got a multiplicity of tribunals which exercise a form of judicial authority across the board. So to my way of thinking it makes sense at a policy level to say, look, the issues which arise in respect of the parens patriae jurisdiction are not ones that are going to be unique to a High Court action, or even a District Court action. Parliament, I say, has recognised, through the broad definition of "court", and also through instances where, for example, the example I've just given you in terms of the Tenancy Tribunal, that actually these issues can arise across the range and we want to make sure that people aren't having to go off to High Court to get the validation of something that can actually be dealt with at the right level.

ARNOLD J:

So if that's the underlying rationale, why wouldn't one say that the section 149 process is designed to serve that sort of function, in the sense of making sure that the parties entering the agreement understand what they're doing.

MR BUTLER:

And so the issue we say with the section 149 process is the process is not designed to go to capacity. So the question in terms of the 149 process, is capacity doesn't arise as a question there.

ARNOLD J:

Well couldn't it arise in this way. If you look at section 152 of the ERA, subsection (1) says that, "no mediation services may be challenged or called in question in any proceedings," but then it's got the exception in (2).

MR BUTLER:

Yes.

ARNOLD J:

And in relation to 149 approvals or certificates there is an exception, they can be challenged or called into question on grounds which relate to the knowledge about the effect of the settlement. Why wouldn't that be a mechanism under the Act which would enable a person who suffers capacity problems at the time, from challenging the agreement, the certification?

MR BUTLER:

I just want to think about it, I've got a whole pile of things buzzing in my head in response to that question your Honour has raised. So can I just have a moment to…

ARNOLD J:

You can come back to it if you like, but it's just a question that I had. You can challenge these things on grounds that relate to knowledge about the effect of the agreement. If the key problem is that the appellant here did not understand the effect of the agreement, why couldn't one challenge the certification, or is that provision entirely procedural. In other words, it's just asking whether the process is being followed. It's not addressed to the substance of the exchange between the mediator and the parties.

MR BUTLER:

Can I put it this way? That's my understanding of how the section is understood to work. What's buzzing around in my head is whether or not, with the insight your Honour has given, whether or not what your Honour

suggests is something which could work within those statutory schemes and which we would say miscarried here.

WINKELMANN CJ:

Or you would say it just shows that the section 108 provisions are not inconsistent with the scheme of this Act.

MR BUTLER:

And that was the other thing that was going around my heads, which says there's not an incompatibility then between 108C and these provisions.

ARNOLD J:

Well it maybe in terms of outcome in fact. It may be incompatible in terms of the way the problem is addressed.

MR BUTLER:

Would your Honour care to elaborate on that for me?

ARNOLD J:

Well if there's an issue with whether the certification process was properly followed, presumably, to the authority initially to resolve all of that, and then it would work its way through in the context of an employment problem that had not been resolved, it seems to me that you might not get quite the same relief or process if you followed 108, and I don't see why you would follow 108 when the Act itself provides you with a process.

MR BUTLER:

I see what your Honour is saying, so could I, just a couple of responses to that of course is that one of the things that's interesting about 108, as I understand how it works, is a 108 application can be made of course by any of the parties to the settlement, where it's just a quick read of this provision, I haven't had to study it in the level of detail that your Honour clearly has so I'm sure you'll tell me I'm wrong, but my take on this is this is something which can be challenged by the – the way it seems to read is it's something for somebody

who now wishes to resile from it to be able to challenge the decision, as opposed to giving, for example, my learned friend's client the opportunity to have it validated and the way that might be resolved is they bring an application under 108, under 9A, and then there's a counter claim or issue, problem raised by the employee. So what I'm trying to say is I'm not sure, just on a first read, that this section that your Honour's referred me to, necessarily covers all the ground. It may or may not, I'm not sure.

ARNOLD J:
Yes, I'm not sure either, I'd need to work it through, but it did seem to me to be a reasonably obvious mechanism.

MR BUTLER:
Yes, so one, can I just – it's a bit of a download in response to your Honour's question.

WINKELMANN CJ:
Well you might want to come back to it because are you coming to the part where – there's other issues about the relationship between the Acts, and when are you coming to that because I'm just conscious about the time.

MR BUTLER:
Yes, I was going to come to those, yes. So the first point I was going to make, if I come to the relationship between the PPPR, Part 9A, and the ERA, is my starting point of principle, which I think from the interaction I've had with your Honour Justice Arnold, it's, hopefully I've made transparent, which is that there's no reason in principle why mentally incapacitated persons should not have the same level of protection in relation to the settlement of an employment problem as for any other money or damages claim. In other words, I'd go back to that point of principle of saying well, why would you want to treat employment matters different from other forms of claim?

GLAZEBROOK J:

Can I just go back to the fundamental question that I raised with Ms Douglass, which is why are settlements treated in a different manner, because some of these transactions that people can enter into, so for instance a settlement of a bond of $300 in the Tenancy Tribunal as against buying a property which is a leaky building, without having the proper advice and…

MR BUTLER:

So that was a topic we touched on briefly at the last hearing. You will know our position on our side of the argument is *O'Connor v Hart* is not good law but to argue such a big proposition on this case, which seemed to be confined to compromises and settlements, this case did not seem to be the right occasion for a full frontal attack on *O'Connor v Hart*, but you should understand that's the perspective. And you might recall that during my presentation I said well, you know, you've got two parties involved, why should you come down on one side as opposed to the other and part of the reason, in my view, that one might take the view that in relation to commercial contracts you come down on the side of the party who lacks knowledge is simply to facilitate the market. You prefer certainty of bargain over the position of the person acting under an incapacity, and recall that when the Privy Council in *O'Connor v Hart* traced the history of the relevant rule, the original common law rule, which is still the rule under Scotch law, is that where a party enters into a contract lacking capacity, lacking mental capacity, then the contract is unenforceable against that person. So *O'Connor v Hart* charts, I can't remember the page number now your Honours, but you'll find it I'm sure, charts the back and forth in relation to that. That's the starting point, then we move to the opposite end of the spectrum, over the…

GLAZEBROOK J:

I think my question is not really asking you to re-open that, it's just why would you have a wide interpretation of section 108 on the basis that settlements are different from ordinary contracts. So it was more why are you going to be expanding section 108 and make it both prospective and retrospective in

circumstances where incapacitated persons can enter into exceedingly unfair contracts for huge sums of money or –

MR BUTLER:

But they can't enter into unfair contracts, that's the point. If it's an unfair contract, then the law will allow it to be set aside. The problem we've got here is, in our case, is that the Court made a conclusion in respect of the settlement agreement –

GLAZEBROOK J:

Well, they won't set aside – it's not a general ability to set aside unfair contracts.

WINKELMANN J:

Can I just ask, is your simple answer that you're not arguing for a wide interpretation, you're arguing for the interpretation which is just for the word "say"?

MR BUTLER:

Correct, that's exactly what I'm doing and I say that Parliament has acknowledged that there is a difference between commercial contracts and settlements and the policy rationale I would say for that is that when somebody is compromising or settling their legal rights, that is a class that is different from entering into an ordinary commercial contract.

WINKELMANN J:

And you were giving us that other explanation on the basis that you're saying that really, the common law mis-stepped at a certain point and it should be following statute on this area?

MR BUTLER:

That's our position, but that's a bigger issue. An earlier point I was going to make in relation, so I'll finish that point I was making as to why this should be no different in principle, is just simply that work is one of the most important

facet of a person's life. It goes to their sense of self-worth. Those themes are covered off in this court's judgment in *FMV* so, therefore, we say that compromising legal claims in respect of work is compromising a very important matter. Just as important as, if not in some cases more important, than compromising a civil claim, and other sort of form of civil claim.

We say also that both the Court and the Authority are competent. By "competent" I mean are able to make assessments as to capacity and as to how the open-ended discretion in section 108C should be balanced in an individual case. There's nothing about them that makes them institutionally incompetent to undertake that task. And we say Part 9A is a generic regime, no reason to construe its language so as to displace its application.

Now my friends for the Chief of Defence say that Part 9A should be interpreted, I would say, more narrowly than its wording requires. They say, for example, that to interpret Part 9A as applying prospectively and retrospectively, is to interpret the Act inconsistently, sorry, to interpret Part 9A inconsistently with the rest of the philosophy of the Act. They make reference in their submissions for a number of provisions but, of course, one of the most important provisions in the Act is section 103 of the PPPR Act which allows the Family Court to review decisions, and there's a long list of them, of an attorney already acting under an EPOA.

WINKELMANN J:
Sorry, what provision?

MR BUTLER:
Section 103. They also try and argue, with respect, misguidedly, that somehow our interpretation of Part 9A is somehow inconsistent with the presumption of capacity. That is not the case. Of course, the presumption of capacity operates or presumption of competence, as my learned friend Ms Douglass pointed out, those words, phrases are used interchangeably. But, as with any presumption, once it is displaced it doesn't operate. Presumption of advancement, that's the presumption, but it can be displaced

and when its displaced, you don't operate by reference to the presumption anymore. The way in which the presumption here is respected on our interpretation of the legislation is that it is for someone in the shoes of TUV to come forward with the evidence to show that they are a specified person, that they lack capacity. That, as we set out at the previous hearing, is not easily done. You've got to come forward with convincing evidence. That's what happened here, but it's not an easy thing to overcome, particularly against a backdrop of the existence of the presumption. So we say that our interpretation is entirely consistent with the fundamental principle of the PPPR Act.

