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IN THE SUPREME COURT OF NEW ZEALAND SC 7/2022

I TE KŌTI MANA NUI O AOTEAROA [2022] NZSC Trans 16

BETWEEN **FIONA MARGARET MEAD**

Appellant

AND **LILACH PAUL**

First Respondent

BRETT PAUL

Second Respondent

Hearing:	22 July 2022
Court:	Glazebrook J O'Regan J Ellen France J Williams J Kós J
Counsel:	S R Jefferson, A S Butler, P A Fuscic and K L Thompson for the Appellant N W Taefi and J E Palairet for the First Respondent J R Duckworth for the Second Respondent (via AVL)

CIVIL APPEAL

MR JEFFERSON QC:

May it please your Honours. My name is Jefferson, I appear for the appellant. With me Mr Butler, on my immediate right, Mr Fuscic, one further over and Ms Thompson at the end of the row. The appellant herself is present, courtesy of an overnight drive. She is third from the left, as you're seeing it, in the front row.

GLAZEBROOK J:

Tēnā koutou.

MS TAEFI:

May it please the Court. Ms Taefi. I appear for the first respondent with my junior Ms Palairet. The first respondent is also present in the court today. She also arrived courtesy of an overnight drive, which her brother assisted her with, and she is seated on the side of the court.

GLAZEBROOK J:

Tēnā korua.

MR DUCKWORTH:

Your Honours, Mr Duckworth appearing as counsel for the second respondent. I am appearing by VMR and I'm in Auckland. Your Honour, my client is aware of the hearing today but isn't here with me.

GLAZEBROOK J:

Thank you. Tēnā koe. We now will hear from Mr Jefferson, I presume, yes. Can I just say that we received the oral outline, which was limited to the three pages, but we were a bit concerned about also receiving two other documents, which really should've been filed with the written submissions, or at least consent sought for filing those submissions. They do contain quite a lot of material, which obviously the respondents haven't had time to look at and to

respond to, so what we propose is that we will accept those documents, they can be referred to, but the respondents can have a week to, if they wish, to make any written comments on those documents.

MR JEFFERSON QC:

I'm obliged to your Honours for that indication, thank you.

GLAZEBROOK J:

So Mr Jefferson?

MR JEFFERSON QC:

Thank you your Honours. It's perhaps important, your Honours, to –

GLAZEBROOK J:

If you wish to you can take your mask off.

MR JEFFERSON QC:

I'm obliged.

WILLIAMS J:

You can't Mr Butler, otherwise I cannot, it's just too hard to understand what you're saying, it's too muffled.

GLAZEBROOK J:

And we know that glasses fog up as well, which makes it even worse.

MR JEFFERSON QC:

I wasn't courageous enough to ask but I'm obliged. It's perhaps important I start by noting, and acknowledging what was not decided by the Court of Appeal. As stated in paragraph 28 of the decision: "No findings have yet been made on matters of fact relevant to whether any two or more of the participants were in a qualifying relationship for the purposes of the PRA, and no findings have been made in relation to division of property." Or indeed the classification of any property as relationship property or not. Those matters, the Court of Appeal was very clear, were matters for, in fact for the Family Court to return

there, if indeed the Family Court has jurisdiction, which of course the Court of Appeal held it did. So self-evidently the answers given by the Court of Appeal to the question of law that was before it were not case-specific. They were designed to be of general application.

The question for this Court, of course, has been very widely framed. Was the Court of Appeal wrong in holding that the Family Court did have jurisdiction under the, what I shall shorthand call the PRA, with your Honours' permission. If the Family Court has jurisdiction under the PRA to determine claims to properly, as between two person who were married, civil union or de facto, and also – so it was a "not only but also" formulation, but also in a polyamorous relationship. The second question, if you like, was was the Court of Appeal wrong in determining that the jurisdiction of the Family Court extends to determining claims amongst three people in an acknowledged polyamorous relationship where each partner in that polyamorous relationship is either married to, in this case, or in a de facto relationship with each of the other parties in that polyamorous relationship.

That two of them in this case were married is, of course, not in doubt. Lilach and Brett were married and all they had to do to demonstrate that fact is produce a certificate. The other people to the extent they're in a relationship have to come in through the section 2D door. They have to establish that the character and nature of their relationship with the others constitutes a de facto relationship.

The complexity I suggest to your Honours lies in the characterisation of the relationship that is before you and the fundamental submission, you wont be surprised to hear, of the appellant is that the Court of Appeal, we say, was wrong. We say it was wrong because the Court of Appeal saw three couples, where in fact we say there were none. There were not three couples. There was a triad. A union of three. These three people deliberately chose to be in a relationship that stepped outside the norm, and the Court of Appeal opened the door, in my respectful submission, to disrespecting the choice that those people made.

If one looks at the decision itself at paragraph 73, one can see the Court of Appeal drifting already, as it works towards its conclusion, drifting into a pairing off, a pairing exercise. This was a pair, that was a pair, that was another pair. Now what happens, your Honours, if you do that is you can only do that by ignoring the third person. If you say these two are a pair, you wilfully, deliberately turn a blind eye to the third person. They don't exist for the purpose of that exercise, and in my respectful submission that is where the Court of Appeal went wrong.

Now this, as we say in our submission, and as your Honours have often commented, is yet another case that comes before the Supreme Court that centres around statutory interpretation. The vast majority of the matters that this Court hears fall under that heading and we say that is what is the case here.

We say that the law as drafted, and incorporated into the PRA, is intelligible, clear, and it follows predictable. I say that observing that, of course, some aspects of the PRA have received attention from this Court, and most noticeably section 15, the economic disparity, so it would probably be too trite for me to say it's so simple that everybody knows where they stand, because you've only got to look at things like section 15 to see that there was complexity. But is nonetheless, as it stands, this Act is accessible to those that it binds, and it's sufficiently precise in its terms to allow people, like the appellant, to order her affairs accordingly.

We say that the Court of Appeal has muddied the waters and as a result if it's view is endorsed, the law is no longer intelligible, clear and predictable. What it tries to do is it tries to assimilate polyamory, and this was, as I say, an acknowledged polyamorous relationship. All three parties acknowledged that's what they were in. This isn't one person, as it were, standing aside and saying, look at what we had here. All of these three were of that view, and it wasn't a fly by night relationship, it went on for some 15 or so years. What the Court of Appeal does is try to assimilate polyamory into a sort of a heteronormative

paradigm, which the parties themselves eschew. The parties themselves didn't want to be part of that.

The issue at the heart of this case is one that the legislators, we say, do not appear to have anticipated, and the legislative history of the Act makes it clear, in very short terms we have the 1963 Act, which of course related to married people, and was essentially based around contributions of the old style traditional property contributions. In 1976 we introduced the presumption of equality, which shifted away from traditional property concepts, and we moved into a special arrangement for those who were in a committed personal relationship, and the underlying theme was, of course, equality, but still marriage. The whole question of unmarried couples was part of the legislative history when the Bill was introduced, I think, by Dr Martyn Finlay in 1974/1975, there was a provision in there for de facto couples, they struggled how to define it, things like in the nature of a marriage and that found no favour. In the end it fell off the legislative platform and they didn't reintroduce it until 2002, and then they introduced de factos with a definition of "living together as a couple" and some statutory indicia, non-explosive of course. So an incremental evolution to introduce de facto couples into the regime. Didn't, interestingly, address the issue of polygamy. I'll come back to that in just a second. Civil unions when they came into being, were introduced into it, and so we went on. They had a deliberate process of amending the Act. Indeed your Honours will know from the material we've given you that there is another process going on even now, the Law Commission has prompted, and there are discussion documents flying around, and there seems to be some suggestion there'll be some more radical changes. But Parliament has incrementally developed this.

Let me make this, as it were, the side point about polygamy. In 1980 in the Family Proceedings Act there was a definition of "marriage" and it included polygamy, and that was in cases where you had polygamously married in countries where it was legitimate to do so and then you turned up in New Zealand with both of your wives or husbands. Now they did that deliberately in 1980. They didn't do it in the 1976 Property (Relationships) Act. They didn't do it when they reviewed root and branch the Act in 2002. Marriage

is still differently defined in the PRA from the FPA and that's a point that Justice Goddard made in the decision in the Court of Appeal, to which I'll return shortly.

Having correctly found at paragraph 58 that the PRA was premised on coupledom, the Court of Appeal, I say, we say, wrongly identified as the "key issue", that's the phrase they used at 59: "… is whether, as between two people in a wider multi-partner relationship, there may be a qualifying relationship to which the PRA applies."

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Can I just pause momentarily. The terminology is significant. It's not merely semantic to insist that polyamory is multi-party or multi-persons, not multi-partner. Now that may fell very semantic, but those who are in polyamorous world are clear. They say multi-party, multi-person, not multi-partner.

I won't, of course, recite or repeat the written submissions that haver been placed before you. The way I'd like to approach this, having given that brief opening, I want to speak briefly to that brief opening to address briefly the nature of a polyamorous relationship, asserting as I say that the deconstruction of this relationship into three couples is wrong. I want to touch on the comments that the Court of Appeal called into aid, where they drew from *Reid v Reid* [1979] 1 NZLR 572 (CA) the very famous obiter of Justice Woodhouse, and I will be submitting to your Honours that in fact without derogating at all from Justice Woodhouse's statements, indeed endorsing every word of them, my submission will be it wasn't relevant here, it actually really took the Court of Appeal off down a bit of a blind alley.

Mr Fuscic, I will invite at that point to address your Honours on the direct issue of statutory interpretation. I will then return to speak to you about the examples that the Court of Appeal gave in paragraph 91 and following, I think it went through to 96, you'll recall that the Court of Appeal had a rolling example. It started with a relatively straightforward example of effectively a

contemporaneous relationship, and then kept adding to it to say the result's the same, if you use this analysis you're always going to get the same result and that, as it were, proves the thesis that we've, and the outcome that we've reached. The workability of the Court of Appeal's approach will be part of that presentation, and at the end Mr Butler will address the Bill of Rights issues.

In terms of the overview, the appellant's position is detailed hopefully succinctly from your point of view, in paragraphs 1 to 5 of the written submissions. In short Parliament has been specific and clear as to the types of relationship the PRA applies to. It applies to married couples, civil union couples, de facto couples. It does not apply to other types of intimate or domestic relationships, including those containing more than two persons. It does not, for example, apply to two elderly relatives who live together under the same roof, have some financial interdependence, go out socially always as a couple, and support, it clearly doesn't apply to them.

As I say, the Court of Appeal, as did the High Court, as did the parties themselves, correctly recognised that the underlying premise of the Act is coupledom and there is an explicit and pervasive use of dyadic terminology throughout the Act. Mr Fuscic will, to the extent needed, take you to those.

So what do I say the fundamental errors were? As I've said, to recharacterize, to reframe this polyamorous three person relationship in which the parties were actually involved, and to hold that we should render it into three contemporaneous relationships of couples living together. I say that was artificial. It's artificial to assert that the parties were simultaneously in these couple relationships, and in a polyamorous relationship with the coupledom enduring, notwithstanding the polyamory.

Now to get to that point I have to get to the point of saying, well, hang on a minute. What happened to the marriage, the Lilach and Brett marriage which exists. We don't know whether, that that co-relationships existed because we've got to see whether the qualifying indicia are met, but we know there was a marriage. We have a certificate, we know that's a fact. So what happened

to it. The proposition that I make is that the relationship – the marriage, the initial relationship, came to an end in 2002 when the parties entered into the polyamorous relationship, and I call into aid there section 2A(2)(a) in the Act which talks about when a marriage ends and it ends when you cease living together as a married couple, and my proposition is if you enter into this polyamorous relationship it's difficult to see how you continue to live as a married couple. There's a certain element of exclusivity about marriage, indeed, about a de facto relationship, that is absent from a polyamorous relationship, and as I repeat, the parties did not drift into this. This was a deliberate choice by them. The legislation –

KÓS J:

So if Fiona had one house and Lilach another house, and Brett travelled between the two, first of all would the marriage have subsisted and a de facto relationship had developed?

MR JEFFERSON QC:

Well it may well have done, your Honour, yes, because what you've got there, if you like, is the contemporaneous relationships, which 52A and 52B of the Act attempt to grapple with, I say not very well, but they attempt to grapple with it, and what you've got there is you've got two sides of the triangle. You haven't go the bottom side. So I don't think, on the face of it, it's extremely helpful to be saying, well hang on a minute, you've got there – say it's Brett, he's got his wife in one house, family home under the Act; he's got his other partner and another home; he travels between them. It's exactly the example that Justice Goddard gave in paragraph 91 of his decision, and there weas no relationship between the two women, as Justice Goddard set it out there. Does that address that?

KÓS J:

It does. So that if then they decided to rationalise, and Lilach sold her separate house and moved in to Fiona's, and the three lived together, but there was no relationship between Lilach and Fiona, so it's a classic ménage à trois, what's the situation there on your analysis?

MR JEFFERSON QC:

The sale of the Lilach house, Lilach and Brett being married, is the sale of the family home, as between them. That's available for division between them and they each then tuck into their pocket, as it were, their share of their relationship property, which then they bring to the polyamorous relationship.

WILLIAMS J:

But if there's no triangular base, I think was the point.

MR JEFFERSON QC:

That's exactly right.

WILLIAMS J:

Justice Kós was – then there's no unity.

MR JEFFERSON QC:

Yes.

WILLIAMS J:

Then they get another bite of the pie, do they, in respect of the second home?

MR JEFFERSON QC:

Well if one follows the thesis I'm outlining, you have the married couple ceasing to live together at the point that the polyamorous relationship commences. Their rights, relationship property rights between each other, so Lilach and Brett, crystallise at that point, and they each take their share of what their relationship property is, whatever it is, and that's theirs. Now I say if they bring it into the polyamorous relationship it's immune from attack. The Court of Appeal says if you bring it into the polyamorous relationship, it's available to the third party.

KÓS J:

Well my example wasn't polyamorous. My example was that the hinge, the hinge or the V relationship moved into a single house.

MR JEFFERSON QC:

Yes.

KÓS J:

But between the two women there was no emotional relationship.

MR JEFFERSON QC:

And therefore the other woman, if I can use that phrase, has no claims.

WILLIAMS J:

To what?

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MR JEFFERSON QC:

Well, therein lies the question, and that's where I say the further you dig into the Court of Appeal's examples the more complicated it gets because what is –

WILLIAMS J:

I'm not talking about the Court of Appeal's analysis, I'm talking about yours, where you've got not a unity but a V, and no cross-relationship, yet cohabitation, how do you analyse that?

MR JEFFERSON QC:

Let me just see if I've remembered the – I've looked at a number of these graphs over the last few days, but let me just get my head right. We've got the man, Brett, moving into the girlfriend's house, the non-wife's house.

KÓS J:

All three are together?

MR JEFFERSON QC:

All three have moved in together.

KÓS J:

But the relationships are with Brett, he is the hinge in the example?

MR JEFFERSON QC:

Yes, but if all three are together under the same roof, you're saying, that then becomes polyamorous, does it not.

KÓS J:

Why? What is the emotional relationship between the two women in that example?

MR JEFFERSON QC:

Well I guess we don't know the answer to that, but it really, it will depend on the emotional relationship between the three women *[sic]*. So let's say for the sake of the argument they're all under the same roof. Two are together as a couple, and the other one is in the other room, and they share the kitchen and so on, that almost certainly wouldn't constitute a qualifying relationship for the other person. The, if you like, the third party.

GLAZEBROOK J:

I think the way the example is running is that you have a man with a relationship with both of the two women in the house, but without a certainly a sexual relationship between the two women.

MR JEFFERSON QC:

Yes, I follow that, and in which case then – then you've got –

GLAZEBROOK J:

So polygamy rather than polyamorous I would think is probably the term.

MR JEFFERSON QC:

Or contemporaneous relationships if you want to take the terminology from 53A and B of the Act, and then – so you'll have a property claim between the man, the hinge, and one woman, and a property claim between the hinge and the

other woman, and as Justice Williams made the point, you know, what property are we talking about here.

WILLIAMS J:

The house.

MR JEFFERSON QC:

Well yes, and what does it constitute. Now in the example that if you've got two relationships of two, it becomes the family home, clearly, because that's fixed the PRA paradigm and then the family home is to be divided equally, and you'll notice that –

GLAZEBROOK J:

Well it can't really be, can it, because there are still three people, two claimants, three – well three claimants against one home.

MR JEFFERSON QC:

Well indeed and what that's, where – what the Court of Appeal did was turn to 52A and 52B and say now that, the answer may lie there, because they have a similar scenario, but the guidance isn't within the Act. You know, fi you look closely at 52A it's not very helpful because what you've got there, in your example Justice Kós, is a co-existing relationship whereas 52A and 52B is premised on successive relationships with the possibility of an overlap.

KÓS J:

Well that might be so but in the first example I gave you it's not difficult to analyse. You have a marriage and the husband has strayed and there is a de facto relationship with a third person. There are separate dwellings.

MR JEFFERSON QC:

Yes.

KÓS J:

The property analysis is straightforward assuming the marriage is allowed to continue to subsist, which it probably does or can do in that context.

MR JEFFERSON QC:

Yes, I agree.

KÓS J:

So I then moved that relationship into one house. That's where the problems, the analytical problems begin.

MR JEFFERSON QC:

I agree with that.

KÓS J:

And then we have a third variation on that scenario which is that you then have a triangular emotional relationship, as opposed to a V relationship.

MR JEFFERSON QC:

And I would say that the problems you've already signalled, with them moving into a house together, without that third limb, magnify when you add the third limb of the, in this case it was the two women entering into a personal and intimate relationship.

WILLIAMS J:

I thought you said there wasn't a problem with the first one, the no triangle base, it's a question of fact.

MR JEFFERSON QC:

Yes.

WILLIAMS J:

If B and C are merely flatmates, then no problem, you just apply the PRA in the usual way, and A and B – sorry A and C, who have moved out of their former matrimonial home into the new co-lateral relationship home, get two bites at that cherry.

MR JEFFERSON QC:

Yes.

WILLIAMS J:

Which seems a little unfair, but there you have it. So as far as you're concerned PRA applies there, and everyone gets something out of that second house?

