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IN THE SUPREME COURT OF NEW ZEALAND SC 8/2022

I TE KŌTI MANA NUI O AOTEAROA [2022] NZSC Trans 18

BETWEEN **TODD WILLIAM FRANK SUTTON**

First Appellant

TODD WILLIAM FRANK SUTTON

and HOFFMAN TRUSTEES LIMITED

as trustees of the Todd Sutton Trust

Second Appellant

AND **JOANNA ELISIA BELL**

Respondent

Hearing: 02 August 2022

Court:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Kós J
Counsel:	J R Billington QC, L J Kearns QC, Z L Wackenier and H P Short for the Appellants V A Crawshaw QC, S M Wilson and J M Gandy for the Respondent

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CIVIL APPEAL

MR BILLINGTON QC:

Tēnā koutou e ngā Kaiwhakawā. Ko Billington tōku ingoa. Ko ahau te rōia mō te kaīpira mātou ko ōku hoa Ms Kearns, Ms Wackenier, Ms Short. If the Court pleases, I appear for the appellant with Ms Kearns, Ms Wackenier and Ms Short.

WINKELMANN CJ:

Tēnā koutou.

MS CRAWSHAW QC:

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Crawshaw ahau. Kei kōnei mātou ko Ms Wilson, ko Mr Gandy, mō te kaiwhakahē Ms Bell.

WINKELMANN CJ:

Tēnā koutou. Mr Billington?

MR BILLINGTON QC:

Do your Honours mind if I remove my mask?

WINKELMANN CJ:

Go ahead.

MR BILLINGTON QC:

Thank you. If the Court pleases. The written submissions, as you will be aware, dealt with the legislative history of sections 44 and 21. Section 2D insofar as it defines a de facto relationship, an issue regarding the New Zealand Bill of Rights Act 1990 and retrospective legislation. The intention to defeat under section 44 and the issue of the children's role in this matter under section 26 of the Act. They are discrete. I don't wish to speak to them further. The scheme of the oral argument will be as follows, subject to the Court's direction. I will deal briefly with section 26 and the issues that arise under that, but that argument will be presented by Ms Kearns, and then I want to deal with the essential points on this appeal, insofar as it relates to section 44. The issues, as the Court will know, is the first and substantive issue is this. Can a disposition entered into prior to a marriage, civil union or de facto relationship be set aside under section 44, and I describe that, as have the Courts below, as a jurisdictional issue. The second issue goes to the interpretation, particularly of section 44(1) and is evidential, and it perhaps works this way, that is the disposer is not aware of any legislative restraint under the PRA then can they, in fact, have the requisite intent to make a disposition in order to defeat an interest under the Act if there is such an interest. Now the counterfactual to that is in fact the current state of the law as has been enunciated by the Court of Appeal, and that is if one has knowledge of the consequences of the transaction, then that, described in a shorthand way by the Courts below, is sufficient to satisfy the statutory test of intention. So the question arises here, if one doesn't have that knowledge, what does one do with section 44(1). The Court might think that indicates that there needs to be some direction from this Court as to the interpretation of this section as opposed to that which was interpreted in *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

The third point is this. That if the appellant Mr Sutton was not aware of the consequences of what he was doing in the sense that they breached a

legislative restraint, does that impact on the issue of good faith when the Court comes to consider the exercise of discretion under sections 44(2) and 44(3). There were two recipients in this case. They were the trustees of the Trust. One was Mr Sherer, the lawyer, in respect of whom the issue of good faith couldn't be raised because he advised the settlement on the Trust against the backdrop, as he understood it, that Ms Bell was Mr Sutton's girlfriend, no more or less than that, without wanting to understate the significance of an exclusive relationship. On the other hand Mr Sutton acted on the advice of Mr Bell *[sic]*. Hie evidence was he did not consider he was infringing the statutory prohibitions, if they exist, and the issue of his good faith they think requires examination in that regard more than the examination afforded it by the Courts below, and particularly the Court of Appeal. It's a conjunctive issue as well because there needs to be good faith and adequate consideration. That issue of consideration is met by the fact that there was a valuation provided at the time, contemporaneous. There was a significant debt, the house was worth 550, the debt was around 400, and then there was an acknowledgement of debt back. The Court of Appeal in the case of *Mills v Dowdall* (10:07:45) decided in 1986 was that the gift back programme did not amount to a gift. So issues arise around that and the question is really should they have been given more consideration than were given in what is the tail end of the Court of Appeal judgment.

WINKELMANN CJ:

So what's your timing, Mr Billington, what's your plan to execute?

MR BILLINGTON QC:

My plan to execute is to identify two further issues.

WINKELMANN CJ:

Sorry.

MR BILLINGTON QC:

Sorry, you want to know how long I'm going to be?

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

Have I gone too long now.

WINKELMANN CJ:

No, carry on through your issues, we just want to get an idea of the day.

MR BILLINGTON QC:

I don't have an idea of the time, because a lot of it depends on what you have to say, but if I speak quickly, which I will, the next issue is one that I flagged in the submissions, and that is the retrospective effect of the Court's judgment here, and that is the conduct of what's not contravening the law as far as one might think was the case in September 2004. Retrospectively on the formation of the subsequent relationship was affected by the Act then. The last issue I mentioned yesterday because I have continued to think about this matter because it's not quite as straightforward as it seems, and that is looking at de facto relationships generally and where they fit into the legislative rubric. One of the matters that I considered, and I'm going to mention this very briefly, is that section 182 of the Family Proceedings Act 1980, which is separate legislation, but it does cover the issue of civil unions and married couples, but it does not cover de facto couples, that is in relation to post-nuptial or pre-nuptial settlements. I actually continued working this morning and I have been saying to my colleagues that the Act is a code and it governs the rights of couples in those relationships. I thought I better look at the Act to make sure I was correct in that, and in fact interestingly section 4 of the Act does state that it is a code –

GLAZEBROOK J:

Which Act?

1010

MR BILLINGTON QC:

The Property (Relationships) Act 1976. Section 4 says the Act is a code and it applies to "transactions between spouses or partners in respect of property" and also "transactions between both spouses or partners and third parties." It does not apply to certain presumptions under subsection (3) but interestingly subsection (5): "This section does not apply if the de facto partners have lived in a de facto relationship for less than 3 years." Now I'm not quite sure what that means except what it does do, as in fact section 182 does, it leaves out de facto relationships from civil unions and marriages. So once that bright line is crossed, and the bright line is something I emphasise here, with a marriage or a civil union then an Act is an exhaustive code, one of the issues with this appeal, which I will touch on in discussing the evidence, is determining when the Act has effect outside the qualifying relationship and the blurred lines that exist, and the carveout of section 4 of subsection (5) rather indicates the legislature was aware of these difficulties during the period of short duration, that is the three year period, for de facto couples.

Now the next point, and this is where I now want to move to a discussion of the, some evidence which is rather brief, and an analysis of the two judgments in the two courts below, because when one analyses those decisions it rather indicates the flaws, and I'm sure the Court has read those judgments, but as one goes through them there are passages that come out that indicate there are flaws in them. Now before I do that there's a rather interesting symmetry here, historically, and the Matrimonial Proceedings Act was enacted in 1963, which entitled spouses to claim a share in property on certain conditions. We didn't reach the equal sharing regime until 23 years later. The debate that that Act engendered, and the milestone that it became in our social fabric, was enormous, but it didn't happen easily or lightly. A further 24 years passed before de facto couples were recognised as having equivalent standing, as did civil union partners and those who were married. A further 21 years has passed and arguably the decision of the High Court in this case, without any public input, has created a form of relationship that's not recognised in this statute in any unequivocal terms, or discernible terms in my submission, and that is a party on the cusp of a qualifying relationship in contemplation of it and attaching

legal significance to that. Now the question arises whether there is, in fact, a new form of relationship that creates legal obligations, and if one interprets the decision of the Court below, as it's meant to be interpreted, then yes it does create a new form of relationship without any of the debate that accompanied the introduction into law through the legislature, as opposed to the Courts of the 1976 and 2000 Acts.

The Acts have continued to engender discussion and debate, and I want to start this part of the submission by referring to the place of trusts. In the respondent's bundle at tab 4 there's a Law Commission paper from 2019, chapter 11, and I'll take you to that. Because we are, as the Judges in the Court below, here dealing with matters that effect the daily lives of a vast number of New Zealand citizens. Now does the Court have that? Could you bring up the respondent's bundle tab 44 please. This is chapter 11 from the comprehensive review undertaken by the Law Commission in 2019. This chapter deals specifically with trusts. If one goes to 11.19.

KÓS J:

I think that's the wrong authority. That's the children's interest chapter you've just taken us too. It's chapter 12.

MR BILLINGTON QC:

It's been hyperlinked incorrectly.

WINKELMANN CJ:

What's the correct hyperlink? Is this another number of your topics, or are we actually into the substance of your submissions now?

MR BILLINGTON QC:

Do you want me to run through the list of topics, because what I'm going to do is this, and I'll do it right now. I'm going to deal with this paper, which talks about trusts. I'm going to talk about the judgment of the High Court and sections in terms of jurisdiction and factual findings that are relevant. I'm going to deal with the Court of Appeal judgment on the same basis, put the two together and come

to a conclusion. Personally I think that maybe helpful to you because I don't simply want to repeat what has been said about the history of the sections and how they work.

WINKELMANN CJ:

All right.

MR BILLINGTON QC:

Because I think the reasoning here, I could put this case really simply, there's not qualifying relationship, therefore the Act doesn't apply, but it deserves far more attention than that and it's the reasoning that underpins it that really does require some consideration in my respectful submission.

WINKELMANN CJ:

I'm just wondering how, all the headings you've told us you're going to go through, how that relates to where you're about to start now, or is it a new heading?

MR BILLINGTON QC:

This is a new heading. I just want to talk briefly about, again, the social issue of trusts.

WINKELMANN CJ:

All right, got it. So it's the notion of the High Court decision having created a new relationship without public input.

MR BILLINGTON QC:

Yes, that's correct.

ELLEN FRANCE J:

So have we got the right…

GLAZEBROOK J:

I mean I'd be interested to know what you say is the new relationship, because the relationship is actually the marriage or the de facto relationship, and the effect of the decisions below is when it's in contemplation of that.

MR BILLINGTON QC:

That's correct.

GLAZEBROOK J:

So it's not a new relationship is it?

MR BILLINGTON QC:

It's a new relationship and it creates defined obligations that are not legislated for.

GLAZEBROOK J:

Well the obligations are still related to the de facto relationship or the marriage, aren't they?

MR BILLINGTON QC:

When it comes into force.

GLAZEBROOK J:

Yes.

MR BILLINGTON QC:

Sorry, when it comes into effect, yes, that is right.

GLAZEBROOK J:

So it's really, the submission is rather that it's against the scheme of the Act to have those obligations come into force before the qualifying relationship, is that more –

MR BILLINGTON QC:

That is absolutely right your Honour.

GLAZEBROOK J:
Okay, thank you.

WINKELMANN CJ:
So we have the right thing?

MR BILLINGTON QC:
Yes we do. If you go to page 273, 11.19, I was speaking about public discussion and input, and this document reflects it, and it's in the context of trusts. It speaks to the ability of a partner unilaterally affecting division of property by settling on a trust, which would, and that property would otherwise form part of the relationship property pool.

It then notes that the contracting out procedure under section 19, which figures significantly in this case, "requires compliance with a procedure" designed to ensure there is informed consent and no compromise of rights. At least in the opinion of the Law Commission, to pick up the point you made a moment ago Justice Glazebrook: "There is no comparable procedure to govern how the partners settle property on trust during or in contemplation of a relationship."

Now whether that's right or wrong, it's wrong in terms of the Court of Appeal judgment.

GLAZEBROOK J:
So where do you…

MR BILLINGTON QC:
That's the last line in paragraph 11.19. Then the other discussions to which I wish to take you record the views of persons who had, or in fact I'll step back sorry. 11.22. "Section 44 of the Act rarely applies because it is difficult to show the required subjective intention, namely, that a partner disposed of property in order to defeat the other partner's rights under the PRA." That's at least the view of the Law Commission. It is writ large in this case, but probably more so in others than this.

1020

Then we go to 11.43. I suggest insofar as these views reflect some public opinion, they are not controversial: "Submitters were generally in agreement that, if the property held on trust represented the fruits of the relationship (that is, if it was acquired through the efforts of either partner during the relationship), the trust property ought to be subject to the PRA and divided at the end of the relationship. However, submitters were less sympathetic where the partners had knowingly settled property on trust for the purpose of benefiting others."

Then 11.45 (b): "Trusts settled before the relationship. In this category are trusts settled by one partner well before the relationship began perhaps for the benefit of their children from a previous relationship and to protect important assets, such as the family home from future claims under the PRA."

WINKELMANN CJ:
So these submitters are largely law firms, are they?

MR BILLINGTON QC:
I don't know who submits. I presume that would be the case because insofar as law firms reflect some public opinion, it is a section of the community, but that's as far as it goes. But I don't think they're controversial, and I guess in the end, law firms submissions, one would think, might be dictated by the views of their clients, so they've probably got a wider reach.

WINKELMANN CJ:
Or the fact that they're the propagators of these trusts.

MR BILLINGTON QC:
That's a very cynical view your Honour.

KÓS J:
Well less cynically perhaps the qualification well before is significant here, isn't it. This is hardly a case of settlement well before.

MR BILLINGTON QC:

No it's not. No it's not.

KÓS J:

It's a settlement right on the eve of.

MR BILLINGTON QC:

No. Then paragraph 11.46, which again is unremarkable, that is if it's settled before the relationship began, but if the relationship continued on there should be some form of compensation. Now that's not legislated for at the moment, and that form of relief finds itself on constructive trust claims that are still being argued and would be available here. So at least in the mind of the Law Commission the Act really hasn't spoken to the decision that the High Court and the Court of Appeal came to in this case.

Now one of the matters, and I think it's almost implicit on your question, Justice Kós, is this. We all are driven in the legal fraternity by an irresistible urge to see justice done and to ensure that a person is not deprived of an interest that they would otherwise be entitled to, and one can see in this case where a relationship has existed for some eight years and the parties have occupied the home and had two children, on the face of it one might think, well one of those, both of those parties are entitled to a share in that home, and that's a natural inclination. Now the difficulty with that is that this case has had an unfortunate history and it's a temptation I want you to put to one side and to succumb to that urge, the history being this. That the reason we are here having this discussion is because of the choices made by the respondent. Now she chose to argue that the de facto relationship began at a much earlier point in time than that which the Court ultimately settled on, and the effect of that was that if she was correct in that then it brought the transfer to the trust within the period of the relationship. But she did that on the basis of an incomplete evidence. So the issue of the proximity to the relationship was never tested, but that was her choice. Now she could have equally brought an alternate proceeding in conjunction with the same proceedings in constructive trust to reflect the fact that she had introduced $39,000 in capital to the home at some

stage to help with alterations, and the fact that she had been in the home as a de facto partner for some eight years. So there could have been two proceedings, so when one says, well if the result of this decision is that she fails, that is of her making.

WINKELMANN CJ:

Well, it's of the making of the factual findings that were made in the courts.

MR BILLINGTON QC:

Well, it's more – and I'm going to go now to the judgment of Justice Walker, because the fact is that there was a preliminary issue hearing before Judge Clarkson as to the date of the commencement of the relationship, and Judge Clarkson found that commenced in February of 2004. It wasn't until there was further evidence discovered an application to appeal, an application to adduce that evidence on appeal, that the High Court was able to find that, in fact, the relationship had commenced in December/January of 2004 and 2005, some three months after Mr Sutton had seen his lawyer to initiate the disposition to the Trust.

Now if we go to the Walker judgment, reference 101.0149. "Issue One: When did the de facto relationship commence?" Now just to step back a moment, this issue of the commence of the relationship has a backdrop. A hearing before Judge Clarkson, and also before Judge Druce, and Ms Bell had been directed by the Court prior to those hearings to produce as much evidence as possible, as was available to her, documentary evidence, to establish the commencement date of the relationship. So she went to those hearings with the directions that had been made, and those directions are recorded in an affidavit that she filed in April 2018, the references which are 201-0046.

GLAZEBROOK J:

Where are we going to on this, because at the moment I don't see that it's particularly helpful.

WINKELMANN CJ:

I was going to say it Mr Billington, you've got a limited period hearing, and we're here to do a, we're doing with the meaning and application of section 44, this seems to be a diversion.

MR BILLINGTON QC:

Well, what in my submission is significant is this. That the evidence which the Court found established the later date of the commencement of the de facto relationship, also speaks to the fact that one has to consider whether the parties were at a point where they should be entering into legal relations under section 21 and that evidence is in the Walker judgment in more detail than it is in the Court of Appeal judgment, because the issue of the commencement date was not in dispute, but the passages in the Walker judgment are from paragraphs 67 through to 73, and they commenced with an email at paragraph 66 where in February 2004 Ms Bell had written to Mr Sutton setting out the effects of the property relationship law and at paragraph 67 the Judge said: "This email supports Mr Sutton's contention that Ms Bell instigated the setting up of a trust. The language speaks to the impermanent and unsettled nature of their living arrangement." At 68, there are other emails which present a different view but mutuality is important.

Then the emails are then set out at paragraph 69, March 2004, "flatting with you me and Niko".

WINKELMANN CJ:

I must say, my confusion about why we're spending so much time on this remains Mr Billington. Can you just summarise the impact of what you're saying?

1030

MR BILLINGTON QC:

The impact of it is this. The Court found ultimately at its conclusions at paragraph 74 that had those emails, which were not available to the Court below, been available to Judge Clarkson –

GLAZEBROOK J:

Mr Sutton was the recipient of the emails so I don't know why we're blaming Ms Bell in relation to that.

MR BILLINGTON QC:

Well she had all the computer hardware. He did not get it until he got back into the house, and they're on hard drives. But put it away, aside, the relevance of it is this. They –

WINKELMANN CJ:

So he didn't have access to his own email, is that what this is –

MR BILLINGTON QC:

No, because the computers had been, the hard drive, the computers had been finished, the hard drives had been downloaded and left in the house, he could not –

WINKELMANN CJ:

Do you know how emails operate Mr Billington?

MR BILLINGTON QC:

I do. He didn't have the computers.

WINKELMANN CJ:

You don't need the computers to access your emails.

MR BILLINGTON QC:

Well he did not have the documentation, or if he did have it he only obtained it when he was able to get the hard drives, get expert advice, and they were downloaded. There is –

GLAZEBROOK J:

Well anyway, it doesn't matter because it's totally irrelevant.

MR BILLINGTON QC:

It doesn't matter, no, this doesn't matter. What does matter, it speaks to the impermanence of the relationship up until December 2004/January 2005.

WINKELMANN CJ:

That's how the Judge saw it, yes.

MR BILLINGTON QC:

That's how the Judge saw it, yes. Now if that is the state of the evidence as it was, then you have an impermanent relationship through until December 2004/January 2005. In September 2004 Ms Bell won a free consultation with Mr Sherer, and Mr Sutton went to see Mr Sherer and obtained the advice to protect his interests, broadly speaking, across a number of factors, he would be able to settle this property on trust, which he did.

KÓS J:

Which Ms Bell had already told him.

MR BILLINGTON QC:

Which she discussed, exactly, she suggested it, and she was fully – and the judgments are replete with references to her knowledge of this transaction, if not the detail, the status of it, but the fact that she had encouraged it from the February 2004 email. So against a backdrop of a finding of an impermanent relationship, which is probably a better way of describing it than an on the cusp of a relationship, he settled the property on trust. The documents are in the supplementary bundle, but the documents amount to a trust deed, a memoranda of wishes to record the interests of his children, a valuation of the property, and a debt back conventional documents that estate planning lawyers provide for their clients every day.

Now Judge Druce recorded in his judgment at reference 101.0043, paragraph 53: "…I take the respondent's point that he may not subjectively have believed that the couple was living in a de facto relationship at the time of

the disposition… notwithstanding," at that stage he was bound by the Clarkson decision.

ELLEN FRANCE J:

Mr Billington, so do you see that as going to the legal position or is it an argument about the facts?

MR BILLINGTON QC:

The legal position is blindingly simple in my submission. You're either in a qualifying relationship or you're not. But if, in fact, one has to test the Court of Appeal's proposition, which supported Justice Walker's proposition, that something other than that is sufficient, then the evidence around a degree of permanence, and the parties' intentions as contracting parties, is relevant, including his subjective opinion, recorded also at paragraph 54 of the judgment, that she was his girlfriend at the time. Now the point of that, Justice Glazebrook, is this, the legislature has provided a specification, for lack of a better word, a series of criteria in section 2D of the Act, the PRA setting out when the Court may consider a de facto relationship has commenced. It is not an exhaustive list but it is a comprehensive. Now what is recognisees is the difficulty in establishing a commencement date which is significant for the three year period and then the rights that flow after the three year period, which are the equal rights which the Act provides for. Now if the legislature has turned its mind to attempting to set a start date for such a relationship, what it hasn't done is turned its mind, in a response to public opinion, to a relationship that is something else, but proximate to it but impinges on the rights of –

GLAZEBROOK J:

Well it has in section 21 in terms of contracting out, hasn't it, which mightn't be the full answer –

MR BILLINGTON QC:

No it's not.

GLAZEBROOK J:

– but it has certainly turned its mind to that.

MR BILLINGTON QC:

It has, it's also got it in section 8 where parties in contemplation jointly acquire an asset. That's a joint decision that they make, and section 8(1)(d) records the fact that there's a joint intention to go and buy something for their joint benefit as a married couple. Equally in contemplation of a marriage or a relationship the parties may enter into a contracting out agreement. Now it's probably timely just to talk about a contracting out agreement here.

WINKELMANN CJ:

We're still struggling to know where we're going with your submissions. Are we in the realm of your section 44 –

MR BILLINGTON QC:

My submissions are, and I'm not obviously doing very well at this, to show the stupidity of this –

WINKELMANN CJ:

Well no you set out seven points.

MR BILLINGTON QC:

(inaudible 10:36:18) decision, simply has no legislative support and you gain that by analysing the facts, and the first lot of facts that I discussed with you was the impermanence of the relationship which moved the commencement date to a bright line, which the legislature had set under section 2D. Now anything short of that is impermanent by definition. Now the next question, which is to respond to that which Justice Glazebrook raised, what do you know when parties are in contemplation of a relationship. They have the ability under section 21 to contract out of it. Now the starting point is it's a contracting, it's a contract between two parties.

GLAZEBROOK J:
Well it's a bit more than that, isn't it, because it has safeguards.

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
It's not just procedural safeguards. The procedures give substantive safeguards.