So, if we turn then to the individual questions. So, your Honours, I note it's quarter past 11, so I'm intending to zip through these and be done by the break, unless your Honours have some more questions for me?

WINKELMANN J:
No, that's good.

MR BUTLER:
Okay, thank you. So does the scheme of the Employment Relations Act displace the application of section 108B in the area of disability, referring and there's particular reference made to a number of sections of the ERA, and those are dealt with in some detail in our submissions, submissions number 3 at paragraphs 41 through to 47, and I simply direct your Honours collectively to those submissions.

We don't see anything in the philosophy of the ERA which says if you should find that Part 9A is displaced. My learned friends for the Chief of Defence Force accept that, at least in terms of its prospective operation, it is not displaced. So, I say if they're prepared to accept that it can apply at least prospectively –

GLAZEBROOK J:

Just don't assume that the Court is accepting that though. I'm not making any comment, it's just, it's not necessarily an assumption that you can accept.

MR BUTLER:

Okay, thank you for that, your Honour. Well, as an advocate I'm going to take advantage of it nonetheless and I'm going to say that the Chief has indeed recognised that the two can operate alongside each other, at least in respect of the prospective operation of it, and I think that's a realistic acknowledgement on their part of the fact that there is nothing in the language of Part 9A, the first half of Part 9A, and the ERA, which says that you should find the two to be incompatible, one with the other such that the operation and application of Part 9A should be displaced by the language or scheme of the ERA.

My friends make some reference in this part of their argument to the Human Rights Act 1993, specifically section 92N. Section 92N of the Human Rights Act, as your Honours will know, is basically replication in slightly different form of sections 108D, 108E and 108F of the PPPR Act, and they seem to want to build on that as some indication that there is some form of incompatibility between that Act and the PPPR Act and, therefore, that tells you something about how generic the PPPR Act regime is intended to be.

In our submission, section 92N is just simply another example of an appendix. We all wonder what's the point of an appendix. It's just there. Section 92N is the successor to provisions that existed in previous iterations of the Human Rights Act and the Human Rights Commission Act 1977. I can't remember now, just while I'm standing here, whether there was a similar provision in the Race Relations Act 1971, I want to say I think there was, that dealt with the payment of monies and damages where there had been an award. So my submission is that simply when the time came to enact the Human Rights Act, Parliament just brought forward provisions that were already in place in the earlier iterations of the legislation can't take anything – you can't take anything from it. Indeed, it's interesting that in one of the authorities we've handed up,

the *DHB* case, settlement was approved relying on the Part 9A, I've just lost the reference to that, your Honours, I might just come back after the break with that reference. It was approved under, using Part 9A.

So we don't see anything in the individual sections, and I'm not going to take your Honours in great detail through the individual sections, your Honours have our interpretation of those sections and why we believe they're not incompatible with the application of Part 9A.

WINKELMANN J:
Yes.

MR BUTLER:
Was anything in those written submissions, your Honours had wanted to raise with me?

WINKELMANN J:
Are you going to come on to the impact of the United Nations on the Rights of Persons with Disabilities?

MR BUTLER:
Yes, I was going to come on to that, so there was probably something I was just going to touch very briefly with my learned friend, Ms Douglass, on the break, and she might talk more specifically to that briefly after the break.

WINKELMANN J:
Well she's going to be reasonably time-constrained as well.

MR BUTLER:
Okay, well, so we do make reference to the CRPD in our written submissions and I'll come and highlight those, why don't I do that straight after the break and make sure that I give our take on that properly and fairly.

WINKELMANN J:
Right.

MR BUTLER:
So, the next question, which is B, is whether section 108B is applicable to a settlement entered into before the other party knows of or is on notice of the incapacity and the relevance of *Dunhill v Burgin* to that question. So, our submissions in relation to that are that first of all knowledge is not a requirement for the application of section 108B. Subsection (1) of that section sets out what the predicates are, knowledge is not one of them. So, first point.

Second point we'd make is, that when one looks at *Dunhill v Burgin* to which the Court has directed our attention in regards to this matter, of course, *Dunhill v Burgin* confirmed that the absence of knowledge of the incapacity did not mean that the compromise rule was disapplied. I refer your Honours to paragraph 21 of *Dunhill v Burgin* where the Court specifically recorded: "It has never been suggested that this defendant either knew or ought to have known of the claimant's lack of capacity." And your Honours will recall that one of the arguments accorded at paragraph 22 of that judgment, that was advanced, was that a knowledge of requirement should be read into the compromise rule. And the Court rejected that, saying: "The problem with the defendant's argument is that it involves writing words into the rule that are not there. If anything, the words hint at the reverse as they refer to a claim made by or on behalf of a patient or a protected party," and you'll recall earlier in my oral submissions I just flagged that that same phrase "by or on behalf of" where you specify a person rather than the phrasing "a patient or protected party," so, I think *Dunhill v Burgin* is helpful to us in terms of the proper interpretation of the rule.
And of course, your Honours will also recall that at paragraphs 25 of *Dunhill,* specific reference was made to *Imperial Loan Co Limited v Stone* [1892] 1 QB 599, and to *Hart v O'Connor.* The argument was made, very much of my learned friend's make today and last time, that *O'Connor v Hart*, I'm reading from photograph 26: "This rule it is argued applies just as much to the

settlement of civil claims as it does to any other sort of contract. Once the parties to ordinary civil litigation have reached agreement, it is not for the Court to interfere in their bargain." That was the argument that was advanced and that was the argument that was rejected. So this time round, I say last time round I was relying on the language of the case itself but now I say I've got language in Part 9A of the PPPR Act which put on a statutory footing in New Zealand the compromise rule.

Question C, whether section 108B should have retrospective effect in the area of settlements of claims for money and damages, given the ongoing requirement of proof of actual or constructed knowledge of incapacity in relation to contracts in other contexts. As we said in our written submissions, and I may be disagreeing with some members of the Court with this proposition that I advance, but effectively we reject the premise behind the question. The premise behind the question is that settlement agreements compromises are no different to any sorts of agreement, and we say that premise is at odds with the common laws embodied in *Dunhill v Burgin*, and it is inconsistent with the language of part 9A, and we also say it's inconsistent with sections 103 and 107 of the CCLA. They are the provisions now dealing with Minors' Contracts.

Question D was whether the appellant's claim was properly characterised as a money or damages claim. The answer is yes.

WINKELMANN CJ:
There's this issue about what the claim is that's settled, isn't there? I mean…

BUTLER J:
And on the detail of that, that's where I would definitely hand over to my friend Ms Douglass because she's, of course, all of that detail far better than I.

WINKELMANN CJ:
No, but the statute, because it uses claim in multiple senses in that one provision, I think.

BUTLER J:

Yes, is your Honour referring to…

WINKELMANN CJ:

Because it says it applies where money or damages are claimed.

BUTLER J:

Yes.

WINKELMANN CJ:

And then it says settlement of the claim.

BUTLER J:

Yes, and of course one of the things that's interesting, just worth noting, your Honour, is that section 103, which defines what a "personal grievance" is, says a personal grievance is something which involves a claim that, and then the list of things you claim for in terms of a personal grievance appears in paragraphs A through to whatever the list is. So that language of claim is what is used to describe a personal grievance. Just again, I think that's something that's probably worth noting if your Honour's had any concerns about, you know, whether claim is the right word to be used in this context. It is, we say, and so I just wanted to come back, because the premise, the point I was trying to make in the written submissions when I talked about this particular aspect about whether the money or damages aspect is satisfied is which of the documents, for want of another term, which of the events you look at to decide whether or not you've got a relevant claim.

One option is to look at what was raised through the union advocate back in the day and which was then the subject of the section 149 agreement. Equally, if you look at the statutory scheme, of course the word claim can relate to what is now being brought or was first brought to the authority and what is now before the Court. That is indeed a claim for money or damages, and what is being set up as a bar to that claim for money or damages is the existence of the section 149 agreement. So what I'm trying to say is, for the

purposes of claim you're not simply confined to looking at what happened back in 2015, and also now look at what was filed with the authority in 2017, because that's just as much a claim to which part 9A applies. Whether on the facts of this case the Court, so I'm at looking at E, whether on the facts of this case the term Court as defined in section 180A should be interpreted purposively to include the ERA and the relevance of –

WINKELMANN CJ:
I think you've covered that.

BUTLER J:
And I've dealt with that already. So your Honours, it's now 11.30.

WINKELMANN CJ:
Yes, so what else have you got to do?

BUTLER J:
Shall I just stop there? And we'll just regather our notes and see what we need to cover after the break.

WINKELMANN CJ:
Okay, we'll take the morning adjournment then.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.47 AM

DOUGLASS J:
Yes, may it please the Court, just briefly to conclude our submissions, I will address the CRPD in relation to how this applies to the facts on this case. First of all, just to bring to your Honour's attention, the question was raised about the parens patriae jurisdiction, and we do have part of that. We do have a submission in our second supplementary submissions in relation to the supervisory role of the Court and the safety net jurisdiction of parens patriae.