MR JEFFERSON QC:

That, yes, that's why I would say, but not when you do the…

WILLIAMS J:

But if B and C decide they like each other too, game over.

MR JEFFERSON QC:

Yes, precisely.

KÓS J:

Well what on earth is the point of that? Why would Parliament have made that distinction? When you move from the second to the third scenario?

MR JEFFERSON QC:

Well I don't think Parliament did make that distinction. Parliament just simply didn't address it at all. Nowhere can I find in the discussions around the 1976 Act and the 2002 amendments, any consideration that polyamory, and the only time that there was consideration of contemporaneous relationships was in the 2002 amendments, when suddenly it became apparent that you could possibly have a married couple and a de facto couple in some sort of contemporaneous engagement, because before that, of course, you couldn't. You couldn't have two married couples because that was bigamous. So Parliament never had to turn its mind to that at all. It's suddenly by injecting de factos in the scheme, suddenly thought, gosh, we could have a marriage and a de facto that's perfectly feasible, and the only attempt they've made, Parliament has made to address that, was in the 52A and 52B which we'll come back to but very specific

about two relationships and clearly no broader thought had gone into it as to what if there are more than two relationships.

KÓS J:

But you accept, as I understand it, let me see if this is right, you accept that the PRA can deal with the intermediate scenario that I put up, which is where that V, or hinge relationship involves cohabitation in a single dwelling.

MR JEFFERSON QC:

Yes, I think it can, yes.

KÓS J:

Right, so it only falls apart when B and C form an emotional attachment.

MR JEFFERSON QC:

Simultaneously, yes, that's right. But that it does fall apart I suppose is my point, and I can see that your Honour is a little puzzled by that, but that is the proposition. That the moment you get a third union, and you're talking about contributions, you're talking about identifying what is or isn't relationship property, or might have been separate property because it came from a prior relationship, it starts to get complex to the point where I say it can't be unravelled by applying the provisions of the Act.

KÓS J:

It's just a little hard to see why it's harder in the third scenario, when the only thing that's happened in the facts is that B and C have now formed that emotional relationship.

MR JEFFERSON QC:

I suppose the answer, when you say the only thing that's happened, in fact the relationship has substantially altered. It is harder – sorry. It is difficult to see if, in fact, you continue to see these as three couples, which is of course how the Court of Appeal did.

KÓS J:

Well it's only become harder in the eyes of lawyers. As far as the three people living in their house in Takanini, or wherever it is, is concerned, nothing has really changed except that the bond has now become tri-directional.

MR JEFFERSON QC:

Well except that is quite a significant change, is it not.

GLAZEBROOK J:

I suppose looking at it from the other side, your argument to a degree depends on the marriage having effectively dissolved, and you say that happens because it's no longer a relationship of a couple, it's a relationship of three people, I can understand that argument, except that normally when you think of a marriage dissolving you think of the emotional ties dissolving, and people can separate and remain in the same building and in fact now that it's more difficult for people to find accommodation it's probably more common that separation does occur and people remain together than it would have been in the past, together in the same building. But here the emotional ties are still subsisting; they're just shared with another person.

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MR JEFFERSON QC:

Yes, and if I can correct your Honour, of course the marriage hasn't been dissolved. The marriage has come to an end. The dissolution is a process –

GLAZEBROOK J:

Well, I'm using "dissolved" in the sense of separated, not in terms of the formal dissolution.

MR JEFFERSON QC:

Sure. But at that point we say, and I think your Honours acknowledge that you follow the argument, that they have ceased living together as a married couple which is what section 2A…

GLAZEBROOK J:

And that's because they've ceased living together as a couple and have become a – the reason that's the…

MR JEFFERSON QC:

Yes, that's the essence, and there is freight in the word "married". There is a certain degree of exclusivity in marriage that is immediately lost when that is shared, if you like, and there's no suggestion it was shared in anything other than complete sharing.

KÓS J:

And reverting to the scenario before, which is slightly different from what happened here because it involves cohabitation and then the triangle forming, not only on your argument has the marriage ended for the purposes of the PRA but so too has the de facto relationship between A and C.

MR JEFFERSON QC:

Yes, I would – that would have to be right because they've ceased living together as a couple which is the statutory phrase, and what I say, I suppose, is it's not consistent with the purpose of the Act to treat a married couple as continuing to live together as a married couple when they're part of a broader multi-party relationship. It's just not how New Zealand structures its families ordinarily, and this is unusual –

WILLIAMS J:

It does seem to be how New Zealand structures its families. We wouldn't be here.

MR JEFFERSON QC:

Well…

GLAZEBROOK J:

Well, does it? The Act does assume that when you've stopped living together, leave out the couple, you will split your property but not before, and these

people haven't ceased living together and haven't ceased the emotional ties between each other even if they're now sharing those emotional ties with a third person, have they? It's just challenging the assumption that living together as a couple is the important thing rather than living together and having emotional ties.

MR JEFFERSON QC:

Well, as a couple or as a married couple, the two that were married there comes to an end when they cease living together as a married couple. That's explicitly in section 2A. The de facto is when they cease to live together as a couple. In each case I say they did cease to live together, whether as a married couple or as a de facto couple, because they started to live in a union of three.

GLAZEBROOK J:

Yes, all I'm putting to you is that you're stressing as a couple rather than living together as being the important issue, and I doubt that with what the – that was the stress, the couple rather than the living together.

MR JEFFERSON QC:

Well, you know, we're going to come back to the words and what they mean and the text that used to be king is still paramount but is no longer, as I understand it, king, but the text is clear and we have to start working from the words. It would be the submission I'd make on that, and Mr Fuscic will no doubt address that.

The polygamy example which Justice Kós, I think, you were touching on in your questions, is at paragraph 67 of the judgment, Court of Appeal judgment, and in that case the proposition was that they had married polygamously but lawfully from wherever they came from, they arrived in New Zealand and one of those marriages split up. Let's call A and B's marriage split up. A and C remained married and the question was what is B's remedy, and we say, well, sadly and unfortunately there is none because what you – it doesn't fit 52A because it's not a marriage and a de facto, it doesn't fit 52B because it's not two de factos. It's actually two marriages and that just isn't provided for.

Now I accept entirely that that seems unfair, just as I accept, and I must accept, that the proposition I'm making about the Act not applying to polyamory may be unfair, but the Act is the Act and it does need reform and, as the Law Commission says, that reform is going to require inquiry, social assessment, finding out what the polyamorous community, if indeed there is one, feels about it all. It's not a good idea to be doing this in the context of an adversary situation.

In the article that your Honours have kindly admitted, and giving my friends some opportunity to respond, the author quoted Sir Ivor Richardson. So this is the article of *Filling the Gaps*. Sir Ivor made the point that litigation under the adversary system doesn't allow, doesn't readily allow, for an extensive social inquiry and there's a need for great care in reaching conclusions as to social policy and the public interest on the information and arguments furnished by parties, such as has happened in this case. Of course, it's no criticism of the parties but what you're being invited to do or what the Court of Appeal has set out is a form of legislative reform based on two parties putting their respective quite narrow positions to the Court of Appeal and saying choose something from that, and we're saying go to the Act. The Act doesn't provide. You're going to be doing more than just filling in the gaps if you extend the Act to the polyamorous relationship.

They're not without remedy, these people. If the Act doesn't apply, their remedies are in equity and other matters. But I accept that the law needs reform, but that's not the law you're dealing with. You're dealing with the unreformed law and I suppose the big question before your Honours is the extent to which you can reform it from the Bench, as it were, or the extent to which you defer to the legislature to reform what I say is an unfortunate but necessary interpretation of the legislation.

GLAZEBROOK J:

Can I just go back to your polygamy example where people are lawfully married offshore and find themselves in New Zealand? Why do you say if one of those marriages breaks up there is no remedy?

MR JEFFERSON QC:

Well, because what you've had in effect, the instant before the break-up, is two contemporaneous marriages. Now the Act provides for contemporaneous relationships in two places: 53A *[sic]* where it provides for a marriage and a de facto, and 52B where it provides for, and the numeral is in the heading, two de factos. Now it doesn't provide for two marriages. Now…

WILLIAMS J:

But if you read section 11, which contains the rule, as you'll know much better than me, it seems to apply perfectly.

MR JEFFERSON QC:

Sorry, the…

WILLIAMS J:

It says: "On the division of relationship property … each of the spouses or partners is entitled to share equally…"

MR JEFFERSON QC:

Yes, but –

WILLIAMS J:

It doesn't mean 50/50. It could mean 33/33/33.

MR JEFFERSON QC:

I agree, and if there are –

WILLIAMS J:

And the remaining marriage holds two-thirds of the property. That seems to be quite fair I would have thought.

MR JEFFERSON QC:

And that may well be right. I mean I see section 11 sitting here.

WILLIAMS J:

So there's no need to revert to 52A or B at all.

MR JEFFERSON QC:

And on that proposition you're accepting, as you must, that you can have more than one spouse, because…

WILLIAMS J:

Well, yes, and that would be the same as having more than one de facto partner so it would make a rather logical way of interpreting the statute.

MR JEFFERSON QC:

I accept and follow that, yes.

WILLIAMS J:

Okay, so your whole case hinges on the base of the triangle changing the game?

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MR JEFFERSON QC:

Yes, indeed, and changing the game in the sense that it's not, as my friends have persuaded the Court of Appeal, three couples. It simply isn't three couples. It is a union of three, and that's a very different scenario.

The Court of Appeal said, of course, that their reasoning was consistent with the principles, objects, purposes scheme of the PRA, and it referred to the social legislation aspect of it, and called into aid, at that point, the comments of Justice Woodhouse in *Reid v Reid*, also called into aid the New Zealand Bill of Rights Act upon which Mr Butler will address you. Then, as I say, it was almost, this is probably desperately unfair, but one had the sense that there was a result that the Court of Appeal felt was the right result and then tit was a working backwards to get to that, and the best way they could do it was to adopt my friends' analysis of the three couples, and that's where, as I say, I think it goes wrong.

I've outlined the propositions to which I've spoken in greater detail in paragraph 5 of the written submissions, and I won't repeat that there.

KÓS J:

It seems to me the difficulty you run into is the extended definition of "live together as a couple" which is given in section 2D(2), because what you're really trying to do is reinsert some measure of exclusivity into the definition and yet exclusivity is not part of the extended definition in 2D(2) of whether two persons live together as a couple, and you've already had to accept that's so because you've accepted that the hinge relationship in two dwellings falls within the PRA, and you also accepted that the hinge relationship within a single dwelling can fall within it. As Justice Williams says, it's simply the third leg, the base that is a gamechanger for you.

MR JEFFERSON QC:

Yes.

KÓS J:

But 2D(2) certainly doesn't talk about exclusivity in any sense. It's about a whole lot of things which are met in this case. Common residence, mutual commitment to a shared life –

GLAZEBROOK J:

Can we please get that up on the screen. Thank you.

MR JEFFERSON QC:

Yes and no, if you'll forgive me sounding like a lawyer. Those 2D(2) indicia are, of course, non-exhaustive as you know, and if you go down to 2D(3) it's – the fact you've got all of them doesn't necessarily mean you're living together as a couple, and the fact you've only got one of them, doesn't mean you're not living together as a couple. So there are some issues there, particularly the degree of mutual commitment to a shared life. The reputation and public aspects of the relationship, and the financial dependence or interdependence. Now those

are all factors which we are not to go into here, because the Court of Appeal said they're to be determined back down the line, but it does seem to me, in determining whether two persons lived together as a couple is the qualifier. Now Justice Glazebrook has already made the point that to get my argument sheeted home one has to give meaning to that phrase "as a couple" or to say that it is an integral part of the definition as opposed to just living together. It does seem to me that it must be an integral part of the definition because all sorts of people live together. In this day of age, of course, some adult children seem to be unwilling to leave home, but it is, as a couple is important.

GLAZEBROOK J:

Well, if you look at the indicia, not all of them relate to couplehood.

MR JEFFERSON QC:

No, but the starting point is in determining, you know, your starting question is, and I'm dragging –

GLAZEBROOK J:

I suppose I'm having trouble with – let's go to a de facto couple, a de facto couple who are clearly a de facto couple, meet all of those measures in respect of that, just the introduction of another person doesn't seem to break the living together. It might break the couple but not the living together which is why I say your argument depends on the couple being the primary role.

MR JEFFERSON QC:

Yes.

GLAZEBROOK J:

Because it doesn't seem that when you are still living together and have all of those indicia that the Act actually thinks of, at that stage, the relationship being broken and the consequences of the Act coming into play, because, of course, until that relationship ends there isn't any relationship property consequences.

MR JEFFERSON QC:

That has to be right, I think. I need to just –

GLAZEBROOK J:

So it's slightly odd when you still are living together with all of those things occurring in terms of sexual relationship, common residence, a long-term relationship, mutual commitment to a shared life, that somehow that breaks at the point you bring a third person in.

MR JEFFERSON QC:

Well, I'm dragging –

GLAZEBROOK J:

So you're actually saying that living together – the couple is the important – and you actually have all of the consequences of the Act like splitting the property at that point which is really not contemplated by the Act because the relationship is still subsisting.

MR JEFFERSON QC:

Yes. I don't think it's in the authorities so I'm wrenching back into my not-very-reliable memory, but I think it's a case of *L v P* [2008] NZFLR 401 which was Justice Asher where he was considering the 2D criteria. You know, there've been any number of cases have been argued whether or not people fit within it or without it and he made the point that the critical starting point was not to start at 2D(a) and work through to 2D(i) but to start with the opening sentence, the people living together as a couple, because without that there is nothing.

WILLIAMS J:

I wonder whether it's possible to think of this as more multi-layered than you – and I know it's the trouble with this thing, you can't tell who's talking.

MR JEFFERSON QC:

I absolutely can't. I'm watching eyebrows to see whose eyebrows are moving. That's my way of doing it.

WILLIAMS J:

So you say this is a unity, not a couple.

MR JEFFERSON QC:

Yes.

WILLIAMS J:

But, of course, within that unity there are relationships that involve two people, aren't there? There have to be. It's just the human reality of it.

MR JEFFERSON QC:

As there would be if you had a husband and wife and two teenage children.

WILLIAMS J:

Correct. That's going to be my next point, that family is a unity. We talk about "the family". But within the family there are multiple relationships, between the parents, between parents and child or children, and between the siblings, all of which are important in their own right.

MR JEFFERSON QC:

Yes.

WILLIAMS J:

Isn't the question here whether we should see all the relationships in terms of the PRA or see only the surface?

MR JEFFERSON QC:

Yes.

WILLIAMS J:

If we were to see all of the relationships then the base of the triangle doesn't matter, does it?

MR JEFFERSON QC:

Well, except that then you go back to the purpose of the PRA, and if I can drag us back to the original question which was does the Family Court have jurisdiction under the PRA, and the PRA is about the division of property derived from a relationship, in essence. I've summarised a hundred sections in one sentence but – so in your family unit of your teenagers, the relationship between Dad and the teenagers, Mum and the teenagers, the teenagers with each other, is immaterial in terms of the PRA.

WILLIAMS J:

Of course, in terms of the PRA, but what you've done is conceptualised the arrangements here as a unity.

MR JEFFERSON QC:

Yes.

WILLIAMS J:

And by doing that you've removed the couples, which at least at some level or other you'd agree do exist. I mean they are not in each other's company all of the time.

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MR JEFFERSON QC:

Of course.

WILLIAMS J:

They're not kind of Siamese triplets right. So they'll have individual mutual rather than triadic relationships –

MR JEFFERSON QC:

Yes of course.

WILLIAMS J:

And the question is whether the PRA sees through the unity or not, and you say it doesn't see through the unity because that wasn't in Parliament's contemplation.

MR JEFFERSON QC:

That's exactly what I say, yes.

WILLIAMS J:

All right.

ELLEN FRANCE J:

Is Justice Asher's case the best authority you have for the proposition that you have to put the emphasis, you say, on "as a couple"?

MR JEFFERSON QC:

Yes it is, your Honour. It's regularly cited and that's why I say it's the best authority and it's probably the reason I remember it because it's, this is a bit of a colloquialism, but it's trotted out, you know, as the opening line of, we're now looking at whether this is a de facto relationship and the key question is were they living together as a couple, now let's have a look at the indicia of the specific couple, and if you're not living together as a couple the indicia become irrelevant.

ELLEN FRANCE J:

But in terms of the sorts of relationships that are then seen to come within 2D in the cases, they're not situations where other people are living, or there are other relationships, aren't necessarily excluded, are they, in the cases I'm talking about.

MR JEFFERSON QC:

Well no there's, obviously there's not. There's, I did a trawl through 2D cases for an article I wrote some time ago and, you know, they're endless. There's the man who has a family on each side of the lake and, you know, there's the classic mistress scenario, you've got a mistress in Auckland and a wife in New Plymouth. But there's – I'm not aware of any where they're throwing up more than two and of course one of the cases that we've put in the authorities, I think it's the *DM & MP* [2012] NZHC 502, [2012] NZFLR 358 case I think it was, Justice Miller in which he said just because Parliament says there can be more than one relationship doesn't mean there necessarily will be because one of the critical issues is going to be the level of mutual commitment to a shared life and it may be difficult for someone to argue that they had a mutual commitment to a shared life when they actually meant they had a commitment to several shared lives now.

GLAZEBROOK J:

But in the same house it seems you've more likely got a mutual commitment to a shared life between all three people.

MR JEFFERSON QC:

I agree and –

GLAZEBROOK J:

Which again is, is the couple the important point, or is the living together in the sense of shared commitment to a shared, a mutual commitment, or several commitment, to a shared life the important part of that phrase?

MR JEFFERSON QC:

Well we could go back –

GLAZEBROOK J:

You say couple is –

MR JEFFERSON QC:

Yes, we can go back and forth but I'll stake my claim on –

GLAZEBROOK J:

You say couple is, yes.

MR JEFFERSON QC:

Indeed.

KÓS J:

Well you do but you seem to have stuck your stake in rather shifting ground, because you accepted before that if there was a V, or a hinge relationship, A, B and C with A being the hinge. If they were in separate dwellings that could come within the PRA.