MR BILLINGTON QC:
They do, but the essence of it is, that the parties who have elected to take legal advice to enter into a contracting out agreement have elected to enter into a contract with a layer of safeguards that require not only an intention to enter into legal relations in conventional contractual terms, but to contract out of a legislative regime that would otherwise govern their rights, and to do that they require separate legal representation.

GLAZEBROOK J:
The separate legal representation could lead them to, or one of them to say, well I'm not entering into the contract, and that's the point of those provisions, isn't it, and the safeguards? To say, well, do you realise what you're doing, and I advise you very strongly not to.

MR BILLINGTON QC:
Yes it does, doesn't it. It is discussed in the Court of Appeal judgment in a way that I suggest rather simplifies it. For those of us who have been in practice, and that's all of us, the idea of getting a free will from the Public Trust was not a very difficult to do. So if you didn't want to die intestate you can go and get a free will, or you could even get a will from a lawyer and it wasn't overly expensive. A section 21 agreement is by its very nature a complex circumstance. Now what it requires, apart from separate legal advice, it requires full disclosure by each party of their total financial position. Because anything less than that would void the, would subsequently void the agreement,

either at any time because it would be unfair or incomplete in some material factor, as would any contract be. So parties who are in a impermanent relationship, if you adopt the Court of Appeal's judgment, are still required, if they wish to deal with their own property, each to take separate legal representation, each to disclose to the other party who is their girlfriend or boyfriend, or whatever, their whole financial position, and then make decisions around the future in the event they may get into a permanent relationship in the future, but they may not, in which case all that effort and all that expense goes nowhere. Now whether that's what the public want to do, perhaps the better place for that to be decided is in Parliament.

1040

KÓS J:

Well, we're agreed, are we not, that section 21 provides for contracting out pre a qualifying relationship in contemplation?

MR BILLINGTON QC:

Yes, it does.

KÓS J:

So if you're right, why would anyone bother?

MR BILLINGTON QC:

If I'm right in that...?

KÓS J:

Well, why would you bother? I mean you don't need to. If you're right you can simply do it all unilaterally, transfer the property into a trust and you don't need to go through the pre-relationship.

MR BILLINGTON QC:

Well, even that's not quite so simple, your Honour, because if the property is transferred to a trust at some point earlier – and let's be specific here, let's say it's a home in which the parties are living and will live, now that by operation of

law automatically becomes joint property under section 8. If the transaction's entered into prior to any section 19 agreement then the trustees cannot be parties to the section 21 agreement. It's only the couple. So you're then required to get another set of contracts as between the trustees and the parties who may enter into a relationship in the future. If on the other hand the transaction brings the agreement, the section 21 agreement, brings the property into the property pool as separate property and the owner of the separate property wishes to settle it on trust later, then issues will still arise as to the status of the other party, whether they are a discretionary beneficiary, whether there are children affected and whether it's a transaction that can be even entered into or whether even though it's ring-fenced as separate property may not. Now this is a layer of legal complexity which is not unusual in second marriages.

Mr Sutton, like many people, has come out of a relationship deeply bruised and wounded, and he's bought his home, and on this case he then – notwithstanding the encouragement of Ms Bell to settle the trust, he's blocked by the fact that they have to go down, even though it's an impermanent relationship, he regards her subjectively as his girlfriend, and into a section 21 agreement.

Now you asked me, well, if that was the case why would anybody bother? Well, it's not very difficult if one looks at the case of *M v H* [2018] NZCA 525 in the Court of Appeal which this Court below in fact extended the test, *M v H* made the test very narrow and it reflects the thinking of the Wills Act 2007 which is referred to in the judgment. If a marriage is contemplated there needs to be clear and concise evidence of the contemplation of the marriage. Anything less than that is insufficient. That's the Wills Act. Likewise, if the parties are contemplating entering into a marriage, engagement of its own is not sufficient. So you reach a point where there is mutuality, that is each of the two parties understand they will marry or enter into a civil union. That is a bright line that is discernible. With that knowledge and with that mutual intent they will then go and see their separate lawyers and then go through this complex process.

KÓS J:

Yes, but none of this –

MR BILLINGTON QC:

And they're not going to waste that money most likely unless the marriage falls over for some unforeseen reason.

KÓS J:

But none of this is answering my question. My question is why would you bother going through a pre-qualifying relationship section 21 agreement, all the complexity and cost you've talked about, if you can simply undertake a unilateral transfer as Mr Sutton did here.

MR BILLINGTON QC:

Well, the difference, you can – well, the issue in *M v H* was whether in fact the agreements, which pre-dated the Act but whether they were in force, were in fact, fell within the category of section 21.

KÓS J:

Well, I understand that but that still doesn't answer my question.

MR BILLINGTON QC:

Because at the point in time that – why would you bother doing it? Why would you do it when you're in an impermanent relationship? That's the counterfactual. That's the opposite side of the argument. If you're not in a relationship and you don't know whether it's going to go ahead – we're talking about human beings here.

KÓS J:

No, but you're asking for a bright line. So you say –

MR BILLINGTON QC:

Yes, I've got – there is a bright line.

KÓS J:

Yes, and you say that is when the qualifying relationship exists.

MR BILLINGTON QC:

Yes.

KÓS J:

So we have impermanence and then we have getting to permanent and then we actually have a qualifying relationship.

MR BILLINGTON QC:

In contemplation of.

KÓS J:

Yes, in contemplation.

MR BILLINGTON QC:

Yes. But that doesn't –

KÓS J:

On your argument, at no point until you get to the qualifying relationship is there any point in entering into a section 21 agreement. You don't need to do it.

MR BILLINGTON QC:

No, that is not – no, I'm sorry, obviously I haven't expressed it clearly. Section 21 and section 44 sit quite separately. There is nothing – yes, there is. You can't go and enter into a section 21 agreement in contemplation unless you meet the high standard of what is in contemplation, *M v H.* You can go and do that.

1045

GLAZEBROOK J:

Why would that be? I mean, why would the legislature say, oh look, if you're still sort of slightly equivocal about whether you are going to get married or not,

a section 21 agreement has no effect? I mean, why would they set such a really high standard?

MR BILLINGTON QC:
I think –

GLAZEBROOK J:
If people choose to go and get a section 21 agreement, why isn't it operating as a section 21 agreement even if they haven't set the date and…

MR BILLINGTON QC:
Well I – the context in which that – I am getting – the context in which that is decided is what is in contemplation and that is a factual enquiry, and if it's genuinely in contemplation, which it has to be genuinely in contemplation to satisfy the contractual standards and tests, then the parties, yes, will go and do it. That's what Parliament intended. In fact, as I mention in the written submissions, Parliament didn't intend to bind people to this Act if they chose to contract out of it, so it requires a level – there must be mutuality and at least an acknowledgement the relationship has a permanence to it which requires contracting out of the Act.

Now, that sits alone. The issue of section 44 and its place in it is whether that is inextricably linked as the Court of Appeal has done to section 21. The comment you make, Justice Kós, I'm not agreeing with you totally in the end you decide, not me, but there is a point of difference between us I think, but that doesn't answer the issue of section 44 and does it mean that if you don't enter into a section 21 agreement in this early stage pre the bright line, does that mean section 44 applies?

KÓS J:
Well let me put it another way. What is it that you're contracting out of under section 21 if –

MR BILLINGTON QC:

You're contracting –

KÓS J:

No, no, let me finish the question. If at the time you enter into the contract you're not in a qualifying relationship, on your argument?

MR BILLINGTON QC:

You're contracting out of the fact that the Act will come into force in the foreseeable future in relation to the relationship you are in by way of marriage.

KÓS J:

Right.

MR BILLINGTON QC:

By way of civil union, which is much easier because probably there is a date set, much more difficult in relation to de facto relationships because of the fact that we don't even know – parties may have different views of that relationship.

KÓS J:

So is your argument that when you are in that contemplation state then section 44 does apply?

MR BILLINGTON QC:

Does not.

KÓS J:

Does not?

MR BILLINGTON QC:

Does not.

KÓS J:

Well in that case, again I ask my question, why are you bothering entering into the contract? You can just make the transfer unilaterally.

MR BILLINGTON QC:

Yes, because once you cross the line and have got married then the Act operates in its full force.

KÓS J:

Absolutely, absolutely, but I'm talking about in the period immediately before.

MR BILLINGTON QC:

Well that is the state of the parties' relationships and their joint decisions, how they are living each with the other and how they will govern their affairs as they move towards the state of permanence, which is reflected by a marriage certificate, to put it in its simplest terms.

KÓS J:

But they wouldn't need to? They could just do a unilateral transfer, in your argument.

MR BILLINGTON QC:

And if it's done it's done.

GLAZEBROOK J:

And without any of the safeguards that they would have had they gone along to their lawyer and said: "Should I enter into a contracting out agreement?" The lawyer may say yes, may say no.

MR BILLINGTON QC:

But how does that work with the fact that – can I ask a question? How does that fit with the section that requires the party concerned to have rights or interests under the Act, because it requires the intention to defeat rights or interest, claims or rights under the Act.

GLAZEBROOK J:

Well they won't have –

MR BILLINGTON QC:

They don't have claims or rights.

GLAZEBROOK J:

But they won't have rights under the Act –

MR BILLINGTON QC:

No.

GLAZEBROOK J:

– as I think is pointed out even once the de facto relationship starts until the end of the relationship anyway, because if it's a relationship of short duration…

MR BILLINGTON QC:

They will have rights. They are limited but they will have rights. Can I come back to – it's quite –

GLAZEBROOK J:

They're future rights whichever way you look at it, aren't they?

MR BILLINGTON QC:

No, once the relationship has commenced they are actual rights.

WINKELMANN CJ:

So does your –

MR BILLINGTON QC:

It's quite helpful to look at it as Justice Kós does and say well, if we look at them as marriage it's much easier.

WINKELMANN CJ:

Well can I suggest to you, there is an answer to Justice Kós' question. One way you could argue it is that section 21 enables you to look ahead and create a sort of a framework for your relationship owning in the course of the relationship.

MR BILLINGTON QC:

It does.

WINKELMANN CJ:

But can I –

MR BILLINGTON QC:

But the point that you are at then, and this is the fundamental issue, is the Act doesn't – party B doesn't have a claim or right. See, party B is specified in section 44(1) so the disposition is intended to defeat the interests or claims or rights. If we just look at the statute for a moment.

1050

GLAZEBROOK J:

So this is the argument that says nothing occurs until the relationship has actually started, isn't it?

MR BILLINGTON QC:

Yes, that's right.

GLAZEBROOK J:

So this is the fundamental argument you're making.

MR BILLINGTON QC:

It is really, yes.

GLAZEBROOK J:

And you say that section 21 can't be used to reinterpret section 44 as including that prior period.

MR BILLINGTON QC:

That is right.

WINKELMANN CJ:

And that involves an argument that involves reading words into section 44, doesn't it?

MR BILLINGTON QC:

To make it fit the –

WINKELMANN CJ:

Your framework.

MR BILLINGTON QC:

No it's the other way around.

WINKELMANN CJ:

No I think it – because the Act says that you don't get rights in a de facto relationship until three years into the relationship.

MR BILLINGTON QC:

No, no, that's not right.

GLAZEBROOK J:

Well you do get some rights, yes.

MR BILLINGTON QC:

You get some rights but they are less, but you get rights from the date the relationship starts. It's a short duration and the rights are qualified. Yes, that is correct. But you have rights from that date, so every party B, if we look at subsection (1).

GLAZEBROOK J:

So when – I mean it's rights under the Act not an interest in property, it's what – so it's from the time you get rights, actual rights under the Act is the argument, isn't it?

MR BILLINGTON QC:

That's right.

WINKELMANN CJ:

Yes, because what I'm trying to get you to is ask you to respond to paragraph 30 of the respondent submissions, where they make the point that if a non-transferring spouse was required to show that rights existed under the Act at the time of the disposition, that would lead to injustice and anomaly and they suggest, for instance, a disposition of the family home takes place during the initial period of a de facto relationship when their relationship would be classified as one of short duration.

MR BIILLINGTON QC:

That's correct.

WINKELMANN CJ:

The relationship subsequently becomes one of long duration. You would accept that section 44 is engaged.

MR BILLINGTON QC:

I say section 44 is engaged from the moment the qualifying relationship has commenced. The rights during that period of short duration for de factos are more restricted. There's interests of children. They are engaged. There are rights under the Act but they are more limited than those which apply to marriages or civil unions, but –

WINKELMANN CJ:

So that still entails protecting rights, anticipated rights? That still protects against anticipated rights being defeated.

MR BILLINGTON QC:

But the claims or rights have to – whatever the claims or rights are they have to exist under the Act and they have to be the claims or rights of party B. Party B is defined.

GLAZEBROOK J:

And they to exist, you say, actually exist at the time of disposition.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

Not contemplated to exist. That's the nub of the argument, isn't it?

MR BILLINGTON QC:

It is.

KÓS J:

So where do you get that from section 44 when you read it against sections 44C and F? Because it seems pretty opaque to me.

MR BILLINGTON QC:

Yes, I think that that is a – 44C and 44 are interesting in that sense and I asked myself this question yesterday because it's not posed in the other submissions before the Court and I anticipated this question coming. The way I see – 44C operates automatically after the relationship and is a disposition by both or either party to the detriment of both or either and that's pretty straightforward, except it's not one to which section 44 applies. Now 44 applies to a disposition made by or on behalf or at the direction of any person, so it doesn't have to be the other party to the relationship. It can be a third party. Now the cases that I considered might apply would be these where there are retained earnings in a closely-held company where there are undistributed, yes, undistributed, retained earnings or capital accounts or assets that are within the control, undeclared dividends, a whole range of property interests, because property is very wide under section 2, that are in the control of a third party but which are the property of the other spouse. Now if the company disposes of that undertaking, sale of the company, distribution or a succession plan such as in *Blake v Blake* [2021] NZHC 2590, [2021] NZFLR 696 or something like that then it's the third party that's done it, so that's not a 44C case because it hasn't

been disposed of by the parties to the relationship. It's been disposed of by a third party and that is the only logical distinction, in my submission. It picks up a wider range of disposers. It is in the end a – it has its history in the relation-back provisions of insolvency.

1055

WINKELMANN CJ:

Can I just take you back to my question and in conjunction with the answer you gave to Justice Glazebrook? So you say it only protects against rights that are actual, not anticipated. So in that first three years of a de facto relationship –

MR BILLINGTON QC:

There are rights.

WINKELMANN CJ:

But there are many that have not yet accrued.

MR BILLINGTON QC:

They have, that's right.

WINKELMANN CJ:

So are those contingent rights, protected against being defeated in that first three years?

MR BILLINGTON QC:

I think to give the section its proper interpretation, once the relationship has commenced so as to bring the parties within the jurisdiction of the Act, then it would be an appropriate reading to look at future rights that haven't yet vested, yes. Now I understand the point that you're making –

GLAZEBROOK J:

Was that it does include those future rights or it doesn't? Sorry, just…

MR BILLINGTON QC:

It has to, I think.

GLAZEBROOK J:

It does include them?

MR BILLINGTON QC:

I think it has to, yes, because what the Act is concerned with – I know you've had a case on this a week or so ago – essentially is part – well, it's couples, it may be couples or it's parties in a relationship, a qualifying relationship. So once you establish the qualifying relationship then the rights are either vested then or they're potentially going to vest in a point of time. Now a transaction that simply unilaterally removed the family home during the period of short duration is unlikely to withstand the proper application of section 44. But even if that is wrong, it's an analogy and analogies are dangerous, in my submission, because it is not the facts of this case. The facts of this case are very different. We are dealing with a specifically different case, and I'm not sure you're helped in interpreting the section by looking particularly at that issue.

WINKELMANN CJ:

That means that you accept, I suppose, that it means, if you look at the section: "Where the Court is satisfied that any disposition of property has been made,… in order to defeat the claim or rights of any person under this Act," you would accept you'd read in "the claim or rights of any person that may arise under this Act"?

MR BILLINGTON QC:

Because I'm not arguing that case, I'm not going to accept it but I can see that one could do that, because that is not this case. So yes, I understand the point.

KÓS J:

The expressed "claim or rights" transfers between 44 and 44(c).

MR BILLINGTON QC:

Yes, it does.

KÓS J:

So that's really found in both.

MR BILLINGTON QC:

It does.

KÓS J:

What's not found in 44 are the words "since the marriage –

MR BILLINGTON QC:

That's correct.

KÓS J:

– or qualifying relationship".

MR BILLINGTON QC:

That's right.

KÓS J:

And for my part I wonder why it is that Parliament, if your argument is right, hadn't put those words "since the marriage" into section 44.

MR BILLINGTON QC:

And there is nothing in the history that answers that question which is why I covered the history of the section. If we can put it another way though I did touch on the history of this matter. It's an insolvency provision effectively, voidable transaction provision, which are generally specifically expressed as being antecedent transactions which are then brought back in. Now this doesn't fall within that definition.

So it's sat as it has for 123 years without being touched and the question really is why, and the "why" in my submission is because on one reading of the "claim or rights" they have to exist at the date of the disposition, not some future time when parties are in this impermanent state.

WINKELMANN CJ:

But you –

MR BILLINGTON QC:

Now that was modified – sorry, you…

WINKELMANN CJ:

Carry on.

1100

MR BILLINGTON QC:

The only exception to that has been a bundle of cases that were decided in relation to the coming into force of the Act in 2001: *Ryan v Unkovich* [2010] 1 NZLR 434 (HC), *Gray v Gray* [2013] NZHC 2890 and *K v V* [2012] NZHC 1129 which I refer to in the Court of Appeal judgment. Now those cases all involved parties who were in a de facto relationship at the date of the disposition, and the dispositions were made up against the coming into force of the Act on the 1st of February 2001. On a strike-out application, Mr Unkovich's claim survived in front of Justice French where he argued that because his de facto partner was aware of the coming into force of the Act, that was sufficient to establish knowledge in terms of *Regal Castings*. Now the issue wasn't decided and the Judge left it open as to whether that knowledge was sufficient to establish the subjective intention to defraud, as it was put, but they were in a qualifying relationship.

The case of *K v V* referred to in the judgment is a judgment of Justice Collins in relation to the disposition of property in Dixon Street. He had no knowledge, he said, of the coming into force of the Act. It was accepted and therefore section 44 did not apply, but they were in a qualifying relationship. *Gray v Gray* is very informative in that it's a discussion by Justice Heath of the issue of retrospectivity as well, what was Parliament doing here, and he described it as an exceptional circumstance.

WINKELMANN CJ:

But those are all cases dealing with the time when the Act was coming into force?

MR BILLINGTON QC:

They are the only cases where a disposition made before the claim or rights came into existence were found to be affected by a section 44 disposition.

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

They are the only cases. This is the only case. So they are very – of limited assistance. They're High Court anyway so that makes them limited, but Justice Heath's discussion of the retroactive implementations was because of the fact that the Act actually is now said to come into force in 1976 was a special circumstance contrary to the normal rules, but they are only of limited assistance because each of those parties were in the relationship. We haven't had a case where a disposition has occurred prior to civil union, marriage or de facto relationship.

WINKELMANN CJ:

So can I take you back to my question again?

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

So what I want to understand is because I had understood that part of your argument depended upon the notion that section 44 only protected rights that existed at the time of the disposition, because I think your concession –

MR BILLINGTON QC:

No, no sorry, but it protects rights that are there once the parties are subject to the Act, hence I discussed earlier the code. Yes. So it's from the date of the commencement of the relationship. The party has rights under the Act.

WINKELMANN CJ:

Okay, so you do not say it only protects rights that exist at the time?

MR BILLINGTON QC:

No, not to that extent, no. The rights come into effect when the parties are subject to the Act, which is why I thought it was interesting to carve out, the carve-out in section 4 as to the code because de facto relationships of short duration are specifically carved out. So yes, the claim or rights under the Act come into effect when the parties are under the Act in terms of section 4.

WINKELMANN CJ:

So has your argument changed a little bit from how it was run in the Court of Appeal?

MR BILLINGTON QC:

I didn't run it in the Court of Appeal.

WINKELMANN CJ:

So has your argument – yes.

MR BILLINGTON QC:

And yes it has changed, and it's changed to the extent there was a recognition that there had been 44 dispositions that were caught where the parties weren't under the Act because they were the pre-2001 enactment coming into force, but they are the only cases, so to that extent the Court might well have thought that the jurisdictional issue wasn't as pronounced as I now make it.

WINKELMANN CJ:

So interesting though, you took us to section 4(5)?

MR BILLINGTON QC:

Yes, yes.

WINKELMANN CJ:

And on that analysis the Act doesn't apply until after three years, the de facto relationship.

MR BILLINGTON QC:

During the period of short duration, yes that is right. I'm not sure what that means, and I said to you I've been thinking about this thing quite intentionally for quite a long time and the more I think about it the more I find anomalies for de facto relationships. What those anomalies tend to suggest is that de facto relationships are still a second-class relation to marriages and civil unions.

WINKELMANN CJ:

You mean in terms of how well they're provided for in the legislation?

MR BILLINGTON QC:

Yes, that's right, and that's why I made the observation that section 182 doesn't apply. The easy answer, really, I think is this that de facto relationships are so difficult to determine the commencement date as we know from the raft of cases that it is very difficult to say that the line has been crossed so as to create the rights, and that comes back to the point you and I were discussing a moment ago, the right –

1105

WINKELMANN CJ:

So the problem with your argument though is that it kind of begs the question because the Act applies if section 44 is read as the Court of Appeal read it, but it doesn't apply if it's read as you read it.

MR BILLINGTON QC:

Well no of course it doesn't apply as I read it because that's the correct way to read it. If you're not under the Act, you're not under the Act. I mean, this was

socially engineered by Parliament twice, three times, and now we're trying to do it here with all due respect and I don't think we should be. If this is intending to capture boyfriends and girlfriends or boyfriends and boyfriends then it needs to say so legislatively, and just the fact that someone's having a relationship and living in a house together, flatting together, kissing each other, that doesn't take it anywhere.

WINKELMANN CJ:

Yes but the difficulty you have though is that on one plain reading of this section it does apply. The point is it's not the status of the relationship.

MR BILLINGTON QC:

Sorry, which plain reading is that your Honour?

WINKELMANN CJ:

Section 44(1).

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

There is no limitation that you would impose upon it. The critical factual issue is whether the transfer is made for that with that purpose.

MR BILLINGTON QC:

No, the claim or right has to exist under the Act, and that claim or right, if you read it that way, then the Act doesn't apply. Ms Bell had no claims or rights under the Act.