So in the number 2 supplementary submissions number 2, 30th of November, paragraphs 18 to 24, we have made the submission and given some case law, mainly under part 9 of the PPPR Act and around enduring powers of attorney, but also drawing attention to section 102 of the PPPR Act, which essentially recognises the general supervisory jurisdiction of all courts to the regime provided by the PPPR Act. There is a couple of cases there, *Waldron v Public Trust* HC AK CIV 2009-4-00485 [19 January 2009], 2008 FRNZ 403 (HC), *Vernon v Public Trust* [2016] NZCA 388, a decision of Justice Potter, I think, in *Carrington v Carrington* [2014] NZHC 869, and of course section 114 of the PPPR Act preserves the inherit jurisdiction so matters can be dealt with by the High Court if it is not a matter that is covered in the Act itself, and further to note that in fact the definition of specified person is a person unable to manage their affairs, which is essentially – I think the provision is now under section 14 of the Senior Courts Act, previously section 17 of the Judicature Act 1908.

WINKELMANN J:
Section 14?

MS DOUGLASS
Section 14, yes, and that's in the footnote at paragraph of our submissions and the case law that I've just referred you to. So that's in and around the point being that, of course, there has been a lot of focus under Part 9 of the PPPR Act under the jurisdiction of the Family Court and the powers of review

and supervision in relation to enduring powers of attorney and, as has become obvious in this case, little or no attention to Part 9A. So that's available to you.

So just turning then, finally to the final questions in and around what should happen in this case. And I'll deal with questions F and G together. Essentially, the position taken by the appellant is that this matter should be referred back to the Employment Court and that there is no bar for TUV to proceed in her claim. It is always open at any time, of course, for either party to seek approval under these provisions in Part 9A.

In terms of the criteria or what factors to be applied, at paragraph 28 of our written submissions we listed 11 factors, so that's further up in our submissions, not under the question itself, but with a view to making it clear that in our view that these should be non-exhaustive. The words are that "it is a matter of discretion" and the Australian case law and similar provisions under their Public Trustee Act talk about "for the benefit of the person". This is where, of course, Article 12(4) of the CRPD kicks in, so to speak, in the sense that in constructing a decision or making an assessment for a particular person that falls under these provisions, in our submission its highly relevant that their rights will and preferences are taken into account. And that is the slant and the thrust of Article 12(4) of the CRPD.

So on the facts of this case, what we can see is the actual agreement itself is purely around taking a financial position. The agreement is set out at 302.0251, which is volume 5 of the hard bundle. It doesn't actually recognise the problem it's seeking to resolve. It's not uncommon to at least identify that a claim has been lodged or a statement of problem has been received without even going into the detail. But other than stating that it has agreed terms of settlement to Employment Relation –

WINKELMANN J:

Can I just ask, why are we considering this because we don't – no one's suggesting that we should have to determine whether or not the agreement should be validated –

MS DOUGLASS:

No. That's right. I suppose I'm really just simply highlighting that from TUV's perspective, this is wholly about the financial perspective and it fails to take into account her own perspective which is that from fairly early on her union representative raised the employment relationship problem and pointed out that she and one other employee, in fact, could be eligible for compensation in terms of section 123 of the Employment Relations Act for humiliation, injury to feelings, loss of dignity. So that's in Mr John Drummond's letter and I can take you back to that. That's at –

WINKELMANN J:

That's all right. I don't think we need to.

DOUGLASS J:

Yes, so at the end of that letter it raises the fact that –

WINKELMANN CJ:

Yes, but we don't need to go into it.

DOUGLASS J:

All right, and then of course Chief Judge Inglis herself raises a number of flags in her own judgment about factors that would be relevant in our submission to such an assessment. The other factor that would be relevant at a material time, and which I spoke to at the first hearing, was that there was a psychologist involved, Dr Lea Galvin, and she highly recommended that the parties meet and have a discussion, and she alerted to the fact that TUV had substantial stress, and that was just prior, in fact, to her adverse stress reaction in August of 2015. So the submission really is, is that the lens applied to date has been very much of a financial one, yet the statement of

claim now filed not only seeks compensation, as is common in such cases under section 123 of the Employment Relations Act, but raises non-monetary remedies, which is a feature of course of the employment jurisdiction, and if I just take you to the statement of claim.

WINKELMANN CJ:
I don't think we need to see that.

DOUGLASS J:
All right. And in fact, it has been pleaded also as a loss of mana and tikanga and process for my Māori client, is very significant in this case, and I can certainly reassure the Court that that has always been high in TUV's priority in terms of the remedies she seeks is respect and dignity around the circumstances of the termination of her employment, and added to that in law, of course, under the Employment Relations Act there is actually a pleading that there has been racial harassment.

WINKELMANN CJ:
Yes, well all things you're saying are used against you, I think martialled against you by the respondents, and they say, well, part of your claim has nothing to do with money or damages.

DOUGLASS J:
Well the appellant would say that the scheme or the regime of Part 9A is engaged because there is a claim for money or damages.

WINKELMANN CJ:
So you say you don't slice and dice it?

DOUGLASS J:
Sorry, your Honour?

WINKELMANN CJ:
You don't slice and dice it and say, well, part of it's valid and part of it's not.

DOUGLASS J:

No, no, not at all, no, it engages the regime. But taking into the discussion around the context of the employment jurisdiction, and in particular the principles under sections 3 and 4 that it is a specialised jurisdiction and it's very common, of course, particularly in a mediation context, that other non-monetary remedies are considered. It can be an apology, it can be a –

WINKELMANN CJ:

Okay, but that's not really responsive to the point the Defence Force makes, is it? In any case, I think you probably answered it.

DOUGLASS J:

Yes, yes. So from in terms of waiving her right to bring a claim in the authority or the court, those are very high on the appellant's mind, and those are factors in our submission that point to the role of that article 12(4) has in taking into account those factors and values that are important to the appellant. So it's not – and hence also the Crown have or the respondent has suggested that it's a best interest test, and we would disagree with that because essentially what article 12(4) is saying is that there are other factors that need to be taken into account to put weight on the person's own values and wishes in relation to those decisions. Just bearing in mind also that one outcome is in fact for this matter to go to a further mediation, because what the Employment Relations Act does, it offers two pathways. One is the one taken here where there is a private negotiation and the agreement is certified by the mediating.

WINKELMANN CJ:

Right, I think we understand that.

DOUGLASS J:

Yes, so really just to highlight that these process issues around the settlement are hugely significant for an employee such as TUV. Unless your Honours have any specific questions around applying these matters to TUV, I'm conscious of the time.

WINKELMANN CJ:

No, thank you very much, Ms Douglass.

DOUGLASS J:

Thank you.

WINKELMANN CJ:

So in terms of the logic, Mr Hancock, you'd make submissions next? Is that what you –

HANCOCK J:

Your Honour, I –

WINKELMANN CJ:

Because I think – carry on?

HANCOCK J:

Sorry about the video delay. I can make some very brief submissions now. I'm very conscious of the time and the fact that the other party has not had an opportunity to speak. I can very briefly summarise our primary submission.

WINKELMANN CJ:

Well I just thought the logic was for you to make submissions next, simply because they are more supportive of the appellant's position than the respondent's.

HANCOCK J:

Yes, your Honour, that's correct. So you've received the Commission's memorandum of 30th of November and the supplementary submissions we made on this particular issue. Those can be distilled into four primary submissions, the first being that the Commission submit that sections 108B to C may be applied to section 149 agreements under the ERA, and that can enable compatibility with human rights obligations under the CRPD in some circumstances.

The second submission, and this is the nub of the dispute in this hearing, is that the Commission supports the application of part 9A or sections 108B and C retrospectively, and in our submission that's consistent with the safeguarding requirements of article 12.CRPD.

The third primary submission is that CRPD principles should be reflected in a Court's validation of a section 149 agreement under section 108C. That's covered in paragraphs 37 to 39 of the submission. I won't repeat that now, but those paragraphs attempt to flesh out how a CRPD compatible approach to validating an agreement under 108C might look like.

The fourth primary submission, and it's probably the submission that is most distinctive, is that where a section 149 agreement seeks to settle allegations of human rights breaches, and the Commission submission is that this case involves allegations which could be seen in that light, that any section 108C validation process should consider whether the settlement provides an effective remedy for the alleged breach of human rights, and you would have seen in the written submission, your Honours, that was referred to, the ICCPR and jurisprudence that this Court and the Human Rights Review Tribunal have considered in relation to an effective remedy in respect of a human rights breach, and so those are the four primary submissions of the Commission, your Honours. I can turn to each in more detail, but I am mindful of…

WINKELMANN CJ:
No, I think –

GLAZEBROOK J:
It's about time. We're all shaking our heads only because of time. It would be very interesting to hear.

WINKELMANN CJ:
Yes, well I must say, Mr Hancock, your written submissions are very clear and very helpful, so I think we've been greatly assisted by your submissions, thanks, and I don't think we need to hear further from you.

HANCOCK J:

Thank you, your Honours.

WINKELMANN CJ:

Mr Martin?

MR MARTIN:

E ngā Kaiwhakawā o Te Kōti Mana Nui, tēnā koutou. I'm conscious of time, Ma'am, you would like me concluded by one?

WINKELMANN J:

If possible, yes.