MR JEFFERSON QC:

Yes.

KÓS J:

If they were within the same dwelling that two could come within the PRA.

MR JEFFERSON QC:

Yes.

KÓS J:

Well where's the couple there? Because there are three people in that couple as Princess Diana said.

MR JEFFERSON QC:

She did. So you've got your separate residences. No difficulty with that. That's, as you said earlier, pretty straightforward analysis. You've now got a shared residence. Now you don't have the baseline that Justice Williams pointed out, so wouldn't be straightforward, I suppose, from a human level but, yes, two couples.

KÓS J:

Well as Justice Glazebrook said the commitment to a shared life is greater in the situation where the hinge moves into a single residence. But it's certainly not a couple. It's two couples.

MR JEFFERSON QC:

In that case it would be but, and I suppose then the argument that we say is that the moment that you get a deliberate attempt, a deliberate effort to shift into a three, I've struggled to find a phrase that doesn't sound dismissive, but into a three person relationship, then you've got a substantial shift. You've moved away from that mutual commitment to a shared life. You've moved into a commitment to a triple life, triplet life or whatever phrase you can find that isn't demeaning.

GLAZEBROOK J:

I think we've taken that as far as it goes. You say the issue or the emphasis isn't on the living together; it's the emphasis on the couple and as soon as the couple becomes three that creates all of the issues in respect of relationship property, including turning relationship property into, well, triggering the division of relationship property.

MR JEFFERSON QC:

Yes, your Honour. Your Honour has –

GLAZEBROOK J:

So as soon as it goes into three it triggers the division of relationship property.

MR JEFFERSON QC:

Yes, between any couple that existed at that point, and, of course, in this case the married couple existed at that point. I just wanted to –

GLAZEBROOK J:

And so in this case the marriage ended at the time there was the decision to move to a threesome couple. I apologise if term – we keep shifting terminology and I don't mean any disrespect in respect of the decision or the terminology.

MR JEFFERSON QC:

It's something that we've wrestled with as well, so I accept that it's not straightforward.

I just wanted to touch, if I could, on the calling into aid of the Justice Woodhouse material and that came from *Reid v Reid* which is, of course, in the bundle of authorities, and in that case, which is of some antiquity now, of course, the 1976 Act had come in. It replaced the 1963 Act and it introduced, as a fundamental underpinning, the issue of equality and it had introduced, as a fundamental underpinning, that contributions were not simply measured by monetary matters, and so what had happened under the 1963 Act was essentially the division went in favour of – the contributions that were of financial and tangible sort were given much greater weight than the intangible contributions. In '76 Parliament said no, that's not the way we do it. Mr Reid, although he did get an unequal division in his favour, wasn't happy that it wasn't done equal enough and he took it on into the higher echelons of the Court structure, and what happened there was that his argument – indeed, may I say the wife also argued that she hadn't got a fair crack of the whip either – so that was an appeal and a cross-appeal.

Now what Justice Woodhouse was looking at was at the issue of contributions. This was the pivot of the argument, and the question that was being answered by Justice Woodhouse – I'll find it at page 580 at line 24 of the decision, and in my submission it's important to – yes, so you'll see at line 24 he starts: "…two questions immediately arise." First is what is meant by "the contribution of each" and what's meant by "the marriage partnership" in the context of contributions, and, second, on what basis is the decision made that one contribution was or wasn't greater than the other.

So those were the questions he was answering. So having posed those questions he then set out five propositions and the first he says, uncontroversially, the Act establishes a statutory framework which lies outside the more traditional laws of property. That was the intention of the Act. So that's what Justice Woodhouse said, and he said the Act reflects the equal

contribution of a husband and wife to a marriage partnership – in this day and age completely non-controversial but perhaps in 1976 it wasn't quite sheeting home. All of that's correct – and, importantly, and to declare in advance the basis upon which property is to be divided at the end of the marriage.

Now, of course, Parliament has extrapolated that since then to incorporate de factos and civil unions. Parliament has done that. Parliament introduced those to it, and the ability to foresee and to plan, something that Justice Woodhouse noted.

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The second proposition that he put was about equality for those relationships to which it applies and at that stage it just applied to marriage but, you know, he reiterated that.

The third proposition, again, very difficult to disagree with him. No contest at all. Then, and I'm talking about this because the Court of Appeal dropped it into their reasoning and said, look Justice Woodhouse has given us a steer, something to navigate by.

The fourth proposition concerns, said Justice Woodhouse, the hypnotic influence of money and then he went on to say that, you know, it would be completely wrong in a marriage partnership to allow money and traditional property approaches to apply, all of which Parliament had already said. That's what was before that. He was really reiterating the obvious and suggesting if there was any issue around contributions, and contributions to the marriage partnership, and how you define those, here was what Parliament had intended. Equality. Non-monetary and monetary contributions, all the same, and what I'm unclear about is why, in terms of the fourth proposition, the fact that the hypnotic influence of money was to be rejected, why the Court of Appeal found that relevant. It said, the word it used was "resonates here" and this isn't about the hypnotic influence of money, I suppose it is to a degree, but at the end of the day there's going to be a division of property. But there's been no suggestion here and that's not for this court to consider that if the Act applies

the usual, equality, contributions, monetary, non-monetary, the exceptions to equality, section 13, if that applies, section 14, you know, it's any number of exceptions to that. There's no suggestion of that, and then Justice Woodhouse returns in his fifth proposition to focusing again on the issue of contributions.

Now in my respectful submission there is absolutely nothing that I would disagree with Justice Woodhouse way back then. I just struggle to see why it was relevant to the analysis that the Court of Appeal was undertaking in this case. He was really saying social legislation, you've got to step away, as Parliament actually asked you to do, from traditional property approaches, and we agree. So just, I was unsure why, and I'm still unsure having read it many times, why that was called into aid to reach the view. It was called into aid by way of statutory interpretation to assist moving, I say, improperly. That's, you'll forgive the crudity of that phrase, moving away from what the Act says. The dyadic, that the two person relationship, and saying, as I read it, this is social legislation. There's an enormous ability to stretch it to cover unforeseen things, and this polyamory was a bit unforeseen, but it doesn't matter. If you look at Justice Woodhouse's point is we can stretch the interpretation, and I say just that it's just a misplaced emphasis on Justice Woodhouse's analysis.

Modernising the law by way of court decision is a fraught exercise. There's no doubt that the Court is mandated to fill gaps where legislation falls short and Parliament has mandated that. But the function, that function has its limits. It's not appropriate for the Court, in my submission, to stray beyond the lines and boundaries of the Act.

The argument, as it was developed in the Court of Appeal in paragraphs 60 through to 70, I think touches largely on the questions that your Honours have been posing, particularly Justice Kós, whether r or not exclusivity is the key issue, and again, Justice Glazebrook, you've identified this. We say there's a qualitative difference. The emphasis is as a married couple and that probably is where the matter pivots, and, as you rightly say, there's nothing more to be taken from that.

One of the difficulties we have here is, of course, there has been no determination as to whether there are in fact two de facto relationships plus the marriage. We don't know. That analysis has not been undertaken. I say it shouldn't be and doesn't need to be. But if it was undertaken, it's entirely feasible that a court may say that neither of the two other relationships, other than the marriage, that is, qualify and the Act doesn't apply in any event, full stop, because they're not a qualifying relationship. Now that's possible, I'm guessing, and one of the issues there might be can, back to the couple thing, you know, can you have a degree of mutual commitment to one another if in fact you're in a three-person unit? In many circumstances it may well be that you simply don't, that you might be profligate with your affection and so on, and indeed possibly even with your money, but you may not meet the 2D criteria.

The Court of Appeal said that it saw its position reinforced by considering the position of Fiona and Brett, that's one of the putative de facto couples, after Lilach disappeared or departed from the three-way relationship in November '17, and the Court of Appeal said: "As between Fiona and Brett," so the putative de facto, "nothing material changed…" But it did. It absolutely did. The ménage lost a member. It materially changed. But really to your proposition, Justice Kós, that they were all under the same roof, but actually now one of them's left, gone. So there's a completely different set-up, and a new couple relationship actually was created at that juncture, in my respectful submission.

The Court of Appeal said, oh, Lilach's – and I may have pronounced that name wrong and if I do, I apologise. I know she's behind me – but it says: "Lilach's departure would not of itself affect any of the specific factors," the 2D factors, "as between Fiona and Brett." But it would. It surely would. It must reflect on the degree of commitment to a shared life. It must reflect on the reputation and public aspects of the relationship. It may reflect on the aspects of financial dependence or interdependence. It simply can't be said that Lilach's departure would not affect any of the specific 2D factors as between Fiona and Brett. It clearly would.

I'll pause there, your Honours, because I think Mr Fuscic should address you on the interpretation issue. If your Honours would find it helpful for me to return and go through the examples that Justice Goddard set out, what I call the rolling example, I'm able to do that and I'll do that after Mr Fuscic. If your Honours are of the view that that's not going to be of any assistance then that's fine too.

GLAZEBROOK J:

Can we get some idea of timing in terms of how you're going? We obviously didn't break at 11.30 which we usually would because we started late and it may be – so we'll just go through till 1 o'clock, but obviously I think in order to give enough time for your friends you would have to finish by 1 o'clock at least at the absolute latest.

MR JEFFERSON QC:

That's exactly what we're aiming for and at the absolute latest. I've taken more time than the indicative times.

KÓS J:

Well, we've covered a great deal of Mr Fuscic's thunder, I suspect, because we of course have got to the interpretation intensely with you.

MR JEFFERSON QC:

Yes, well, I think that's possibly right. But let Mr Fuscic, as it were, take the stage, but yes, your Honours, mindful of the timing, hoping to be finished by 12.30. The airlines tell me that if I don't make my booked flight tonight I might not get a flight before tomorrow night.

1200

GLAZEBROOK J:

Yes, I think that's probably right. So you aim to finish in the next half hour?

MR JEFFERSON QC:

Yes, why don't I shut up and sit down as they say.

GLAZEBROOK J:

Thank you Mr Jefferson. Mr Fuscic?

MR FUSCIC:

I will take my mask off because I tend to fog up with my glasses and hopefully that's all. My spot in this menu is in the oral submission – sorry, in the road map at interpretation. Just putting away my papers because I find this case an amazing, a significant piece of interpretation. I don't think, well I certainly haven't read case where the Court has been asked to interpret the meaning and the application of an entire statute. We deal with words, the meaning of "shipping". We deal with meaning of "phrases" the meaning of "provisions" in statutes, but never the application and the meaning of a whole statute of some 99 sections, three schedules and a specimen section 21 agreement attached to it. What makes this exercise even more profound is that this is social legislation. Legislation that is designed and is intended to affect everyday lives of a very significant portion of the public. Those who are individuals, who choose to live life with another person as a couple.

At the last census in 2018 it was recorded that 61% of the adult population are either married or in a de facto relationship. Accordingly, it is important in the interpretation of the PRA that the lines and boundaries, as my learned friend has said, of the application of that Act are observed. That it reaches its target audience. That it is clear and it is workable, and we're not all the time having to come to the court to find out what it means and to whom it applies to. It is important that the interpretation and the application of the Act does not cross the lines and boundaries to affect an audience it is not intended to affect, and indeed cannot affect in its present form.

Now I need to cut to the chase because of time, but we all know that words don't exist in a vacuum, and this is certainly the case of the PRA. Justice Williams referred to "living together" and its multi-layering that that can apply to. Father and son, mother and daughter, et cetera et cetera, but those words do not exist in a vacuum from the other words connected to it, and that is "living together as a couple". Now when this Act was first, in relation to

applying to de factos, the definition was “living together as a couple in the nature of marriage”. “In the nature of marriage”. Now we might be asked to be talking about what is “in the nature of marriage”. Is three people living in the same bed for 10 years or more, with a ring ceremony of themselves as a threesome, is that in the nature of marriage? Does that have the character of marriage? No it doesn’t, and I take you –

KÓS J:

I'm just not sure why you’re taking us to that rather historic position. Could we deal with the statute as it currently is?

MR FUSCIC:

Yes. Well, we are dealing with couples in the nature of marriage, really, and the character of that can be seen in what we might think is a marriage. It’s a couple, it has exclusivity to it, an element of exclusivity.

KÓS J:

Sorry, does it have exclusivity, or an element of exclusivity, or what?

MR FUSCIC:

Well I use the word substantive exclusivity.

KÓS J:

And where do you get that from?

MR FUSCIC:

I get that from the cases Sir. If you look at my diagram, my charts of, relationship chart and – that’s the appellant’s relationship chart, and there are six of them all together. If you look at chart number 3, and may I just add here that I'm not aware of there being any case decided where the Court has found that there have been two de facto relationships contemporaneously in existence. One has always excluded the other because of the lack of exclusivity and the Courts here, in my footnotes to that diagram on page 3, talk about there must be an element, or a substantial degree of exclusivity in a qualifying

relationship, and I come back to your Honour Justice Kós' reference to the inverted V diagram on page 3 of my chart.

GLAZEBROOK J:

I think Justice Kós was asking you about the statutory interpretation side rather than whether what's actually been held by the Courts, so where do you see the exclusivity coming in the statute?

MR FUSCIC:

The word "exclusivity" is not used, I accept that, but to have the character of living together, two people, as a couple, they have to actually do that.

GLAZEBROOK J:

So you say, again, it comes down to the emphasis on "couple"?

MR FUSCIC:

It does and my friend referred to Justice Asher's decision, and I think the words that he used was the essential plank of the definition of "de facto relationship" is living together. Living together. But he was talking about two people living together, not three or four. It's a couple and –

KÓS J:

Well nonetheless your senior counsel accepted the prospect that the inverted V might give rise to two qualifying relationships –

MR FUSCIC:

I accept that, I would have to slightly disagree with him there in the sense that when you put the V, inverted V in the same house, where is the exclusivity? There isn't any. A is not in an exclusive or substantially exclusive –

KÓS J:

The house can't make a difference there. The question is the exclusivity of the emotional relationship.

MR FUSCIC:

Yes.

1210

KÓS J:

President Mitterrand loved two women and had children by both, and lived in separate houses from time to time, as I think was the case. Why would there not be, in that situation, potentially a marriage and a de facto relationship, because there is an intense social engagement, intense commitment, but it just happens to be with two people.

MR FUSCIC:

But there are other cases where that has not actually worked because they haven't crossed the line into the commitment of living together, okay? Living together.

KÓS J:

Sure, sure, but we're dealing here with the notional. This is a question stated as to jurisdiction. So the question is capacity. Can the Act apply in that situation? Your senior accepts that it can.

MR FUSCIC:

Well, I have to slightly disagree with him there, your Honour, because if you put the relationship in the same house there is no substantive exclusivity of the relationships.

WILLIAMS J:

Depends on what you mean by exclusivity. It's –

GLAZEBROOK J:

Well, I think it's again an emphasis on "couple". I think we're probably just going over the same ground.

MR FUSCIC:

Yes, we've thrashed that, but that's right.

GLAZEBROOK J:

So perhaps we can move on.

MR FUSCIC:

Yes.

GLAZEBROOK J:

The submission seems to – both depend on that definition of "couple". It has to be mutual and exclusive to the couple. As soon as you introduce a third person I understand the argument to be that exclusivity no longer arises and there might be a slight difference of opinion as to – between counsel for the appellant – as to when that arises, but…

MR FUSCIC:

Well, it's probably – we talked about polygamy and whether that applies under the Act. Well, the Law Commission has thoroughly looked at all this and have come to their conclusions, as we know, and there will be a correction in my road map on exactly what is put in there, but chart number 5, your Honours, the conclusion there is there we have a foreign legal, legal by foreign law, polygamous marriage entering into New Zealand. The Law Commission has said it's unclear. It's unclear. Now I submit that the dual de facto relationship in the same house, whether the PRA applies to that is unclear, at least, at the very least it's unclear.

KÓS J:

All right, so now what were you going to tell us about statutory interpretation?

MR FUSCIC:

Section 11 of the Legislation Act 2019, the ambulatory provision: "Legislation applies to circumstances as they arise". In my submission, that provision doesn't help in this case. As I said at the opening, we're not dealing about some discrete aspect of the law. We're dealing with a very significant piece of legislation, and it is not reading the statute obliviously to new or altered circumstances or conditions but is to arrive at a result consistent with the

requirement that a judge should construe the statute by assessing what the speaker of those words would have made of the situation and give judgment according to that assessment, ie, in our submission, polyamorous unions are not covered.

Text, purpose and context are all aligned in the PRA, in our submission, to be consistent as saying polyamorous relationships are not covered. You cannot justify –

WILLIAMS J:

It's usual, isn't it, that legislation and legislators can't predict how their words will play out because they are operating at the wholesale level. That's why you need judges.

MR FUSCIC:

That's right. Now –

WILLIAMS J:

So the fact that they hadn't contemplated something is not necessarily fatal because it happens rather a lot actually.

MR FUSCIC:

Well, if I can assist there by making the observation of section 11. I think your Honour mentioned, well, the word is "equal". Why can't it just be one-third, one-fourth, one-eighth? If I can take you to – and there we have section 11.

GLAZEBROOK J:

Just to put it out there, the other issue is not what the speaker of the words would mean of the situation looking backwards, but what the reader would make of it looking at it now.

MR FUSCIC:

That's right.

GLAZEBROOK J:

And section 11 ties into that because "circumstances as they arise" will make a difference to how the reader of words might read them now as against what the speaker might have meant at the time they spoke.

MR FUSCIC:

There's confusion in this Act when you take that approach, Ma'am, and just to go straight to the specimen example of the prenuptial agreements at the back of the Act, I think it's a model form of agreement, if you look at that. I think that's in the supplementary material of the appellant's supplementary – the "Model Form", I think it's headed.

GLAZEBROOK J:

It is in the supplementary authorities.

MR FUSCIC:

It's 53A, power to prescribe – sorry, no, that's not – we'll come back to that in a moment.

WILLIAMS J:

You were talking about section 11 of the PRA.

MR FUSCIC:

That's right.

WILLIAMS J:

You were going to make a point about that.