WINKELMANN CJ:

Okay so we're back to your point that you said your argument didn't depend upon…

MR BILLINGTON QC:

No we're not. I've not resiled from that, your Honour. What I was concerned about was your suggestion that the transaction had to be effected and effect a claim or right at the time but what I have said, and have maintained, is that the claims or rights come into existence when the parties marry and not before, and that's it. There are no claims or rights. Ms Bell had no claims or rights in September 2004 and she never got any.

WINKELMANN CJ:

Justice France had a question for you, Mr Billington.

MR BILLINGTON QC:

Sorry.

ELLEN FRANCE CJ:

No, I think you've answered it, Mr Billington, because you are saying it has to be a disposition in order to defeat the claim or rights. You can't be making such a disposition if there aren't any claim or rights.

MR BILLINGTON QC:

That is right.

GLAZEBROOK J:

And there are, and I think what you say is as soon as the relationship starts there are rights under the Act even if they might be limited for the first three-year period or certainly future in terms of actually getting property?

MR BILLINGTON QC:

That is correct.

GLAZEBROOK J:

Yes.

KÓS J:

So none of that quite addresses however the distinction in drafting between 44 and 44C for instance.

MR BILLINGTON QC:

No.

KÓS J:

Your argument would be so much stronger if the words "since the marriage or qualifying relationship" were to be found in 44 as well.

MR BILLINGTON QC:

It would.

KÓS J:

You are requiring us to read that in.

MR BILLINGTON QC:

Well the way Justice France put it to me, which is the way I put it to you, to me is astonishingly compelling. But whether it compels you, because your Honours what we can't lose sight of here is people need certainty in their lives and legislative certainty, and we did go back and look at the history of the section and for reasons that are not obvious to any of us, this section has just trundled along in its present form as it has been. But to prevent a party making a disposition in relation to party B, doesn't party B have to have rights under the Act at the time of the disposition? Either by being in the relationship, which creates the rights, but Ms Bell had no rights in relation to this man's property, absolutely none, and the judgments in the court below –

KÓS J:

Not at that time.

MR BILLINGTON QC:

No.

KÓS J:

But of course, the reason why your argument's slightly specious is that none of this will have implications unless the boyfriend and girlfriend become de facto partners or married. So long as they continue in the state of boyfriend/girlfriend with the impermanence and lack of commitment that would convert it to a de facto relationship.

MR BILLINGTON QC:

I wonder whether that stands up, your Honour, because we know when parties marry or have a civil union they've actually committed in writing and by standing around and making certain commitments, so we know what they've committed to do. And equally, if they're going to do an agreement they've reached the stage, as *M v H* says, virtually that same high level or threshold. Now, these de facto couples in our communities are all ages. They're not just university students or teenagers, they can be 80 years of age and I've actually had it in my experience, an 80 year old. These are not – now, you have to determine what does – there has to be a mutuality here.

1110

GLAZEBROOK J:

But there can be.

MR BILLINGTON QC:

If you ask one partner: "Are you in a de facto relationship?" "No. She's my exclusive girlfriend but I'm not in a de facto relationship." Ask the girlfriend, or vice versa, and you might get two different answers. Now, the courts had enough trouble, and there are legions of cases as this was one, and Heath J says, don't do this as a preliminary question. It's too complex, the commencement date of a de facto relationship. So if you follow this judgment not only are we going to have complex time consuming expensive cases about the commencement date of the de facto relationship, we're now going to have another layer of arguments about whether each of the parties could be said objectively to be in the impermanent relationship but on the cusp of the permanent relationship. Now all of that is to do what? To stop somebody

dealing with property that they've purchased off their former wife and disposing of it, as they're entitled to do, and the possibility that in the future they might get together. Now, is that really something that ought to be done in this room or should it be done somewhere else?

GLAZEBROOK J:

But do you have to have it quite as stark as that? If you have a very tight definition of "in contemplation" for 44 purposes, which you probably would need in any event to get the intent, because if you're there and you've just started dating somebody, no suggestion that you might live together or share your lives then you think, well, I better sort myself out before it gets to any sort of stage. I'm not sure anybody would suggest that was in contemplation or if they do it would be making it very wide. But if it's tight in a way that *M v H* is tight...

MR BILLINGTON QC:

Yes, and *M v H* is tighter than this case.

GLAZEBROOK J:

No, well that might be the case factually, but –

MR BILLINGTON QC:

No, no, it's actually said so, which I find astonishing.

GLAZEBROOK J:

No, no, I understand that.

MR BILLINGTON QC:

Yes, I understand what you're saying.

GLAZEBROOK J:

I'm just putting to you that would you say that in an *M v H* situation, I can't remember if it was M or H, if M had put all the property into a trust at that very time, the day before they were going to get married, that that would have been fine because they weren't actually married?

MR BILLINGTON QC:

Well, that's if you're applying a contemplation test. You see, what –

GLAZEBROOK J:

Well no, but the question is should you apply the contemplation test or should you say it would have been perfectly okay?

MR BILLINGTON QC:

I don't know, is that – the answer is I don't know. I think no.

GLAZEBROOK J:

Well you say no, I think, and have to say no.

MR BILLINGTON QC:

My life experience is different from other people's and vice versa.

GLAZEBROOK J:

Well, I think you have to say no because you say that you need actual rights and they only start at the time of the relationship.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

So you would say that either M or H was absolutely free to do anything they wanted to until they'd actually signed the register.

MR BILLINGTON QC:

Well, they can deal with their property as the law permits them to until this Act comes into effect and it comes into effect when they are married, civil union or in a relationship. Now, prior to that they are entitled to deal with their property as the law permits them to, which is why I've said this is a retrospective judgment which is in a –

GLAZEBROOK J:

Well the law only permits them to do that subject to section 44, because in fact after marriage they can do what they like with their property subject to section 44 and 44C et cetera.

MR BILLINGTON QC:

Subject to section 44. The question is, well we still come back to does section 44 speak to something before the marriage when there are no rights?

GLAZEBROOK J:

Well that is the point, isn't it?

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

So your position is it's only once you do have rights under the Act, i.e. actual rights under the Act and that's only when the relationship started. That's the –

MR BILLINGTON QC:

Yes that's right. You see one of the –

GLAZEBROOK J:

I suppose you would say and if it meant something else it would have added in contemplation like it did in section 21.

MR BILLINGTON QC:

As it does in some of the other statues to which I refer in the written submissions, the tax avoidance provisions is one of them, prospective liability for taxation, if you avoid that you've got a problem. The insolvency statutes talk about antecedent transactions. They are explicit in the sense that they reach back. This does not reach back.

WINKELMANN CJ:

It's 11.14, Mr Billington. Where are you at?

1115

MR BILLINGTON QC:

Can I just finish off what Justice Glazebrook said because I think – and I made this in a, euphemistically, in a written submission about the real-world implications of this if the Act reaches back, and we talked about the complexities of what is required of a section 21 agreement, the fact if there's a trust involved there's another layer of agreements that are outside the Act.

But the other side of this is if a party – and there's a whole estate planning industry out there, tax and estate planning, where people govern their affairs under the legislation as it is at the time, because they know as a certainty they're caught. Now what do you do if one party says, as Mr Sutton says: "I've got a girlfriend," and she says: "No, I'm his de facto partner"? The whole thing, the cost is enormous and the potential for disruption is even worse. Is that what ought to be imposed under this Act where the wording of the section is so imprecise on the public as to have that effect on them?

Now if I can move on from that then, the next –

KÓS J:

That's your horror story though, isn't it, that you're trying to impress us with, but –

MR BILLINGTON QC:

It's a reality, your Honour. This is not a horror story. This is a reality.

KÓS J:

But against that is the very stark example that Justice Glazebrook gave you which is a dealing in a situation where there is an engagement and the marriage is the next day and in which there is no complexity or difficulty working out anything there, and probably a pretty strong inference that the dealing is in order to defeat, just not a right that is yet patent.

MR BILLINGTON QC:

Well, a marriage is certainly – that is correct and whether it is different between marriage and de factos I'm not sure.

KÓS J:

Well, your argument has to work for both.

MR BILLINGTON QC:

But you don't have the next day with a de facto, do you, you see, even if that is right.

KÓS J:

No, but your argument has to work in both situations.

GLAZEBROOK J:

Well, you can do.

MR BILLINGTON QC:

Yes, it might – no, my argument is – because I'm not arguing in marriage. Be careful. I don't want to argue a case I'm not arguing here. I'm arguing a de facto situation. Now if it's a marriage and I came along and made the same argument, you're going to put the same propositions to me and I'm not quite sure what I would say to that. I don't know because they're not the same. But what you do know is –

GLAZEBROOK J:

Well, de facto people can actually make the same sort of commitments and say: "Well, tomorrow we're moving in together. We're sharing our lives. We'll go along to the bank and do our bank account," et cetera, or next week, especially, if there are children involved, they may need time to work through how they're going to run their joint lives. I mean not everybody drifts into a de facto relationship in the way that I think your 18-year-old and my son certainly seem to but…

MR BILLINGTON QC:

No, I agree with that. But you're quite right, we're talking across the whole social spectrum here, in fact, as to how people govern their lives.

WINKELMANN CJ:

Yes, but they don't normally go out and make agreement – in that scenario, they don't normally go out and make dispositions in this way.

MR GILCHRIST

There's an awful lot of people now that might think they might have to and do it several times. I mean some people you say how many de facto – how many relationships are you in contemplation of at the same time, and we do have to be careful here. I mean if you simply look at our own experience of life which is different from a lot of other people's, there is a hugely diverse community out there with seriously diverse views of how they govern their personal relationships. It's not hard to say to those people, which Parliament did: "You're married, you're in. You're not married, you're out," and then they wanted to do something with de factos and they've created some criteria but there's no bright line, so you don't have, Justice Kós: "Well, tomorrow we're in the de facto relationship," and this is the case I'm arguing. I'm not arguing the marriage one. I don't know what I'd do with that. I probably would say the same thing but I don't have to argue it. But with a de facto relationship and the difficulties with finding a commencement date –

KÓS J:

You just don't have that luxury, Mr Billington. Your argument has to apply also in the marriage context. We have to consider that. How do we distinguish them?

MR BILLINGTON QC:

I think the simple distinguishing factor is this, that if you thought – the contemplation doesn't apply, in my submission, but if you thought that I am wrong in that, de factos may have to be dealt with differently because this legislature deals with them differently anyway, and that is you cannot reach that

level of certainty, and which is why I took you to the Walker J judgment. It was impermanent. There was a degree of impermanence until December/January. Now if there's a degree impermanence what are we doing requiring people to go and to sign a section 21 agreement so they – to stop them doing things they would otherwise be entitled to do, to –

WINKELMANN CJ:

It may have been – the Judge may have described it as "impermanent" but they were talking about how to deal with assets –

MR BILLINGTON QC:

They were.

WINKELMANN CJ:

– in anticipation of this de facto relationship.

1120

MR BILLINGTON QC:

If it happened, and you see, they each gave different answers because 12 years down the, eight years down the track, he's saying I – and he told his lawyer: "She's my girlfriend." Now she's saying something different. In fact, she said it started much earlier, which is not correct. So their views are different then.

WINKELMANN CJ:

Well, I mean, it was a relationship and she has a different view of it to the view he has and we're not relitigating that now.

MR BILLINGTON QC:

No, but let's say they had different views in September. They're talking about it but it's not a qualifying relationship. So he says no and she thinks yes. Well, they haven't got the required degree of mutuality then. So if you haven't got the required degree of mutuality then, how are you going to have a contract under section 21?

WINKELMANN CJ:

Well, mutuality is a different thing, isn't it, again?

MR BILLINGTON QC:

Sorry?

WINKELMANN CJ:

Mutuality is a different issue again, isn't it?

MR BILLINGTON QC:

Well, it's a precondition to contracting.

WINKELMANN CJ:

Mmm, it's a precondition to contracting –

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

– but it might not be a precondition to the application of section 44. That's one of the issues we're addressing.

MR BILLINGTON QC:

No, but the way the Court of Appeal has linked the two sections together, for which, in my submission, there's no justification, it is essential because you're going to contract and these parties are going away with intention to enter into a legal relationship.

GLAZEBROOK J:

It doesn't have, it's not particularly attractive, is it, to say that the section 21 agreement that the parties went along to sign in contemplation isn't actually in contemplation because one of them had his fingers crossed behind his back and wasn't sure if they were going to go through with it. I mean that's very unattractive.

MR BILLINGTON QC:

I think that's one of the reasons *M v H* is as restrictive as it is. You see, the Court of Appeal said yes, *M v H* is restrictive, and it was, but we are making it less restrictive, more extensive. Well, why would you do that, given the discussion we've just had, Justice Glazebrook? That doesn't make sense either.

GLAZEBROOK J:

In a section 21 sense I think you would make it less prescriptive because you're certainly not going to say: "Well, because you had your fingers crossed behind your back it's not a section 21 agreement." I mean you say it's a section 21 agreement. You're stuck with that.

MR BILLINGTON QC:

You are. There's no doubt. But it's when you –

GLAZEBROOK J:

Because you've contracted with your eyes open in respect of that.

MR BILLINGTON QC:

It would be quite hard to avoid it on that basis, wouldn't it, and I don't think that's an issue. The question is what – that's fine because you're looking at that in terms of the enforcement of the agreement and I agree with you, but if you look at it in another context, which is what the Court of Appeal's done and shifted it across to section 44, then you –

GLAZEBROOK J:

I mean you say they're two different things and I can understand that argument.

MR BILLINGTON QC:

They are two different things, that is right.

GLAZEBROOK J:

And two different ways that they – well, for a start, section 44 doesn't have "in contemplation" in –

MR BILLINGTON QC:

Correct.

GLAZEBROOK J:

– explicitly, and that's one of your arguments.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

And it's argued against you that there need be no mutuality.

MR BILLINGTON QC:

It is. But it doesn't make sense for the reasons I've just discussed that if you are requiring a party who's intending to make a disposition to which he's entitled to get a section 212 agreement before he does then there needs to be a mutuality to enter into the section 21 agreement, and there also needs to be, objectively, a mutuality at the date of the disposition which there wasn't here.

WINKELMANN CJ:

But that's for the application of section 21 whereas if you look at section 44 on its own terms it's the persons' purpose with which we're concerned, not the issue of mutuality, and you're saying the linking to section 21 is wrong. I'm asking you to –

MR BILLINGTON QC:

Well, I'm wondering – if you take that view, your Honour, who is "party B" here? If the party has no rights under the Act, now the party who's affected is party B who has claims or rights under the Act, Ms Bell didn't have any claims or rights under the Act so is she "party B minus one" or something?

WINKELMANN CJ:

So what I'm asking you –

MR BILLINGTON QC:

Or "party A"?

WINKELMANN CJ:

All I'm asking you, so I'm asking you to address the respondent's submissions, and so they say that it's enough if party A intends – has in their mind that they are going to enter into a de facto relationship with party B and their purpose is to defeat any interests that party B has. So it's all on party A.

MR BILLINGTON QC:

Well, that's conflating two issues. The first is that they are contemplating entering into a relationship which seems to have some significance which it doesn't, in my view. But the second point is this. If a party who is not in a relationship, qualifying relationship, wants to make a disposition, there is no party B because party B doesn't have any rights under the Act. So what do we put in for party B? Party B, Ms Bell, had to have some claims or rights under the Act. She didn't have any. So when Mr Sutton says, and his lawyer says: "Here's how you need to order your affairs so you don't go through this wringer again," and it's a wringer, "let's put the property in trust, because Ms Bell's your girlfriend," at least in his view, and viewed objectively that's what Justice Walker said. They were boyfriend and girlfriend. They weren't in a de facto relationship so she's not party B, she's something else.

1125

KÓS J:

We haven't really focused yet on "in order to defeat" and that's pretty important –

MR BILLINGTON QC:

It is.

KÓS J:

– and there's a distinction there also with 44C and F, because –

MR BILLINGTON QC:

Yes, yes. 44C operates automatically.

KÓS J:

Because it operates if the effect is there.

MR BILLINGTON QC:

Yes.

KÓS J:

Here there has to be some form of intent. Now that can reach back too, arguably, because in a situation where the couple are just happy toddling along as boyfriend and girlfriend and that probably involves to avoid a de facto relationship or non-exclusive relationship or at least not a committed single relationship. In that situation there probably isn't an intent to defeat because there is no contemplation of rights accruing.

MR BILLINGTON QC:

That is right. If my argument – sorry, I'm interrupting you.

KÓS J:

But in the situation where there is a contemplation of marriage or a contemplation of a qualifying relationship then the "in order to defeat" does arise and what we do know is that if we're having an argument at the moment about when the claim or right should exist –

MR BILLINGTON QC:

Yes.

KÓS J:

– and we don't know quite what the temporal aspect of that is, the temporal aspect of an order to defeat has to be at the time of the transfer.

MR BILLINGTON QC:

Yes. That is what I regard as the second – a step down in this argument. My high point is the jurisdictional point which I am sure Justice France put to me and I don't retreat from that because that is how we need to give effect to this statute to give the public the certainty it deserves. But if I'm wrong in that then the question you ask, I think, is exactly where I head to. This has been – the problem here is caused by a long history of cases which start with *Ryan v Unkovich* which imports *Regal Castings*.

WINKELMANN CJ:

So, we're moving on to a different issue?

MR BILLINGTON QC:

One minute and I will, and this is a different topic. This is what is meant by "intention to defeat" and it also impacts on the issue of "good faith" and it's the question that Justice Kós asked me. I can't say any more about the jurisdictional point, it's in the submissions. It's there and it's correct in my submission but you may not decide that.

So let's come back to the question that you asked me, Justice Kós, "in order to defeat the claim or rights". Now *Ryan v Unkovich* and the bundle of cases around that, including *K v V,* said if there was knowledge that it would impact on the rights of the de facto partner by the coming into force of the Act in 2001, that was sufficient for the *Ryan v Unkovich* pleadings to survive strike-out. In *Gray v Gray*, Justice Heath endorsed that.

So that derives from what I submit, respectfully, is a rather shorthand and less than rigorous understanding of *Regal Castings*, which speaks to a totally different section and a totally different set of circumstances. Now *Regal Castings* historically is a fraud case. It's very closely aligned to conspiracy to defraud and it is expressed as a fraud on creditors. It uses the word "fraud". Now, the Supreme Court –

KÓS J:

It's a very protean word though. We talk about fraud on a power and –

MR BILLINGTON QC:

Yes, but this is criminal fraud.

KÓS J:

Well…

MR BILLINGTON QC:

It's history if one looks of it, the – what sits behind this is the common law concept of conspiracy to defraud and that is you can engage in a form of conduct, the purpose of which is to maybe improve your own financial position, but if it has the effect, the known effect of disadvantaging a third party then that is the fraudulent intent, hence the distinction Justice Young made in the Court of Appeal between fraud and intent. That's the history of that interpretation.

Now when one goes to *Regal Castings* there is an exhaustive analysis by Justice Blanchard as to what were the material facts that were relied upon by, in his judgment, to establish the requisite intent and they were the surreptitious nature of the transactions, the knowledge that there was a debt, the knowledge the debt couldn't be made, the fact that the transfer of property which it produced which substituted property of value for no value, the fact as he said there was no other legitimate reason –

1130

WINKELMANN CJ:

But this is looking for evidence of dishonesty, which we don't need here.

MR BILLINGTON QC:

Well no, well yeah, but this is – can I just carry on, because where it finished up was that it is inconceivable that the transfer was done for any other reason than to defeat the creditor's interest and therefore he had to know that, and knowing

he would defeat the interest was the test. Now that test was then imported into section 44, and you're absolutely correct it's a completely different section, it doesn't require fraudulent intention, but what has been said is that it requires knowledge of the consequences to establish the subjective intention.

GLAZEBROOK J:

Well what say you had sort of probably been "living with your head under a rock" I must admit for some time, but –

MR BILLINGTON QC:

Sorry, who's been living with their head under the rock?

GLAZEBROOK J:

No, I don't mean in particular. I mean a person who –

MR BILLINGTON QC:

I'm just one of a number of people who have.

GLAZEBROOK J:

A person who's disposing of assets, they're married, and as I say they've been living under a rock for some time because they actually say "well I can do what I like with my money", they hadn't heard of the PRA or any equal sharing.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

I mean you can't possibly say that ignorance of the law in that situation is an excuse.

MR BILLINGTON QC:

No ignorance of law can't be. So I –

GLAZEBROOK J:

Which is where the difficulty –

MR BILLINGTON QC:

That is the problem. That's the problem with the current state of the interpretation of section 44 deriving as it does from *Regal Castings* and being expressed as knowledge because you immediately get the problem, which is the other side of it, "I didn't know". Your point, Justice Glazebrook, and that can't work either.

WINKELMANN CJ:

Sure can't because –

MR BILLINGTON QC:

No it can't.

WINKELMANN CJ:

– apply that – and it would imply that in heartland of section 44. It couldn't possibly be that high.

MR BILLINGTON QC:

No it can't work. So to a degree, what I have argued elsewhere unsuccessfully, is that this issue of knowledge on its own is not enough. But equally, lack of knowledge is not enough either, Justice Glazebrook, and with that I agree totally. So the question –

WINKELMANN CJ:

And then with that we should adjourn – finish your statement.

MR BILLINGTON QC:

The question then is what do you do to answer Justice Kós' question? If the parties are not in a qualifying relationship can the intention be present, first question. Or the second is if they are in some sort of a cusp but he doesn't know it, what do you do with the intention then, and that is a very difficult proposition. I'll stop there because it is a difficult question and I'll come back to it after the break.

WINKELMANN CJ:

So as we look ahead, Mr Billington, when are you intending to finish because we have a half day for this hearing, don't we?

MR BILLINGTON QC:

I'm not far away your Honour. You've moved me on successfully much more quickly than I intended to go but I also think what I wanted to do is provoke a discussion around the reasoning because the principles, so called, are simple but the reasoning that underpins them demonstrates the flaws in there and the decision in my submission.

GLAZEBROOK J:

So just so I can be clear, when you started off and I was going to ask you then but you were just summarising, you said something like "if you don't know there are rights, you can't be" – let me see what I've written down.

MR BILLINGTON QC:

Yes, on the current state of the authorities if you don't know that you're infringing the rights then you can only have the requisite intent.

GLAZEBROOK J:

But you accept that – well as I say in the very unlikely event someone had been living under a rock and didn't know there was an equal sharing regime post-marriage that wouldn't suffice because ignorance of the law is not sufficient to defeat intent.

MR BILLINGTON QC:

No, but on the current state of authorities that doesn't quite work, that's the point.