MR MARTIN:

I think we can be well-focused, but I'll be guided by your Honour's questions. Your Honours should have a two page outline which may assist us move through things. So that was filed yesterday and I think you'll have it electronically, just because we're not supposed to pass the papers to you.

GLAZEBROOK J:

I'm not sure I printed mine out.

MR MARTIN:

So two page outline, 12 paragraphs, entitled "Respondent's outline of argument for 27 September". The part of the outline I may spend a little bit more time than other points actually arises at the top of the second page at paragraph [8] where there's a bracketed reference to *Dunhill*, and I wonder if, in the interests of progressing things, rather than work through the outline, I might go to paragraph [8] to begin with and address *Dunhill* and then come back and move through the outline, if that is of assistance, and it's just to address the provisions in *Dunhill*. The respondent's submission is that *Dunhill* turns on distinguishable UK rules and does not support a common law exception. So just to flesh that out, and as I say, I'll come back and work

through the rest of the scheme, but *Dunhill* does sit in its own scheme which is retrospective.

WINKELMANN J:
It was interpreted as being retrospective.

MR MARTIN:
Dunhill interprets in a retrospective way. The outcome in *Dunhill* turns on specific rules and they are the procedural rules 21.3 subsection (4) which is where the retrospectivity sits in that set of rules. So the starting point there is invalidity where there is not a litigation guardian and the rule that is, on its face, broadly equivalent with the section 108B provision is a different rule, 21.10. So, what you have in the scheme of the UK Rules is you have retrospectivity which, it is submitted, is absent from the equivalent New Zealand scheme. And again, 108B might be seen as a comparable provision with rule 21.10, but the equivalent rule to what is the retrospective rule in the UK scheme, 21.3(4), is in New Zealand High Court Rule 4.34, and that is expressed in the opposite terms and this is the important distinguishing point. So, in the New Zealand context, a compromise where a person doesn't have a litigation guardian is valid unless set aside, which it can be if it the incapacitated person is unfairly prejudiced. So in *Dunhill* we have a case that is dealing with a statutory scheme that is, on its face, having similarities, but has this quite different retrospective starting point.

WINKELMANN J:
Where do we find rule 4.34 in your materials?

MR MARTIN:
I will take you to it, Ma'am. In the materials you have, volume 6B, at 29 it has the High Court Rules 2016 for New Zealand and then it has the Civil Procedures Rules 1998 at 31.

GLAZEBROOK J:
Civil Procedure at 31, and what did you say, sorry, so where did you say the High Court Rules were, which tab?

MR MARTIN:
So tab 29, this is all at volume 6B, 29 is the High Court Rules, the New Zealand ones. The Civil Procedure Rules at focus in *Dunhill* are 31.

GLAZEBROOK J:
I've got the 31.

WINKELMANN J:
That's a step in the proceeding, 4.34 is a step in the proceeding, it's not to do with a settlement, is it?

MR MARTIN:
So, and I'll take you to how it's discussed in *Dunhill*, on this point. So, yes, those are steps in the proceeding 21.3 deals with, and then 21.10 deals with compromise specifically, and if we come to *Dunhill*, which is in volume 6A, at tab 9, there are really, at risk of summarising too much, but there's two sets of paragraphs that are most germane, I think, for this part of the discussion.

First of all, 19 and 20 under the heading "The effect of incapacity". In 19 in the quote from *Masterman-Lister v Brutton & Co; Masterman-Lister v Jewell* [2002] EWCA Civ 1889; [2003] 3 All ER 162, is the only reference in the decision, I think, to rule 21.3(4). But there's the discussion there of the step, so this is because in that case there wasn't a litigation friend as required by that rule. Then there's the discussion at the end of 19: "It might be appropriate retrospectively to validate some steps but not others. In this case we've not been asked to validate anything but no doubt we could do so of our own motion if we thought it just."

Then in 20, her Honour says in that case: "It would not be just while any other step in the proceedings might be capable of cure the settlement finally

disposing of it is not and they've not been asked to retrospectively validate the settlement".

So, what you have then is the discussion about the CPR 21.10 rule, and it is submitted that that needs to be understood as sitting within that retrospective context, both the rules with the particular starting point in 21.3(4), but then also in the context of this case, where the discussion was focused on there not having been a litigation guardian and, in fact, importantly factually, the settlement, the compromise was described as grossly unfair or inadequate, whatever the word was. But it was, one assumes, why they weren't seeking to validate it.

So, quite different context there in this case, and the reason *Dunhill* comes into from is, and this is the second point and I was going to take you just to paragraphs really 28 and 30 of the judgment, and this is where –

WINKELMANN J:
Just before you do though, could we look at this. Actually, it's quite a similar scheme to ours, isn't it, if you include section 108 and rule 4.34, so our 4.34 is their equivalent of 2.10, isn't it, which allows for steps in the proceeding to be validated?

MR MARTIN:
So, our equivalent of our High Court Rule is 21.3. Is that what your Honour's asking me?

WINKELMANN J:
Well, they have a provision which allows for steps in the proceeding to be validated.

MR MARTIN:
Yes.

WINKELMANN J:

And our equivalent of that is 4.34?

MR MARTIN:

Yes. But the starting points are different. And so I won't labour that point, but the starting point in the UK are retrospective and here are presumed valid unless there is unfair prejudice. So, it's that different starting point that I'm singling because you do have schemes that look similar –

WINKELMANN J:

Yes, but they're looking at one scheme, which is a set of rules whereas we've got a statutory provision.

MR MARTIN:

That's right, your Honour, which is why, because that's really the second point that comes up in relation to 28 and 30 in particular of the judgment, and this is the limited, and it is a limited discussion, this is a limited discussion about really, and my friends are relying on this discussion to say that there must have been in common law an exception from *O'Connor v Hart* or *Imperial Loan*, as it is in the UK, there must have been an exception because the rule would be ultra vires if it were seeking to change the common law.

So if you look at the discussion here at 28 and 30, and it is submitted it isn't as clear as that. What those paragraphs in particular, read in their context, where they seem to get to is that the rule-making power is broad enough to make the rule that you see and it's the retrospective rule, 21.3, so *Dunhill* gets to the point where, well, first of all, *Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170 (HL) had got to that point in quite a different factual context. And then really only at 30 is the discussion where her Honour, Lady Hale, discusses whether or not she's effectively going to follow *Dietz* and decides that she will although she notes that Lord Pearson in *Dietz* has given no reason for his acceptance that the compromise rule is within the powers of the rule-making body. But it is important to note that she doesn't just follow *Dietz*, but she refers to the argument of Mr Mountain, in paragraph 30, that the rule-making

power is broad enough and she says: “This could certainly be read as conferring an expressed power to make rules of court modifying the substantive law.” So where does that get to? It is submitted the *Dunhill* is not clearly the authority for there already being an exception in the common law. It is submitted that what it appears to be is a decision that turns on the particular rules and the difference, despite some similarities, the significant difference between *Dunhill* and this case and our scheme is that retrospectivity that sits in rule 21.3(4). So that’s the difference, that’s what we don’t have in the same terms because our High Court Rules is the opposite.

I hope I haven't laboured that too much, but it is an important point and it is a point of difference, obviously, between the parties. If there aren't questions on that point I might now go back to the beginning of my –

WINKELMANN J:
Were you going to deal with your paragraph 8 which is why I thought you’d taken us to?

MR MARTIN:
It’s paragraph 8 of the outline and it’s just that reference in brackets there to –

WINKELMANN J:
Okay, right.

MR MARTIN:
So I know I’ve jumped into the middle of it, Ma’am but it maybe the point that I spend the most time on, because I just wanted to be clear about how that difference, how that distinction is because I think, well, I’ll speak for myself, but you do need to read *Dunhill* a few times before you see how the various moving parts sit together.

ELLEN FRANCE J:
Sorry, just on that, the nature of the scheme point, in 108 the subsection (3), what do you say about the use of the words: “whenever entered into or made”?

MR MARTIN:
Yes, so the difference here is, the respondent submits that those words are really just talking about “whenever entered into” after there is a specified person, and it is submitted for the respondent that you need to have identified a person with a incapacity before section 108B is engaged and then “whenever entered into or made” simply means, whether before or after a proceeding. So you have your specified person and then at any point after that, whether before or after a proceeding has commenced, you can – the section applies.

Sorry, it is submitted that it doesn't affect the premise which is that, the respondent says section 108B is prospective in its operation because you need to have identified a specified person first.

I might go back and sort of take you through how that argument proceeds in how the statutory schemes sit together by going back to the beginning of the outline. It is submitted that the two schemes, the ERA and the PPPRA can be read together, but there is a rider on that which is the respondent says provided you read section 108B prospectively from the point when a specified person is identified, in other words, a person is specified. I realise that there’s not a lot to go on in terms of the actual language, but –

WINKELMANN CJ:
Can I ask you a question about your paragraphs 1 through 3 of your outline?

MR MARTIN:
Yes.

WINKELMANN CJ:

Is it your position then that you would say that this is the way you apply section 108 generally, it's not just in the employment context, it is subject to *O'Connor v Hart*?

MR MARTIN:

Yes.

WINKELMANN CJ:

Now the statutory history that Mr Butler took us through has *O'Connor v Hart* being decided after the provisions enacted?

MR MARTIN:

Certainly after its predecessors, yes.