MR FUSCIC:

That uses the word "equal" and the Court of Appeal was able to extend that into the concept of "equal" means, doesn't mean 50/50. It can mean other fractions of equality.

We've got the model form there now and if we scroll down of that, and I won't go through it laboriously word-by-word but anyone reading that who was saying to themselves: "Well, we're in a polyamorous relationship," or about to get into one, "and we want to opt out of this Act. We want to be clear about that," this form is not talking to that relationship.

WILLIAMS J:

Well, they'd just write a different one, wouldn't they? They'd get a good lawyer and write a decent one.

MR FUSCIC:

Yes, or write or rewrite the Act to apply to polyamorous relationships in a clear, concise and applicable form.

WILLIAMS J:

But is that form compulsory, is it?

MR FUSCIC:

No, it's not compulsory. It has to be certified by a lawyer, so that would have to be an aspect. But it's not talking to the target audience of polyamory. It's talking to a totally – to the traditional form of relationship which the Act covers which is coupledom.

Now –

GLAZEBROOK J:

Well, do you want to go to section 21 itself?

MR FUSCIC:

Of the PRA?

GLAZEBROOK J:

Yes, because you – do you say that doesn't cover this situation, assuming that the Court of Appeal are right and you have to look at the –

MR FUSCIC:

Section 21?

GLAZEBROOK J:

– the relationships underneath the three-way relationship.

MR FUSCIC:

I'm not at 21, Ma'am. Section 21?

GLAZEBROOK J:

The point I was making, there's no point in looking at a specimen agreement if in fact it's not compulsory. So are you saying this won't apply, section 21 can't apply to contracting out relationships if there's a three-way relationship?

MR FUSCIC:

Yes, no, no, no, just –

GLAZEBROOK J:

Why do you say that?

MR FUSCIC:

It doesn't work. Well, how do you make it work when it says any two persons in contemplating entering a marriage, civil union, may contract out? What two persons? And it comes back to the submission I make that we can't just selectively look at a phrase and say, well, it can do this, it can do that. We've got to construe it in the light of and be informed by the rest of the words in the statute and a classic example of that is, and it's in one of our charts, is section 20B where the provision is to provide for the protected interest of one partner against the other partner's separate debts. Now have a look at 20B(3). The whole purpose of that section is one-half. One-half. It's not talking about one-third or one-fourth.

1220

WILLIAMS J:

Section 21B(3)?

MR FUSCIC:

Sorry, section 20B subsection (3). Throughout the language there is one-half.

WILLIAMS J:

So what does that mean?

MR FUSCIC:

What it means is that the net equity of relationship property as to either the specimen sum of $103,000, or one=half of the net proceeds of the sale of the family home in that case, is protected to the other spouse or partner from the other – the spouse or partner that has the separate debts. Now that is a very important section, I'm sure, from the point of view of official assignees dealing with groups of relationships, or units of relationships of more than two. How does that work? The language of the statute is not telling the Court it can do some other fractionization of that protected interest.

Again I come to my theme, central theme is that you've got to look at this Act as a whole. How it works, how the cogs of it all turn and interconnect, and it's all designed for couples. People that are in relationships of two, with a substantial degree of exclusivity involved in them.

GLAZEBROOK J:

Are there any other provisions you want to draw our attention to that you say don't work because you say the half doesn't work. Well, the half makes it clear that it's a couple I think is probably the better way of putting that. Are there any other provisions you need to draw our attention to like that?

MR FUSCIC:

That is the most profound one as to the workability of the meaning and application of the Act. The submission that has been filed has gone through – I can take you laboriously through the language of each section as to how its, we call this dyadic, it's a phrase that has never been used, as I've seen, in a

court decision other than Justice Hinton's decision, and it's riddled with that language. I wish to take –

WILLIAMS J:

Is that, perhaps I need a calculator, but if you adopt the couples approach, that the respondent does, it's half of that equity, isn't it?

MR FUSCIC:

One-half.

WILLIAMS J:

So A and B –

MR FUSCIC:

It's one half.

WILLIAMS J:

Yes, half of A and B's equity, half of A and C's equity.

MR FUSCIC:

Well –

O'REGAN J:

What about B and C's.

MR FUSCIC:

Well we've got to go back to the definitions of what is a spouse, what is a partner. The definition. That's the core. We can't go to the end result. Interpretation. You know, it's a DNA of two, right through this Act, and it's always been a DNA of two.

WILLIAMS J:

Yes, but you're saying it doesn't work.

MR FUSCIC:

It doesn't work.

WILLIAMS J:

That's what I'm testing. I understand you say that as an article of faith, and circa 1975 there cannot be any doubt that you're right. But your point here is, look at the statute, it's machinery doesn't work.

MR FUSCIC:

No.

WILLIAMS J:

Square peg, round hole.

MR FUSCIC:

It's chalk and cheese Sir, chalk and cheese.

WILLIAMS J:

Yes, I get that, so 20B you say is the clincher because –

MR FUSCIC:

It's an example of where the statute is meant to be sitting with couples. Not with multi-partner unions of three or more. It doesn't work. How do you look through that lens there of the Act. Good example, look through that –

WILLIAMS J:

You'd probably need an accountant to assess this and I'm certainly not one but it's half of the equity of the combatants, that's the crucial point. Are you sure that doesn't work? If you're simply assessing the equity of that person vis-à-vis the other couples in the –

GLAZEBROOK J:

I think maybe we're getting into too much detail, this might be something – we're going to, I don't know that we're going to, because you'd have to go back to the definition of "family home", which means the dwelling house either of both of

the spouses of partners used habitually or from time to time, and I'm sure Mr Fuscic would say, either or both can't mean three people.

MR FUSCIC:

Any, or, yes.

GLAZEBROOK J:

So the family home is defined in terms of coupledom, and the half means that couple.

MR FUSCIC:

Yes.

WILLIAMS J:

The other side says you take each couple as it comes, and the Act speaks to each couple. If you took that approach does 20B not work quite well? I know you disagree with that.

MR FUSCIC:

I have to fundamentally empathetically disagree with you.

WILLIAMS J:

I need you to tell me that in practical terms not because that's your belief.

MR FUSCIC:

Well my friend will come to those workability diagrams.

WILLIAMS J:

I see.

MR FUSCIC:

Which shows how the workability of the Act, and that's what we all need to be working with in our lives, the workable Act doesn't Act for this.

WILLIAMS J:

Well that's what I need to be educated about.

GLAZEBROOK J:

What you'd say, I think, is if you've got three couples, you've only got one house. So if you do couple 1, and they each have half of the house; couple 2, each have half of the house; and couple 3 each have half of the house, that's really too many halves. That would be one and a half houses and there's only one. I think is the argument.

MR FUSCIC:

Well it's removing what I call the substrata and the substance of the whole Act as it was intended. The DNA, call it the DNA, with two strands in the molecular structure of the unit we're talking about. Yes two, not three, not four. It's coupledom not –

KÓS J:

All right, I think I've got the essence of Mr Fuscic's argument.

MR FUSCIC:

So they're very different from each other and really, in that respect, nothing in common, in my submission, and I'm going to leave it at that because Mr Butler will be talking to you. Thank you your Honours.

GLAZEBROOK J:

So just to be clear, you say 20B is the extreme example but all of the other examples you've given have been – are premised on coupledom, that's the basis?

MR FUSCIC:

Yes.

GLAZEBROOK J:

Which is why you stress the couple side of the living together rather than – well you stress the phrase as a whole but the couple part being the whole basis of the Act, I think that's the argument?

MR FUSCIC:

Yes Ma'am, and I'll leave it at that. Thank you.

MR JEFFERSON QC:

Your Honours, I provided under cover of a heading that said "appellant's workability sheets" some six examples. Now I'm mindful of time, and my preference would be at this juncture to have Mr Butler address you on the Bill of Rights matter, which is important, and we don't want to lose sight of it, and if your Honours are of the view that being talked through these walkability charts would be of assistance, I take the view that they're graphic illustration that you're all more than capable of reading and won't need me to take you through them.

GLAZEBROOK J:

Well, seeing we were on 20B, have you got a workability that goes through that?

MR JEFFERSON QC:

Yes, diagram 6 that is, of my workability charts, and the way I did these charts was to, on the left-hand side, do the Court of Appeal approach, and on the right-hand side do the High Court approach. The High Court approach –

WILLIAMS J:

Which one is diagram 6?

1230

MR JEFFERSON QC:

Sorry, the last one, the very last one, and the background scenario was A, B and C in a polyamorous relationship, A racks up a $300,000 gambling debt during the relationship, the only asset is a modest family home worth 400.

With the High Court approach the answer, the creditor who they're trying to protect under 20B, the creditor sues A for the entirety of the debt, he wants the house to be sold to get his money, B and C don't have a protected interest under the High Court approach, and the creditor can sell the house and grab his money and there's no protected interest and B and C miss out. Now under the Court of Appeal approach, which may –

KÓS J:

Sorry, and that would be true also if A and B were married or had been married.

MR JEFFERSON QC:

Yes, it wouldn't make any – well, on my analysis yes, because bear in mind this is predicated on this being a polyamorous relationship, not three couples. If it were three couple you'd go to the Court of Appeal approach, and I see that I've done three de factos but it probably doesn't matter if one of them's a married couple. The creditor sues A, because he's the debtor. Once the home is sold, fine, that's fine, both B and C have protected interests and the question is how do you then apply 20B(3) where there are three partners, and you've got this language of one half of the equity, and your Honour, I think Justice Williams, you were saying, and like you I'm no accountant, one of the reasons I took up law I couldn't add up.

WILLIAMS J:

You and me both.

MR JEFFERSON QC:

But your Honour was saying, I think, part of each of their halves was one possibility.

WILLIAMS J:

Yes.

MR JEFFERSON QC:

And Justice Glazebrook I think summarised neatly. Whether we breached on that I don't know I'm going to assist you further by –

WILLIAMS J:
Well, it depends on what you, half of what?

MR JEFFERSON QC:
Yes, well, exact –

WILLIAMS J:
If it's half of the entire home then that's obviously problematic. But if you read it as half of the, each couple's portion of the home, then it's no problem.

MR JEFFERSON QC:
Yes. And it is, as you say, how you read it, and that comes back to statutory interpretation, doesn't it?

WILLIAMS J:
Quite.

MR JEFFERSON QC:
Which is really why we're here. I don't want to deprive Mr Butler of the opportunity of speaking to us in his Irish brogue and reminding us all about the weekend, as well as the Bill of Rights.

GLAZEBROOK J:
Thank you, Mr Butler, and we won't mention the war.

MR BUTLER:
No, Ma'am. I'm happy to, your Honour. Needless to say, your Honours, surprisingly I will be brief today because it seems to me the case is broadly about a question of statutory interpretation. You'll see that my submissions say that I feel the Bill of Rights doesn't really add anything to the statutory interpretation exercise here, but there are number of points that I think do need to come out to establish that in fact the Court of Appeal shouldn't and didn't

need to go anywhere near the Bill of Rights to resolve the issues here. You have my written submissions and I'd like to make, if I could, four disparate points to you in terms of the Bill of Rights issue that arise.

So the first point I'd like to make goes to whether or not the Bill of Rights is even implicated here, and that turns on the Court of Appeal's approach to the proper definition of the phrase "family status" in the Human Rights Act 1993. We submit that there is no discrimination on family status grounds here, and that is because consistent with the thesis that we have run before the High Court , the Court of Appeal and this Court, a significant step took place when these three people entered into a union of three. The reason, we say, that the PRA does not apply is a recognition of the significance of the step that they have taken. They are not being treated differently because of the existence or otherwise of a marriage, they are being treated differently because they have undertaken the significant step of entering a new form of relationship and thereby ending any pre-existing marriage, civil union or de facto relationship.

WILLIAMS J:

That sound suspiciously like the appellant, the defendant or whoever it might be, chose to be Presbyterian, chose to be gay or chose to be polyamorous.

MR BUTLER:

No, I wouldn't – I think I understand the point your is trying to make. But the important thing we're trying to make is when you look at the definition of "family status" it's discrete, as is the way of –

GLAZEBROOK J:

So a landlord could say: "I'm not renting my house to you because you're polyamorous and I'll only rent to married couples"?

MR BUTLER:

Well, they can't say: "I'll only rent something to married couples," that's the point, that would be discrimination on grounds of marital status. The ground that was found by –

GLAZEBROOK J:

Well, no, but I'm not renting to you because you're polyamorous. Are you saying that's not discrimination on the basis of family status?

MR BUTLER:

Well, it doesn't raise issues on family status along the lines of what was raised by the Court of Appeal, it raises a different, it seems to me, a different issue.

GLAZEBROOK J:

Well, are you saying that polyamorous isn't family status?

MR BUTLER:

I'm saying it doesn't need to be because –

GLAZEBROOK J:

Well, it may not need to be, but is it or isn't it? So if I say I'm a landlord, I'll rent to anybody but a polyamorous three-people relationship, is that not discrimination?

MR BUTLER:

It is discrimination, but it's done through a different prism, you don't have to identify them as being polyamorous as such, you say that a person is discriminating on the basis that they are not a married couple, for example.

GLAZEBROOK J:

No, I'm discriminating on the basis they are polyamorous. I'll rent to absolutely anybody else apart from a polyamorous relationship.

MR BUTLER:

Right. So then if that's the proposition I'm asked to address, polyamory as such is not an identified ground of discrimination in the legislation.

GLAZEBROOK J:

So it's not family status.

MR BUTLER:

So it's not family status, no. All I'm trying to say back to you, your Honour, with respect, is that –

GLAZEBROOK J:

I'm having difficulty with that proposition but…

MR BUTLER:

Yes, good, okay. So all I'm trying to say back is that the way in which that scenario would be dealt with is through different parts of the Human Rights Act, that's the only point I'm making in response to what your Honour has raised.

ELLEN FRANCE J:

So why is it not family status?

MR BUTLER:

So in the Court below, the basis upon which the issue was raised was whether or not a person, and by dint of the relationship of a particular person to somebody who is married, de facto or in a civil union, that was the basis upon which the Court of Appeal decided, if you look at paragraph 79, and the point that we make is that's not the basis upon which the PRA does not apply.

GLAZEBROOK J:

I'm back at why isn't it family status?

MR BUTLER:

Well, for the reason I've given your Honour, which is that it doesn't fall within the crystalline, the careful drafting that's set out as to the definition of "family status".

GLAZEBROOK J:

Okay, so, well, but do you want to take us to that then, why you say that?

MR BUTLER:

Sure.

GLAZEBROOK J:

Can we have that up, please? So we need the Bill of Rights.

MR BUTLER:

Yes.

GLAZEBROOK J:

Or we might need the Human Rights Act.

WILLIAMS J:

Human Rights Act.

MR BUTLER:

Human Rights Act, yes. So if you look at section 21(1)(l), "family means", so it's not "includes", so it's an exclusive definition. It means "having the responsibility for part-time care," so that's not applicable here, "having no responsibility", "being married to or being in a civil union or a de facto relationship with a particular person" or "being a relative of a particular person".

WILLIAMS J:

And then "relative" is pretty broadly defined as "same household", isn't it?

ELLEN FRANCE J:

Why you can't read "person" as plural there?

MR BUTLER:

To what end, your Honour, sorry?

ELLEN FRANCE J:

Well, are you saying (l)(iii) doesn't apply because we've got three people?

MR BUTLER:

Yes. And, in particular, what you're looking to see in our submission whether or not a person is treated differently because they are married to or in a civil union or in a de facto relationship with a particular person. And again it may be that your Honours are on a different page from where we are at in terms of our underlying thesis. Our underlying thesis is that by entering into the union of three, you have taken a significant step. You are no longer, as my senior indicated, for the purposes of the PRA, you are no longer considered to be married to, in a civil union with, or in a de facto relationship with, a particular person.

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GLAZEBROOK J:

Do they define “de facto relationship” in this Act? Can we go back and…

MR BUTLER:

Yes, I think it’s defined in terms of the Legislation Act, but I could be wrong. I'm told that’s correct.

O’REGAN J:

It’s the same as in the PRA isn't it?

MR BUTLER:

Broadly.

WILLIAMS J:

I thought the definition of “relative” meant a person living in the same household.

MR BUTLER:

I don’t have that in front of me.

WILLIAMS J:

On any analysis isn't the third person in this relationship a relative and you can't discriminate against that person as a relative of the target person?

MR BUTLER:

I don't have the term "relative" in front of me.

GLAZEBROOK J:

Can we go to the definition section of the Human Rights Act please?

MR BUTLER:

So much for my being brief your Honours.

WILLIAMS J:

It's our fault.

MR BUTLER:

So we're looking at the definition of "relative" in section 2(1)(a), (b) and (c), and it's (c).

WILLIAMS J:

Yes, "member of the person's household".

GLAZEBROOK J:

"Is a member of the person's household".

WILLIAMS J:

So you can't discriminate against that person because they're the third person in a relationship. If they're in the same house.

MR BUTLER:

If they're in the same house, exactly, that's right.

WILLIAMS J:

But this whole case is about the same house so what do you say?

MR BUTLER:

So in principle I can see that the word "relative'" has got a very extended meaning there, to embrace, is a member of the person's household.

WILLIAMS J:

Yes.

MR BUTLER:

Absolutely. Then I'll have to go back because of course I'm dealing with the basis upon which the Court of Appeal said the Bill of Rights was implicated.

GLAZEBROOK J:

Of course it may not really mean much, as you say, because we're actually looking at the definitions in the PRA and how the PRA applies rather than the Human Rights Act itself.

MR BUTLER:

Correct.

GLAZEBROOK J:

It's just that I don't want to be, have us making broad statements about the absolute ability for landlords to say, sorry, I'm not renting to you.

MR BUTLER:

Indeed, and you can well imagine that was not territory I would wish it to be going on, which is why I was immediately rushing in with an alternate way of making sure that nobody would get that message.

GLAZEBROOK J:

Yes.

MR BUTLER:

So we're on the same page. Well in the same book if not on exactly the same page your Honour. So I just wanted your Honours to understand that the reason I advanced the submission that I do in relation to the not being discrimination on grounds of family status is entirely consistent with the approach of the team on behalf of the appellant, namely the significance of that step into a union of three.