GLAZEBROOK J:

Well then what – I mean, after the adjournment, probably what is intent, yes.

MR BILLINGTON QC:

That is a fundamental issue.

WINKELMANN CJ:

If you can tell us after we come back exactly what you say the law should be and how that relates to *Regal Castings*?

MR BILLINGTON QC:

Yes.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.49 AM

MR BILLINGTON QC:

Could I take you to the written submissions at page 14, your Honours? It is this section that deals with the issue you raised, Justice Kós and Justice Glazebrook, and it's been a vexing problem for some time at least insofar as present counsel's concerned, and that is the use of *Regal Castings* to interpret a completely different section and the consequences that flow from that. That's reflected in a passage that I refer to at paragraph 26, which is in paragraph 98 of the Court of Appeal judgment, and it's the emphasis on knowledge here which leads potentially to a wrong decision and is unhelpful with this section but: "An intent, or knowledge of the effect of the disposition, suffices. The conscious desire approach no longer reflects the test. That means that a disposition made in good faith, but nevertheless in order to defeat, meets the threshold for s 44(1)." It's a rather contradictory statement in any event but what it is saying in my submission is that knowledge is sufficient without more. Now that may be a bit unfair, but it –

WINKELMANN CJ:

Hang on, so what are you saying? Are you saying that should be the test or are you saying that's what –

MR BILLINGTON QC:

No, I'm saying it falls well short of the test, yes, in relation both to the section in *Regal Castings* with the intention to defraud and equally in relation to 44(1). Now the law as it –

WINKELMANN CJ:

So what falls well short of that? What is the test you say it should be?

GLAZEBROOK J:

Perhaps we go to the Court of Appeal –

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

– judgment.

MR BILLINGTON QC:

At paragraph 98?

GLAZEBROOK J:

Yes, just so that we see what you're actually saying they said. So, thank you.

MR BILLINGTON QC:

This is what is a fairly brief discussion around the issue of whether there was the relevant intent and lack of good faith so as to engage 44(2) and (3).

WINKELMANN CJ:

Whilst there's a pause I should say, because I know Ms Crawshaw will be anxious about this, that I was told over the morning adjournment that it's not a half day.

UNIDENTIFIED FEMALE SPEAKER (11:52:12)

You look very relieved, your Honour.

GLAZEBROOK J:

So you say intent or knowledge is not sufficient, is that what you're saying?

MR BILLINGTON QC:

Yes. That has been adopted as a shorthand approach to – in an evidential analysis that is called for in a fraud case, which is what the Supreme Court did in *Regal Castings* with a different section. Now you might not approve of this test either, looking at paragraph 26, but *Coles v Coles* (1987) 3 FRNZ 101 (CA) was the Court of Appeal judgment that was in force until they were disregarded in *Ryan v Unkovich* in the High Court, but it was a Court of Appeal judgment which construed section 44(1) as saying this: "What is plain is that the words 'in order to defeat' mean that the spouse who entered into the challenged transaction did so because of a conscious desire to remove some item or items of matrimonial property from the reach of the Courts." That was historically correct, particularly in relation to section 44 as it was under the earlier legislation because it dealt with the disposition of assets where a petition had been filed, so there were rights. Now that test in a sense accords with the plain meaning of section 44(1), but whether this Court would be comfortable with it in this context, I'm not sure.

KÓS J:

Well there's two questions.

MR BILLINGTON QC:

Yes.

KÓS J:

One is whether it's the right test.

MR BILLINGTON QC:

Yes.

KÓS J:

Secondly, if we applied it, would it make a difference here? Because it may not. I mean it may be that your –

MR BILLINGTON QC:

No it may not here, no, well you come back to that point and this is what I discussed as the submissions. What I've done in the submission is I've then gone through because courts don't – have not been doing this, is going through what Justice Blanchard actually said and how he got to his conclusion that knowledge of the debtor was in that case sufficient to establish the requisite intent. We reach a point at paragraph 26.8 of my written submissions where he says, following an analysis of a whole raft of behaviours on the part of Lightbody: "It beggars belief that Mr Lightbody acted without any appreciation of the risk" he was creating for Capro, and that is a conventional expression of intention to defraud in the sense that fraud's been used for centuries. There is no other plausible reason, it wasn't a bona fide family transaction. Now that is actually what was said in *Regal Castings*, and accurately, and on analysis it wasn't that knowledge of its own suffices in the way it has been expressed here. 1155

Now when you look at the facts of this case in the sense I've summarised them very briefly at 26.14, I say this: "In the present case, apart from the fact that at the time of the sale Ms Bell did not have any claim or rights under the Act, the following facts should have been taken into account:" and this is the opposite to the *Regal Castings*, "the transaction was entered into" with her knowledge and consent, "there were other reasons for the disposition, not the least of which was his desire to provide for the children's needs," and that's reflected in the memorandum of wishes, "as having priority over the needs of all other beneficiaries," this was a trust settled for the benefit of his children. "At the time he could not have had the relevant intention required under s 44(1)," particularly if you adopt the *Coles* test, "because neither he nor any other person would have known that the provisions of s 44(1) would be applied retrospectively to a transaction he was entitled to make at the time." And of course in that analysis one would look at the evidence of the lawyer who gave the advice to enter into

the transaction, who's a trustee, and say, well, where does that sit in evaluating objectively the intention of the parties, the trustees in this case? "The sale was at valuation and in exchange for a debt back, which was a permitted type of transaction under the law at the time," and I've mentioned *Mills v Dowdall,* a decision of the Court of Appeal, where an arrangement of gifting back is not gift, forgiving debt is not a gift. So there was the valuation –

GLAZEBROOK J:

Well, that's what's been held. But if you're never intending – you have to take into account the time value of money, don't you, if you're making that submission?

MR BILLINGTON QC:

You do, exactly, and that was one of the factors in *Regal Castings*, that what was exchanged was a house which was security for the creditor to a valueless extinguishing debt. So that has to be looked at as one of the pieces of evidence. I don't disagree with the way in which one analyses the evidence, and then the conclusion is the trustees who received so did so in good faith, and Mr Sutton's knowledge, which is imputed to him, is then said to impact on good faith without good reason and without the sort of analysis that *Regal Castings* requires a court to undertake.

WINKELMANN CJ:

Why do you need lack of good faith? Why is good faith even in the equation?

MR BILLINGTON QC:

Because good faith, if the property is received in good faith and the parties altered their position on it, then the Court won't make the orders under 44(2) or (3), that's why it's relevant, and it's conjunctive. So the property has to be received in good faith and for valuable consideration, and its valuable consideration, there are two, "valuable" can be something less than actual value, and that's a conjunctive, they're in the conjunctive, so that's what's required. And if the party satisfies that the recipient –

KÓS J:

Yes, so Mr Sutton sells the house to buy bitcoin, because that seems to be the best kind of tulip of the day.

WINKELMANN CJ:

Yes.

KÓS J:

Yes.

WINKELMANN CJ:

But that doesn't seem to apply here. He can't match the valuable consideration, can he? It's simply forgiveness, it's a gifting programme.

MR BILLINGTON QC:

Well, that's why I mention *Mills v Dowdall,* because you wouldn't necessarily just put a line through that, you've need to examine the effect of it. You see, this house was already, was heavily encumbered anyway, some 400,000 as against 550. Yes, you might conclude that it has that effect and was intended to have that effect, you might conclude otherwise, because it is a very common form of transaction. The question is what's it doing? And at that time Ms Bell had no rights anyway, which comes back to the argument I had with regard to jurisdictional question.

But the uncomfortable position is this really, that we don't have a decision that in my submission is authoritative on what 44(1) actually says beyond *Coles* except to the extent you import in *Regal Castings*, and I don't disagree with bringing *Regal Castings* in to the extent it's an evaluative exercise to establish an intent. But the question then, as Justice Kós, you asked me, what is the requisite intent? That is a very difficult question. But the intent, one would still – if one adopts the plain wording of the section unchanged when *Coles v Coles* was the law, it's more a question of the intent in order to defeat an interest and one would think there needs to be some conscious appreciation that's what's being entered into.

1200

Justice Glazebrook, you asked me a moment ago, "people living under a rock", that is a very difficult one because, you see, 44C is a cause and effect section, you don't need to have any understanding of the law, whereas 44(1) rather suggests you do need to have some understanding of the law. Now that can lead to a – it might lead to the proposition that you put to me but that's highly unlikely because I think you would be driven to the conclusion today as –

GLAZEBROOK J:

Well, certainly, that's what I was – why I had the –

MR BILLINGTON QC:

What did Justice Blanchard say? That's just inconceivable that somebody would not know if they were married that there were some rights that were being…

GLAZEBROOK J:

But he certainly knew there were going to be rights, didn't he? I mean those emails are clear on that and the fact that he was actually entering into the transaction would suggest he knows that.

MR BILLINGTON QC:

I see you're agreeing, Chief Justice.

WINKELMANN CJ:

Well, the emails, you know, the emails that you've…

MR BILLINGTON QC:

My junior asked me yesterday what do I make of that letter? You know: "You should do this. I don't want…" I would construe that as saying: "Well, I don't want your property. Do what you like with it," because that – there is no impediment to going into this relationship.

GLAZEBROOK J:

No, but that is a different point, isn't it, because he – it can't be said here that he was not aware that once they entered into a de facto relationship –

MR BILLINGTON QC:

That is true.

GLAZEBROOK J:

– that there would be consequences in terms of property.

MR BILLINGTON QC:

Judge Druce said that. But what he did say was, and he heard the evidence: "I do not dispute that his" – this is quite interesting in the sense he said: "I don't dispute his subjective belief that she had no rights and was being affected by them" – that he may have subjectively believed that he wasn't impinging on the rights but viewed objectively he could not have thought that if, in fact, it occurred in the future those rights would be impinged on. So his subjective opinion his belief has not been disregarded. It's accepted as being validly held but it doesn't have the consequences that one would take from that. Now –

ELLEN FRANCE J:

Mr Billington, could I just ask you about *Ryan v Unkovich*?

MR BILLINGTON QC:

Yes.

ELLEN FRANCE J:

If you look at paragraph 33 where Justice French deals with *Regal Castings* vis-à-vis *Coles*, what she says there is that "in so far as the Coles formula fails to distinguish between intention and motive," it's contrary to the reasoning in *Regal Castings* "and should not be followed. Knowledge of a consequence can be equated with an intention to bring it about." Do you agree with that?

MR BILLINGTON QC:

Yes, I think that is correct, your Honour, yes. It is one factor in the evaluative process.

WINKELMANN CJ:

I think you'll find it's also a principle that does not just exist in *Regal Castings*. It's a –

MR BILLINGTON QC:

No. No, it doesn't, but as I said its history is in rela – that I'm familiar with, and because it's a fraud case, is in fact that. If you are aware that –

WINKELMANN CJ:

It's throughout the criminal law.

MR BILLINGTON QC:

Yes, it is. It's throughout the criminal law. That's exactly correct, yes. But what has happened, and has happened in this case, is that knowledge of itself is sufficient and that is where it falls short, Justice France. It's what accompanies that knowledge and there was an exhaustive list, non-exhaustive lists in *Regal Castings* as to what drove Justice Blanchard to say it beggars belief that Mr Lightbody could have thought otherwise. Now are we driven to the same state of mind here that it beggars belief that Mr Sutton could have thought otherwise, and one factor that militates against that is he took legal advice as to how he might protect his property interests, having just been through the mill.

WINKELMANN CJ:

So is your fundamental point about *Regal Castings* that you have to understand how Justice Blanchard applied that approach?

MR BILLINGTON QC:

Yes, that is correct.

WINKELMANN CJ:

It's not that *Regal Castings* is wrong, it's the application of it, wrong in application to this case. Obviously not wrong.

MR BILLINGTON QC:

Yes, and wrong in application to this case and a number of others and it's unfortunate because – and in fact I think you touched on this, your Honour. That's a fraud case. You don't need fraud here.

WINKELMANN CJ:

Well, it's the dishonesty aspect.

1205

MR BILLINGTON QC:

Yes and I – there are publishers still publishing that dishonesty is required and they may be right, but whether "dishonesty" is the right word or something that equates with it I'm not sure.

WINKELMANN CJ:

Well my point is that that wouldn't really help you because if anything it's a lesser thing here, but –

MR BILLINGTON QC:

No, well I'm not trying to help myself here.

WINKELMANN CJ:

No, okay.

MR BILLINGTON QC:

I'm actually trying to get to something that is a sensible test in these circumstances and a fraud case is not necessarily a sensible test. But to pick up your point, an evaluative process that leads to irrefutable knowledge is satisfying that something was done "in order to defeat" would help. But then the question is what is meant by "in order to defeat"? Then you ask yourself

the question, Justice Kós, well if there's no rights at the time and they are prospective, the section is silent on prospective rights but the rights are no longer prospective once the parties are in the relationship. Coming back to the discussion we had early.

O'REGAN J:
We're just going around about again.

MR BILLINGTON QC:
Pardon?

O'REGAN J:
In *Regal Castings* though the Court did say that the intention to defraud is essentially the same as intent to defeat, didn't it? So doesn't that suggest that is –

MR BILLINGTON QC:
In *Ryan v Unkovich*?

O'REGAN J:
No, in *Regal Castings* itself I think the Court said –

MR BILLINGTON QC:
To defeat the interest of the creditors.

O'REGAN J:
Yes.

MR BILLINGTON QC:
Yes, I think that is right, or to defeat their legitimate interest. That can be equated with fraud but yes, I do accept that is correct, yes.

O'REGAN J:
So in that sense the difference between the wording of the insolvency provision and section 44 is neither here nor there is it? Because we're talking about

defeat here when that's what they said they were talking about in *Regal Castings*.

MR BILLINGTON QC:

They do import a dishonesty component into it irrespective, because they have to because it's fraud and the judgment does –

O'REGAN J:

Well –

MR BILLINGTON QC:

So yes, I do accept what you say, that by defeating the interest of a creditor by removing an asset you are defrauding that creditor.

O'REGAN J:

Well I think in *Regal Castings* they actually said "defraud" is an unfortunate term –

MR BILLINGTON QC:

Choice.

O'REGAN J:

– and that's not really what the section's getting at. It's really getting at hindering or defeating the creditor's rights.

MR BILLINGTON QC:

But it's getting at a conscious state of mind. All the judgments say that.

WINKELMANN CJ:

I suppose the dishonesty comes there because it's a – well, maybe not. So –

MR BILLINGTON QC:

Well it does come to – it's a conscious state of mind test, Justice O'Regan, and that might be another of looking at it, yes, and then it matters neither here nor there, but – and it's "what is the conscious state of mind"? The conscious state

of mind is to defeat the creditor's interest and you could express it that way, shorthanded fraud. So you say here, well, the conscious state of mind has to be –

O'REGAN J:

But it's not a point of difference between that case and this case I don't think. I mean, certainly you can say in *Regal Castings* it was implicit that there were creditors rights and they were being actually defeated, so that goes in your favour.

MR BILLINGTON QC:

Well then you come across, and you say "let's talk about marriage". If they're married and the conscious state of mind is that he's removed it from the marriage and therefore removed it from the Act and the claims or rights, no problem with that. If they're in the de facto relationship, even with its limited reach, the same. But you come back to this – is the conscious state of mind present here when a man is not in a qualifying relationship under the Act, he takes legal advice, acts on the legal advice and removes property, which at the relevant time, she has no claim to. How can that be –

KÓS J:

Yes, but even on the – I mean, no one transfers property without thinking about why they're doing it. So the question is, "why, Mr Sutton did you transfer the property?"

MR BILLINGTON QC:

Well the Court of –

KÓS J:

There might be a whole lot of reasons.

MR BILLINGTON QC:

Yes.

KÓS J:

In which case you might come into an interesting question about whether there's a dominant consideration or not. But here in these circumstances on the facts, whether you apply the *Regal Casting* test or the *Coles* test it was probably to remove the property from the reach of the Property (Relationships) Act were they to enter into a de facto relationship, a matter which he had had previous experience of.

MR BILLINGTON QC:

There are factual findings to that effect.

KÓS J:

Yes, exactly.

MR BILLINGTON QC:

Yes, that is right. You've got some interesting –

KÓS J:

The test doesn't really make a difference here to you.

MR BILLINGTON QC:

It makes – it does make a difference whether – and it's not a dominant purpose test I don't think, it's whether that one of the purposes is sufficient and those are the factual findings. But the issue then is still whether that is sufficient of a purpose when motive – which are both and you can't conflate them, at the time when she has no rights at all.

KÓS J:

Well that comes back to your first question.

MR BILLINGTON QC:

It does really, doesn't it.

KÓS J:

Yes.

MR BILLINGTON QC:

But even so it goes to the second question then, is because – was it done in order to defeat when there were no such rights in existence except the fact of the impermanent relationship with which they were in, and that – so it's not entirely exclusively related to jurisdiction, it's also related to a conscious appreciation of what you are doing.

KÓS J:

Well I doubt the enquiry requires a close interrogation of the legal knowledge of the transfer or of the Property (Relationships) Act.

1210

MR BILLINGTON QC:

It doesn't, it just shows if you're in a marriage you've got some pretty obvious rights. There are extremes here, *Horsfall v Potter* [2018] NZSC 196, [2018] 1 NZLR 638 is a very good example of one extreme where the Chief Justice in dissent issued a cautionary note, and it's quite valid in my submission. The Court below evaluated what he knew and did. He had been through a relationship, he moved it into joint names, he knew when he moved it out joint names he was defending an interest. They were factual findings, that sits at one extreme. And there's not much problem, you don't have to say, well, there's no other plausible explanation for it. The question is what happens when you find a plausible explanation for it, because this section seems to suggest you need to find a plausible explanation, that is the conscious desire to remove it from the reach of the other party. No problem when they're married, because it would beggar belief to think someone didn't have some appreciation of it.

WINKELMANN CJ:

So just before you move on to the next topic, because I'm thinking you're running out of time even on a full day analysis…

MR BILLINGTON QC:

I am.

WINKELMANN CJ:

Before you move, it must be Ms Kearns time to stand up and…

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

But just to clarify further, because I realise I haven't really helped myself, my questions of clarification. Do you say *Coles v Coles* should apply and your fallback position is *Regal Castings* should be read carefully in how it's applied, or are you content with *Regal Castings*?

MR BILLINGTON QC:

I think it's probably better to say that *Regal Castings* is a guide but ought to be expressed in the context of this Act as to what's required.

WINKELMANN CJ:

Okay.

MR BILLINGTON QC:

It's an advance and an improvement on *Coles*, which probably is too narrow. But equally simply to say *Regal Castings* is the sole base for interpreting is leading to differences in courts below. You've got examples of cases, for example such as *Blake v Blake,* where the property was the separate property of the disposer under a section 21 agreement, he disposed of it as a succession plan, the courts below found there was no breach of good faith, that the transaction was legitimate, but because he knew, because his wife had said "don't do it", that knowledge would suffice. Now that was the issue in that case, so that's the other extreme with which we're discussing.

Now given we have a day I want to mention another case to you, because I think it shows you how absurd this is becoming –

GLAZEBROOK J:

So, sorry, can I just go back to your test?

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

Because I think you say *Regal Castings* is a guide –

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

– but it has to be looked at in terms of this Act.

MR BILLINGTON QC:

I think it should apply directly, yes.

GLAZEBROOK J:

And then you make the point, I think, that *Regal Castings* looked at all of the factors involved and didn't just rely on knowledge.

MR BILLINGTON QC:

That is correct.

GLAZEBROOK J:

So it's not just knowledge, it's all of the types of factors that were taken into account by Justice Blanchard in particular in *Regal Castings*?

MR BILLINGTON QC:

And I agree with Justice O'Regan, in the end it is a disposition in order to defeat, because that's what you do. But it may be better expressed in the context of this section, it may not, I'm not sure, Justice O'Regan perhaps won't agree with me. I rather think it's time we had a decision in relation to specifically

section 44(1), importing, as you did, Justice France, the issues around motive and intention, but that's as much as I can say about that.

But then it's a question of what do you do with the position with this person when he's getting legal advice to act in a particular way and the relationship is where it's at, does that satisfy the in order to defeat and isn't he entitled to an evaluation of that on either basis? Because that wasn't done. And I would suggest that, whichever test you apply, you need to evaluate that in the context of the particular facts of this case and how he conducted himself. And then I mention the fact –

GLAZEBROOK J:
And you say *Blake v Blake* was wrong?

MR BILLINGTON QC:
I do.

GLAZEBROOK J:
Right, yes. Sorry, just…

ELLEN FRANCE J:
And then I think you were going to refer to another case?

MR BILLINGTON QC:
Well, there was *Horsfall v Potter* at one extreme…

WINKELMANN CJ:
No, you were about to take us to a case.

ELLEN FRANCE J:
When you were talking about *Blake v Blake* you were going…

GLAZEBROOK J:
Which you said was even more ridiculous than *Blake v Blake.*

MR BILLINGTON QC:

Oh, yes, I don't want – will you bear with me on this for a moment, please?

WINKELMANN CJ:

Well, I mean, so long as you sit down immediately after it.

MR BILLINGTON QC:

I think it is relevant, it shows how absurd the law has become. I've got a case, and it's called (citation 12:14:32), so it's not a – here is a case where a person separated from his wife in 1982, he had three children. He and his wife settled, over a period of time there was an estrangement between the father and the children, the father remarried, he made a number of Wills to the effect that he was leaving those children out of his Will. He became concerned as got older that the Will would be challenged so he got legal advice and he and his second wife settled their property on trust. He died. There's now an application before the Court to argue that the disposition to the Trust is in breach of section 44 and the party B is the husband, the father. Now that hasn't been heard, but this is the extreme to which section 44 is now being utilised.

WINKELMANN CJ:

Well, I mean, really that's not going to help us.

MR BILLINGTON QC:

But what I'm submitting is there needs to be a focus on what 44 is actually intended to achieve and whether, as the law sits at the moment, that is sufficient.

Now I provided the Court yesterday – I'm going to finish shortly – with an article by Professor Peart, I think it's of value only to the extent that it indicates some concern about this judgment and…

WINKELMANN CJ:

Yes, we've received that, thanks.

MR BILLINGTON QC:

Yes, and it's at page 7: "By including dispositions made at a time when a de facto relationship is in contemplation rather than in existence, the Court has added an additional layer of uncertainty for de facto partners. As the Court acknowledged, determining whether a de facto relationship exists and when it began is riddled with uncertainty and often hotly contested, as is evidenced by the number of case under section 2D. Couples commonly drift into a de facto relationship over a period of time without realising that their relationship had reached the qualifying stage or when it did so. Even when the nature of the relationship is assessed retrospectively, with all the benefits of hindsight and aided by a wide range of evidential material that the parties would not normally consider while their relationship is maturing, the commencement date found by the Court may come as a surprise to one," of them. I can't put it any better that that, but that is the reality of it.