WINKELMANN CJ:

And you say that its meaning was altered by *O'Connor v Hart* then?

MR MARTIN:

Sorry?

WINKELMANN CJ:

So I'm just wondering does it mean that interpretation means it's sort of got a perambulatory meaning that common law interpretations in other areas alter the meaning of section 108B?

MR MARTIN:

I would like to just go back to the memo that's been filed in the legislative history, because it is the antecedence to the provision, go and back and some time. So I would just like to check the point that that cuts across, given also the –

WINKELMANN CJ:

Okay, yes. Did you want to get the memo?

MR MARTIN:

Perhaps Ms Dowse can look while I'm sitting here, and if she confirms.

WINKELMANN CJ:

You can come back to it.

MR MARTIN:

Thank you.

WINKELMANN CJ:

Because it is at your point 8.

MR MARTIN:

Yes, although we'd also potentially submit that the rule in *O'Connor v Hart* I think predates that articulation of it, if I can put it that way. I don't know that – *O'Connor v Hart* didn't introduce the rule into the common law, it was an expression in New Zealand of that. But if I may return to the point and perhaps give a more direct answer.

So at paragraph 2 of the outline it is submitted that if section 149 or an agreement under that section is made then it comes first, and it is valid and binding until it is set aside. So I should say if it comes first, because the flip side of our argument is that if section 108B is engaged before a 149 agreement, then the two schemes can still operate together. But in this situation section 149 comes first and the agreement is valid and binding until it is set aside, and there's several reasons it's submitted why that makes sense. There's the presumptive benefit of settlement that is strongly imbued in the ERA. An example of that it is submitted is that section 101(a), that's an object clause around agreements, and 101(a) says resolution is more important than rigid formal procedures, and what you have in section 149 is a specific provision with its own protective mechanisms, and then at 3 in the road map it is submitted that the scheme of the PPPRA and part 9A in particular is genuinely prospective. That is because of the presumption of competence that you see in sections 5 and 24 of the PPPRA, and it is submitted that what

section 108B is doing is enabling people who are known to have incapacity to participate in negotiations. So it is an enabling provision and in that way it is consistent with the CRPD, the convention. It is capacity enhancing, and it also, I say “it also”, it’s not a separate point, they’re connected. It’s capacity enhancing and it reduces risks for other parties. That’s not a separate point because the two link, it is capacity enhancing because it reduces risks for other parties and enables, therefore, people who might not otherwise be other to engage to be able to do so.

At 6 of the outline, it is submitted that the PPPR Act, so where those provisions operate retrospectively, they generally apply after incapacity has been identified. So they’re still forward-looking in that sense, you have in the language of 108B, you still have a specified person, so they operate from that point of time forward, even when they look back earlier they generally provide for relief for those affected without notice, and we have set this out in some more detail in our written submissions at pages 8 to 12.

So I wasn’t going to step you though all of that material. It obviously relates to a range of other provisions in the overall scheme. But one example, so I won't take you to, but it’s section 53, and it’s addressed specifically in the submissions at 20, the written submissions now I’m referring to at 20. So section 53 is the powers of persons subject to property orders and when a person is subject to a property order, enters a property transaction without leave of the Court, so this is where someone has already been made subject to the Act, where they nevertheless, enter into a property transactions without the leave of the Court, that agreement is avoidable by that person, or by their manager. So all of this is reflecting in a sense the operation of the Act after incapacity has been identified, but the person who has entered into a transaction with them can, nevertheless, find that the transaction can be avoidable. But, and it is important to look at subsection (8) of section 53, because that provides relief to the incapacitated person can be denied if the person from whom relief is sought received the property in good faith and has altered their position in reliance such that it would be inequitable to grant relief.

So the point that's being made for present purposes, and it's in the context of the scheme, is simply that again you have actually identified an incapacitated person before the Act is engaged and even when you do reach back into the past, it is in quite a specific way and there is provision for relief for the innocent party, if I can put it that way.

So, as I say, discussed at pages 8 to 12 of the submissions. Returning to the road map, the outline at paragraph 7, bottom of the first page. Section 108B is difficult to apply retrospectively. And I say that in the context of construing the PPPR Act and actually, in terms of construing the statute book as a whole. So, the relationship between the two Acts. Section 108B is difficult to apply retrospectively because it would create uncertainty and there is then practical consequences that flow from that and we spent some time on those at the previous hearing. In summary, the undermining of incentives to settle, incentivising inquiry into capacity, and it is submitted that those things would be contrary to the presumption of capacity.

WINKELMANN J:
Is that not a slightly overstated proposition, however, given that it's quite a high threshold to meet, to show that you lacked capacity? So there is a presumption of capacity. The person who seeks to set aside the settlement would have to show that they lack capacity at the time, which would in itself be a disincentive to settlements being challenged.

MR MARTIN:
And I don't want to overstate it, which is why I think when we come to really almost the last quarter of the outline you've got paragraph 11 where we talk about different ways in which there might be an outcome against what is submitted for by the respondent, but I've set that out in the outline. We'll come to it shortly, because there are different ways in which a decision against the respondent in this court might to some extent – the consequences will be different depending on what route is adopted. So I'm endeavouring not to sort of overstate the consequences. However, it's the uncertainty that is

the difficulty here, the uncertainty about whether or not a settlement will stand, and that is what potentially has the impact on not only people who are incapacitated, but people who may not be but who there may be – yes, another party may decide to question the capacity of. So I'll come to those, because I think it's probably more help for the Court if I stepped through what different graduations of consequences might be, and I'll do that reasonably briefly. But there is, it is submitted, still some significant practical consequences that may well flow from the operation of 108B retrospectively if that was where the Court decided.

We've touched on already, so I'll move through paragraph 8, which is the presumption, and we'll come back to it with your Honour's questions – on your Honour's question, I'll come back to that shortly, which brings us on really to paragraphs 9 to 11 of the outline. The principal submission here is that access to justice through ADR, through mediation, through negotiated agreements depends on the ability to rely on those agreements, and again this is not attributing any fault obviously to people involved, and so we come to the options for relief, which as I've indicated are set out in 11. These are obviously in the employment scheme and there might be different consequences in a different kind of settlement context. But focusing on the scheme in the employment context, looked at specifically three different ways in which 108B, if it were to be applied, obviously contrary to the respondent's position. I said at least three different ways, because obviously there could be permutations in different approaches. But one possibility is that this court could simply say on the basis of the presumption of capacity and the findings in the Employment Court that there is nothing here to displace the presumption. So absent anything else, you would simply confirm in these circumstances the settlement, and perhaps oddly I have inserted into that part of the outline a submission from my friends at 26 where they appear to submit that employees wouldn't need to be worried, would not need to take steps, because in the event that something that they didn't know about emerged, they would be protected by the presumption of capacity, which, just to pick up on something my friend Mr Butler said before the break, it is submitted that the presumption of capacity means more than simply an onus, simply an onus

of proof in this context. It is the ability to be able to rely, a requirement to rely on, you know, a person who is presenting as being capable being so.

WINKELMANN CJ:

It just seems strange that you're taking something from the statutory regime which is intended to be protective of the rights of people with a disability and using it to be undermining of their rights, to not be bound by contracts which they didn't have capacity to enter into.

MR MARTIN:

And I think that first of all it is not the respondent's – two responses to that. First of all, it is not accepted that this approach does undermine the position of incapacitated people because there are still the equitable remedies to balance equities and so –

WINKELMANN J:

It doesn't balance equities though, does it, because they have to prove knowledge so it's their interests are subordinated to the interests of certainty of contract?

MR MARTIN:

We're talking in this situation where you have, that the clear findings around the fair and reasonableness of the settlement, and that is what complicates this point, because you have a fair and reasonable settlement which, you're right, the respondent says that the incapacitated person is bound by. But it would be different if you had a situation, like Dunhill's case, where there was a grossly unfair settlement.

WINKELMANN J:

Why would that be different?

MR MARTIN:

Well, wouldn't – not applying this rule, but because you would potentially be able to access the equitable remedies, again, depending obviously on the

circumstances. But you would get to a point potentially where someone is on notice.

WINKELMANN J:
So, it's notice, yes.

MR MARTIN:
So they're able to use, they can either use *O'Connor v Hart* or they can use one of the other equitable remedies that might be available to them on quite different facts to this case. But accepting what your Honour is asking me, which is on these facts where you have a fair and reasonable settlement, and an incapacitated person, they would nevertheless, be bound, yes.

WINKELMANN J:
Well, you would go further than that though. It's not just fair and reasonable. You would have to show that it was in some way grossly improvident so that in terms of the settlement itself, for putting the people on notice that there was lack of capacity. There would have to be sort of a slightly, no reasonable person would enter into it would have to be the threshold, wouldn't it?

MR MARTIN:
Yes, I'm not sure it needs to be at quite at that very high level, but yes, they do need to be put constructively on notice. So there does need to be something and that could be apparent or in the discussion in the Varney article which you have in the earlier materials, there's a suggestion that it could be arising out of the circumstances. So two different ways of looking at constructive knowledge in the academic literature. But your Honour is right, it is certainly a threshold that has got to be clear enough otherwise you do end up with the consequences that I'm speaking to at this part of the submissions. And it's the second part of my answer to your Honour's question, which is that – so the first part of the answer was, that there are remedies for injustice to an individual.