The next thing I wanted to briefly address if I may, and it's touched on in the road map, is this question of detriment and disadvantage. Your Honours well know, I don't need to tell you, that one of the things that we look for in a discrimination claim, or discrimination case, is whether you can say that there is a disadvantage or a detriment that is created by any distinction. So this is making an assumption that we're actually in the territory or section 19, and a very important point I wanted to make here, which is a theme that underlies the submissions you've heard from my friends earlier, Mr Jefferson and Mr Fuscic, but I think it bubbles to the surface quite strongly when you're thinking about Human Rights Act implications. It is, however, relevant, I do believe, to the statutory interpretation grounds.

It goes to this question. My learned friend Mr Jefferson referred about the heteronormative paradigm, and how easy it can be if you are used to operating within that paradigm, to see the world through that prism, through that paradigm. One of the things I think the Court needs to be conscious of, which is something which is driving the approach of the appellant to this statutory interpretation exercise, is that that is not necessarily the paradigm that people within the polyamorous community wish their relationships to be seen through. Now in the road map we've given you, it's in the submissions, but in the road map there's a reference to an article which I think your Honours may find helpful, I'll just tell you where it is in the road map if I may and ask you afterwards to read it, because I do think it's important when you're considering this question of detriment or disadvantage if you believe the Bill of Rights is implicated.

So the reference is to the article by Francesca Miccoli in *Whatever*, I gather is the name of the journal. It's at page 364, and you'll find that reference, the part I think – if you look at the paragraph commencing: "Even though the composition of the polyamorous community appears homogeneous…" do your Honours see that?

GLAZEBROOK J:

Yes.

MR BUTLER:

And do your Honours see in particular the sentence towards the bottom of the page: “It is evident that…” Then if you carry over the page you’ll see similar statements that are recorded.

KÓS J:

I'm not sure I entirely understand the thrust of this argument, that you and Mr Jefferson are making. This is not a question of being disrespectful to the polyamorous community. It’s a question of jurisdiction.

MR BUTLER:

Yes I understand.

KÓS J:

And in particular whether a statute that effectively embraces in a positive way for the economically disadvantaged person in a close relationship applies, or whether they are thrown back to equity, where they don’t have that advantage. At the end of the day, the way in which people will achieve the departure from the application of the statute will be by contracting out, and so if polyamorous couples are within the jurisdictional basis of the Act, and they don’t wish to be, because they regard that as inconsistent with their outlook, the answer to them is to contract out.

MR BUTLER:

And what I would say back to that is of course is that the starting point, the jumping off point, which is the issue I'm raising, is an assimilationist, to use that phrase, approach. It starts from the premise that these relationships should be looked at through that prism and be treated in the same way as relationships –

GLAZEBROOK J:

Well isn't it the other way round is the argument I think of the respondents is that they shouldn't be discriminated against because they’ve decided on a different form of family status so it’s a recognition that you can have a whole lot of different statutes, family statuses and everybody should be treated equally

to the extent that they come within particular, and of course the statutory interpretation in relation to the PRA still applies, but that that's the basis of the Human Rights Act, that it is saying family – we are not telling you, you have one form of family status that is the right form of family status. You are not allowed to discriminate on the basis of people who choose to have what might be thought of as non-conventional arrangements.

MR BUTLER:

Yes, so –

GLAZEBROOK J:

From the conventional side might be thought of as non-conventional.

MR BUTLER:

Yes, quite, thank you.

GLAZEBROOK J:

So it's really the other side of yours, it's saying, well yes, we shouldn't be saying what relationships people would have. We should be accepting of all of those relationships.

MR BUTLER:

And I understand, obviously, the argument. So I can acknowledge the argument, the viewpoint, if I can put it that way your Honour, the opinion, to which I say enables me to come to the next point I was going to make, which is this is actually a debate, a discussion that should be taking place with the involvement of the polyamorous community in the way in which the Law Commission undertook its work and research, and I'd like to refer you again, I'm just conscious of time, I'd like to refer you to the relevant parts of the Law Commission's work where it actually considered this very issue, noted the responses that came in from the polyamorous community, and said more work and research needs to be done to understand what the implications are for that community of the application of the PRA to them. Now that, your Honours, is exactly what we did when we decided to, for example, extend same sex,

marriage to same sex couples. There was a very vigorous discussion within the community as to whether that was a welcome or an unwelcome step. Our community also undertook a vigorous discussion as to whether or not de facto relationships should fall or not fall within the coverage of the PRA.

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The history of the PRA, in our submission, is a history of incremental extension of its coverage to different relationship types over time as a result of community engagement and discussion, debate in the public forum, because it is not clear that everybody within the polyamorous community, for example, would welcome the application of the PRA even though there are before this Court some who now are of that view, and when I say "now" I do not want to be understood as being disparaging. But what we do know from the literature is that many people in the polyamorous community, what they are doing is they are deliberately stepping outside of what they perceive and what others might say is convention or the norm and to apply to them structures and ways of looking at relationships that reflect the conventional is not necessarily welcome. So –

KÓS J:

How does that do that? How does the application of the Act here finding jurisdiction do that when what this is doing is dealing with the wreckage where the relationship falls apart? The question then is how is the property divided? In particular, the PRA is protective of those who come to the relationship or leave the relationship in a situation of economic disadvantage.

MR BUTLER:

But it's not necessarily wreckage, Sir. I mean the Act also deals with matters such as succession. So what happens upon death. So wreckage, to use that phrase, is one aspect. Of course, not always wreckage. Some people just fall out of love without being wrecked, so as to speak. But it's not the sole and exclusive way, and, as I said, I don't think it undermines in the least bit the point I've been trying to make about the incremental nature of the extension of the Act. There's got to be community buy-in both by the community saying: "Yes,

we think it's appropriate for these relationships to fall within the coverage of the PRA," and also for those affected communities to say: "That's what we want to –" or at least: "Let us have a discussion about it and give you our feedback."

WILLIAMS J:

I must say I'm, for myself, somewhat sceptical about the idea of polyamorous community because it's so pluralist and I just don't have a sense that there's political cohesion in a group of people who are by nature non-conformist.

MR BUTLER:

And your Honour just doesn't know because we haven't done the research. What the Law Commission said is we actually need to undertake the research to get a better feel for what the impact is going to be on the community to respond to exactly the points that you raise.

WILLIAMS J:

Yes, well, I'm not sure of the Law Commission's reach on these matters either, frankly.

MR BUTLER:

Well, on that regard, what is interesting, your Honour, and it does repay and I'm going to give you the references, they expressly in the issues paper asked and sought for submissions on the application of the Act to multi-party relationships, for example, as well as other types, domestic relationships, so siblings, those sorts of things, and they got feedback and they've analysed it and they took the view that they did. In my submission, that's why we have the Law Commission so that the right developments, the extension of the law in this way takes place through the right vehicle.

I mean you might ask yourself: "Well, why didn't the Courts use the Bill of Rights back in the day to extend to re-read the MPA," as it then was, "and just apply the MPA to de facto relationships?" Why didn't you just do that? You didn't do it because you recognised, I would say, with respect, well, first of all, maybe nobody ever thought of it, but the Courts could have raised it because we know

at the time there was some level of judicial dissatisfaction at the time the application of rules of equity inserted in respect of certain de facto couples that might come before the Court, but I would submit the reason the Courts didn't intervene is because they recognised that the right place for this to be discussed is through the legislative channel, not through the judicial channel.

GLAZEBROOK J:

It's a slightly different – you're really supposed to be telling us why the Bill of Rights doesn't apply. So we understand that this isn't the right place, that it should be done in Parliament, but –

MR FUSCIC:

Well, the reason it's relevant to the Bill of Rights, your Honour, is it goes directly to how you inter – when the interpretative obligation arises. I gave you *Bellinger v Bellinger* [2003] UKHL 21 in my written submissions and I would refer you – I'm conscious of time – in…

So first of all, *Bellinger* was given approbation by her Honour, the Chief Justice, in *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551, so if your Honours would like to just take a note. Her Honour in *Fitzgerald*, when writing her judgment, explicitly recognised that the framework to interpretation and its limits, I'm quoting here, are helpful for section 6 BORA purposes. So that's paragraph 72 of *Fitzgerald*, and more broadly generally helpful the UK cases are. She said she expressly recognised that the Courts shouldn't in effect push section 6 where a "rights-consistent interpretation imposes on the Court a task beyond its institutional competence", that's why I've raised the issue, that's paragraph 69, and a good example, she said, is in the area of "complex social policy", again paragraph 69, and she has a footnote in 69 which cites to an article and expressly cites *Bellinger v Bellinger.* So that's why I do see, your Honour, with respect –

GLAZEBROOK J:

I think you'll find that the other Judges in *Fitzgerald* did not comment on that, I know specifically I did not.

MR BUTLER:

No, that's correct. I suppose the take I would have on it as between the various judgments that were issued in the *Fitzgerald* case, the one that sought to push the interpretive obligation under section 6 and give it the maximum impact, in my submission, was that of the Chief Justice, and so to my way of, the submission I'm making, is even when she was suggesting that section 6 BORA is a very strong interpretive obligation, she accepted that that strong approach to interpretation needs to be modulated and kept under restraint when we're in the area of complex social legislation which, for the reasons that my learned section, Mr Fuscic, advanced, I say we are in.

Your Honour, those were the principal points that I had wanted to make on the Bill of Rights aspect. Was there anything else you wanted me to specifically address in relation to that aspect of the appeal?

GLAZEBROOK J:

No, thank you very much, Mr Butler.

MR BUTLER:

Thank you.

GLAZEBROOK J:

Mr Jefferson, did you have anything further you wanted to…

MR JEFFERSON QC:

If you don't mind, I'll take the five minutes that we have before we rise. I just wanted – I think it was Justice Williams – but I wanted to pick up on the section 21 issue, which I actually address it in diagrams 1 and 2 of my workability diagrams, and again I won't insult you by taking you through those diagrams. But it does get complicated. I think it was Justice Williams said: "Well, hey, they can just, you know, if they don't want to be part of the Act they can just contract out of it." Now section 21 provides spouses, civil union partners, de facto partners or any other two persons, so very much two people, can contract out. Now you've got the possibility of A and B entering in a 21

agreement and C declining to, you've got the complication of a lawyer certifying, which is of courses a requirement of the agreement that they've explained the effects and implications, and they're saying: "Well, hang on a minute, out there is a third person with rights, potential rights, that we really don't have a handle on at all because the Act's not clear." You couldn't have a three-way 21 agreement, it's clear that there would have to be, if the Court of Appeal approach is right, there'd have to be three 21 agreements, it's the only way it could work, and they'd have to dovetail and they'd have to be independent, the independence of the lawyer certifying under 21(f). I'm guessing you'd have to have three lawyers, not two, I'm guessing that any lawyer who purported to certify on behalf of two parties would not have the requisite degree of independence, and at that point it's, that's to me one of the examples of why this gets or could get two messy, what I've described in my notes to myself in the middle of the night, "a rat's nest", really the moment you start trying to – because the Act isn't just about, to use whoever's phrase it was, "dealing with the wreckage of a relationship", it enables people to regulate their affairs by going to section 21, it categorises or classifies property as to whether it's relationship property or not. Section 25 allows declarations to be made, not necessarily in the wake of a broken of wrecked relationship, you can make those declarations at any time. So Mr Fuscic's point is that the Act is – the moment you start to tinker with one part of the Act, it's a bit like fiddling with the economy, some other part pops out and says: "Hang on, it's not going to work here."

WILLIAMS J:

Yes, well, you should try the Resource Management Act.

MR JEFFERSON QC:

Please never, please not. So, and as I say, I'm mindful of time, my friends have a stupendous effort to get here, I don't want to cut them short, so unless your Honours have anything especial – yes, Mr Butler, draw your attention to the Law Commission. The references he wants you to pay attention to are the New Zealand Law Commission Issues Paper – sorry, it is page 4 of the road

map, you're quite right, it's under the heading numeral 5, "Statutory Interpretation" and it's in the margins there, "NZLC Issues Paper".

GLAZEBROOK J:

Thank you.

MR JEFFERSON QC:

Thank you. Unless your Honours seek any more from me at this time…

GLAZEBROOK J:

Thank you very much.

MR JEFFERSON QC:

Thank you, your Honours.

GLAZEBROOK J:

Ms Taefi, would you be assisted if we come back at 2 pm, or do you think that we can start at the normal time and you would finish leaving enough, a short period for a reply?

MS TAEFI:

I'm comfortable to start at 2 pm.

GLAZEBROOK J:

Yes, I think we'll come back at 2 pm then.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.04 PM

GLAZEBROOK J:

Ms Taefi.

MS TAEFI:

I appear for the first respondent, Ms Lilach Paul. Ms Paul lived in a de facto relationship with Ms Mead for 15 years, during which they built a home, they supported one another in their careers, and they were open with their friends and family about their commitment. That relationship ended in 2017 and since that date Ms Paul has had no access to relationship property. The appellant says that Ms Paul has no right to the family home, relationship chattels or other property because Ms Mead and Ms Paul were in a contemporaneous relationship with Brett Paul.

At its core, this is a case about whether persons in polyamorous relationships should be excluded from the Property (Relationships) Act and the appellant's case hangs on whether "couple" means "exclusive couple", and the first respondent says there is no such exclusion in the Act and that one should not be read in.

Ms Paul is not seeking to expand the definition of a de facto relationship or asking the Court to go beyond what is in the Act. She wants the Act to apply to her circumstances just as it would anyone else, and she's asking the Court to accept that there can be a qualifying de facto couple within a wider multi-partner relationship.

The first respondent fully accepts that the PRA is framed in terms of coupledom but not exclusive coupledom and characterises the relationship as being one of three qualifying relationships, two de facto relationships and a marriage, and that is represented on page 2 of the first respondent's submissions in figure 1.

In terms of a road map for today's submissions, the first respondent intends to follow the structure of the written submissions which are divided into three sections. The first section deals with the ordinary principles of statutory interpretation. The second section is focused on the Bill of Rights Act and my learned junior, Ms Palairet, will address the appellant's submissions in respect of the *Ballinger* decision. Part 3 of the first respondent's submissions deals with "mechanics and workability", and in this section I am happy to address the

appellant's workability documents and also spend some time discussion implications for other statutes which was a matter raised in the appellant's submissions, written submissions.

The statutory context begins with the provisions of section 2D of the Property (Relationships) Act and the respondent's submission is that this test is evaluative and enables the Court to adopt a fact-specific approach to a variety of human relationships. In an initial draft of this provision there was a reference to a de facto relationship being a relationship in the nature of marriage and Parliament deliberately rejected that approach. It didn't want to frame de facto relationships in those terms and so instead it came up with the criteria in section 2D(2), and we now know so many years later that courts have determined a very diverse range of relationships will meet the definition of a de facto relationship and this includes where parties don't live together, where there's no sexual element, relationships that are not monogamous.

An important distinction between a marriage and a de facto relationship is that a marriage is intentional whereas the law will impose a de facto relationship in circumstances where it is completely unintended by the parties, and this is really a feature of cases about section 2D. Parties will say: "No, this is not my de facto partner. This is my flatmate," or "my business partner" or "my casual lover". In the *Moon v Public Trust* [2018] NZHC 1169 case the deceased had always referred to herself as single and she had referred to the respondent as a devoted friend and caregiver, and the Court found there was a qualifying relationship regardless. In that regard, my learned friend's emphasis on the parties' intentions is not really of any assistance to the Court because the test for a de facto relationship is not concerned with how the parties describe or see their own relationship; it's concerned with a qualitative assessment of the characteristics of that relationship.

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If anything, we do start to run into trouble if we adopt the appellant's submissions and we say that polyamorous relationships are excluded because then the Court has the task of assessing, well, what is a polyamorous

relationship? What is that group that is now going to be excluded from the scheme of the PRA? It's not clear that there is any cohesive polyamorous community. My learned friends have already taken us to some authorities which show that it's very versatile and varied, and…

O'REGAN J:

But we wouldn't be determining anything other than this case, would we? We would say this relationship is or isn't but we're not saying anything about a different one. I mean this isn't an advisory opinion case. It's a case based on a set of facts.

MS TAEFI:

My understanding of the genesis of the case is that it started as a question stated from the Family Court and it was not stated in terms of this case but of a general proposition. I believe the way that Judge Pidwell expressed it was in general terms as a question to the Court: "Does the Family Court have jurisdiction to determine the property rights of three persons" – I'm sorry, this is at 101.0013.

O'REGAN J:

But then the High Court changed that and so did the Court of Appeal, didn't they?

MS TAEFI:

But it did remain at the level of a question of law as opposed to the specific facts, being grounded in the specific facts of this case, was my understanding.

GLAZEBROOK J:

I suppose the submission really is that if we say this relationship wasn't included then the Courts are going to be deciding whether like relationships and where you go from being a de facto couple to being a threesome and where that line is drawn. That's the submission, isn't it –

MS TAEFI:

That's correct.

GLAZEBROOK J:

– that they'll be line drawing whichever way we decide this?

MS TAEFI:

The submission is there's more line drawing. If we stick with the first respondent's submissions we're just sticking to the test in 2D. It's just an evaluative test, doesn't mean the characteristics. We're not concerned with whether there's a polyamorous relationship or not. If we adopt the appellant's interpretation and we say that polyamorous parties are excluded from the scheme of the Act then there needs to be some definition of what a polyamorous relationship is and we saw this morning that even as between counsel for the appellants they were not certain as to whether a polyamorous relationship would be found to exist if you had party A in two de facto relationships in one household as opposed to three sets of relationships.

WILLIAMS J:

The Court of Appeal's formal answer just uses "polyamorous relationship" and says they're covered, doesn't it?

MS TAEFI:

Yes, it says they're not excluded.

WILLIAMS J:

Yes, not excluded. So your point is some might be but that's for the fact, by fact, case-by-case assessment?

MS TAEFI:

Yes, and if you're going to exclude them then you're going to have to define what they are.

WILLIAMS J:

You're going to have to apply the required considerations in section 2D(2) and so on?