WINKELMANN CJ:

All right.

MR BILLINGTON QC:

There's another little test one might like to engage in, and I tried this. Go and try to explain to a layperson how this case works. It's quite difficult, just put it in three sentences, it's not easy. It's easy for lawyers to say but it's quite hard to say, to explain it. So I'll leave that with you.

If I can just check my notes, because I basically didn't use them in the end…

WINKELMANN CJ:

We noticed.

MR BILLINGTON QC:

Yes, it was pretty –

WINKELMANN CJ:

I think we traversed your seven points though.

MR BILLINGTON QC:

I think we did quite well.

WINKELMANN CJ:

Well, apart from the parts Ms Kearns is going to traverse.

MR BILLINGTON QC:

I don't know what attraction there is in this, and I just want to touch on it, because in the written submissions – this is the issue of retrospectivity and retroactivity…

WINKELMANN CJ:

We've got your submissions on that.

MR BILLINGTON QC:

Yes. You don't want to hear on that at all? No. Thank you.

WINKELMANN CJ:

Well, I think if we read them, and you did touch on it.

MR BILLINGTON QC:

I did. What I didn't do, and I'm not going to, but I do urge you to do, is in both judgments look at the indicia of the two relationships, that is the cusp relationship, which I did with Justice Walker, and the formation of the de facto relationship, and when one goes through those what they reinforce is the uncertainty that Professor Peart speaks of, and if you've got that level of uncertainty then the issue is does this judgment stand up as a proper application of the statute governing the rights of persons in these cusp relationships where Parliament has not debated them at all. And I submit that if a proper reading of the reasoning in the indicia, it simply fails as a robust analysis of what's required to govern the rights, the significant personal private rights.

If the Court pleases.

MS KEARNS QC:

Good morning, your Honours. I am hoping that I will be able to complete my part of the submission in the next 40 minutes, that's subject of course to your Honours' questions.

WINKELMANN CJ:

Well, you certainly won't be able to go past that because I think we're already short-changing Ms Crawshaw if we take another 40 minutes.

MS KEARNS QC:

Yes.

WINKELMANN CJ:

So perhaps if you could try for half an hour so at least get Ms Crawshaw begun. 1220

MS KEARNS QC:

I'll do my best, yes, I'll do my best, Ma'am.

What I propose to do is to make some opening comments, deal with the discretionary provisions of section 44, deal with the provisions of section 26, then deal with the facts of this case and in the end and lastly I want to respond to my friend's submissions to the effect that Ms Bell should get her entitlement to the property now.

So this case presents an opportunity for this Court to provide judicial guidance as to the interpretation and application of section 26 in order for the interests of children to be actually taken into account in PRA proceedings. To date their interests have either been ignored or given lip service as we've set out in our submissions. At the heart of this case are the parties' children, MS born on the 17th of September 2005, he's now aged 16, and AS born on the 26th of February 2009, now aged 13, and proceedings relating to their care have been in place since 2015 and are ongoing.

The appellant's position is that the lower Courts were wrong to reject the orders it sought on behalf of the children, relying on the discretion contained within section 44 overlaid by the mandatory consideration provided for in section 26.

I want to start by turning to the discretionary provisions of section 44 and if I can ask you, please, to turn to the appellant's bundle of authorities, the decision of *Lu v Huang* [2016] NZHC 2311 at page 247. That sets out section 44 in its entirety in, I might say, in large print. So if we look first of all at section 44(1), the Court, if there is an order for the defeat made, "the court may make any order under subsection (2)". In other words, the Court has an option not to make an order and that was an option which was proposed in this case and, in my submission, should have been given some consideration.

Subsection (2) also is a discretionary provision. It refers throughout to orders that the court may make if it thinks fit, and subsection (2) provides that the Court can restore the property in full or in part.

Subsection (3) adds to the discretion because it says: "For the purposes of giving effect to any order under subsection (2), the court may make such further order as it thinks fit."

In terms of the decision of *Lu v Huang*, if I can ask you to look at page 249, in particular paragraph 216, the Court in that case said that "section 44(3) permits the Court to make any further order as it thinks fit to enable Ms Huang to receive her entitlement" and also the Court referred to the powers under 25(3) which, of course, are the order provisions under the Act and the ancillary provisions contained within section 33(1). Now in this case the particular ancillary provision which comes into force is section 33(3)(d) which provides for the making of an ancillary order postponing vesting of any share in the relationship property until the occurrence of a future event to be specified.

The other case which the appellant's have referred to in the submissions, if I can ask you to look at the decision of *SMW v MC* [2013] NZHC 396, [2014] NZFLR 71. This is –

KÓS J:

So, sorry, you've taken us to *Lu* but that's simply a précis of the statute. Is there anything else in *Lu* we need to know about?

MS KEARNS QC:

That case does have some similarities, your Honour, to this case because in that case the evidence which gave rise to the section 44 decision being made in that case came late and the Court, of course, gave the appellant, allowed an appeal out of time, but it's really the reference to simply the discretionary provision that I am particularly referring to there.

Then in the decision of *SMW v MC* is a further example of how the Courts have looked at the question of discretion under section 44. That's at page 275 at paragraph 89 where the Court in that case said: "Under s 44(2), the Court's powers are discretionary. Where improvements have been made to property disposed of in order to defeat the claims of any person by the transferee, the Court should consider whether it is appropriate to allow that person credit…" and what my friend says about that is, of course, that that was for a third-party trustee but in my submission the intention of the section 44(3) allows the Court, and particularly in this case, to give credit to Mr Sutton if that is in the interests of the children.

1225

We then look back to the provisions of section 44 and particularly section –

WINKELMANN CJ:

Could give him credit for what?

MS KEARNS QC:

For his initial contribution to the property because what Mr –

WINKELMANN CJ:

So you're saying that you could combine those two factors, which on their face are freestanding?

MS KEARNS QC:

Yes.

WINKELMANN CJ:

The contributions he's made?

MS KEARNS QC:

Yes, and this –

WINKELMANN CJ:

But on the other side there's the interests of the children. You're saying you can combine them?

MS KEARNS QC:

I do, Ma'am. The two remedies that Mr Sutton was seeking was to an order – was for a credit to be given for his acquisition of the property, for ringfencing of that initial contribution which was about 209,000 at the time in 2019 and about 39,000 for Ms Bell. That was one of the remedies that Mr Sutton was seeking in terms of the discretion which is apparent under 44(3), overlayed by section 26.

The other provision of course which my friend has referred to in her submissions is section 44(4) and that is where, your Honour, you raise the question of why is good faith come into play? The appellant's position was that in this case, the trustees did receive the property in good faith. The Trust had been encouraged to be set up by Ms Bell. The Trust then was administered properly. It acted properly in terms of providing for the children and so – and of course Mr Sutton has altered his position in reliance on the Trust because for about six years after Ms Bell – after the parties separated, he ensured and the trustees ensured that Ms Bell could remain living in the trust-owned property. He paid all of the outgoings. He paid child support at a high level. He paid the children's expenses. So the trustees actually – the Trust operated, it didn't just say so –

WINKELMANN CJ:

But that's not a detrimental reliance, is it? He has the house. How's his position been detrimentally affected by his reliance on the transfer being effective?

MS KEARNS QC:

This is a matter that was actually raised by Justice Druce in his decision, because he said that in fact Mr Sutton was disadvantaged or prejudiced by the fact that he could have in fact simply divided his own assets at the date of separation and he wouldn't have then paid, for example, continued to pay for Ms Bell's living in that trust-owned property when he was receiving no benefit from doing so.

WINKELMANN CJ:

Isn't that a consequence of choices made, as Mr Billington would have it? He took – he chose to defend the action on the basis the transfer of the Trust was legitimate?

MS KEARNS QC:

Yes, I think the point I'm making Ma'am is that now when we're looking back though and looking at the remedies for the Court, we would say that one of the factors that makes it inequitable to grant the relief and total that Ms Bell is seeking is an assessment of the position of Mr Sutton as well and the steps he took to uphold the Trust. But I accept, Ma'am, it's really the general discretion under section 44(3) that we are in fact relying on.

If I take you back then to section 26 and I want to refer the Court to the case of *Babylon v Babylon* (2009) 27 FRNZ 622 (HC) in the appellant's authorities at page 176. This is a decision of Mr Justice Heath and this is a case where one of the issues was whether in that case the adult – the children were – it was a 44 case and the issue was whether the children, who were adult beneficiaries, fell within section 26 but it does – Justice Heath went through the provision of section 26 in some detail.

So I just want to take the Court through the actual provisions of section 26. First of all, it says: "In proceedings under this Act", so in other words it's all-encompassing, "the Court must have regard to the interests of" the children, and so it's a mandatory provision. The Family Court's failure to consider a mandatory provision constituted an error of law. The High Court was wrong to find otherwise but was right to stress the importance of this issue in granting a second appeal and the Court of Appeal, we say, also erred.

If we look then at the elements of section 26, the elements are threefold. There has to be minor or dependent children of the relationship. There has to be a consideration of the interests of those children and if the Court determines it is just, an order can be made. So the word "just" is a much lower standard than "extraordinary circumstances", as found in section 13, and "serious injustice" is found in section 21J of the Act. And, as the Law Commission and commentators have noted, the preponderance of previous case law has imposed a high threshold which has led to the adoption of an incorrect judicial approach and has resulted in the interests of children being ignored.
1230

And to give the Court an example of how high the threshold is, I want to refer you to the case of *Hammond v Hardy* [2007] NZFLR 910 (HC), which is in the respondent's authority at page 78 at paragraph 109. What Justice Priestley was looking at in that case was in order, for the benefit of children, and at 109 he said the settlements are, he says it has to be made only in exception circumstances, which were absent, and in paragraph 109 he says this: "Settlements appears to occur where the situation is 'somewhat out of the ordinary', there being cited examples of parental disappearance or death, sexual abuse, or some form of physical or mental disability on the part of the child," and that case is reflective of the high threshold test that has been implemented in terms of section 26 and explains in part why orders under section 26 are rare.

GLAZEBROOK J:

Is that just an assumption that the parents though are going to be looking after the children and is that assumption an incorrect one usually?

MS KEARNS QC:

Each case, your Honour, has to be looked at on its own circumstances. But the Court has to look at whether in every case – and this is the position that I'm taking – that in every case before orders are made the Court does have to give regard to whether the children's needs and interests have been taken into account in the division of the parties' property, and that will of course involve a consideration of each party's ability or intention to provide for those children. So that, for example, at the moment where the Family Court are not allowed to simply rubber-stamp consent orders, counsel are required to file memoranda certifying that the orders that are sought to be made are in accordance with the principles of the Act, and what I'm saying is that practically speaking section 26 should require counsel to also certify in that case that the children's needs are going to be taken account of in the division of the parents' relationship property and whether the order is a just result for the minor or dependent children of the relationship and, if the Court considers it just, they would need to identify how those children's needs are going to be met.

WINKELMANN CJ:

So your case is that it shouldn't be an exceptional circumstance consideration and your case is that it should be a consideration in every case where there are dependent children?

MS KEARNS QC:

Absolutely, Ma'am, tat's the nature of the mandatory consideration and the wording of simply being just.

GLAZEBROOK J:

But my question was really if, having considered that, even accepting that, if having considered that they say that the decision is that the parents will look after those children?

MS KEARNS QC:

Well, then there is no need for there to be, I totally accept in that circumstance there is absolutely no need for there to be any settlement on the children. And that of course, Ma'am, will be the –

GLAZEBROOK J:

But isn't that just what's being said here, they have to be somewhat out of the ordinary because effectively you'd normally expect that the parents would be looking after the children?

MS KEARNS QC:

What Mr Justice Heath concluded the test should be in *Babylon* was simply that it was held that the enquiry was whether the facts establish a present need to provide for the interests of the minor or dependent children. I think that, Ma'am, answers your question.

GLAZEBROOK J:

Thank you.

MS KEARNS QC:

Is there a present need based on a consideration of – and in the standard run of cases where parents of course look after their children there won't be – but the threshold test to say that someone's got to be, to the extreme of it was, is my concern in terms –

GLAZEBROOK J:

Right, so not extreme, just a need for that?

MS KEARNS QC:

Correct, only that it has to be a need, present need.

KÓS J:

How does that bite here? This is, I mean no disrespect to the parties to say a relatively run-of-the-mill case. Both parents have contact, one has care, and

the house that is worth two and a half million will be sold. A more modest residence can be acquired by each parent. So why is it something different here requiring a special order?

MS KEARNS QC:

Because this, Sir, this is not a run of the mill case. These children have been subjected to years of significant trauma, both physical and psychological abuse, and I am going to take your Honour to the actual evidence that underpins that because that is apparent from the Family Court decisions that have been made, that this is not a run of the mill case. These children have been exposed to –

GLAZEBROOK J:

I suspect that you're not totally speaking into the microphone in that we can hear you but it may not be so easy for the transcribers.

MS KEARNS QC:

Sorry Ma'am.

WINKELMANN CJ:

Well can you just take us through the findings as opposed to traversing the evidence?

MS KEARNS QC:

Yes.

WINKELMANN CJ:

Because I apprehend from the respondent's submissions that much is disputed and really in the final Court of Appeal we don't want to be reopening those kind of issues. We're only just concerned with findings on those matters.

MS KEARNS QC:

Yes Ma'am. If I can take you – I was going to take you, Ma'am, to the – I'll go back again. For the assistance of the Court, we have provided an index of the judgments in chronological order as part of our supplementary submission and

my submission to you is the COCA decisions, of which there are many, have to be read in sequence with the relationship property proceedings. There are two particular decisions that I want to refer your Honour to which will highlight what I'm saying about these particular children.

WINKELMANN CJ:
But before we go to that, is your case that these children therefore need a higher standard of care than other children?

MS KEARNS QC:
Yes, absolutely.

WINKELMANN CJ:
And that means that they, what, have to be able to stay in the family home?

MS KEARNS QC:
Absolutely. These particular children, in terms of what they've suffered, their interests and needs require them to stay in that family home at least until their minority. If I can take you firstly to the first decision, which is the decision that – there are a number of decisions. The first decision I want to take you to is the one on 4 December 2017. That is the decision at 501.0001 in the appellant's supplementary bundle.

Now I want to just set the scene for that briefly. In 2016, Judge Maude determined care arrangements for the children. There was a three-day hearing and he had the opportunity of hearing witnesses and the psychologist's report. Her recommendation was that the children's care with their mother should be supervised. Judge Maude gave Ms Bell a last chance and that is recorded in the decisions whereby he put in a week-about arrangement, but he also imposed a number of restrictive conditions to make sure the children were safe when they were in their mother's care. By April of 2017, Ms Bell had breached those conditions and there was then an immediate reversal of custody so that the children were then living with their father full-time and only having six hours a fortnight with their mother.

WINKELMANN CJ:

All right, Ms Kearns. So what part of the judgment do you want to take us to?

MS KEARNS QC:

Right, so if I take you to the first part of the decision. This is – and so the reason this decision is very important, because it deals with two things. It deals with the final parenting orders which were going to be made and it deals with the question of Ms Bell's ongoing occupation of the Point Chevalier property. So if I can take you to this decision.

So the first point that I want to take you to is paragraph 44, because what the Court is hearing is that there are multiple incidents which are described, and which then Judge Maude sets out in the ongoing paragraphs. He sets out at paragraph 45 that he'd: "Found Mr Sutton, as I did in 2016, a truthful witness whose wish would have been for a mother fully engaged in the lives of [the children] if possible."

O'REGAN J:

This is pretty remote from what we're dealing with now. Just tell us what the Court found. Why did these children need something more than any other children need to live in a matrimonial home?

WINKELMANN CJ:

Yes, because even this is not making a finding that – of any kind of –

O'REGAN J:

We're not going over this stuff again.

MS KEARNS QC:

No, no, I –

O'REGAN J:

We're just dealing with a point of law about section 44 and section 26.

KÓS J:

We're also going way past your written submissions in terms of the detail here.

WINKELMANN CJ:

Yes.

MS KEARNS QC:

I have set out in the written submissions, Sir, that salient facts here refer to, for example, some of the more serious incidents which have occurred with the children, being MS at aged 11 being held down –

WINKELMANN CJ:

Yes, but are those found to be facts by a judge?

1240

MS KEARNS QC:

Yes, because Judge Maude accepts the evidence of the psychologist, he continues the final parenting –

WINKELMANN CJ:

Look, I don't think it's a simple question, those are factual allegations and, I mean, well, it is really remote and this is a final court of appeal and this family has been through trauma through these issues being litigated, et cetera, so we want to keep this hearing as narrow as we can without re-litigating that aspect, because the whole purpose of this legislative regime is to allow people to find peace within their families and restore them, so we don't want to go re-arguing things which are not clearly bolted down and binding factual findings. So not just sort of, for instance Judge Maude just says, you know, that Mr Sutton has described multiple incidents, but he's not making a finding of any of those incidents. So we're interested to know what the findings are that you're basing this on because if there aren't firm findings then we're not going to be reading through massive amounts of evidence and making fresh findings.

MS KEARNS QC:

So this, to the effect of this order, was to confirm the final parenting order in favour of Mr Sutton, because the Court determined that that children were not safe in the day-to-day care of Ms Bell. It put in place an unusual provision that in the event that MS, for example, maintained the same contact and it put in place a particularly unusual provision that in the event that MS raised another area of concern he could be immediately uplifted by his father, and in fact that's entirely what then happened. So it confirmed that the orders which would have been put in place, the restrictive orders that had been put in place in April 2017, they continued. The Court found that the children, the importance of this decision, and I do encourage the Court to read it, is because it sets out what life is like for MS, bearing in mind that section 26 does require individualised assessment, it describes him being 10 out of 10 for sadness, it also records that the children themselves are wanting to stay in the family home.

WINKELMANN CJ:

All right, thank you.

MS KEARNS QC:

Yes.

WINKELMANN CJ:

So I think we'll read the decisions. Can you tell us which decisions?

MS KEARNS QC:

So the first one is, that is the first decision, which is the 4th of December 2017, and the second decision is the decision which is at…

GLAZEBROOK J:

The submission as I understand it is that against that background, if you look at section 26 properly there should have been an order that they can stay in the family home?

MS KEARNS QC:

Correct, yes, that's correct, Ma'am. In fact the second decision is the –

WINKELMANN CJ:

Until they're 18?

MS KEARNS QC:

Yes.

GLAZEBROOK J:

Sorry, yes, for a further period.

MS KEARNS QC:

Yes. And so the second decision I want to refer you to and I encourage you to read is the 18th of November 2019 decision, and that sets out the reason which led in fact to **[redacted]** not having any contact with his mother following what I would describe as the "Judas Iscariot" incident, yes.

WINKELMANN CJ:

All right, okay, Ms Kearns.

O'REGAN J:

So where is that decision?

MS KEARNS QC:

The Judas Iscariot incident is set out in that decision –

O'REGAN J:

But where is that decision, that's what I'm asking.

MS KEARNS QC:

It's at page 301…

WINKELMANN CJ:

So, Ms Kearns, we are going to read it.

MS KEARNS QC:

Yes, thank you.

WINKELMANN CJ:

So can you please just avoid sort of inflammatory-type references.

MS KEARNS QC:

Right.

KÓS J:

Reference, please.

MS KEARNS QC:

Yes.

GLAZEBROOK J:

I didn't quite catch the date of the first decision. It's 4 December…

MS KEARNS QC:

4 December 2017. The second decision is dated, it's in the decision at 301, is 0203 is the, is in fact paragraph 6, there is perhaps a summary of the orders that have been made. The reference to the Judas Iscariot incident occurs at page 301.0210.

Now to finish the position for the children, I want to refer the Court – and so again those decisions really show the extent to which the children's lives have been impacted by the –

KÓS J:

Isn't it really unsatisfactory that we're hearing this from counsel for an interested party as opposed to counsel for the children?

MS KEARNS QC:

Well, Sir, I asked for counsel for the children to be appointed in the very first decision, and that was recorded in Judge Druce's first minute…

KÓS J:

Well, that may be the history, but nonetheless, I mean, you're in a very conflicted position on the argument you're making.

MS KEARNS QC:

Well, Sir, I had specifically sought to have Ms Soljan appointed to represent the children's interests and what Judge Druce said to me was that, and this is in the first minute that is in the bundle, he said that interests of the children could be submitted through their counsel. So, Sir, I agree that it would have been preferable and I'm simply asking that the Court take on board the record of these decisions because it does –

KÓS J:

It seems to me in the difficulty you're in with the conflict of interest that's underlying your position, you're better just simply to take us to the references and leave it there.

MS KEARNS QC:

Yes, right.

WINKELMANN CJ:

I mean, that's what I'm asking you. Can you just – you don't need to do any – because you're running out of time anyway and we only – I mean, this is a case which is easily able to have been argued in half a day.

MS KEARNS QC:

Yes.

WINKELMANN CJ:

So can you just tell us which documents you want us to read on this point without any further submissions on it? We can read your written submissions.

MS KEARNS QC:

Thank you, Ma'am. So the next portion of evidence I want to refer you to is Mr Sutton's last affidavit which brings the evidence up to date, 5th of August 2020 at page 201.0206, and I'll leave – that brings the issue of the children up to date.

WINKELMANN CJ:

Sorry, what was the reference?

MS KEARNS QC:

201.0206. And that was the last evidence that was before the Court.

GLAZEBROOK J:

That's the whole of that? Or is it particular –

MS KEARNS QC:

It's an affidavit where Mr Sutton brings up to date what's been happening for –

GLAZEBROOK J:

No sorry I mean, are there particular paragraphs or the whole affidavit?

MS KEARNS QC:

It's five paragraphs, 5 to 8 Ma'am.

GLAZEBROOK J:

5 to 8, thank you.

MS KEARNS QC:

So what my friend in terms of the responding to the issues she has raised about what Mr Sutton was seeking was that the children's interests were a "spent force" and I would say that the information that is before the Court is right up until 2020. The children are still impacted by the care arrangements and the difficulties they've had with them. So I would argue that it's not a spent force, that the time – what has to be looked at is not simply a general view that the length of time from separation, being 10 years, means it's sufficient for the

children's interests to be considered in a generic way. They have to be looked at as – in the terms of these particular children.

The next point I wish to make is that Ms Bell says, and this was accepted by the Court, that her position was that the Court of Appeal and High Court were right to reject postponement of vesting on the basis that the children's future best interests would be met by having a relationship with both parents and that Ms Bell could not achieve a relationship with her children without her relationship property entitlement.