But the second part of the answer is, that these settings are protective to incapacitated people and people who may have varying levels of functional capacity over time. It is protective of those people for the reasons that are covered in the Convention. It is protective of them because there is an emphasis on supported capacity but people are presumed to be competent to conduct their own affairs. To exercise their legal capacity. And I accept that in answering your question we are stuck between that spectrum of agency from sort of decisional competence at one end and global incapacity. We're in the middle trying to find settings that balance the policy, and it's been described in the Varney article that I mentioned, as, you know, a conflict of policy, but we are trying to balance those different levels of competence, and you see that in the statutory scheme of the PPPR Act. Again, I think it's at section 4, 5 and 6, and repeated at 24 and 25, you see not only the references to the presumption of capacity, buy you also have the reference there that's repeated that imprudence in decision-making is not to be equated with lack of capacity. So, I realise that's different to what we're dealing with here.

WINKELMANN J:
Yes, but the presumption of capacity in the PPPR Act is a presumption as to factual capacity, it's not a presumption as to capacity that doesn't, in fact, exist.

MR MARTIN:
And that is, I think, where there is potentially an overlap between legal capacity and incapacity, functional incapacity. But what is being achieved here with a knowledge requirement is not only a balancing of fairness or equities between parties, there's also the important policy considerations underpinned, it is submitted, by the convention that you don't want a presumption of incapacity, you don't want people's ability to enter into settlements to be questioned on a routine basis, because that is not enabling and it potentially has deleterious consequences, and again not wanting to overstate that, but at the same time in this paragraph 11 of the outline, just trying to describe how that depends to some extent on how far retrospectivity

might extend, because at 11.2, describing the situation again contrary to the respondent's submissions. But if the Court were to decide that the covering of 108B's, if it were to operate retrospectively, if its coverage were limited to money paid and a bar on the bringing of a grievance. So if those things were effectively reversed but the resignation stood, then you would be in a situation where TUV could seek to bring a grievance out of time, she could seek compensation for alleged unreasonable performance management and bullying, and the prejudice in that situation would be still present for the respondent, but it would be confined to delay, stale evidence.

WINKELMANN CJ:
So, just to be clear, this one turns on you on section 108B having an effect only on that part of the claim which relates to the claim for money and damages, and so anything to do with – can you just explain this part?

MR MARTIN:
Yes, and you're right, it does go into money and damages, so I'll touch on that now. But, to be clear, the money and damages point, it's not as crass as to be saying this can't be money and damages, it's an employment relationship problem. There will be components here that are obviously money if you take that view and if you take the view that therefore everything bound up in a settlement is part of a claim for money and damages. That's not really what I'm taking issue with.

There is though I think an important point about to what extent 108B might be engaged, given that the definition predicate in the section is a claim for money and damages. Here, to take the specific example, what you have is under the broad encompassing umbrella of an employment relationship problem, which this Court has obviously considered recently in the FMV case, you have in the centre, I would submit, money and damages, potentially. [redacted] So there's compensatory payment in terms of section 123(1)(c) of the Employment Relations Act, so in that sense nothing linking back to the original grievance at the time. So the original grievance of course didn't relate to any loss of income, because it became before the end of the employment. So

there isn't actually any direct link in there. [redacted] But it is submitted that there is then a broader outside circle which the Court may or may not regard as part of that overall claim for money and damages or engaged by it, and that has quite significant things in it. So they're still part of the employment relationship problem, but I am questioning whether or not they are a part of a claim for money and damages.

GLAZEBROOK J:
Can you explain what the outer circle is? Is that the resignation?

MR MARTIN:
Exactly, yes.

GLAZEBROOK J:
All right, that's fine. I just wondered if it was something more.

WINKELMANN CJ:
Well can you put it into words for me? Justice Glazebrook may understand you, but I don't.

MR MARTIN:
No, I will, and it would be easier if I wasn't trying to draw with my hands and perhaps had a whiteboard, but the smaller circle in the middle is the things I've talked about [redacted]. Then in the outer circle there are the things like the resignation [redacted] and there is, it is submitted, the resolution of the employment relationship problem itself. So there is that broader –

GLAZEBROOK J:
What about the human rights issues that are the fourth point that the Human Rights Commission was making? And the tikanga issues, where do you see them sitting, I'm just, are they part of the outer circle as well?

MR MARTIN:

I think they would be in this broader, they would be in the outside – I'm pausing only because there's a question around how much of it can be encompassed in the employment relationship problem and whether it's in time, but putting all that to one side, to answer I think the question you're asking me, those sorts of concerns, I would put in the outer circle.

WINKELMANN CJ:

It's seems an extraordinary argument to be making, really, because this would apply whether the claim is, whether there were in a retrospective or a prospective area, isn't it, so you would be…

MR MARTIN:

But it just, the purpose for which the submission is made, I think, is important. So it is going to this question of how, if you were going to –

WINKELMANN CJ:

I suppose, just to finish my point, it seems an overly technical reading of the provision is my point.

MR MARTIN:

But your Honour, bear in mind I'm not encouraging this reading of the provision on you, because the respondent's submission is that it does not have the retrospective effect, so these sort of problems would not arise. What I'm illustrating here is there are questions that immediately arise once you start to look back. For a start you need to define what is encompassed by money and damages claim, and you may say it's all of those things, but the broader it goes, and this is really the point that's being made at 11 with the different scenarios, the broader it goes, the more that the other party has at risk, and so specifically at 11.3 that is the broad encompassing approach. If the Court were to say, look, it's all ultimately attached to a claim for money and damages, we're not going to unpack it, we're not going to sort of do that, that's impractical, I would say, it's not intended to look backwards at all but if you're going there you may say it's all encompassed but that does, and

coming back to your Honour's question to me earlier, about whether I'm overstating the issue, on this scenario it is quite a significant issue because potentially we are now coming up six years after the settlement was entered into. If the Court does not clearly make repayment a condition of setting aside any resettlement, and if the resignation does not remain effective, then there are financial and practical consequences that are, it is submitted, more significant, much more significant really, than in 11.1 and 11.2.

GLAZEBROOK J:
Why wouldn't you make repayment a condition unless – obviously unless the settlement was validated, but if you did set it aside, where would – would you ever get to 11.3?

MR MARTIN:
Only if you took a very broad and, in my submission, unworkable view.

GLAZEBROOK J:
But if something is void then people usually pay back whatever happens under the void settlement, don't they?

MR MARTIN:
That's, and to be fair there is the indication that, in respect, for them but there is the indication from the appellant that that is what would happen. But what these submissions are directed at is how any outcome here might set the law, and how that might apply in other cases, and you may recall from the original hearing, and I'm going off memory now, but I think it was something like 8,000 references through mediation services a year, and things like that. There's a lot of volume, as you'd expect, in this jurisdiction, and even if only a percentage of it, and I'm trying to take care not to overstate the point, but even if it's only a percentage of that volume, then that is nevertheless a significant change to current settings.

WINKELMANN CJ:

I mean none of these three outcomes are likely in this court, are they? We're not being asked to approve the settlement and if we found that you were right that *O'Connor v Hart* is to be read into section 108, then we wouldn't be finding that the – I suppose we might be in terms of the current response but it's just, it doesn't seem to me to track very likely what we're going to be doing, because we're not dealing with the validity, or otherwise, of the settlement under section 108B because neither party asked us to do that.

MR MARTIN:

So the respondent has invited, if the Court gets to this point, has invited it to consider whether it simply says on the basis of the Employment Court's findings and the presumption of capacity, if you like, there is only one option but to approve, rather than sending it back. But that's not really something I need to detain us onover. But it is something that you've been invited to consider and –

WINKELMANN CJ:

So you're asking us to treat it as an informal application for validation?

MR MARTIN:

Yes, it's one option. If you were to accept the submission that because of the presumption of capacity, if properly construed the section does look backwards, then in these circumstances, given the findings in the courts below, that's a fair and reasonable settlement and because of the presumption of capacity, that is an option, is one option.

But to pick up on your other point, I'm just reflecting, I'm not sure it's the respondent's submission that you're reading *O'Connor v Hart* into the statutory provision. The submission is that the schemes, looking at the statute book as a whole, the scheme's here can be read together if 108B is read as, and we've pointed to the part, and they can be read together if 108B is read prospectively only. So that it takes *O'Connor v Hart* out of the equation. It doesn't read it into the statutory provision, is you see what I mean, because

on the respondent's submission the provision only operates from the point where you have a specified person identified. So if, to turn the facts around, if the person had been identified and the parties went and sought – if they had identified a specified person and then they went ahead anyway, then there would be the possibility of it being set aside under *O'Connor v Hart*. But in these circumstances, it is submitted it isn't engaged by the provision.

WINKELMANN J:
So it involves us reading in the words "settlement entered into" after it has been identified that the person is a specified person?

MR MARTIN:
It's submitted that that is the reading that's already there. A specified person, it is submitted, is someone who's lacking capacity. I'll go to the provision, rather than speaking from memory, but the –

WINKELMANN J:
Well, it doesn't say a person who's been determined to have that lack.

MR MARTIN:
No, it doesn't say that. So, specified person means a person who is incapable of managing his own affairs and I accept that there's some ambiguity there. But –

WINKELMANN J:
Where's the ambiguity?