MS TAEFI:

Yes, if you accept the respondent's argument you just apply the 2D factors. If you accept the appellant's argument you'll have to put some limits around what is a polyamorous relationship so people know whether they're in or out of the scheme of the Act.

My learned friends have referred to the Law Commission report in some detail in their written submissions and also in their oral submissions today.

WILLIAMS J:

Isn't it fair though, isn't Mr Jefferson's point that in order to do that you have to read "In determining whether two or more persons live together" into 2D(2) in order to even get access to that list, don't you think? That's the gateway. Two persons. In order for you to be right, Mr Jefferson says you've got to read that as "two or more", and you're not allowed to, he says.

MS TAEFI:

Yes, and the respondent's response to that is it's not an exclusive two persons which opens the door for the Court to analyse it in terms of couples.

WILLIAMS J:

So you would read it as "two persons however configured"?

MS TAEFI:

Or "two persons whether in a wider multi-party relationship or not".

KÓS J:

Well, you're looking at it in terms of were Fiona and Brett in such a relationship, were Lilach and Brett in such a relationship, and were Fiona and Lilach in that relationship.

MS TAEFI:

That's correct.

KÓS J:

There's obviously two because there's three.

MS TAEFI:

That's right.

KÓS J:

We can all do the math.

MS TAEFI:

That's correct. The point I did want to make about the Law Commission report is that it's a 500-page document that considers a wide range of issues relating to relationship property and there are two pages of the Law Commission report of that 500 looking at the issue of multi-partner relationships and this issue has since been considered in much greater depth by the Courts, gone from the Family Court to this Court, and the understanding has deepened significantly since then.

The respondent accepts that in any exercise of statutory interpretation the starting point must be the text and, as we've discussed, the appellant focuses on the words "two persons living together as a couple". There was a discussion with your Honour, Justice Glazebrook, about whether the focus should be on the "two persons" part or the "living together" part. The respondent's response to that is that there's nothing in the definition of "coupledom" that requires it to be exclusive coupledom.

There's a Canadian report in the supplementary materials. John Paul Boyd. It's authored by John Paul Boyd who write a paper in 2017 for the Canadian Research Institute for Law and the Family on *Polyamorous Relationships and Family Law in Canada*, and he goes through the law province by province, thinking about whether it might apply to polyamorous relationships and how.

He does draw this distinction between provinces where there's an explicit exclusion and those where there is not.

So, for example, in Alberta there is an Adult Interdependent Relationships Act very similar to our notion of a de facto relationship. It's a relationship outside of marriage in which two persons share one another's lives, are emotionally connected and function as an economic and domestic unit. There's a limitation in that Act which says a person cannot have at any one time more than one adult interdependent partner. The author comments that this express exclusion means that the Alberta Act doesn't apply, it's not going to apply to polyamorous persons.

But the same is not true of the legislation in other provinces, such as, for example, British Colombia where their Act uses more of the sort of language of coupledom. It talks about "both" and "half interest" and the sort of language we might have in our Act, and the author comments that it doesn't exclude a multi-partner scenario and that a purposive interpretation of the legislation could result in an interpretation where all parties to a polyamorous relationship are entitled to equally share in family property and equally responsible for debts.

WILLIAMS J:
Why is that purposive?

MS TAEFI:
It's purposive – I could address that question in the context of our law, why I think it would be purposive in the context of our law.

WILLIAMS J:
Try that.

MS TAEFI:
If that would assist. But I wouldn't consider myself a sufficient expert on the British Colombia statutes.

WILLIAMS J:

Fair enough. I guess the point of my question was you can see why that might be argued to be a rights consistent interpretation.

MS TAEFI:

Yes.

WILLIAMS J:

But are we really suggesting that that was the legislature's purpose?
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MS TAEFI:

Well, the purpose of the PRA in the first respondent's submission is to provide for the just division of relationship property between spouses or partners when their relationship ends, it's not to limit relationships to those involving two people, and that's really where we come to *Reid v Reid*, because the Court of Appeal quite appropriately used those principles to set the scene for the task of interpretation. Justice Woodhouse was interpreting the law, looking at the question of what is meant by the contribution of each – and it's at page 580 of this decision. Yes, so he says at line 24: "Two questions immediately arise. First, what is meant by the reference of 'the contribution of each' and the further reference to 'the marriage partnership'? Second, on what basis is a decision to be made that the one contribution was or was not clearly greater than the other?" So in determining and carrying out the task of statutory interpretation, Justice Woodhouse quite properly says: "Well, before I can give an answer to those two questions I need to look at the context and the purpose of the Act," and there are five principles that he deduces and those are the first one, which is also a stated purpose, I think it's the stated purpose in section 1M of the Act, that the PRA is designed to enable the just division of property when a relationship based on mutual love and commitment has ended. So the purpose of the Act is not let's make sure everyone stays in two-people relationships, it's how do we deal with the fall-out or how do we deal, how do we divide property when relationships are over? And the other –

WILLIAMS J:

I guess you'd say it's in terms of creating an assumption in legislation and a purpose?

MS TAEFI:

That's correct.

WILLIAMS J:

Because you're not going to argue that the couple thing was not an assumption.

MS TAEFI:

It may have been an assumption but, yes, it's not the underlying purpose of the Act. The purpose of the Act is to divide property when relationships end, and then there are some subsidiary purposes that Justice Woodhouse identifies: so to abandon a broad discretion in favour of equal division, to achieve substantive justice and avoid uncertainty of resolves.

The comment about "neat commercial balance sheets", my reading of that is that his Honour is saying: "Let's move away from the emphasis on financial contributions." And then the last factor was acknowledging the sharing of risk and opportunity across a relationship, that, you know, you put your lot in with others and so you have to be prepared to, you know, if it goes badly then you have to be able to share in that and if it goes well you have to be prepared to share in that too. And it was very appropriate for the Court to have regard to these factors as an aid for statutory interpretation and they support an interpretation that acknowledges the relationship of love and commitment between the parties, the need for equality, you know, providing them with – and that acknowledges their non-financial contributions and their sharing of risk and opportunity over the 156 years that they were together.

So in that regard the respondent's submission is that it would be contrary to the purpose of the Act to deprive Lilach from the rights of a de facto partner under the PRA where her relationship otherwise meets all of the factors in section 2D solely on the basis that she and Fiona were also in a committed relationship

with Brett, and it would also be contrary for Lilach and Brett's marriage to have ended when Fiona joins the relationship, because they haven't separated, and I know my learned friend did refer to, you know, the provision that talks about the end of living together as a couple, but my submission is that what that really means is that the parties are living apart, and in that regard I'd like to refer to section 25(2) of the Property (Relationships) Act, which sets out when the Court may make orders, and in section 25(2), the Court cannot make an order for the division of property "unless it is satisfied, (a) in the case of a marriage or civil union, that the spouses or civil union partners are living apart", it doesn't say "have ceased to live together as a couple" here.

WILLIAMS J:

The counter argument would be, well, these apparent inconsistencies, because no one thought of this problem, it just wasn't in contemplation when the Act we drafted, that's now in issue, and it's better if the legislature deals with it, not us piecemeal. What do you say to that?

MS TAEFI:

I've got three responses to that. The first is that what was contemplated by the legislature and what they discussed and what the Hansard reports show, is they contemplated that it was going to apply to non-exclusive relationship, so –

WILLIAMS J:

This is 52A, 52B?

MS TAEFI:

Well, just generally the Act. They talk about –

WILLIAMS J:

The vibe.

MS TAEFI:

They talk about, they don't necessarily – but perhaps if we go to it, it might be of assistance, and again I'm only referring to Hansard as a cross-check to say,

well, you know, in the way that your Honour Justice Kós did in *Holler v Osaki* [2016] 2 NZLR 811 (CA), to say is this what the legislature was thinking, so not to give it too much prominence. Here we go, at paragraph 44 of the first respondent's submissions there's a quote from some of the parliamentary debates. And so there were concerns, I think there's, so it's at paragraph 44 of the submissions, it's in footnote 30: "The fact is we are promoting bigamy and polygamy, yes, we are. Although we are not changing the Crimes Act, we are definitely saying that if a man has a wife and a lover and has relationship property with he two of them then they both have absolutely equal status," and there are some other comments. I don't know if that would be of assistance, for me to take –

KÓS J:

Well, it's really only the view of one parliamentarian.

MS TAEFI:

That's correct, but there's some discussion about it, it's not as if they didn't even think about the situation of multi-partner relationships, there were a few concerns about this applying in a multi-partner scenario, and I think the response from the Labour Party to these comments was: "Well, actually we're not talking about the status of specific relationships, what we're dealing with is the fallout." And actually I think, yes, there's a reference in footnote 31 – no, that's not the right reference, sorry.

WILLIAMS J:

It should be here NZPDs.

MS TAEFI:

But essentially I think it's Alec Neill who comes back and says the whole – there's another, yes, so there's the one that's on the screen there, yes, and it starts just at the page above. It says: "One of the interesting provisions that's new in this Bill is how we deal with concurrent relationships," so this is speaking specifically about 52A and B. "By that I mean when someone is involved in a married relationship but also in a de facto relationship," "they may be in a

situation where they are having to split some of their property with the de facto partner, also known as 'the girlfriend'."

WILLIAMS J:

That's…

MS TAEFI:

Anyway, I won't labour the point. But the point is that –

WILLIAMS J:

That's really covert collateral relationships, isn't it? That's what they're thinking about?

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MS TAEFI:

That's correct, but they're thinking about – so the first answer is that they're certainly thinking about non-exclusive relationships as a category, and then the second point is really to rely on section 6 to say that the Act applies to circumstances as they arise, and that even though this specific situation wasn't contemplated, in application of the Act on its terms, because it doesn't have a requirement that excludes multi-partner scenarios, means that the Act applies.

GLAZEBROOK J:

And I think your point about section 25 was that it certainly doesn't contemplate – well, it only contemplates when people live apart or are separated in terms of married couples. It doesn't say the marriage comes to an end when they continue to live together in a loving relationship in the same house even if that loving relationship is now a three-person loving relationship and not a two-person. That was the point about section 25, wasn't it?

MS TAEFI:

That's correct.

GLAZEBROOK J:

So whatever happens, you say, it doesn't happen as Mr Jefferson said that the marriage comes to an end?

MS TAEFI:

That's correct, and –

GLAZEBROOK J:

Or at least it might be that a marriage comes to an end in terms of living together as a couple but the Court doesn't have the ability to make an order under section 25.

MS TAEFI:

That's correct, your Honour.

KÓS J:

Which would be a curious incongruity.

GLAZEBROOK J:

Exactly. Well, I think that was the point that you were making, wasn't it?

MS TAEFI:

Yes, and you can imagine a situation. I mean there are time limits on claims. So you could have a de facto couple who only have three years from the end of their couple, and this is section 24 of the Property (Relationships) Act, so there's a time limit for de facto couples that if they want to make an application for division of property after a de facto relationship has ended they have to do that no later than three years. So if you had a de facto relationship, let's say, of 10 years' duration and then you added a third polyamorous party for another 10 years and then you all separate, well, the initial two parties are going to be out of time and it would not be readily apparent to anyone that that would be the case. "Oh, we've added a third party to our relationship so we'd better go off to the Court and get orders."

O'REGAN J:

The Court can't extend it though?

MS TAEFI:

The Court can extend them, that's correct.

GLAZEBROOK J:

But you say that just another indication that it doesn't end when you bring in another person?

MS TAEFI:

That's correct, your Honour. The respondent's submission is also that approaching – I mean the appellant's have made a submission that it's very artificial to approach a polyamorous relationship couple by couple, and the first respondent's response to that is that actually it's the best way. It's the best way to analyse a polyamorous relationship and that's for a range of reasons. Firstly, each relationship, you know, just like the example that your Honour, Justice Williams, gave of a family, each relationship within that wider group is going to have its own characteristics, so each one needs to be examined to see whether it is in fact a qualifying relationship under the PRA to look at, for example, does this particular relationship have a sexual component? Is there financial interdependence between these two parties? Is there a public aspect to this part of the relationship? It's not going to be easy. It's certainly not going to open the floodgates as we know from the contemporaneous relationships cases. There's a high threshold for establishing in the first place that you even have a de facto relationship. So you have to approach that couple by couple. They are not doing everything together, connected together, you know. They're all individuals living individual lives and who have relationships with one another.

The other point is that each relationship will have its own beginning and end. So here, for example, we have the marriage between Brett and Lilach pre-dated the relationship with Fiona, also Lilach left the relationship before Brett left the relationship. So it's appropriate to look at them in their dyadic parts.

Each relationship might also have different relationship property pools and claims. So, you know, you could envisage a situation, for example, that Fiona has an investment property and Brett does a lot of work on that property that increases its value. Well, he would have a claim under section 9A of the Property (Relationships) Act for the increase in the value of that separate property but Lilach would not. Also parties have different roles in relationships and that's what the Property (Relationships) Act acknowledges. In the present case, for example, it seems to be more or less agreed on the evidence that Fiona looked after all of the financial side of things. Brett says that he was mostly responsible for maintaining the farm and Lilach says, well, she was an artist working at home so she did a lot of the housework. Look, I appreciate those are all issues to be nutted out in a different forum but certainly the lives they've lived, that people live, they don't live them as one unity. They relate to each other independently as well as together.

WILLIAMS J:

Your point is, I guess, that polyamory is what polyamory does and that's not the same as are the factors in 2D(2) met because they're all so different with different levels of commitment and cohabitation and so on, perhaps just like heteronormative relationships.

MS TAEFI:

That's correct. I mean we might have a community out there that, there'll probably be lots of communities out there, that have different ideologies or different approaches to the way that they live their relationships. There'll be different religious frameworks that people work within. There'll be all sorts of relationships and the beauty of 2D is that it's evaluative. You can apply it to all of these situations and if the standard is met, regardless of how the parties see themselves or call themselves, then you'll see whether the test is met or not.

The last point I'd like to make with regards to the text of the Act is with regards to section 52A and 52B, and that's really to say that they're only referred to as an interpretive aid. The first respondent doesn't rely on sections 52A and B as a means for division. They're not referred to in her application for division of

property, but they're referred to because they indicate that Parliament didn't intend for the PRA to apply to exclusive de facto relationships. It contemplated multiple relationship scenarios.

So I have discussed the text and the purpose. The other issue to briefly touch on is the wider context and that wider context is that the PRA is social legislation and it's appropriate for the Court to have regard to the fact that relationships are becoming more diverse and have regard to the reality of what is happening in society and in that regard certainly the respondents are not asking the Court to take a reform role but simply to apply the Act to circumstances as they're arising in the real world.

I've now finished this section on ordinary principles of statutory interpretation, so if the Court does not have any questions for me I will move on to the application of the Bill of Rights Act.

ELLEN FRANCE J:

Could I just check, just in terms of if you look at the appellant's relationship chart number 3, just as a shorthand way of asking the question, that the sort of material referred to in the footnotes there that suggest some idea of exclusivity, what do you say to that?

MS TAEFI:

This is the relationships chart?

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ELLEN FRANCE J:

Yes. So I'm looking at chart 3, page 3, and just the cases, particularly Justice Miller's one referred to in the footnote there, which I think are relied on as indicating some ideas about exclusivity, and it's just a way of asking you what your response is to that notion that there is some reference in some of the cases that might suggest that idea of exclusivity as having some relevance.

MS TAEFI:

Yes, so those comments are, I don't believe they're from *L v P*, I believe they are from the Court's decision in *M v P*.

ELLEN FRANCE J:

Yes, yes, that's right.

MS TAEFI:

Yes, I mean I think the submission that was made was that contemporaneous – I mean the quote from Justice Miller is that contemporaneous relationships are not merely likely because legislation admits their existence, and I think that's actually quite a different point to the one that my learned friend was making. He's just saying they're not going to be more common because they've been contemplated in the Act. That the Court shouldn't be quick to jump to them, but rather we need to properly look at the characteristics.

ELLEN FRANCE J:

Yes, I think it's more the latter part. There must be natural limits.

MS TAEFI:

Yes, and I mean there does have to natural limits to one's capacity. You spend your life in lots of relationships. I mean I think that's very true. You're not going to meet the test in 2D with, it'd be extraordinary if you could meet it with, you know, eight people, would it. It's just not going to happen. For most one relationship is enough. It seems that some can manage two. I'd be surprised if anyone can manage more.

WILLIAMS J:

There's a famous woman in Wairarapa called Niniwa-i-te-rangi, who is long since dead, who had nine husbands, all contemporaneously.

MS TAEFI:

That's very impressive.

WILLIAMS J:

That's what I thought.

MS TAEFI:

For ordinary people our capacity to have the requisite levels of mutual love and commitment, the public aspects, the financial support, the emotional support, that's going to be very difficult to achieve with multiple people, it's just –

KÓS J:

And that's why it's important, I think, to pick up the words that Justice Miller used in the sentence following the passage that's in the chart we've just looked at. What he said there was: "Contemporaneous de facto relationships maybe most likely when A cohabits intermittently with each of B and C, maintaining two households on an indefinite basis. Each such relationship might be so substantive that the legislative objective would be defeated where A permitted to escape legal obligations to B and C by pleading that neither relationship was sufficiently exclusive."

MS TAEFI:

That's correct, and in the context of a lot of cases that have arisen, it is usually someone saying, well I don't want to pay my full half to my wife because, oh, I had this other substantial relationship over here with my mistress, and the Court is saying, well actually I don't think that relationship with your mistress was sufficient enough for me to find that it's a qualifying relationship, and they're usually, you know, secret, they don't have the public aspect, but these are just cases decided on their facts. Certainly none of the Courts that have dealt with this issue have said, it's just not going to be possible. Some have said it's going to be hard, it's not going to be likely, but they're not saying it can't be done.

GLAZEBROOK J:

You say also that there is nothing in the PRA itself that says exclusivity is part of those definitions, it's apart possibly from the couple idea itself.

MS TAEFI:

That's right, and the respondents' case operates within the rubric of coupledom. We're not trying to escape from that rubric, we accept that it's there, but what the appellant is asking the Court to do is read in a proviso, as exists in the Alberta statute, to say you cannot be in more than one de facto relationship at a time. Or, you know, you certainly can't be in, I think that's in my learned friend Mr Fuscic's submission in –

KÓS J:

Yes, well there was a slight disagreement between the counsel at that point.