Now I say there are several issues with that assessment. It ignores the history of the matter whereby Ms Bell's care of the children was progressively removed from her despite her having sole occupation of the trust-owned family home for nearly six years. The history of the matter makes it clear that the respondent's care of the children is not dependent on her relationship property entitlement but is dependent on her ability to safely parent the children.

There was also a misapprehension as to what in fact Judge Maude said, because he said that in respect of AS that holiday blocks of contact could occur in respect of AS to commence once Ms Bell had permanent accommodation. Permanent accommodation, this is at your Honour's bundle at 301.0222 was "defined as either: a) a home owned by her; or b) a tenancy of not less than a fixed term of six months' duration." The other –

WINKELMANN CJ:

Well I mean it's the only point that is being made, which is a profoundly true point, was that the best way to settle family situations is to resolve all the issues between the parents in relation to relationship property, and you're saying that's not the issue that exists for Ms Bell with her parenting?

MS KEARNS QC:

Correct.

WINKLEMANN CJ:

I think we have that submission.

MS KEARNS QC:

Yes.

WINKELMANN CJ:

I'm mindful that you've only got – I said you should be finished by about 10 to, which is in two minutes. I apprehend you're not going to be finished by 10 to but we're not going to allow you to go past 1 o'clock.

MS KEARNS QC:

I'm nearly finished, Ma'am. Ms Bell – the other issue of course is that the other important decision that I want to refer your Honour to in the bundle is the decision of Judge Fleming, which appears at the bundle and there's reference to Ms Bell's own position. She has not taken steps to obtain permanent accommodation. She has not sought employment since losing occupation of the family home and that's set out at 301.0198.

1250

Then finally, I wanted to address, Justice Kós, your position about the financial position of the parties, because what is clear in this case is that the only asset of the Trust is the family home. Judge Druce questioned the parties about their financial position. This is at 201.0814 of the transcript of evidence. Mr Sutton explained he'd always only been in salaried positions, he was on at that stage about 110,000, his position worsened during the COVID crisis so that he's now on about 96,000, that is set out also in the decision of Judge Fleming, the position of both parties is that neither of these parties are in a position to afford a new home, because even if the home is sold for 2.4 million, there's $510,000 owing on the mortgage, there'll be commission taken off, and that would leave the parties with just under, about 900,000 and, as Mr Sutton had said from the outset, in the even there is a directed sale of this property he would not be able to afford to remain living in Auckland, and that is clear from the evidence itself. It is not accepted that these particular children in the particular circumstances

of their life she be forced to rent, as Justice Walker had said that children of separated families should do, because that's not considering these particular children in their particular circumstances where they themselves are seeking the security of the accommodation in their family home. So that the orders that Mr Sutton was seeking –

KÓS J:

Well, for up to five years.

MS KEARNS QC:

Yes, and at that point the children will be finished their minority, Ms Bell will of course – we're not saying that Ms Bell should not receive her share of entitlement, but if section 26 is actually to be properly implemented here these children's interests do enable the Court to tailor relief which takes into account her need for accommodation as opposed to the children's need for security, and these particular children in their particular circumstances do need to have the security of accommodation to enable them to stay in their familiar home and attend the schools through this important teenage period of their life, and so that –

KÓS J:

And what happens to Ms Bell in this time, when she is out of her 900,000, what life will she make for herself?

MS KEARNS QC:

Well, I accept that – the position has to be looked at from the point of view of the children, not at either party. Ms Bell has not taken steps to obtain any accommodation, she's not making any – Mr Sutton is solely meeting the financial needs of the children, and the section 26 enables the Court under section 26(2) to disregard the clean-break provision and in fact tailor relief by providing either postponement investing under section 26A and, in this case, some ring-fencing of the contribution so that the children in terms of their position, and of course they've lost their position also as beneficiaries of the Trust, which provided them with accommodation and the legacy. So for these

particular children, MS and AS, in terms of what, the insecure arrangements they've had, the trauma they've experienced as a result of these parenting proceedings, it is no small price to pay for there to be a deferment to ensure that these children can remain in their home during those teenage years.

KÓS J:

Well, there's already been a 10-year break, it's hardly clean, and you're arguing for 15.

MS KEARNS QC:

Well, except that the children have had the insecurity every day, even in 2020 Mr Sutton has deposed that there is further proceedings being instigated by Ms Bell to five without notice applications and so on.

KÓS J:

Right.

MS KEARNS QC:

So, yes, while it's accepted that's a considerable period, there is ample evidence before this Court in terms of their particular interests to make that a proposition which the Court should have given regard to, and I accept that in the usual run-of-the-mill cases that would not be the case, but this is anything but a usual run-of-the-mill case. Those are my submissions.

WINKELMANN CJ:

Thank you, Ms Kearns. Sorry, Ms Crawshaw, there's six minutes to go. Perhaps you'd like to at least just, you know, orientate us in that time before lunch

MS CRAWSHAW QC:

I'm happy to do that, Ma'am. I take it that your Honours have received the road map of the argument for counsel for the respondent?

WINKELMANN CJ:

Yes.

MS CRAWSHAW QC:

In terms of time estimate, I can actually address you, your Honours, on my argument within, I think, 30 minutes, but I anticipate allowing for questions it would be more like 40, perhaps 50, and my learned junior will address you about the relief issues that my learned friend Ms Kearns has addressed you about.

I say there are actually four issues this Court needs to determine. Firstly, does section 44 or can section 44 apply to a disposition that takes place before a marriage, civil union or de facto relationship, and I say the answer to that question is yes, that's the jurisdictional point. Secondly, what is the legal test to determine whether a disposition has been made in order to defeat the rights or claim of any person as required by section 44(1), should that test be on a first principles basis in a domestic relationship context? I say *Regal Castings* has been correctly applied but this Court isn't wedded to that decision either and can take into account the social fabric and context of the legislation. Thirdly, in this case did Mr Sutton transfer the Hawea Road property to his trust in order to defeat Ms Bell's claim or rights under the Act and I say the answer to that is yes. And, finally, the respondent argues that there are no material errors in the way in which the lower courts addressed the question of relief, either under section 44(2), (3) or section 26 and 26A.

I do want to address your Honours about some core facts. I'm not going to go to these in detail, your Honours have the submissions, but we can't move away from the fact that this was a seven and a half year committed relationship, not taking into account the previous period before the parties were found to be in a qualifying relationship. There were two children born of the relationship. The parties meet in July 2003, and that is just days after Mr Sutton settles his matrimonial property with his first wife. Judge Clarkson found, notwithstanding she was found to later be wrong about the start date, but she found that during that 2003 and early 2004 period this was an exclusive relationship, they were

spending time together, they were staying overnight with each other, and that's referred to in the Judge Clarkson decision at paragraph 7. There were no findings that this was a business relationship, contrary to my learned friend Mr Billington's submissions at paragraph 7. In fact Judge Clarkson found that the business relationships suggestion was somewhat misleading, and that's at paragraph 12.

The next point is that there wasn't a contracting out agreement here and neither were there findings there was agreement to the disposition, as the appellants contend. The Todd Sutton Trust is settled "on the cusp" – and I use that wording deliberately because I think Justice Walker's analysis is actually very appropriate – but that settled on the cusp of this de facto relationship on the 29th of November 2004. We know the start date is found to be sometime between December 2004 and January 2005 around the time the first child is conceived – the first child is conceived actually in December 2004 and just weeks after that disposition.

The next point is that when Mr Sutton's trust was settled there were no children in existence, and I think this is important because there seems to be a bit of a conflation between the children's interests and the children as beneficiaries of this trust. The then future children's needs were actually not elevated above Mr Sutton's needs in the memorandum of wishes, the memorandum of wishes makes it very clear that Mr Sutton's needs are elevated above these future children, who don't at this point exist.

The February 2004 email is important, and I'll take your Honours to that, for various reasons. It was important because it helped inform the High Court Judge of the start date of the relationship, it's important because it conveys this knowledge about a trust, but it's also important because Ms Bell also mentions the fact that the parties could contract out of the Act and receive independent advice.,

Finally, in terms of the core facts, the fact that Ms Bell applied most of the proceeds of sale of her Eden Terrace apartment to Mr Sutton's trust is relevant.

Whereas Mr Sutton's mother enters into a loan agreement to protect her assistance to the Trust for the renovations, no such protection is afforded to Ms Bell. And it's interesting because the very same lawyer, Mr Sherer, who acts on the Trust, acts on Ms Bell's sale of the Eden Terrace apartment. One might say that there were some conflicts, because he seemed to be aware, at least by 2009 in the evidence, that she had applied the proceeds of sale or most of those to the Trust.

It's now just after one, I'm going to skip through quite a lot of what is in my oral argument, but I will obviously concentrate in the areas that your Honours wish me to.

WINKELMANN CJ:
Right, we'll take the luncheon adjournment, thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.15 PM

WINKELMANN CJ:
Ms Crawshaw.

MS CRAWSHAW QC:
Thank you, your Honours. I don't intend to labour the point about the overview of the Property (Relationships) Act, that's all in my written submissions. I do just, however, draw your Honours' attention to the diagram contained in the little road map. I'm sorry it's in ant writing, it just had to squeeze onto the page, but this is quite important I think and helpful just to consider the way in which the Court does look at various points within the duration of a relationship, and it isn't confined to a start date.

So, single and dating, obviously no enquiry there, but the contemplation part is considered in a number of sections. The qualifying relationship begins and that of course is section 44(C) and other sections of course as well. That's a short

duration relationship from that point to the next point, which is when the qualifying relationship reaches a three-year period. Of course, the Court does have some discretion around that point and that's important to bear in mind.

GLAZEBROOK J:

Can you – at some stage are you going to tell us what, at least in the context of section 44 because it may be different in other sections, what you say "contemplation" means?

MS CRAWSHAW QC:

Well what I say, and I've mentioned this in the written submissions, is that that is not a jurisdictional point. It's an evidential point.

GLAZEBROOK J:

It doesn't matter which one it is. What do you say is the test, is what I'm asking.

MS CRAWSHAW QC:

I say that it needn't be a mutual contemplation test because that could unfairly exclude a situation where there is a disposition with knowledge, but nevertheless one party is deliberately not wanting to enter into a de facto relationship perhaps, so requiring a mutuality I think would be too high a test. I say, in my submissions, there shouldn't be a jurisdictional threshold but it will turn on the knowledge of the party. For example, you might have somebody who was commitment phobic. This is actually the case of *Genc v Genc* [2006] NZFLR 1119 (HC) and deliberately not wanting to enter into a relationship but all other factors might be present. But from their point of view they don't want to be in a relationship and they say that loudly and clearly and there's evidence of that. But nevertheless, in some cases a disposition might nevertheless be caught not so much because of their lack of commitment but the extent of their knowledge, because that is the focus under section 44(1).

WINKELMANN CJ:

Well what would be the knowledge that would make it caught if they don't want to enter into a relationship?

MS CRAWSHAW QC:

So –

WINKELMANN CJ:

What would be the knowledge? What would be the knowledge that they could have to make it caught?

MS CRAWSHAW QC:

The appreciation of risk. They might have been in a relationship for five years, for example. They might have some other intentions. For example, they might be open to having children but they're definitely not living together. Done that before, they don't want to do it, but –

GLAZEBROOK J:

Well you don't have to live together to be in a de facto relationship. I think by the time you're having children there might actually be not that many arguments against that at that –

WINKELMANN CJ:

So your point is that –

MS CRAWSHAW QC:

No, they might have contemplated having children.

WINKELMANN CJ:

Your point is that they're not contemplating a de facto relationship. They definitely don't want to be in one but they've got a relationship that is drifting towards one.

MS CRAWSHAW QC:

They've got a relationship where there may be some risk that they are appreciating and they may in fact be deliberately, in fact, avoiding the commitment for the very reason. One of the reasons being that they don't want to share property but then they end up being in a relationship and a start date

is found later. All I'm saying is that in terms of jurisdictional tests there needn't be a mutual contemplation as is required –

WINKELMANN CJ:

Well you've gone to an extreme position though.

MS CRAWSHAW QC:

I have.

WINKELMANN CJ:

Because you're actually talking there – there are two points. Your first point is that the intention of party B is irrelevant because section 44's talking about the intention of party A.

1420

MS CRAWSHAW QC:

Yes.

WINKELMANN CJ:

So, and then you're going to party A, that's your next point, which is the thing you're just taking us to, and saying and even when party A is, might be trying to deliberately avoid having the regime applying to them, they can still say, see themselves as being of risk and therefore taking steps to protect to themselves, so they're talking steps to protect themselves in case the regime does apply to this relationship.

MS CRAWSHAW QC:

Yes, that's correct, but I'm not sure if I answered your Honour Justice Glazebrook's question, which was what do I say the test of contemplation should be?

WINKELMANN CJ:

Yes, and you said it need not be a mutual contemplation test.

MS CRAWSHAW QC:

I don't think it has to be, I think it's more likely that knowledge is going to be found, much more likely, where there is mutual contemplation. But what I say is the Court of Appeal's analysis of *M v H,* which was the test of contemplation of a marriage, is correct when they said that contemplation of a de facto relationship may be a less strict test, and I think that's correct. Because factually de facto relationships have got something of an amorphous sort of quality to them, particularly at the beginning,.

WINKELMANN CJ:

Well, it wouldn't be a stricter test, would it? Isn't it just it might be harder to prove on the facts?

MS CRAWSHAW QC:

I think that's probably a better way of putting it.

KÓS J:

Now whose contemplation? If it's a single unilateral contemplation are we talking about transferor or are we talking about the non-recipient?

MS CRAWSHAW QC:

Is your Honour going back to my earlier statement about it not being required to be a mutual contemplation?

KÓS J:

Yes. So that means a single contemplation. I mean, obviously if no one's contemplating it we're not in the realm, are we?

MS CRAWSHAW QC:

No, absolutely not in the realm at all, because that's that single date in factor.

KÓS J:

Right, okay.

MS CRAWSHAW QC:

I have gone to the extreme and I wonder if that's not helpful for the Court. All I'm saying, your Honour, is that the requirement of mutuality is going to be in some cases in the context of this section too high a threshold, and some may not cross it, and it would apply in the case of either party, potentially. Because my example that I used almost implied that would be a deliberate lack of contemplation in order to prevent a property sharing. But equally, as in *Genc v Genc*, it was the de facto wife, ultimately de facto wife, who was commitment-phobic.

WINKELMANN CJ:

Isn't the answer to this question really that section 44 doesn't require mutuality, its focus is upon the intention of the transferor? So it might that they see this de fact relationship developing and it's their intention that it do so, perhaps, or not in your case. But, as you said, but it doesn't really matter what the other person's intention is?

MS CRAWSHAW QC:

I think that is correct in that –

WINKELMANN CJ:

It just makes it harder if you don't have the mutuality, harder to show.

MS CRAWSHAW QC:

It makes it harder on the evidence, I think that's the obvious answer.

WINKELMANN CJ:

So it's an evidential question.

MS CRAWSHAW QC:

So it focuses on the section itself and the requisite in order to defeat, it will be an important part of the overall factual matrix.

GLAZEBROOK J:

It still is slightly difficult to say: "I don't think I'm in a de facto relationship, in fact I'm doing everything I can to avoid being in a de facto relationship, and then I can't transfer property because I might be in," it just doesn't seem quite – I mean, I can see if you say, well, one party thinks they're in a de facto relationship or getting towards it and transfers property, but I can't see it the other way: "I think I'm dating and I'm absolutely determined that's all I'm going to do."

MS CRAWSHAW QC:

Yes, and that is going to turn on its facts, and I think that does lead to the next point which is when people enter into a contracting out agreement if there isn't –

GLAZEBROOK J:

Well, that might be a different question.

MS CRAWSHAW QC:

That could well be a different question and I think that's answered much more neatly in the sense that if they then go and enter into a contracting out agreement and they say they're in contemplation they'd have some real difficulty in trying to wriggle away from that at some later date and try and say there was no jurisdiction for the agreement.

I just want to go straight to section 44 which is my next point, and that is this. I say these key points were observed by Justice Walker in the High Court decision at paragraph 79. Three points really that need to be made about this. There's nothing that requires the parties to be spouses at the time of the disposition, there's no requirement that the property was relationship property, and the key comparison is with the neighbouring section, section 44C, which by contrast does require those things, and I think that's of assistance to the Court. The Court of –

ELLEN FRANCE J:

In terms of that point, you can see those sections as dealing with sort of a sequence, if you like. So 44 is the situations in which something is set aside. 44B's dealing with disclosure of information, and then you get compensation in a different situation when after the – since the marriage, et cetera. So there is arguably a logic to 44 being silent about timing, if you like.

MS CRAWSHAW QC:

Yes, I think that is a fair point but I do think that if Parliament when enacting 44C, et cetera, had wanted to confine the period for which a disposition bites under section 44, there was an opportunity to do that, and section 44 remains broadly worded.

ELLEN FRANCE J:

Well, I think that's a better point rather than saying necessarily that you can draw a lot from the comparison with 44C.

MS CRAWSHAW QC:

I understand.

ELLEN FRANCE J:

That's all I'm suggesting.

MS CRAWSHAW QC:

Yes, I take that point, your Honour. The Court of Appeal said at paragraph 57 that the existence of a qualifying relationship is not a pre-condition, and that's just on a plain and ordinary reading of the section.

KÓS J:

It's interesting that this argument has been lying in plain sight for 22 years or more and no one's really twigged to it.

MS CRAWSHAW QC:

No, and it seemed to be twigged in *Genc v Genc* but it turns out it wasn't because there were some misunderstandings I think by counsel and the Court that it needed to be relationship property before it could be disposed of. But yes, that's right, it has been laying in wait for your Honours to consider.

I simply take you, your Honours, to paragraph 30 of my submissions, and I think your Honour, Justice Winkelmann, addressed my friend. These are the three examples I've made. The only one I want to discuss really is paragraph 30(c). This is a marriage where there's no qualifying relationship prior to the wedding. It could be a marriage of religious people or perhaps an arranged marriage, but the month before the wedding, or even the day before the wedding, as your Honour, Justice Kós, mentioned, one spouse-to-be disposes of the intended family home, meaning that once the parties are married there is no family home. I say section 44 would apply in that instance. This is no requirement for rights to have crystallised at that time, but that would still be consistent. That is exactly the same example as we have here except here we are in a de facto relationship situation, not a marriage.

It is the timing of the disposition in each of those examples that I have highlighted at paragraph 30 which would almost certainly be relevant to the question of intent. But that, of course, again is that factual analysis analysing the disponer's intent.

1430

I think if I can now move to the legislative history, which I don't intend to go into, I just want to make the point that it is interesting from the Law Commission's investigations that the use of trusts did flourish at a time. Two junctures, one when the 1976 Act was passed and equal sharing became inevitable, and the second when the umbrella was extended to include de facto relationships. That is, of course, their anecdotal research but it is interesting that there was this use of trusts perhaps as a device to defeat the terms of the Act and to say that sections 21 and 44 co-existed peacefully during the reign of *Coles v Coles* is, in my submission, to ignore the fact that they were used, and effectively, as

a device. Parliament had deliberately allowed for a door to be opened out of the Act for people to go through, which is section 21, and in my submission the unilateral disposition of property in circumstances where there is an appreciation of risk is like someone climbing out the bathroom window. In my submission, *Coles v Coles* did allow for that.

I do want to speak briefly about the interface with section 21 and policy issues. In my submission it was appropriate for the Court of Appeal to give a broader overview of the sections in the Act and to also consider how section 44 sat with section 21. So at paragraph 57 of the Court of Appeal decision, in my submission the two points that the Court made about that interface between section 44 and section 21 were correct. Firstly, that: "If section 44 did not apply… to dispositions made before a qualifying relationship", firstly there'd be this "potential to 'hollow out' section 21". Secondly, the incongruity that the Court drew attention to of a situation where parties did go and take the proper step through the door that Parliament had intended, contracted out, got independent advice, years later, there was an attempt to set aside that agreement. The Court would still have jurisdiction to consider serious injustice if that were the claim, but in the case of the unilateral disposition there would be no remedy.

I say that it is incorrect to say that the Court created a new class of relationships. I just think that's wrong, and as I've shown in that diagram the Court has always recognised the reach prior to the commencement of a particular relationship or marriage. Saying that people won't know if they're contemplating relationships, it's a fairly simple answer to that. If they are desperate to dispose of property, and I thought about this and I thought why would they be desperate to do it? What is the desperation? But if they are and then – I actually can't conceive of one except in a commercial context and then that would potentially be questionable if there were creditors involved.

GLAZEBROOK J:

Well it may be prior children of a prior relationship, because one can understand that one might – well, actually it would be sensible for somebody to try and make some provision for the other children, wouldn't it?

MS CRAWSHAW QC:

It absolutely would, and this is one of the three reasons that the Law Commission recognises people enter into contracting out agreements. One is where there's a huge disparity of wealth when they get together and another is where there are children involved and it's a second relationship and they do want to protect their children. But there's an easy way of doing that, and when in doubt, is there a problem with getting advice?

Do I need to take you through my argument that I don't think that including a threshold requirement of contemplation of a relationship is correct? That has formed part of the notice to support the decision on other grounds.

WINKELMANN CJ:

Yes, go ahead and take us through that, thanks.

MS CRAWSHAW QC:

This is in my submissions at paragraph 46. I just simply say that it's wrong to try to read that jurisdictional threshold into section 44. It contains no temporal requirement, it is always going to be relevant to the assessment of knowledge, but as jurisdictional threshold or a legislative condition imposed I don't think that is the correct approach.

WINKELMANN CJ:

You're saying it's not a jurisdictional threshold but it's inevitably part of a factual enquiry about intent?

MS CRAWSHAW QC:

Absolutely.

GLAZEBROOK J:

You'd surely have to have a particular relationship in mind, because you're actually looking at two people under the section itself.

MS CRAWSHAW QC:

Undoubtedly that's correct.

GLAZEBROOK J:

So at what point? I start dating and I think: "Wow, if this actually later comes into something I'd better deal with my previous marriage and my previous children and my separate property."

MS CRAWSHAW QC:

And that is one of the imponderables that arises –

GLAZEBROOK J:

Well, is it after the first date or after the tenth date that you suddenly…

MS CRAWSHAW QC:

Well, the point is that, you know, whilst it would be lovely if this Court could insert a bright line, I don't think that is appropriate to do so. It will depend on the extent of knowledge and the facts in that particular case. And I say that that uncertainty arises from the very nature of de facto relationships and the inclusion of de fact relationships into the umbrella of the Act.