MR MARTIN:
What is submitted for the respondent is that that should be read as meaning a person who has been specified as being, or identified as being, incapable in that way. And that is consistent with the broad scheme of the Act, the presumption of competence in particular that we've also talked about there is where the Act does look specifically back. But it's also consistent with the part.

WINKELMANN J:

So, can I just ask you, so would you say, determined under the PPPR Act as being, would you say, is it like a court designation or the parties? I mean, what would you read in there?

MR MARTIN:

The respondent is simply saying, it is after a person who has been identified as being incapable. So there would need to be, in these circumstances, on these facts, the parties would need to know. It could be constructive knowledge. So in that sense it may mirror *O'Connor v Hart* but it's not a case of reading *O'Connor v Hart*, it is submitted, into the statutory scheme. It is a case of looking at the section in its place in that Act. Including in the part, as I say, where much of the part is concerned with what happens to money and damages that are subject to it.

GLAZEBROOK J:

I apprehend that a lot of your paragraph 11 is actually saying, is an argument really for non-retrospectivity because of the real issues that arise in circumstances where something might be six years after the event and matters have moved on to a degree that really would make it quite impractical. And also probably related also, I assumed your submission that people are going to be very reluctant to enter into settlement agreements where there's any question of incapacity and require the sort of thing that happened in *FMV* effectively where everything is stalled totally and the person's grievance can't be worked through which I think everybody in that case expressed some dissatisfaction with.

MR MARTIN:

I mean, yes, it is illustrating the consequences or the problems, but it was also hoping to not remain at a level of abstraction to simply say so that it becomes a floodgates argument. It's to avoid that but to try and say, look, there are different ways that you could back but they're all problematic and there will obviously be consequences for the jurisdiction in terms of advisors looking at this and saying, okay, what do we now advise? Which, if I can just touch on it

briefly, does potentially have implications, practical implications in terms of the argument around court or authority, that point. The respondent has shifted position on it. There are pointers each way, and what I understand the appellant to be saying is that for the purposes of 108B the authority could be a court but that this case should be referred back to the Employment Court. To come back to your Honour's question, if there were to be a volume of requests under 108B, just by parties saying we want to be sure, this is a case about stress, it's a case about bullying, we want to be sure, you know, that this is going to be a settlement before we pay the money and so we don't find ourselves two years from now with you saying actually you should be still employed. We don't want to be in that position, so just to make sure, we're going to get it signed off under 149 and we're going to seek judicial approval, and if that is a judge, then that is one option. The authority would be more practical.

GLAZEBROOK J:
Could you think of judicial approval though without having a finding of incapacity?

MR MARTIN:
What you would do is you'd have to seek essentially the confirmation that the section didn't apply, essentially. So one way or another, you'd be testing the capacity. So you'd either get –

GLAZEBROOK J:
But somebody would be required to undergo a capacity test, because the Court can't say you don't have to have it or I approve it without knowing about capacity. Because otherwise 149 is final.

MR MARTIN:
It becomes difficult logistically, yes it does, and I mean those are the sort of real problems that people would have to engage with if the section were retrospective because they would be faced then with – they would otherwise be faced with not knowing where they stood, and so as an advisor I don't think

it would be appropriate for people to be giving thought to this. Not in every case, but in cases where you would have some basis to wonder about whether capacity might become an issue at some stage.

WINKELMANN CJ:
And perhaps they should.

MR MARTIN:
Well, and your Honour raised that with me last time, but that is what section 149 is directed at really.

WINKELMANN CJ:
And it's not really, is it? It's directed at the inequality of bargaining power of the parties. Mediators aren't an expert on capacity, especially mediators on the phone.

ARNOLD J:
Well if you look at 149, the critical thing about 149 is that you have to explain to the parties that this is a full and final settlement, this is the end of it, that's the key point, and it seems to me that does go to capacity. It's not really a matter of inequality of bargaining power so much, although it obviously it does provide something of a safeguard against inequality because the parties need to know this is the end of it, particularly the employee, which does bring me on to this section 152(2). What's the Crown position on that?

MR MARTIN:
Yes.

ARNOLD J:
Could a party, say well the mediator says he explained it to me. I understood nothing of it at all because of these capacity issues and therefore there was non-compliance with 149.

MR MARTIN:

Yes so it's, I mean it's, the submission is that you, because section 149 covers off, it means that the mediator can't really be giving evidence about this. What you're left with is a submission that section 152 does not allow a challenge to the quality of the agreement including, I guess, the quality of the understanding I suppose is the, my immediate reaction to that. So people could argue that the mediator couldn't possibly have been satisfied. It could be a gross unfairness situation where no mediator could have been satisfied that a person would've entered into this, but it would need very clear evidence of that incapacity, it is submitted, so it's not a –

ARNOLD J:

Doesn't that make the mediator's role very formal, formalistic? I thought the point of these processes was to get to the substance, and if an employee by reason of lack of capacity at a particular time, perhaps lack of (inaudible 13:01:32) sophistication, doesn't fully grasp the implications of the settlement agreement in terms of finality, wouldn't you expect a mediator to turn his or her mind to that and seek to explore it?

MR MARTIN:

I mean obviously on the respondent's argument the mediator is part of the protective mechanism here, so in one sense your question is going my way, but from a scheme point of view we come back to the presumptive benefit of settlement and finality. So the avenue through 152 to question capacity in that way is not necessarily, it is submitted, contemplated in that way.

ARNOLD J:

So even where the mediator didn't do the job properly in terms of this particular employee who didn't understand because of lack of capacity, there's no route through 152?

MR MARTIN:

Well if they abdicated their job, so that is what is submitted as directed at, at least principally, as a situation where the mediator abdicated their job, didn't ask the question, didn't have the conversation –

ARNOLD J:

So it's formalistic, basically?

MR MARTIN:

Well, no, I mean if someone came along and said, there is no way this mediator could have thought in this situation that I was agreeing to this, or I was consenting to this. So it's more than formalistic but it isn't as fine-grained as going into the quality of the person's understanding at the time, and it, I suppose, isn't, it is submitted, a gateway to reopening that.

ARNOLD J:

Okay. Thank you.

WINKELMANN CJ:

Mr Martin, how much longer do you think you need?

MR MARTIN:

From my point of view, subject to your Honour's questions, I think I have concluded what I needed to cover. I did have one question, your Honour's question, if I may if I talk to Ms Dowse it might be the quickest route. I think there is two things. Your Honour is right. Literally in terms of how the statute book evolved, the provision, 108B came before *O'Connor v Hart*, I think it's '70s and '80s respectively, and but what I said remains that *O'Connor v Hart* is not the first articulation in the common law of the rule.

WINKELMANN CJ:

But not in relation to settlements?

MR MARTIN:

So *O'Connor v Hart* isn't applied in that way either. So I mean it's the broader rule. Yes. I'm not sure we've got much more to go on.

WINKELMANN CJ:

No.

GLAZEBROOK J:

I think we did go into the history before of the rule, didn't we, in terms of it not being created by *O'Connor v Hart*, I seem to remember in the last…

MR MARTIN:

Yes, I mean, if it was helpful we could try –

WINKELMANN J:

No, it's all right.

MR MARTIN:

Obviously in the UK before, with the *Imperial Loan* and so on, there are antecedents along the way. I think we would push it well back before 1970.

WINKELMANN J:

And going both ways in my recollection, but yes, you're right.

MR MARTIN:

Even in New Zealand with *Archer* of course.

WINKELMANN J:

Yes, exactly.

MR MARTIN:

Yes, there's been an evolution so – but I think –

WINKELMANN J:

Too much can't be made of it.

MR MARTIN:

I think that's where I would leave it for the respondent.

ARNOLD J:

I'll just ask a quick point of detail, the insurance policy, the income protection policy, that was a policy that NZDF had, is that right?

MR MARTIN:

They had some involvement. I didn't, if I may, I'll take instructions on that very quick. Yes, it was, it was operated by them.

ARNOLD J:

And NZDF facilitated the appellant's claim under the policy which was done around the same time?

MR MARTIN:

Yes.

ARNOLD J:

Was that part of the settlement or not?

MR MARTIN:

It wasn't directly referenced but it covered a period to two years which, as I recall, went back, began before the settlement. Okay, it's not clear. But it was a two year period. It is separate from but was known to the parties at the time.

ARNOLD J:

Right. Thank you.

WINKELMANN J:

Thank you, Mr Martin.

MR MARTIN:

Thank you, your Honour.

WINKELMANN J:
So, did the appellant wish to make any reply and if so, are you happy to do that before we take the lunch break? It seems sensible just to finish now. Are you handling reply, Mr Butler?

MR BUTLER:
So, just coming to the first interaction that my friend had with the Bench in relation to his attempt to distinguish the UK version of the compromise rule, and their rules from our rules, of course, from our perspective, and I think we did cover this, that's why I just want to touch on it and I'm not going to go into in detail, is the important point from our perspective is in terms of the High Court rule, rule 4.34, makes reference to "a step". And I just repeat the submission that we'd made earlier, which is articulated again in *Dunhill v Burgin*, which is the world of a difference we say between a step, an interlocutory application or something of that sort which might have been made, which can be assessed on a backwards-looking basis by reference to fairness, and the settling of the proceeding itself. So we agree, in other words, with the way in which the point is articulated in *Dunhill v Burgin* in that regard.