MS TAEFI:

That's correct. But in either case the appellants are asking the Court to read in a proviso into the Act and the first respondent's submission is on the ordinary principles of statutory interpretation, if your Honours accept that the Act is about the division of property when relationships end, ensuring equality, substantive justice, all those factors identified by Justice Woodhouse, then the correct interpretation, the purpose of interpretation is going to be the one that doesn't exclude someone who meets all of the criteria in section 2D. They're in a de facto relationship but it's in the wider context of a multi-partner scenario.

GLAZEBROOK J:

What's said against you is that they aren't in a two person relationship, they're in a three person relationship, so they are just not a couple.

MS TAEFI:

I think the answer to that is that they're in both. I mean if we go back to the family example, you know, you have one family, there's family unity, that family will have activities together and perhaps values together and, you know, live together under one roof, but you wouldn't say that there are not also individual relationships, you know, mother and daughter, husband and wife, brother and sister. It's quite artificial to say that there are not relationships between Lilach and Fiona, or there was not a relationship between Lilach and Brett. The only relationship was the one the three of them had together.

So I will move on to the Bill of Rights Act, and first with the section 6 of the Bill of Rights Act, which says: "Whenever an enactment can be given a meaning that's consistent with rights and freedoms… that meaning shall be preferred…" and this court recently referred to that in the *Fitzgerald* case as an obligation. I believe my learned friend Mr Butler made a submission to this court in that case that there is a presumption that enactments comply with constitutional norms, and to displace that presumption Parliament needs to use language so clear and coercive as to be incapable of any other interpretation, and I understand the Court accepted that submission. In the present case, again, that would require Parliament to explicitly state that a person cannot be in more than one de facto relationship at a time.

The respondent says there is unlawful discrimination here because the appellant's interpretation creates a distinction based on a prohibited ground, and that distinction causes a disadvantage, and those are the two limbs of the test from *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456. The human right that is engaged here is the right to be free from discrimination on the basis of family status. My learned friend has submitted that this case does not involve discrimination on the basis of family status because the parties have entered into this new form of relationship, which just isn't captured by that definition. But the ground is express in broad terms. So this is section 21(l) of the Human Rights Act, and it does include, I mean if this court accepts that there is a de facto relationship, it can take the same approach that the Court of Appeal did and say, well, the discrimination is – the appellant's interpretation discriminates on the basis of family status because it excludes someone who's in a de facto relationship with their de facto partner.

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But I accept that's somewhat tautological, and so the next ground to go to is the concept of being a relative of a particular person, which is defined extremely broadly, and the definition is in section of the Human Rights Act, and it's also set out at paragraph 65 of the first respondent's submissions, that a "relative" is defined as "in relation to any person, means any other person" who is related to them by "blood, marriage, civil union, de facto relationship, affinity or

adoption, or is wholly or mainly dependent on the person or is a member of the person's household," and again the first respondent would say the use of the singular there can also be read as a plural and vice versa. Clearly the definition of "family status" is very broadly cast, it doesn't rely, so the respondent's definition doesn't rely on there being a de facto relationship, it can rely on there being discrimination against someone being a relative of another person.

KÓS J:

But they may be a relative and they therefore may have family status. But where is the discrimination?

MS TAEFI:

Well, if we look at, if I could refer the Court to the diagram at paragraph 47 of the first defendant's submissions, the differential treatment here is simply because of, I think we called it the "bottom rung of the triangle". So the discrimination is because Fiona and Brett are in a relationship with one another. If Lilach wasn't in a relationship with someone who was also in a relationship with Fiona, then she wouldn't be treated any differently. This has to be the comparator, because there's an acceptance by the appellants that the Act would apply to the dyadic relationship but not to the polyamorous one.

There's a case that's cited in the respondent's submissions, *Winther v Housing New Zealand Corporation* [2011] NZHRRT 18, and in that case the parties were arguing that they were unlawfully discriminated against by Housing New Zealand who served them notices to vacate their homes on the basis of family status being their intimate relationships with gang members, and they were very careful in that case not to refer to the gang members as their de facto partners" because that would have had other implications for them. And ultimately the Court found there was no discrimination as of fact because Housing New Zealand had already issued the notices before it knew about the relationships. But that's a good ex that is analogous to the present case.

WILLIAMS J:

I guess you could argue that Mr Fuscic's slight dissent from his learned senior will also be caught by that relative prohibition because it would relate to the Lilach/Fiona, for example, relationship, even if there weren't a base of the triangle relationship.

MS TAEFI:

That's correct. Because the base of the triangle relationship is, you know, that that's the household relationship there, that's the particular person, and our family status ground is very broad, it certainly captures that.

The next issue to look at is whether there's a material disadvantage, and my learned friends have referred to equitable remedies that may be available, and I would like to refer – there's a quote at paragraph 71 of the first respondent's submission from the Law Commission report prior to the 2001 amendments to the Property (Relationships) Act, where the Law Commission was talking about how unsatisfactory it was for de facto couples to be left with these equitable remedies and the comment is "that the average division of property for women in opposite-sex de facto relationships of between three and 10 years' duration ranged from 10–40 per cent. Obtaining more than a 20–30 per cent division under this approach was described as 'extremely difficult', and predicting outcome as 'somewhat of a lottery'."

Of course, when we have a constructive trust case there's no presumption of a half-share. You start from nothing, and that's what the Court said in *Lankow v Rose* [1995] 1 NZLR 277 (CA), and also that claimants must show a causal relationship between their contribution and the acquisition, whereas the Property (Relationships) Act scheme is prepared to consider non-financial contributions.

A claim in quantum meruit is similarly dire, I think the case that my learned friends have cited in their submissions in *Buysers v Dean* (2001) 21 FRNZ 431 (HC), and in that case the plaintiff was awarded $58,000 of compensation in 2001 for a nine-year relationship to compensate her for her housekeeping and

childcare. I mean that's really a very unfavourable result if you were to compare it to what she would be entitled to under the Act.

With respect to my learned friends, the suggestion that there's no detriment is just not credible because the whole reason the appellant has protested jurisdiction and has continued to protest all the way to the Supreme Court is because she wishes to create a detriment. She knows that without recourse to the PRA the respondents are going to receive a far lesser share. The suggestion that we need some sort of evidence from the polyamorous community that they consider it to be a detriment, I mean, we don't need a public consultation paper to know that people don't want to find themselves in Lilach's position where they have no access to their relationship property for five years. I'd be surprised if anyone wants to operate in that paradigm. It's just objectively disadvantageous.

If the Court doesn't have any further questions for me on those points, I would like to hand over to my learned junior, Ms Palairet, to address the issue of whether there are any justified or proportionate bases for infringing on the rights and she will also look at the *Bellinger* decision.

GLAZEBROOK J:

Thank you, Ms Palairet.

MS PALAIRET:

May it please the Court, as my learned senior indicated, my part of the submissions today really falls within a really rather discrete part of the wider analysis, but I'm responding to Mr Butler's submissions really around the Court's competency to make this decision and that part of the appellant's analysis has come out, well, it came out in their written submissions within the justified limitation part of the Bill of Rights analysis, in terms of whether it's a justified limit, I think because it's too big of a decision for the Court to make, but I think it really fits better in the section 6 analysis which is really whether or not it falls within the limitation recognised in *Bellinger v Bellinger* which is that in some cases there may be an issue before the Courts which the Courts are

ill-suited to decide, perhaps it falls outside of their institutional competence. The appellant's argument is that this is one of those cases, so even if we get to the situation at the end of statutory interpretation where it may be a possible or tenable interpretation to take, the one that the respondents propose, even then this is a case that falls within the *Bellinger v Bellinger* sort of limitations to the Court's power or obligation under section 6 to adopt a rights-consistent interpretation.

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I wish to respond really in three ways to the submissions that Mr Butler raised and they related, I said, to this *Bellinger v Bellinger* case. If it's helpful, the facts in that case are really quite different to what we're dealing with here. So in *Bellinger v Bellinger* it's a UK House of Lords decision about the rights of a trans woman who sought a declaration that her marriage to a biological man was a valid marriage under the Matrimonial Causes Act, and the House of Lords decision back in 2003 found that the Matrimonial Causes Act was incompatible with her rights under the European Convention, but they didn't find that they could read the Act to make a declaration that her marriage was valid, and that's where this limitation to the section 6 obligation really comes into play, as a large part of that reasoning was that it was too complex a social issue, a social policy issue for the Court to rule on.

So the three points which I wish to respond to for Mr Butler fall within this area of his submissions. So the first and I'd say main thrust of Mr Butler's submissions that we heard were that the polyamorous community might not want to fall under the Property (Relationships) Act, and that the Court is ill-suited to make a decision that they should be able to because that decision has to be made essentially with the involvement of the polyamorous community through consultation and through the normal legislative route. I mean the think that one of the problems with that submission, your Honours, is that it's possible to opt out of the Property (Relationships) Act regime, but it's not possible under the current state of the law to opt in. So if there are some members of the polyamorous community who wish to view their relationship as sitting outside normal heteronormative norms, it's perfectly possible to be able to do that if this

court finds that there is jurisdiction to deal with multiple relationships, and the polyamorous relationships, under the Property (Relationships) Act.

The second response I have to that is that the role of the Court is to assess changes to society and apply those to legislation is in the context of changing social circumstances. Of course public consultation in the legislative process is an important part of that, but just because that isn't a part of this case before the Court, that shouldn't immediately be as a strike out under section 6 in terms of the Court's ability to rule for a BORA consistent interpretation.

Third, and I think this is really where this analysis bites, is that if we compare the cases which the appellants have relied on, and which they say this case falls in a similar boat or category of cases, cases like *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA), where the Court refused to allow same sex marriage because it would be too much of a sort of a stretch for the Courts to do, or *Bellinger*, which was about trans rights essentially. It's my submission that those cases really fall in the very different category of case to what we're dealing with her, and the reason that those were too complex is evident from the decisions. It's a very different form of complexity to this one where one of the main issues apparently is the lack of opportunity for proper consultation, and if we look at the kinds of factors, taking *Bellinger* as an example, in Lord Nicholls decision, and we can look here at, for example, paragraph 40 or 41, Lord Nicholls concern was about the difficulty of drawing the demarcation line between male and female, and in his decision he ran through the different types of surgery that people in the trans community have to undertake if they are going to undertake gender reassignment surgery, and at 42 you can see these are deep waters.

There must be some objective publicly available criteria by which gender reassignment is to be assessed, but then at paragraph 42 later down the House of Lords is not in a position to decide where that demarcation line could sensibly or reasonably be drawn, and the reason, in my submission, is because it's fundamentally a much more complex issue than what the Court is being asked to deal with here. There's already a set of criteria for what amounts to a

de facto relationship and that's under section 2D. It doesn't require this court to undertake complex medical or scientific analysis about anything to do with polyamorous. The question is just applying a pre-existing test.

If we are to look at a case like *Quilter*, the reason why *Quilter* was particularly complex is, and it's similar to *Bellinger* in that it was also deciding about the institution of marriage, and this is very well reflected in the words of Tipping J at page 581 of the decision.

GLAZEBROOK J:

Well probably the main thing in Quilter is that marriage was defined explicitly as between a man and a woman, and so reading those words as something different than that they said was – well I think they said not possible, whereas you say – or the respondents say well it is possible to read the words in the PRA as including this type of relationship.

MS PALAIRET:

Absolutely, and so I mean in our submission we don't needs to get to this issue under section 6, and I think that you're right that in *Quilter* the language was just much clearer in terms of what it might include or exclude, much clearer than it certainly is in this case where we say there is no language excluding polyamorous relationships. But the point I'm making by drawing your Honours' attention to this particular page, and this particular section of *Quilter* is just to say that there was a reluctance of the Courts to make a decision about one of society's fundamental institutions, perhaps without the engagement of civil society, and again we say that's just quite a different case from what's being decided before this court today.

So I think that's probably all the time I need to take on this submission. As I say, it's our view that you can reach this conclusion without having to get to the BORA analysis, but if you do, and if it ends up reaching a position of, is the Court institutionally competent in order to make this decision, it is our submission to your Honours that the answer is yes. Thank you.

GLAZEBROOK J:

Thank you Ms Palairet.

MS TAEFI:

The other point of course in terms of *Bellinger v Bellinger* is that the New Zealand courts didn't follow it. We have a decision of Justice Ellis in *Attorney-General v Otahuhu Family Court* (1994) 12 FRNZ 643, which is in the first respondent's supplementary authorities. Justice Ellis had no difficulty finding that: "Once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex." And she seems to have made the decision without too much deliberation, and it hasn't actually caused all of the problems that the House of Lords was worried about. But that's just an aside.

The final part of the respondents submissions are to deal with mechanics and workability. I don't intend to file any submissions in response to the diagrams and the additional charts that have been filed, I'm very comfortable to address them today, and I will spend some time with them, because the respondent's submission of course is that it's very straightforward to apply the Act to parties in polyamorous relationships, and it's certainly no more messy than dealing with a dyadic contemporaneous relationship. It adds no additional complexity whatsoever. Drawing that distinction, it just simply doesn't work and I'll go through some of those examples with your Honours.

The starting point is that the Court has broad powers under section 25 to do justice between the parties, and it can make any orders it considers just determining respective shares of each spouse or partner in relationship property, and that's section 25(1)(a) of the Property (Relationships) Act, and the respondents fully accept that it's not a general discretion for the Courts too, you know, divide property however they like. They have to do it in a principled way. They have to do it in accordance with the Act, but it is the starting point, and they can only do it when spouses are living apart, a marriage has been dissolved, or de facto partners no longer have a de facto relationship with each other, and that is all set out in section 25.

The next key provision is section 11, and your Honours did explore that with my learned friend this morning, but there is no difficulty applying section 11 to a polyamorous scenario, just as it's not difficult to apply it to any other couple. So it provides for an equal share of relationship property for each partner, and of course that's a presumption, and that presumption can be displaced. It can be displaced if there is a finding of economic disparity, it can be displaced if there are extraordinary circumstances that make equal sharing repugnant to in a relationship of short duration or if there's a lack of a family home. Those are just some of the situations and they would just apply in the ordinary way. In the case of a –

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O'REGAN J:

Are you assuming that all of the relationship breaks up at once there? How would you see it applying if one party peels off but the other two stay together?

MS TAEFI:

There's no difficulty. Because it's approached through the rubric of coupledom, there's no difficulty dividing property as between couples when a wider relationship continues. Our courts are so adept at doing that because it's very, very common in relationship property cases for someone to say: "Well, we don't own this whole house. My mum gave me some money and actually she's got a one-third constructive trust interest in this house. So the relationship property pool is in fact – it's smaller. We only own two-thirds of this house and that's the share that's available for division." It's not really any different to dealing with a multi-partner scenario. Courts do it all the time.

O'REGAN J:

In this case there seemed to be a difference of view between the High Court and the Court of Appeal as to how you would do that? So it didn't seem – and it was Justice Hinton, who's a very experienced Family Court Judge, came up

with a different way of splitting the family home than the Court of Appeal did actually.

MS TAEFI:

That's correct and perhaps because Justice Hinton was very much focused on section 52A and 52B rather than looking at the more general provisions of the Act because section 52A and 52B only kick in if you cannot meet the relationship property orders from the available property. It's when there's not enough property to meet the claims, and so it's not gong to apply in every case. It's going to be very rare actually for section 52A and 52B to apply to a polyamorous scenario because usually in a polyamorous scenario there would tend to be, you know, if in fact they do operate in principles of honesty and openness, there would tend to be some understanding about what the property is and the share in it.

In a case of a section 21 agreement, and I do comment that I think I would be naïve to be saying that these aren't already happening in the world, but there will be cases –

KÓS J:

Just before you move on to that can you just take us through – who was the first person to leave here? I've just forgotten.

MS TAEFI:

It was Lilach.

KÓS J:

Okay. So Lilach leaves. So that'll be the first occasion on which the property had to be assessed under the Act.

MS TAEFI:

Yes.

KÓS J:

How would it be done?

MS TAEFI:

Well, she would apply for orders in the Court. She would –

KÓS J:

Yes, but what would the orders be?

MS TAEFI:

She would apply – well, the same orders that she applied for which is she sought a third of the relationship property pool.

KÓS J:

And apply it in your couples analysis. How does that work?

MS TAEFI:

In the?

KÓS J:

Using the couples analysis. So you're taking an equal share of the property attributable to the couple.

MS TAEFI:

That's correct.

KÓS J:

How do you do that when there are two couples that she is part of?

MS TAEFI:

Because you have to take into account that Brett would – you're applying section 11, so you know that Brett has a third interest. That leaves only two-thirds available as between Lilach and Fiona and so she claims one-third of that two-thirds share.

KÓS J:

And what about qua Brett, because she's leaving both of them?

MS TAEFI:

That's correct. So she's claiming that against the two of them, and in the original application that was filed it was filed in respect of both parties. I think Brett was a respondent to that application. There is…

WILLIAMS J:

So Brett is the equivalent of the mum with the equitable interest, assuming that the separation is with Fiona, say. It doesn't really matter which one. So you would –

KÓS J:

It's with both surely. She's departed.

WILLIAMS J:

Yes, but you can do this by saying the separation is with partner A and partner B has a third share.

MS TAEFI:

That's correct, and I mean a good example of it would be section 20B(3) which the Court discussed with my learned friends where you've got a protected interest, so the value is going to be, I think, the specified sum or the half of the share, and that share has to – again, it's only going to be two-thirds because you have to take into account the fact that there is going to be this other share which reduces the pool for division as between these parties. That's what would happen in scenarios – sorry, I was talking about section 21 agreements which –

KÓS J:

I mean logically her application would surely be against both the remaining partners that she was with because she's left both of them and she wants the most she can get out of the property.

MS TAEFI:

That's correct.

KÓS J:

So she would apply against both of them as respondents and would seek half of the property attributable to that couple.

MS TAEFI:

That's correct.

WILLIAMS J:

So it's the PRA equivalent of a cross-lease.

MS TAEFI:

I like that.