GLAZEBROOK J:

Well, it doesn't – I mean, on the first date I might be thinking: "This is the one I think maybe I'm going to marry in the future." Am I in a problem there if I say: "Well, I've got to deal with my previous children"?

MS CRAWSHAW QC:

I cannot see how your Honour would be in a problem in that situation at all, I can't conceive of that. I would have to say that – and this is a continuum, isn't it? But that is right at the very outskirts of a continuum, I cannot see that there

would be a risk that any court would find that you were just dating someone, it was your first date and you thought you were going to marry them, that by disposing of your property into a trust for your children at that juncture would be extremely unlikely, that the Court would find that the appreciation of risk was of such a degree to constitute in order to defeat under the section.

KÓS J:

Would there need to be some exchange between the parties: "You are the one, I think you might be the one"? In other words, I mean, you can't really look into someone's mind here to try and work out when it was they thought that they might be on risk because this might develop into a DFR.

MS CRAWSHAW QC:

One would think that there would need to be some extraneous evidence to catch that evidence, because of course the Court is undertaking an objective analysis of knowledge, not a subjective analysis where the disposing party is likely to say: "Oh, I never had any intention, never had any knowledge whatsoever," and the other party is going to say they did it to, you know "get me in the eye", that's neither of those tests are helpful to the Court, the Court is going to be undertaking an objective analysis and obviously extraneous evidence is going to impact that consideration.

ELLEN FRANCE J:

You are talking about a disposition that is in order to defeat claim or rights and if there's absolutely, however you define it, no contemplation at all of any relationship, why should, why wouldn't you say there's no jurisdictional basis?

1440

WINKELMANN CJ:

In other words you're pitching your case too high and making your argument harder for it.

MS CRAWSHAW QC:

I don't think it's intellectually honest to make it a jurisdictional requirement. I think it is, from my part, on behalf of the respondent, I say that is not going to fall within the section because the knowledge test is definitely going to fail.

WINKELMANN CJ:

So it's an inevitable part of the factual matrix but not a – it must be there on the facts for there to be the intent to defeat but it's not a jurisdictional…

MS CRAWSHAW QC:

Yes, that is my submission. I've just addressed you briefly about contracting out agreements in the submission in my –

GLAZEBROOK J:

I suppose the counter to that is that it has to be jurisdictional in the sense that you have to come within the section.

MS CRAWSHAW QC:

In that sense, absolutely.

GLAZEBROOK J:

And so…

MS CRAWSHAW QC:

You won't come within the section in a jurisdictional sense.

GLAZEBROOK J:

So it's relatively difficult to say –

WINKELMANN CJ:

It's a jurisdictional fact.

GLAZEBROOK J:

– some appreciation of risk, a little appreciation of risk, actually means you've got an intent to defeat when you're not very proximate to, and whatever that

means, actually turning into either a marriage, a civil union, or a de facto relationship. A marriage is easier because you have a particular date and you usually have – well, I mean, you have at least some time before that particular date usually to have been contemplating the arrangements.

MS CRAWSHAW QC:

Yes, I understand your Honour's point and the only point I was making was that I think the Court of Appeal just is reading into section 44 a condition that isn't present. When you look at it from the angle of there will – they won't meet the jurisdiction of section 44 because they won't have the intent, I agree with that.

Can I just briefly address your Honours about this question of section 21 agreements having the potential to destroy relationships? I've already addressed in my submissions that that doesn't seem to be a widely held belief. It is becoming much more of a pragmatic necessity and accepted by many New Zealanders. Well, certainly according to the Law Commission, and that's at paragraph 55 of my submissions. They're considered to be a pragmatic necessity. I presume I don't have to address you about retrospectivity?

WINKELMANN CJ:

No. No, I don't think so.

MS CRAWSHAW QC:

I want to go to the –

ELLEN FRANCE J:

Could I just check, sorry, while we're still on section 44? In the case of a de facto relationship that is less than the three years, how does 44 work in that context?

MS CRAWSHAW QC:

So you're saying if there was a short duration relationship –

ELLEN FRANCE J:

Yes.

MS CRAWSHAW QC:

– and the parties separated and a disposition occurred?

ELLEN FRANCE J:

So a disposition has occurred prior to, however we – before the parties – before the date of the de facto relationship commenced there was a disposition that you would say comes under 44(1).

MS CRAWSHAW QC:

Yes, and then the parties –

ELLEN FRANCE J:

The relationship then does not subsist for the three years. It's just Mr Billington's point about the interrelationship with section 4 I was interested in.

MS CRAWSHAW QC:

So, of course, short duration relationships can but are not always considered by the Court because they have to come under two sections – I'm just going off the top of my head now – either children or a serious injustice if the Court doesn't consider the claim. I think the logical answer to that, your Honour, is this, is that if the relationship is of short duration and the Court can consider it, then section 4(5) applies of the Act which is the code section. The Court can look into it. The claim is likely to be very limited indeed and the Court could use, if it found there was a disposition that – where section 44 did bite, then the Court could use section 44(2) to provide the claimant with a remedy, but it would likely be extremely limited. So it's not that it wouldn't apply it's just that in the usual course with short duration relationships they are limited claims, contribution based.

O'REGAN J:

Does section 4(5) mean the PRA doesn't apply at all or does it just mean it's not a code in relation to those relationships?

MS CRAWSHAW QC:

Yes. Section 4(5) says that: "If the Court makes an order… in respect of… relationship property of de facto partners to whom subsection (5) applies", which is the short duration category, "any question relating to relationship property arising between those de facto partners", then – sorry, subsection (5), it's subsection (6), sorry I was just misremembering that. Subsection (5) doesn't apply which is the excluding of that category from the code provisions of this Act.

O'REGAN J:

Well it says –

GLAZEBROOK J:

They could have put that a bit more simply, couldn't they?

O'REGAN J:

It says this section does not apply, yes. So the code section doesn't apply which means you could do a sort of *Lankow v Rose* type analysis if you wanted to.

MS CRAWSHAW QC:

You can do a constructive trust claim in that short duration.

O'REGAN J:

Yes.

MS CRAWSHAW QC:

So it's basically the code doesn't apply to short duration relationships except when the Court does consider them

O'REGAN J:

I see.

MS CRAWSHAW QC:

Which is those exceptions, and then it does it on a contribution basis. I'm still on section 44 but I'm now moving to *Regal Castings* and its application. I'm just conscious of time. This probably is the focus, really, of my submissions.

WINKELMANN CJ:

Well I mean we don't want to cut you short, Ms Crawshaw. You've not had a long time compared to the appellants, so…

MS CRAWSHAW QC:

Thank you, your Honours. I just say there are two main issues about *Regal Castings.* First of all, my learned friend's submission that it has been misunderstood or misapplied and secondly, and possibly more importantly for this Court its applicability in this context, in the relationship property context.

GLAZEBROOK J:

Mr Billington's probably accepted it, he just says you have to look at all of the circumstances, as I understood what he was saying.

MS CRAWSHAW QC:

Yes.

GLAZEBROOK J:

You don't just go from "they knew there might be an issue under the Act" to "therefore". You have to look at all of the surrounding circumstances. You wouldn't really say anything different, would you?

MS CRAWSHAW QC:

I would say that the ratio of *Regal Castings* does not require a two-step analysis which is appreciation of risk and dishonesty, and I think that was included in my

learned friend's written submissions. I'm not sure that he was really pushing that –

GLAZEBROOK J:
I don't think he did carry on in his oral submissions but –

MS CRAWSHAW QC:
No, well I –

GLAZEBROOK J:
So it's not a two-step analysis with a realisation and dishonesty.

MS CRAWSHAW QC:
No, and if that's my learned friend's submissions I take no issue with that, and I say that one of the obvious points here is that *Regal Castings* was in a commercial context and we are under the umbrella of the Property (Relationships) Act. I say that the ratio as set out at paragraphs 53 and 54 of *Regal Castings* is nevertheless helpful to inform this Court of its analysis. It includes that objective analysis of intent that by the disposition the disponer was exposing the other party, creditor, or other party in a relationship "to a significantly enhanced risk". That makes sense. Then in those circumstances, the debtor is "taken to have intended the consequence".

The evaluation that took place in *Regal* was about the facts in that case and I don't think they can be drawn into an analysis of what constitutes the "in order to defeat" test under section 44. Relevant in the context of *Regal Castings*, the factors that were present there won't always be present and won't necessarily be present in a relationship property context.

1450

I say that the way in which *Regal Castings* has found itself knitted into the relationship property cases, and in particular the higher appellate cases of *Potter v Horsfall* [2016] NZCA 514 [2016] NZFLR 974 and *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293, there's been no error in the way in which

that has occurred. *Potter v Horsfall* in the Court of Appeal at paragraph 41 the enquiry – sorry, is that the Court of Appeal?

WINKELMANN CJ:
It would be, yes.

ELLEN FRANCE J:
That's the Court of Appeal.

MS CRAWSHAW QC:
Oh, yes. These authorities demonstrate, yes, that the enquiry is directed to the disposing party's knowledge of the effect, and so this is the shorthand that my learned friend complains of, but this is actually the substance of the test in my submission, that the disposal will have on the other party's rights from which intention may be inferred.

Then similarly in *Dyer v Gardiner,* Court of Appeal again, in reference to *Regal Castings* at paragraph 90, there's the Court of Appeal I say rightly interpreting *Regal Castings* and saying the intention requirements may be satisfied that the person responsible for the disposition is aware that the effect of the disposition is to defeat a claim or the rights of another person.

My learned friend didn't seems to address this rebuttable presumption argument in his oral submissions but I say that involves a misreading of paragraph 55 of *Regal* which was talking about perhaps an irrebuttable presumption where an insolvent debtor gifted their property, which is really flowing from the notion that you need to be just before you're generous. This is actually not a creation of a rebuttable presumption where there is a plausible explanation or alternative as a reason for impugned transaction.

In my submission the Court, as I said, it can be informed by *Regal Castings* but need not consider itself glued to it. The Court does need to look at the section and establish on a first principles basis how the wording "in order to defeat" should be interpreted in the context of relationship property, guided by

Regal Castings if it's considered helpful, and that is, I say that is a very in-depth decision and it has helped change the law and it's certainly assisted in the relationship property context of moving away from *Coles v Coles* from which the application of section 44 was barren for about 20, over 20 years.

But in my submission there are good reasons why parties in intimate relationships may need greater protection than those of creditors. A creditor's assumed risk when lending for commercial gain, people in intimate relationships do not, it's not a commercial relationship. I know that sounds trite, but we get a little bit too carried away when we start comparing situations such as these parties with commercial relationships, and that is particularly so when this requirement of a clandestine nature of a transaction is imputed into section 44 so that secrecy or lack of secrecy might tip the balance. In my submission – and this is in the written submissions – but in my submission that is an unhelpful requirement, because in the case of a creditor/debtor relationship it would be unusual, though I suppose not outside the realm of possibilities, that they are cuddled up in bed together and sharing pillow talk, whereas in the situation of a relationship of whatever duration parties are likely to be aware of what the other person is doing. And it is quite interesting in the case of *Coles v Coles* – which I do think would be decided differently if it was decided now, it's 40 years ago – Mrs Coles had, the parties had six children, she was pretty busy with those children, he was a farmer, he transferred property that he had acquired by purchase from his father into a company and then a trust. It was said for him that Mrs Coles knew all about it, she said she knew vaguely about it but she didn't know the details, and Justice Casey found that Mrs Coles – this is at page 103 and 104 in *Coles* – had what he described as "an adequate appreciation of what was going on", which seemed to assist in giving this transaction a green light. I say that that is not enough, "an adequate appreciation" of what is going on, and that does not in any way condone a disposition under section 44 in an intimate partner relationship.

WINKELMANN CJ:

So I suppose you would say there are all sorts of power issues and relationship issues which might be driving parties at that point to act against their own best interests, which is why section 21 puts in place those protective mechanisms?

MS CRAWSHAW QC:

It does. And you might have a meek partner who goes along with it or feels they don't really have an opportunity to say: "Oh, please don't do that," or even if they do say: "Please don't do that," the other party says: "Look, I'm just going to do it anyway." So I don't think the secrecy, which you can imagine why that is an important feature in the commercial context, but that is just one example of how those two situations don't quite marry well.

I simply say in terms of the consideration of section 44 and what "intent to defeat" means is that Justice French really looked at this very well in my submission. She – and this is in the *Ryan v Unkovich* case and particularly at paragraph 42(iv) – she referred to *Regal Castings*, and this was obviously why she said that *Coles v Coles* was no longer to be followed because there was no distinction between intention and motive in the *Coles v Coles* decision. But at paragraph 42(iv) she said – it's not right.

GLAZEBROOK J:

I think it might be a different point.

MS CRAWSHAW QC:

Paragraph. Are we on para 42(iv)? Yes. Can you scroll down, please, sorry, it might be (vi). Ah, yes, it is, I beg your pardon.

So I think this is helpful for this Court. She talked about the underlying legislative purpose of section 44. She said it was: "As Ms McCartney submitted, to protect de facto partners, including those who had commenced their relationship before the Act was enacted, from the injustice of one partner accepting contributions without recognising the reasonable expectation of the other that he or she will share in the domestic property," and then she talks

about the "constructive trust claim" that my learned friend says that Ms Bell should have brought and says: "This is a cause of action which Parliament considered to be seriously inadequate," because that was what de facto partners of course were left with. And in my submission that consideration of the underlying legislative purpose of section 44, which is informed by the principles and purposes of the PRA, is really important, and whilst the long title to the 1976 Act did acknowledge contributions and the equal status of parties.

1500

These were not fleshed out in the way that they are under the purposes and principles of the current legislation, and that is materially different. It recognises all forms of contributions being treated as equal. It also recognises that a just division of relationship property has regard to the economic advantages or disadvantages. These are different purposes and principles from the earlier Act.

I have briefly addressed you in the written submissions about how the UK courts interpret their equivalent section. There's a case of *AC v DC* [2012] EWHC 2032 (Fam) where the principles are summarised. I'm not sure how useful that is for your Honours for two reasons. One is that the UK courts don't seem to have the problem with trusts that New Zealand courts do and that they consider property that you can utilise will still fall within the definition of "property" under their matrimonial property legislation.

Secondly, the equivalent section seems to imply an intent on the part of the disponer but the case is, in my submissions at footnote 93, and there's a hyperlink to that decision if it's of interest. The applicable principles for that section are set out at paragraph 11 of the decision. But as I say, your Honours can take from that what you will because it is a different legislative context entirely and also they don't seem to have such a problem with the disposition of properties to trust.

In my submission, and this is my last point, this case contains overwhelming evidence that the disposition was in order to defeat Ms Bell's interests. I'll take you through those points very briefly but they are set out in my oral submissions.

Firstly, this disposition occurred just over a year after Mr Sutton had already divided his matrimonial property. He had recent experience of the operation of relationship property law and as with *Gray v Gray,* as Justice Heath described, he didn't want "lightning to strike twice". That was a phrase used. That is a relevant factor in terms of knowledge. Secondly, he had received an unsolicited letter in October 2003, this is just over a year before the Court found there was a start date of the de facto relationship. He said it was junk mail but it did advise about the – it said words to the effect of "put your property into a trust quickly to avoid sharing it" effectively. In his oral evidence, Mr Sutton admitted knowing at the time of the disposition that a trust could protect a home from being divided in a relationship property context. He was pretty reluctant to acknowledge that, and in his evidence – the Court of Appeal decision refers to that evidence close to the end of the decision, and this is at paragraph 91. So he's cross-examined about his knowledge of – well, the consequences of a family trust protecting a home. He wriggled but he did acknowledge it and the Court of Appeal refer to that in their decision.

Next point is that Mr Sutton had received legal advice to similar effect and Mr Sherer's notes at the meeting recorded only one reference to risk. This is despite Mr Sutton referring to rest home fees being the reason he wanted to establish a trust. Rest home fees was used as a reason in *Gray v Gray* and Justice Heath did not accept that was a plausible reason. Judge Druce was a bit kinder and said he accepted it might have been one of the reasons but it wasn't actually included in Mr Sherer's notes of the meeting. There's no question that Mr Sutton was Mr Sherer's sole legal client. All the letters were written solely to Mr Sutton about the Trust.

The 2004 email which is referred to in the Court of Appeal decision at paragraph 15, this is an email which Ms Bell sends to Mr Sutton in February. Now remember the disposition happens nine months later in November. It's a

long bow to draw, in my submission, to say that this February recommendation that Ms Bell makes then led to her subsequent agreement when the relationship was in quite a different state by then in November 2004, but in this email it looks as though she's done a bit of Google researching and is considering herself to be a bit of a bush lawyer, but she's advising Mr Sutton about here: "…the property can be divided if the relationship breaks up – irrelevant of who owned it originally!" and so she goes on.

But half way down that email she says: "Spouses or partners can agree between themselves," this sounds very much like a copy-and-paste, "on how to share the property. These agreements can be made at any stage of the relationship. Those agreements must be in writing and each spouse or partner must have independent legal advice."

Who knows? From her point of view she might have not really understood the distinction between a trust and a contracting out agreement, but in this email she's telling Mr Sutton, she's saying, well, pop it into a trust or keep it separate, tie it up, but she's also mentioning contracting out.

The Court of Appeal's consideration of that email at paragraphs 89 to 98 of the judgment, in my submission, are correct. The Court of Appeal held that her apparent position did not influence its assessment of Mr Sutton's knowledge of the consequences of his actions and therefore his intent it is straining credulity, in my submission, to claim that this meant the transaction was made in good faith or entered into with the knowledge, consent and support of Ms Bell. One can't assume she would have given her informed consent to the transaction had that opportunity been offered to her.

One of the really important aspects of requiring a party to have independent advice is that one of the roles of the lawyers in giving that advice is to help the person appreciate the position they might be in 10 years down the track, say, with a few children, and not being financially independent any more. It's like trying to help somebody pack for a cold country when they're living in the tropics. So one of the roles of the lawyers is to help identify what the

consequences might be further on down the track. Also, what often happens, I hope I'm not speaking too anecdotally here, but what often happens is that instead of accepting yes, the trust is – the house is that person's separate property and that's it, the lawyer might negotiate a graduated programme of sharing, so to ameliorate, and so after a certain period of time the home then might become relationship property, or perhaps with the advent of children.
1510

Ms Bell's subsequent actions, which is where she applies around 80% of her net proceeds of sale from her home, contradict the assertions that she knew all about and was fully appraised of the details of this Trust.

There's Judge Druce in the Family Court decision at paragraph 63 talking about the fact that there was no evidence before the Family Court that "Ms Bell had any legally informed understanding of the consequences of the disposition of Hawea Road" to the Trust or that she was offered independent advice. As the Court of Appeal recognised, that is why the Act mandates that a person cannot consent to waiver of their rights and entitlements except where a valid contracting out agreement has been made.

WINKELMANN CJ:
So what did Judge Druce find? That she had no legally informed understanding of what?

MS CRAWSHAW QC:
Of the consequences, sorry. This is paragraph 63 of Judge Druce's decision. Are we on paragraph 63?

WINKELMANN CJ:
Right.

MS CRAWSHAW QC:
So "in the present case", it's about half way down the paragraph: "In the present case there is no evidence that Ms Bell had any legally informed understanding

of the consequences of Mr Sutton's disposition of Hawea Road to his Trust nor is there any evidence she was offered independent legal advice to better understand the effect and implications… I… see no proper basis of distinguishing", possibly he should have said "to distinguish", "her position from that of parties who have no knowledge of the transaction."

To conclude, in my submission, there's nothing in section 44 to require a qualifying relationship to be in existence. The Court ought to be informed by *Regal Castings* but to determine the words "in order to defeat" in the context of the principles and purposes of this Act, as Justice French did in *Ryan v Unkovich*, and here there was ample evidence of Mr Sutton's awareness of the consequences of the disposition and his appreciation of the risk. It was a unliteral disposition. Mr Sutton's intent to defeat ought to have put him on further enquiry and it seems, in my submission, he seemed to wilfully abstain from doing so and in those circumstances he's well within the section.

I am going to ask my learned junior to address you about relief. I do want to just say one thing before she starts about the care of children stuff. I think it's important – there's an affidavit in there in the Care of Children Act proceedings, one affidavit from Mr Sutton. I had objected to that being included in the bundle and asked that the objection be noted. Reason it being, otherwise we're going to be – we ought to see all the affidavits and it's not helpful to this Court. What is helpful is for the Court just to see the last decision, which is the 2019 decision. That contains the orders. They do provide for care and contact. To get into all of the details of the Care of Children Act proceedings I don't think is helpful to this Court.

If I may ask my learned junior to address you about relief, unless there are any further questions arising from my submissions?

WINKELMANN CJ:

Thank you.

MS WILSON:

Thank you, your Honours. I'm going to address your Honours on three issues relevant to relief here and I hope to be done in about 20 minutes, I hope that's going to work.

So the first issue is section 26, the second is section 26A and the third is the proposed ringfencing of financial contributions, and these issues are addressed at paragraphs 82 to 98 of the written submissions but I am going to take those issues in a slightly different order, as indicated.

Now the respondent's position is that, in the event your Honours are satisfied that the requirements of section 44(1) are made out here, the orders made by his Honour Judge Druce in the Family Court and upheld by the courts below on appeal were appropriate and that there is no reason to disturb those orders.

So I turn first to the appellants' submission that the courts below have failed to take into account the children's interests under section 26, and in my submission that is not correct. And I just wanted to clarify that there is no dispute that section 26 does require the Court to do this. My learned friend suggested that our submission is that the children's interests here are a spent force, that is certainly not the case. The submission about the spent force relates to the suggestion that there should be a further postponement of sharing here under section 26A, and we say that is not justified in this case where there has already been a 10-year period since separation.

But turning to the consideration of the children's interests here, his Honour Judge Druce does not appear to have expressly considered section 26. I am not aware of whether he was in fact asked to, but in any event any defect arising out of his judgment was cured by Justice Walker who did expressly consider section 26 and the children's interests, and I would like to take you to that paragraph and it is paragraph 123 of Justice Walker's decision, the bundle reference is 101.0169. So Justice Walker says: "I accept that a large part of the more recent stability for the two children of this relationship has been their ability to live with their father in what is their family home. I also accept this is

an important consideration. However, an experienced Family Court Judge with carriage of the care proceedings throughout the long history of this litigation was satisfied that once Ms Bell's accommodation instability was rectified she would be able to have more contact with the children. In short, that the children's future best interests will be met by having a relationship with both parents and that Ms Bell cannot achieve this without her relationship property entitlement." And Justice Walker was there referring to the final alternative orders that were made by Judge Maude in the November 2019 decision which my learned senior Ms Crawshaw referred you to, and we say that that is really the only way in which this long history of the Care of Children proceedings can assist the Court is by looking at those orders. And my learned friend criticised Justice Walker for ignoring the history of this matter, but in my submission that will not assist. And Justice Walker was quite right to recognise, as Judge Maude had done, that AS and MS's interests are now going to be served by their mother receiving her share of relationship property and being able to re-establish herself, and that this will enable the children to have an adequate home with each of their mother and father. And the children have of course been witnessing a marked disparity in living standards between their parent for some time and, in my submission, pragmatically the sooner that is rectified the better.