The next point I wanted to make is one which actually came through, I just was making notes, but it came through in an interaction that my friend had with your Honour, the Chief Justice, about a specified person. We say that when you look at the scheme, its status as a specified person that counts. As your Honour pointed out to my friend, and he accepted, the relevant section does not refer to "it has been determined that a person is a specified person", either they are or they are not. That will, of course, come as about either as a result of a judicial determination or the agreement between the parties, which may well happen. But it's the fact that you're a specified person which engages Part 9A. And I repeat, knowledge of that is not required. My friend –

O'REGAN J:

So are you saying that in a case like this an employer could apply to the court saying, I don't know whether this person's a specified person or not, not because I'm worried about it. I want you to approve this under section 108C.

MR BUTLER:

That is something that might arise, Sir. And so, again, my friend talks about practical consequences and so on, so I must accept that that is something that might arise in a particular case, which I suspect is part of the concern that her Honour, Justice Glazebrook, was articulating earlier in the conversations that we've had. The point that I'm making on behalf of TUV is either way you look at it, there are going to be things that will make you think, oh well, which way should I go because there's going to be some downsides associated with it. But what I say, and I repeat what I said to your Honour, I think it was when we had our first hearing, which is I say that in the real world, when you're the advisor of the sort that Mr Martin made reference to, where you have no knowledge and no flags, no reason, for example, to be concerned about section 152, which I do want to come back to if I may in a moment, then the advice you're going to give is let's proceed with the settlement. That is the advice that you're going to give because actually everybody moves to move on, and the point I made to you last time as well is and if the settlement is very fair and reasonable, as you would like to think it should be, because everybody is acting in good faith, and by fair and reasonable I'm not talking in the very narrow sense in which that phrase was used with respect by the Court at paragraph 73.

Remember, fair and reasonable was used by her Honour the Chief Judge, having just said it was unremarkable. Unremarkable in my submission is something quite different from the sorts of concerns that my friend Ms Douglass has touched on, is when you have the full understanding of the employment and relations problem, then you can see in fact the fact that a whole set of issues weren't dealt with mana not being dealt with through the settlement agreement. You might say I'm not sure that this actually is fair and reasonable. Let's just park that for the moment. The point I'm making is you

will go and make a settlement agreement because in the real world that's the practical answer that will operate.

O'REGAN J:
Well not if you're liable to have it reopened six years later.

BUTLER J:
So the point is then that will the length of time that has gone under the breach is a factor that you will take into account, and again it was interesting my friend reference to section 53(8) of the PPPRA. Have a look at that section when you break, your Honours. He relied on that, so that helps me.

WINKELMANN CJ:
What section?

BUTLER J:
Section 53(8) of the PPPRA. So that's the one where an order has been made and you've got a property manager installed, and yet the person, the protected person goes and makes various, into various contract, transactions. What's interesting in relation to subsection (8) is there's no blanket of protection for a third party who deals with the protected person in that situation. You can't be sure. Now you can come up with a series of facts which might be equivalent to the –

O'REGAN J:
Well except there you know they're a protected person.

BUTLER J:
Well you may not know that they're a protected person.

O'REGAN J:
Because you're dealing with their agent.

BUTLER J:

No, not necessarily. On the way in which the provision is written, it's not that you're necessarily dealing with her agent at all in that situation. What you're dealing with is you've been dealing with them. In any event the point I'm trying to make in that regard is that the relevant criteria, and this is not an absolute rule, first of all you've got to show you were dealing with them in good faith, which means you've no basis to know. You must show that, but even if you can show that, because that you would need to get over the –

O'REGAN J:

You're making a case for approval, aren't you? Which is not what your client wants. You're saying because there's such a long time gone and a settlement that looked completely anodyne, it should be approved and the employer shouldn't feel at risk of having it reopened six years later.

BUTLER J:

No, with respect, I'm not saying that, with respect, Sir. I'm saying that is possible, that is something that they can raise. So they can raise, as they have suggested in their written submissions, well we don't have any witnesses left any more. All water has gone under the bridge in certain respects that just make it unrealistic to reopen the settlement agreement. I can't deny that. I'm accepting that that is the case, but I'm not saying that because that is a possibility that that therefore means my interpretation is wrong. It's not. I'm just accepting that the discretion conferred by section 108C is very broad, it's open-ended and it will be responsive to the individual factors that emerge in respect of a particular case, and of course here it's not six years, with respect, and is now today six years. But of course this issue was raised approximately two years after the settlement agreement had been entered into and a point at which our client had healed. The only reason it's four years on is because of the preliminaries we've had. It's unfortunate, but it's just how it is. We would like to think that won't be the case in future cases once the law has been determined by the Court.

My friend talked about the circle. I just think that's probably just worth touching on very briefly because he was trying to raise the circle of remedies as being a reason why you shouldn't interpret it retrospectively. But if he's right then his analysis will apply prospectively just as much to retrospectively. Example, you enter into a settlement agreement on a prospective basis, subject to court approval because the person is incapacitated. In the employment jurisdiction one of the matters that might arise that might beat you in your settlement agreement is resignation or the settlement of a racial or sexual claim. So, with respect, I don't think that the picture he was painting on his imaginary whiteboard assists here at all. The reality is, I think he's right to say he's accepted, but so long as there an element of money or damages that's there that could be, is part of the claim –

GLAZEBROOK J:
I think the point that he was making was rather if it was retrospective all of the settlement of those wider claims could be brought into question as well as the money claim. And if that happens along time afterwards, that creates more difficulty. If it's prospective, somebody either resigns or they don't and that's taken account of in the settlement. I think that was the only point that was being made.

MR BUTLER:
All right, so he's confining it in that way, then I hear what he says and my answer to that is the one I've made earlier which is, that's part and parcel of the section 103C assessment that can be made.

And there was reference to the difficulties thrown up by the case of *FMV*. When I read the decision, when I read this it looks like people haven't been acting pretty proactively here to try to actually find a way through for this individual. So I don't think you should take the facts of *FMV* and the scenario that was thrown up to this Court as representative of what will happen on the go through – this Court was presented with the situation where things had stalled in the way in which they had. What I say is that on a going forward basis, we're all going to have a much better understanding of how matters like

this can be dealt with. Mitigation guardians in an appropriate case, just as was done in the family caregiver's case, your Honours are aware of that, aren't you? The case where the challenge was made. If we get ourselves back to *Atkinson* and all of that, remember the Government's response to *Atkinson*, was to make the disabled, the intellectually disabled person the employer. Now that might work for some people who have got an intellectual disability, but for a lot of people with intellectual disability, that isn't going to work. And so the question was, a number of those "employers" and their employees, otherwise known as their parents, wished to challenge the status or resolve the status that applied there. Are they an employer/employee relationship or is there some other relationship that's in place? And, of course, one of the issues that got raised was, right, well if this challenge or issue is going to be raised, who can bring it? And sort of thing he Employment Court in that case, so far as we could tell from reading the judgment, it wasn't one that had typically arisen, but the way it was resolved was by having the matter sent to the Employment Court, where the Employment Court drawing on the High Court rules said: "Right, well, we're going to appoint a litigation guardian to make sure that the matters can be represented." So all I'm trying to say is, you know, these huge mountains or insurmountable obstacles, of course they can be surmounted. It's just that, in this context, we're probably just not used to thinking about them in that way.

Your Honour raised section 152, and I did want to come back to that and I apologise, Sir, I didn't address it after the break. That was bad, I should've come back in relation to that. But it does seem to me that goes some way at least to bringing into question the reliance and certainty that my friend claims. He claims that the really important public policy principle you should have regard to here is certainty. But I say section 152 shows that even in respect of something like a section 149 agreement, which is according to one part of one section not to be questioned, in fact, is open to challenge. So that the certainty you're looking for, it can never be guaranteed. What you try to do is put processes in place that will enhance the certainty of it, but also allowing for countervailing considerations of individual justice where the outcome is not right.

We say that that is the case here. Yes, we accept, we have to acknowledge, that in the Employment Court her Honour referred to the settlement agreement that was entered into here as being unremarkable. But we have explained to you in the material why, notwithstanding the label "unremarkable" why it is that it is right and proper for TUV to be able to bring her personal grievance before the Employment Court and to be able to do so notwithstanding the terms of the section 149 settlement agreement. As indicated previously, and is repeated in our written submissions, if that means that some adjustment needs to be made in terms of repayment of money, or whatever it may be, that is a matter that the parties will be able to address. Your Honour's point about failure of –

GLAZEBROOK J:
I think she's out of time. What if she's out of time?

MR BUTLER:
That's a matter that will need to be dealt with in the usual way under the processes provided for under the Act, we say. I'll just check with my learned friend. That is everything, your Honours. Thank you so much for your time and attention.

WINKELMANN J:
Thank you, now Mr Hancock, I didn't check, do you have anything in reply?

MR HANCOCK:
Nothing further in reply from me, your Honour.

WINKELMANN J:
Thank you, counsel for coming back for this further hearing. We've been very assisted by your submissions and we'll now take hopefully not a great deal of time to consider and let you have the decision.

COURT ADJOURNS: 1.21 PM