1520

I do want to address briefly the appellants' submission that the courts below have failed to take into account the children's interests as the final beneficiaries of the Todd Sutton Trust and that their legacy is being denied by the orders made and, as we have said in our submissions at paragraph 93, some care does need to be taken here not to conflate the needs and interests of the children during their minority with those of the Trust beneficiaries, and I say there are three reasons for that. The first is that section 26 makes it clear that the context in which the children's interests – or, sorry, that the focus of the consideration of the interests of the children is on ensuring their financial protection during minority or dependency and the Courts have observed that section 26 should not be used to anticipate succession. I have referred in the

submissions to Judge Adams' decision in *R v R* (1998) [1998] NZFLR 611, 17 FRNZ 75 (FC).

ELLEN FRANCE J:

So where do you get that from in terms of the language of section 26?

MS WILSON:

So section 26, if you wouldn't mind bringing up section 26, so: "In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage," and the issue before Justice Heath in the *Babylon* case was whether there was jurisdiction under section 26 to make orders in favour of adult and otherwise independent children and his Honour concluded that there was not, and I do want to make a couple of short points about *Babylon* but we'll come to them.

The second reason why care needs to be taken when considering the Trust beneficiaries –

GLAZEBROOK J:

I assume what you're saying is you can't anticipate legacies because presumably that will be post them being minor children.

MS WILSON:

Yes.

GLAZEBROOK J:

Is that the…

MS WILSON:

Yes, that is correct, and –

GLAZEBROOK J:

Well, I mean, not necessarily, of course.

ELLEN FRANCE J:

I was going to say not necessarily so.

MS WILSON:

No, but it isn't appropriate to use section 26 to anticipate what succession may otherwise take place.

WINKELMANN CJ:

The point is that section 26 is focused upon their wellbeing during their minority and their interests and inheritance seems to be – it's not exclusively outside that but it's a satellite issue.

MS WILSON:

Yes, your Honour, I agree with that, and a number of –

GLAZEBROOK J:

I suppose if you had something that said somebody's made a Will that everything goes to the cat home in the event of my death which could occur during the minority, then section 26 could have a role there, one assumes.

MS WILSON:

It may do. I understand what your Honour is saying. It may do or it may be in fact that the correct remedies for the children in that situation would be a Family Protection Act claim, if that situation did in fact eventuate, and I think the point comes back to your Honour, Justice Glazebrook's, observation earlier that the assumption being made in the context of the PRA and under section 26 is that parents will provide for their children and that the children's interests are best met by the parents being able to have their property entitlement and that there would have to be a clear need for the children to have a different form of order for an order under section 26 to be appropriate. I can see that that situation where you had a Will that left everything to the cat home, perhaps that would be the sort of case that would come within section 26.

GLAZEBROOK J:

Well, where the assumption that the parent is going to look after the child may not be correct.

MS WILSON:

Yes, your Honour, yes.

WINKELMANN CJ:

Yes. My concern is with bringing in issues of inheritance it's going to create a whole new focus which the Act's really not about, it's – yes, and that could bring in a whole lot of satellite, really quite collateral issues.

MS WILSON:

Yes. I do think that section 26 does indicate that there is an emphasis on the provision providing for the children during that period of minority.

WINKELMANN CJ:

During their dependency.

GLAZEBROOK J:

Yes, yes, that's what it said.

MS WILSON:

Yes, and that there have been cases where there have been circumstances justifying an order under section 26 but it's actually been made on the basis that after the period that it's required for expires the property will then revert to the adult parties.

GLAZEBROOK J:

Yes.

MS WILSON:

The second reason for being wary of taking into account the Trust beneficiaries' interests is that in a case involving a disposition under section 44 they would

not otherwise be a relevant consideration, and in my submission section 26 should not be used to improperly elevate those beneficiary interests generally.

And the third point is that in this case in my submission there is a risk that focusing on the Trust beneficiary interests, as the appellants appear to suggest should be done, could obscure MS and AS's interests here, and there are two reasons for this. The first is that this is the Todd Sutton Trust and it gives Mr Sutton very broad powers under the Trust deed. I don't propose to take your Honours through those powers, but if that would be helpful I can do.

WINKELMANN CJ:
No, you've done it in your submissions.

MS WILSON:
And the second point is that, as Ms Crawshaw indicated earlier, the memorandum of wishes executed by Mr Sutton does in fact make it clear that the children's interests under the Trust are subordinate to Mr Sutton's. Whilst they may be given priority over other beneficiaries, certainly that's not the case with respect to his interests.

So we therefore say there was no error by the Courts below in taking into account the children's interests here, they did, and as they were required to do so, and in fact the orders made were consistent with those interests.

I had touched briefly on section 26A of the Act and why we say that an order for further postponement under that second is not appropriate here. I did just want to make one further point in respect of that section and it concerns the fact that the courts below, Justice Walker and the Court of Appeal, well, Justice Walker found and the Court of Appeal upheld that the evidential threshold for undue hardship, which is a requirement of section 26A, had not been made out, and on that point I just wanted to draw the Court's attention to the fact that whilst there has been some evidence of Mr Sutton's income levels before the Court, this Court and also the Courts below do not in fact have an accurate picture of his finances because it seems an affidavit of assets and

liabilities was never filed by Mr Sutton in these proceedings, so that we don't actually know what his full financial position may look like. But that's all I propose to say about that.

I want to touch briefly on the suggestion that the Court's power under section 26 – sorry, I am coming back to section 26, and that's because we do of course have two issues there. One is whether the Court took into account the children's interests, as they were required to do, and, secondly, whether the Court's power under that section to settle property on children requires some different sort of approach here and, indeed, provides a basis for Ms Bell to be deprived of her relationship property entitlements.

And I'd like to take your Honours to a summary which is contained in Professor Nicola Peart's article, which has been included by my learned friends in their bundle. So this is the Peart article on protecting children's interests, and if you could go to page 50 of that article. And I'm taking your Honours to this because I think this is a neat –

GLAZEBROOK J:
Page 15 was it?

MS WILSON:
So it's page 50 of the original article.

WINKELMANN CJ:
We don't have the original.

GLAZEBROOK J:
Oh, I don't think we've got it.

MS WILSON:
Okay, page 334 of the bundle of authorities.

WINKELMANN CJ:

So we've got numbers from 1…

ELLEN FRANCE J:

No, I think we've got, there's a separate one, isn't there?

GLAZEBROOK J:

There's another one.

MS WILSON:

Yes…

WINKELMANN CJ:

This is *Enter a Relationship at your Own Risk*?

1530

MS WILSON:

No, so I think that was the one that was provided this morning. Yes, this is it.

WINKELMANN CJ:

This is the one that was provided earlier?

MS WILSON:

This is another Nicola Peart article that was in –

WINKELMANN CJ:

Oh okay, all right.

ELLEN FRANCE J:

This was the one that was in the bundle.

GLAZEBROOK J:

So page 50.

WINKELMANN CJ:

Yes.

MS WILSON:

Yes, or it's 334 of the bundle. I'm just taking your Honours to this because I think this is a neat summary of the way the courts approach section 26, and I know Professor Peart goes on to lament what she says is an unduly restrictive approach that has been taken, but in my submission this is actually correct. So are we on – sorry, I can't see the page number there. So she does, down the bottom of this page, refer to 10 propositions that were provided by Judge Adams in his decision in *R v R*, and I won't take your Honours through each of those unless you'd like me to, but I do draw your attention to them because I do think they provide a helpful guide to when an order under section 66 may be appropriate – section 26, yes.

Just following those propositions, Nicole Peart concludes: "These propositions indicate that the courts have to be persuaded that there is a real need to depart from the equal sharing regime to provide for children of the relationship. The main purpose of the Act is to divide the property of the spouses or partners between them. The parties should then be entrusted to care and provide for their children as best they can. Only where that trust is not justified, whether for reasons within or beyond the parties' control, has the Court been willing to intervene to protect the interests of the children."

This does bring me on to the next issue under section 26, which concerns the underlying theme in the appellant's case that Ms Bell's parental conduct somehow justifies a departure from the usual relief under section 44 and equal sharing of what was the family home, and I have two points to make here.

The suggestion that section 26 requires a punitive approach to relationship property proceedings, because of care and parenting issues is, in my submission, wrong in principle. There is limited scope for such conduct, for that sort of argument under the Act, and the threshold for conduct being taken into account under section 18A is not met in this case. Section 26 is not to be used

as a backhanded means of addressing parental conduct issues, and that was an observation that Judge Adams made in those propositions referred to in the Professor Peart article.

It is accepted in this case that Ms Bell's relationship with the children, and particularly MS, since separation has been a difficult one and the Family Court has held concerns about her parenting, in particular as regards a lack of insight. However, despite those concerns, the Family Court has recognised that once Ms Bell's accommodation and stability is rectified that she should have more contact with the children and that this will be in their best interests. In my submission, this Court simply cannot assume that her relationship with the children will not improve and the Family Court in the care proceedings has clearly envisaged that that is possible.

Just before I leave section 26, I do just want to make some short points in regards to the *Babylon* decision, Justice Heath's decision, on which the appellants rely. It's suggested in my learned friend's submissions at paragraph 29.10 that Justice Heath rejected a restrictive approach to section 26 in that case. There are two points to make here. The first is that the issue before Justice Heath in that case was whether there was jurisdiction to make orders in respect of adult children. He did conduct a very helpful review of the cases under section 26 and his Honour made some observations about the way in which the discretion might be exercised. But his observations in respect of the discretion are obiter and, secondly, that is in fact the opposite of what Justice Heath did actually find in *Babylon*. He rejected the sweeping approach and indicated that he favoured the more restrictive approach which had been adopted by Justice Ronald Young in a case called *Bradwell v Kennedy* 23/3/05 Ronald Young J, HC Wellington CIV-2004-485-611(HC*)*, and again I won't take your Honours to *Babylon* unless you would like me to, but the relevant paragraphs are paragraph 71 to 79 and paragraph 83. And the second –

WINKELMANN CJ:

Sorry, what was the decision of Justice Ronald Young?

MS WILSON:

It was called *Bradwell v Kennedy*, and it's discussed in *Babylon.*

WINKELMANN CJ:

Babylon?

MS WILSON:

Yes. And that is actually, that was a case where there had been an argument under section 13 and, as an alternative, it was argued that section 26 should apply because it would be in the interests of four children to have property settled on them, and Justice Ronald Young very clearly said that section 26 was not to be used as a way to avoid the Act and to, in that case, provide for some sort of unequal sharing where section 13 had not been satisfied.

WINKELMANN CJ:

So does that complete your submissions, Ms Wilson, or is there more?

MS WILSON:

I do just have a couple more points, if that's okay, your Honour?

WINKELMANN CJ:

Okay.

MS WILSON:

The second point in *Babylon* is that my learned friends say in paragraph 29.11 of their submissions that Justice Heath there recognised that the more detailed expression of the purpose of the Act in sections 1C and 1M introduced in 2001 had elevated the subsidiary nature of the children's interests, and again this is exactly the opposite of what Justice Heath concluded in paragraph 62 of his decision. He said that that expanded definition had in fact recognised the subsidiary nature of children's interests. Those are just two short points there.

So to conclude on section 26, this Court must be satisfied that the children do have some need that cannot be provided by their parents in this case. In my submission those sorts of cases are likely to be rare and this is not one of them.

The final issue I'd just like to address –

WINKELMANN CJ:

Wo one case might be where the custodial, the parent who has primary care, will be left with ability to house the children for instance, would that be a kind of scenario which might lead to a different approach perhaps to postponing distribution?

MS WILSON:

So is the – oh, certainly. I mean, a postponing of distribution might be – I suppose that's a slightly different issue. Is your Honour's question whether…

WINKELMANN CJ:

I'm just trying to think. Because, I mean, I wonder if it is all that rare, if it could arise where the primary caregiver will be left with no means whatsoever or with such limited means the they can't really house the children, and might that justify some use of these provisions, these remedial provisions?

MS WILSON:

Yes. So where for example an equal division under the Act was going to leave one party unable to do that.

WINKELMANN CJ:

Yes, or the division under the Act, not necessarily an equal division, a division in accordance with the Act.

MS WILSON:

Yes. I mean, I guess in theory that could be a situation. The cases do tend to, the cases decided so far do seem to be situations where, for example, one parent has completely abandoned the family or has been committed to a

psychiatric hospital with no prosect of recovery or has some other – they will not be able to use their interest and so it would be better given to the children, but that could be a situation, Ma'am, yes.

1540

So the final area I just wish to address is the proposal that the parties' shares in the family home should be determined by way of a charge to the extent of their financial contributions. In my submission, there is no basis for that to happen here. The Court certainly has a discretion under section 44(2) and subsection (3) as to the form of relief ordered under that section, but it is not unfettered and it would be wrong, in my submission, for it to be exercised in a way that would but otherwise inconsistent with the principles of the Act and its wider operation, and there is no basis under the Act for that sort of financial contributions-based approach to be taken in respect of a family home. Had it not been disposed of to the Trust, it would be subject to equal division. Both parties here made acknowledged financial and non-financial contributions during the relationship and the Act requires them to be given equal weight, and there's no suggestion that section 13 would apply as an exception to equal sharing.

I'm not going to say much about *Lu v Huang* which is relied on in the appellant's submissions other than that that was a very different case where there was a claim by a third party, namely the husband's ex-wife, to a share in the property. It is not authority for the parties' shares being determined by way of financial contributions.

And finally, that it wasn't entirely clear whether what was being proposed is that Ms Bell's interest would be limited to that financial contribution but in the event that is what is proposed then that would result in an unjustified windfall for the trustees here of the increase in value in a property that ought never to have been transferred to it in the first place.

Unless I can assist your Honours further, that concludes my submissions.

WINKELMANN CJ:

Thank you. Mr Billington, do you have anything to say by way of reply?

MR BILLINGTON QC:

Yes, I do. With regard to section 26, there are two references I need to give you.

WINKELMANN CJ:

I just want to say, before you start, we will need to retire at 4 o'clock.

MR BILLINGTON QC:

I know that. I'm sorry I'm occupying space otherwise better left vacant but I'll do my best to vacate it as… But I'm not sure everybody thinks that, Chief Justice. I know you do because you and I understand each other.

WINKELMANN CJ:

Carry on, Mr Billington.

MR BILLINGTON QC:

There are two references. The first is this. You were given a reference to Mr Sutton's affidavit of 5 August 2020. The reference should be 301.0206. That's simply a correction. In relation to the facts of the matter, the judgment of Fleming DCJ is 301.0193.

With regard to the intervention of sections 26 and 26A, there are possibly two issues. The first is does it operate as one of the discretionary factors under section 44(2) or (3) as forming part of the orders that may be made short of a total restoration, or, secondly, if there is to be a total restoration of the property to the disposer, if that's a partner, marriage partner, does section 26 come into play then? There's no dispute it's to be given effect to. There are possibly two stages but it would be, in my submission, it can also be considered as part of the discretionary factors under section 44.

The contest here then ultimately is this. Where you have a Family Court Judge who has not considered section 26 it becomes difficult on appeal to do justice to those issues. My friend Ms Kearns has taken you to the evidence in relation to that and ultimately that is a matter for you to decide against that statutory background. That's how that works, in my submission.

With regard to the substantive issue, section 44 and section 21, I have six short points, each of which leads into the other and they arise out of in reply.

The first point starts with the statement my friend made: "It would be lovely if the Court could fix a bright line." Well, the legislature has, at section 2D in relation to de facto relationships. Professor Peart spoke of the inherent difficulties and uncertainties of establishing another line before that bright line.

That then leads into my second point, which is the question Justice Glazebrook asked of my friend, and that is what does "in contemplation" mean in section 44 as opposed to section 21, because they are different. They are also different in section 8, Justice Glazebrook. I probably didn't express it very elegantly this morning, but the reason I spoke about impermanence and the discussion of Justice Walker is that in my submission is a useful way to look at it. Because without a measure of permanence, then there cannot be the requisite contemplation, hence the grey areas which make it impossible for people to govern their lives in this context. So section 44, if it's to have any play at all outside a qualifying relationship there must be a sufficient degree of impermanence so that it cannot be described as an "impermanent" relationship, as Justice Walker described it.

Now that leads into the discussion you also had with my friend about the jurisdictional issue. Is it jurisdictional as fact and law or is it jurisdiction as law? My high point of argument you understood this morning and it was put to me, Justice Glazebrook, is that simply if you're not in a qualifying relationship then there is no jurisdiction. But equally if you wanted to move from that – I was going to say "retreat" but that's my pejorative view of it – if you wanted to move from that then there would need to be such a degree of permanence as to make

contemplation as being real. So if a relationship is described, as it was in this case, as being "impermanent" at the relevant time, and that is actually September '04, then it can't then also have the necessary contemplative factors which attach to it, and that's really supported also by the Court of Appeal's judgment in *M v H*, which referred to Justice Brewer's helpful analysis at first instance.

That then takes me to the issue of the statement in *Ryan v Unkovich* at paragraph 44 [*sic*], and I have to say I endorse this statement because, as Ms McCartney submitted, the intention of the 44 was to protect de facto partners and from the injustice of the removal of property to which they had made contributions. Now if that is taken as a reasonable analysis of what the purpose of section 44 is and was, those indicia are simply not present here. They were not in a de facto relationship and at the material time there had been no contributions at all. So that is actually quite a useful – that's (vi) paragraph, it's paragraph 42 actually. That really cuts across this in my submission, that as an accepted statement of the purpose of section 44, and of course it comes from Ms McCartney as well, who is the author of our problems with *Ryan* – with *Regal Castings.*

Now the next point is – and I was asked about this significantly this morning – it relates to the exceptions and the difficulties one encounters with a de facto relationship of short duration. The proposition is this, that once that relationship has commenced it is a qualifying relationship. There are claims and rights under the Act that are available from the date of the commencement of the relationship but they are simply more limited in nature than the case would be in relation to a civil union or marriage. There are exceptions in 14A which relate to children and contributions to the property, so they are confined but they are not non-existent.

1550

So coming back to the questions asked in relation to that of both counsel, "when do the claims and rights come into existence?" They come into existence when the relationship commences.

Then finally, paragraph 30, which I need to pick up, that's of my friend's written submissions, there are three instances which she gave which would, she suggests, lead to an injustice. The first is the transfer of separate property by one partner to a trust when it's about to become the family home. (c) is the same in effect because again there's no qualifying relationship before the wedding, which is the situation Justice Kós spoke about, so the property again is separate property because "separate property" is defined in section 9, and the Act specifically recognises the unique nature of separate property. So it would not be an injustice, in my submission, for the owner of separate property to transfer that separate property either before the relationship or during it because they're entitled to do so, because the proceeds also remain ringfenced. Separate property remains separate property. So the situations that are spoken to in both (a) and (c) are the same.

There's a slight wrinkle with (c). It impacts on some questions I was asked this morning about well what happens if you do it the day before the relationship? That is the – what would one do with that? Well, one could probably argue at that stage that the parties are in a qualifying relationship as a de facto relationship because they are living as a couple and have made the avowed intention to share a life together in the future, in the way that it's expressed in section 2D. It's an answer I should have given you this morning but didn't, but really, as Justice O'Regan said to me in another context, the difference is less apparent than real.

KÓS J:

The High Court of Australia dealt with a case like that, a case called *Thorne v Kennedy* which was exactly the same thing, just before the wedding, sudden transfer.

MR BILLINGTON QC:

Yes, and they were in a relationship, bey definition, yes. That answers it. So we don't have the problem that was vexing me and –

GLAZEBROOK J:

Well just before the marriage they may not be in a de facto relationship.

MR BILLINGTON QC:

No, but that becomes a question – this is the second layer and I think the Court's more attracted to the evidential jurisprudence as opposed to the legislative-led jurisprudence that I contend for. But what I think informs that, Justice Glazebrook, is this concept of separate property though. Parties, even during a marriage, are entitled to deal with their separate property and the proceeds of it.

GLAZEBROOK J:

But the point about this is it's going to become the family home, in which case it's no longer separate property, is it?

MR BILLINGTON QC:

No.

GLAZEBROOK J:

If they hadn't transferred it, it would become the family home.

MR BILLINGTON QC:

It would become separate property, that is correct. But it is separate property, and whilst that may appear to be harsh in some respects, whether injustice is an apt description, justice is a different word, isn't it?

KÓS J:

It's not anything before the relationship begins.

MR BILLINGTON QC:

Correct, that is right. So –

KÓS J:

The categories are irrelevant.

MR BILLINGTON QC:

Yes, so that the –

KÓS J:

But it doesn't continue as separate property, once the relationship begins, it's the family home.

MR BILLINGTON QC:

No, but whilst it's separate property, by definition, up until that date it is separate property.

KÓS J:

Well it's not separate property because there is no relationship.

MR BILLINGTON QC:

No, that's right.

KÓS J:

You don't categorise it before the relationship.

MR BILLINGTON QC:

No, I accept that. This is really a debate that can go on and on and on, and it's not going to because we're going to finish at 4 o'clock, it's what do we do about this jurisdictional issue? Because there is one. It's when it comes into play, and really I think I have covered that, but I wanted to –

WINKELMANN CJ:

Well you've covered your six points.

MR BILLINGTON QC:

I have, and I wrote the six down and I got to six, so, but I wanted to do was actually add a seventh point because what I want to say is this, that the Court of Appeal judgment, in my submission, is in an area that requires significant public input, this is not simply statutory interpretation. I'm minded of a comment the Chief Justice of the US Supreme Court gave us, 2017, he said:

"I wake up and remind myself I was not elected to this job." Didn't work out very well for him, but in my submission, drawing this bright line other than that which has been legislated for is legislating in this jurisdiction, and in my submission is it inappropriate in the social context with which we are now operating. Thank you, your Honours. I take it there are no questions?

WINKELMANN CJ:

Thank you, Mr Billington. It was admirably to the point, and we will take some time to consider our decision, but we've been very much assisted by submissions today. Thank you, counsel. We will retire.

COURT ADJOURNS: 3.55 PM