WILLIAMS J:

Maybe not a good example.

MS TAEFI:

But it's very common. In relationship property cases there are often other interests involved. It's seldom just the couple. You know, there'll be trusts, there'll be loans to companies. The Courts are so adept at dealing with this sort of complexity. In the case of a section 21A agreement we have section 21J which says that if there's an agreement that causes a serious injustice the Court can set it aside, and there's no requirement that one of the parties to the agreement set it aside. The Court can set it aside. So one would think if you have an unfairness, if you have two parties of a polyamorous relationship who have a section 21 agreement then that third party could apply to set that agreement aside on the basis it creates a serious injustice. The –

WILLIAMS J:

You are involving, in terms of the certainty predictability point that Mr Jefferson so firmly pushed, you are creating a lot more judge time, you're imposing a lot

more cost, and who knows how many cases under section 25J, or is it 20, 21J, you'll have to get through before the lawyers can say: "Well, you're going to get X."

MS TAEFI:

My response to that is it's no different for a dyadic relationship if you've got –

WILLIAMS J:

It's that bad there too.

MS TAEFI:

Well, you've got a husband who's got a wife and a mistress. He's got a section 21 agreement with his wife and things go wrong with his – I won't call her his mistress, sorry – his long-term de facto partner who lives on the other side of the lake, and so she can apply to set that agreement aside because it creates a serious injustice for her. The polyamory bent adds no additional level of complexity to the facts scenario.

WILLIAMS J:

Well, except that if the person on the other side of the lake was known to everybody it seems a little extreme that they have to go to court to fix a problem that is inherent because of the earlier agreement in an eyes-wide-open, consensual, three-way relationship. You can understand it when the person on the other side of the lake is not known to the person on this side of the lake and there's animosity from the outset, but that's not the scenario here.

MS TAEFI:

That would be a matter for the Court, wouldn't it, to say, well, did this person know about it? Were they open about the –

WILLIAMS J:

No, I'm not talking about that. I'm talking about imposing on the eyes-wide-open third party the obligation to go to court to fix all of this because the Act is just not structured for these situations.

MS TAEFI:

It would be open to that third party to say, if in fact they're so open and friendly with one another: "This agreement is unfair. I know about it. Let's do something else," or if they have a discussion, and, of course, they all would have to have their own lawyers and get their own legal advice because that's what the Act requires. They could enter into a new agreement or they would have to apply to set it aside.

WILLIAMS J:

Yes, I suppose it could be a friendly application.

MS TAEFI:

That's correct. You know, you can vary these things by consent as well. You perhaps wouldn't even need to go to the Court. You could go back to your lawyers and say: "Our circumstances have changed. We need to change our" – I mean, it's common for section 21A agreements to say that they'll be reviewed, that they will be reviewed in five years or in 10 years. You could review your agreement and your arrangements, because it's pretty unlikely for a polyamorous relationship to have a firm start date.

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You would imagine it would gradually develop like, all de facto relationships do over time and at some point you'd think: "Well, maybe we need to look at this again." But it doesn't add complexity, the polyamorous scenario, to a traditional dyadic relationship, or, you know, the example of one person who lives in a house and has two de facto partners living with them in the home, again there's no added complexity. But just because there's a relationship between the third rung of the triangle, it doesn't change the considerations at play, and perhaps that's the better comparison because it's the most similar, because they would all be in the same household, presumably they would all know that partner A is in a de facto relationship with both of them. It's no more difficult for the Court to deal with, makes no difference if B and C are in a relationship with one another or not.

There is a submission that the appellants have made, they say that section 52A and 52B are so problematic and flawed that they can't be relied on, and the respondent's response to that is that it runs counter to the longstanding presumption that courts should strive to give meaning to provisions and that a conclusion that Parliament was in error must be a last resort. So if we assume that Parliament is rational and an informed body and it's pursuing its purpose in a coherent and principled way, then any ambiguity can and should be resolved by construing those provision in accordance with the purpose of the legislation. And I'd like to spend some time now with those provisions and how they might work in practice.

Section 52A and 52B set out a two-step approach for dividing relationship property where there are competing claims. So here we have in 52A(1) it tells us, well, when does this section apply? It applies if competing claims are made for property orders in respect of property, and in this case it's looking at one where there's a marriage and one where there's a civil union and there being insufficient property to satisfy the property orders made under this Act. So if you have the situation where, as in this case, Brett and Lilach each seek a third of the relationship property as again Fiona, you don't engage section 53A and B, there is enough relationship property to satisfy the claims under the Act.

When might it apply to polyamorous parties? It might apply to polyamorous parties if Lilach and Brett and Fiona were all claiming 50%, if they all said: "Actually, I want half," for some reason, and then the Court wouldn't have enough, there wouldn't be enough property to go round and these provisions would kick in. But it would ordinarily apply in a dyadic situation.

So then we go to section 2B, so this is where the – sorry, no, section 52A(2)(b). If the marriage or civil union in the de facto relationship were at some time contemporaneous, then to the extent possible the property order must be satisfied from the property attributable to that marriage or civil union. So if we did have a situation where Lilach and Brett and Fiona were all seeking 50%, the Court would apply this provision and say: "Well, the family home here, it's attributable to all the relationships, so we're going to divide it, we're going to

satisfy it from the property. It's attributable to everyone and we can divide it three ways."

GLAZEBROOK J:

Well, could there be a time element in there, it's been attributable to one relationship for 20 years and another relationship for five years, for instance? Is that the sort of thing it's getting at?

MS TAEFI:

That's correct.

GLAZEBROOK J:

So you could say it's not attributable to all three equally, it's attributable to the first two who've been together for 20 years as to whatever percentage in the person who's been there for five years for a lesser percentage?

MS TAEFI:

That's correct, and then if you can't –

WILLIAMS J:

I guess you would – you tell me whether this is so. You'd make that call carefully because of the earlier provisions that would equalise after whatever it is, two years or three years?

MS TAEFI:

That's correct.

WILLIAMS J:

So you'd be careful about creating that asymmetry, fair enough?

MS TAEFI:

Yes.

GLAZEBROOK J:

Yes, the family home is probably not a good example, the investment properties is probably a better one.

MS TAEFI:

Yes. So you –

WILLIAMS J:

The BMW, not the BMW? No, it wouldn't be worth enough. The family van, yes.

MS TAEFI:

So you'd satisfy the orders from the property attributable to that relationship, and if you couldn't satisfy the orders from, you couldn't attribute the property to either marriage or civil union, then you divide it in accordance with the contribution of the marriage or civil union to the acquisition of the property. So maybe if we apply 52A(2)(b)(ii) and (iii) to our traditional dyadic contemporaneous relationship we could have a hypothetical Mr X. If he were to buy a bach primarily for his wife and children but he also took his de facto partner, Ms Y, there on occasion, well the Court might say that it's more, the bach is more attributable to the wife than to the mistress and it could use its discretion pursuant to section 25 to make orders that might be that Mrs X and Mr X have a 40% share in the bach but that Ms Y has 20%, but again that's only if there's competing claims to the same item of property. And if the Court couldn't attribute the property to either relationship – it's hard to conceive of a situation where that might apply but I suppose you might have insufficient evidence or it might be too complicated – then you determine the issue by reference to the contribution of each relationship to the acquisition of the property, and in that case Ms Y would only have a claim if she's actually contributed to buying the bach.

WILLIAMS J:

Well, you mean she's shelled out?

MS TAEFI:

That's correct, because the language of 52A(2)(b), it doesn't say – it says the contribution of the relationship to "the acquisition" of the property.

WILLIAMS J:
But you'd have to take into account, you know, opportunity cost of, for example, one of them stay at home and doesn't work but could have worked, all of that sort of thing that you would normally anyway, or is that not right?

MS TAEFI:
Perhaps.

WILLIAMS J:
"No", says Mr Jefferson.

MS TAEFI:
We're not –

WILLIAMS J:
Yes, that's not our issue, so…

MS TAEFI:
Not our issue today but, you know, they do work, they're not unworkable, but they're not always going to be engaged and they're not engaged here.

There are – I would like to address the remainder of the appellant's workability table, and generally speaking I have three comments in relation to it and then I'll go through some of the examples in a little bit more detail.

The first is of course the issues that are identified are not unique to a polyamorous scenario, they're equally complicated if the parties are in a dyadic relationship, you do not need the bottom rung to have these issues. The second is that it's not unusual for the Court to have regard to third party interests, and again that's the situation of, you know, a family trust or a constructive trust interest or some other interest that the Court has to take into account and, I

mean, throughout these examples there's a C who pays nothing during the relationship, in every example. So we've got A and B sort of got some property, C comes along, pays nothing during the relationship, and in the Court of Appeal approach C walks away with something and in the High Court approach C walks away with nothing, and that's rather unfair to C, the respondents would submit, because we know now from a rich body of jurisprudence that the Property (Relationships) Act recognises all sorts of contributions to relationships, not just the person who pays the money, and looking after a home, as I think C does in one of these diagrams, is a meaningful contribution and C shouldn't walk away with nothing.

GLAZEBROOK J:

Well, nothing under the PRA but possibly a constructive trust claim, is that…

MS TAEFI:

That's right, but, you know, C doesn't have the ability to, is going to have to, doesn't have the ability to access an interim distribution of property to pay their legal fees, they can't get any maintenance, I mean, C could theoretically bring a claim in the High Court and litigate it for several years but that seems pretty rough on C.

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So I have addressed diagrams 1 and 2 because those are the ones with section 21 agreements. The next example is workability chart number 3, and in this one we have A, a lawyer on a high income, B, a teacher on a mid-income, and C doesn't work, looks after the home, and the problems: "Can C bring a section 15 claim against both A and B?" and the answer to that is yes, C can, can bring a claim against either or both.

"A may argue their profits were boosted by B's help. Does this bring B into the proceedings?" Well, if the claim is just against A, A may well say: "Yes, B did a lot of the work," but that's no different to someone saying: "Actually, we had a nanny and a cleaner so your contributions weren't so great." It brings B into the proceedings evidentially but not as a party.

"Division of functions within the relationship – which relationship?" Well, if it's a claim against A, it's only going to be that relationship and if it's a claim against A and B it's going to be in relation to both.

"The nexus under section 15 hard to prove with multi-parties." I mean there's still a causal nexus. You have to show in a section 15 claim that there's a causal connection between the disparity and the division of functions in the relationship, and I'm not sure how that changes with a polyamorous situation or even a dyadic situation. I mean you apply it to the present case. You're always going to have one party – parties are doing different things. One might do more housework. One might do more childcare. One might do more financial things. It doesn't add any layer of complexity.

"Does C's claim mean there's less relationship property for B, when B and A separate?" and the answer to that, of course, is yes, because if C takes their share of relationship property there will be less left for A and B, just like if you have a first wife and she has a very successful relationship property claim against you, your second wife is going to have a smaller pot.

"Does the Court need to make a declaration as to B's relationship property when C brings a claim?" No, it doesn't, because the Court only needs to determine the application that's in front of it.

The next page, workability diagram number 4, so we have A, B and C in a polyamorous relationship for four years. A has a $300,000 loan from their family. Spends 90% of it on B and spends 10% of it on C. "Is it relationship debt or personal debt?" Well, that's just the same old test. Is it acquired for the purposes of the relationship or not?

"If it's relationship debt, which relationship?" If truly the 90% was spent on B and the 10% was spent on C, that's how the debt should be apportioned. Again, if you remove the bottom rung, as we've been calling it, it's no more different. If A took a 300K loan from family and spent 90% of it on one partner and 10%

of it on another, the Court would still have to assess the value of those debts, whether they're relationship debts or not and what the impact is on the relationship property pool.

Then we go to diagram 5. We've got two sets of relationships here, one between A and B with a family home, then we have one between C and D. They all become polyamorous and live in one house. D leaves after a year. There's not going to be a qualifying relationship with A and B but there will be a qualifying relationship with C. C then leaves after three years and brings a relationship property claim. A and B are still together.

So what interest does D have in the family home shared with C? Well, D won't have any access to the family home because the family home isn't going to be part of the C/D relationship property and they ask the question: "To which relationship do you attribute the family home?" Again very easy, A and D.

WILLIAMS J:
Let's say the scenario is that…

MS TAEFI:
Sorry, A and B.

WILLIAMS J:
Let's say the scenario is that D did all the cooking and cleaning and looked after the littlies, but it's not in the pool. Would they just have an equitable claim?

MS TAEFI:
Well, because D left after a year, even though D looked after the littlies D is not going to have a qualifying relationship.

WILLIAMS J:
Oh, did D leave after a year?

MS TAEFI:

Mmm.

WILLIAMS J:

Oh, I see.

MS TAEFI:

He would, I suppose he could go for his quantum merit claim in the High Court but I don't fancy his chances.

Then diagram 6. So we have A, B and C in a polyamorous relationship for four years, and we have this situation where a creditor sues A for the entirety of the debt, wants to sell the family home to be repaid, how do we apply sections 20B(3)(a)(ii)? So we look at what is each partner's protected interest. Well, their protected interest will be half of their share…

O'REGAN J:

Well, it's half of the total.

MS TAEFI:

Which is $133,000 will be their…

O'REGAN J:

Isn't that half of the total?

MS TAEFI:

No, it will be a half of their share so will, they're each going to have a third share in the family home.

WILLIAMS J:

So a sixth each.

MS TAEFI:

And each – that's correct. Sorry, no, it's not a sixth each, it's a third each.

O'REGAN J:

No, a third each, yes.

MS TAEFI:

Because I understand that the way that section 20B(3) applies, it's not talking about your individual share, it's talking about the share of the relationship. So the protected amount is going to be 133, because the amount as between the relationship is going to be 266. Again, it's no different to Mum having a third interest in the house. What's the equity in the house? Well, it's going to be 266 because Mum owns 133. So what's half the relationship's share? It's 133. I mean, I'm not, I haven't analysed these in any great depth because I did receive them last night.

O'REGAN J:

You're making it sound like it's an incredibly easy job to be a Family Court judge.

MS TAEFI:

No, it's not, it's very difficult, and I mean I haven't, you know, I've only had these for a short time. But I don't think they pose any difficulty that our very competent Courts can't deal with. There's none of these is so unworkable that the Court of Appeal's interpretation cannot stand, and if we apply the High Court's interpretation we end up with such an unfair result for partner C, just walks away with absolutely nothing, which can't have been the intention.

Now I don't propose to take the Court through the case where section 52A and 52B have not been applied, but simply say that the Courts are clear that a contemporaneous relationship is theoretically possible but didn't succeed on the facts. The Court has found, there is one case I've found where the Court found there was a contemporaneous de facto relationship in a marriage, and that's decision of *Chapman v P* HC Wellington CIV-2007-485-1372/1871/1887, 2 July 2009, it's a decision of Justice Mallon, and it's in the context of dealing with property after party A dies. He does without a Will and with an estate of $5 million. He had a wife and then he had a de facto partner, and the Court found that both those relationships were contemporaneous. And I think the wife applies under option A for property orders under the Property (Relationships)

Act, and de facto partner P elects option B and takes the full intestate entitlement.

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The last point I'd like to address is one of the wider implications, and this is one that, a point that arose in my learned friend's written submissions but wasn't addressed orally, and I would like to briefly discuss some of those provisions because I have spent some time going through all of those Acts that my learned friends refer to as creating, you know, terrible problems, and again what I've found is that there's a real injustice if you – there's either no effect or a great injustice if you adopt the High Court's interpretation over the Court of Appeal's.

For example – sorry, and there is the precursor to that, which is that the reach of this present case is really limited to a few Acts. The relationship property Act's definition of "de facto couple" applies in the Family Proceedings Act and the Administration Act and in the Family Protection Act, but not most other legislation.

KÓS J:

Hang on, take that more slowly, please.

MS TAEFI:

Sorry. The Family Proceedings Act, the – this is at paragraph 96 of the first respondent's submissions.

KÓS J:

Right, thank you.

MS TAEFI:

And I may have missed one, but those are the ones I could find. The Legislation Act in section 14 contains its own general definition of a de facto relationship, and that definition is context-specific – that's at section 14 of the Legislation Act. So it says here: "In any legislation, "de facto relationship" means a relationship between two people who live together as a couple in a

relationship in the mature of marriage," they're "not married or in a civil union", they're both over 16. And then in paragraph (3): "In determining whether two people live together as a couple in a relationship in the nature of marriage or civil union, the court or person required to determine the question must have regard to, (a), the context and the purpose of the law in or for which the question is to be determined and, (b), all the circumstances of the relationship." So that's not to say it would necessarily apply everywhere, but let's assume that it does impact the other, you know, when the issue comes before courts and subsequent cases it refers to this decision and it takes some guidance from the Court's approach, let's see what happens.

So perhaps if we begin with employment entitlement. So my learned friends have said that entitlements against may be increased beyond what is fair, and if we look at the content, so the Holidays Act for example, and in the Holidays Act we have a "partner" means "de facto partner". Section 65 of the Holidays provides that: "An employee is entitled to 10 days of sick leave," in a year and that they can take six leave if they're "sick or injured", if "their spouse or partner is sick or injured" or "a person who depends on the employee for care is sick or injured". So if we adopt the respondent's interpretation, Fiona, if employed, would be able to take 10 days of sick leave a year and she could use that entitlement to care for Brett or for Lilach if they were unwell or injured on the basis that they're her partners. But her overall entitlement to sick leave doesn't change. If the appellant is correct, then the position is no different, Fiona could still use sick leave to care for Lilach and Brett but would do so on the basis perhaps that they're her dependants rather than her partner.

The other employment provision is the Parental Leave and Employment Protection Act. Again there we have a definition of "partner" which is "de facto partner"…

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… Parental Leave and Employment Protection Act 1987. Again, there we have a definition of "partner" which is "de facto partner" and we don't have a specific definition of "de facto partner" so we would probably use the Legislation Act.

Section 17 provides that an employee may take two weeks partner's leave if the employee is the partner of a primary carer in respect of a child. So if Fiona had a child Lilach and Brett would both be entitled to two weeks of parental leave, and that's unpaid parental leave so it doesn't add a cost for the employer, but if the appellant's interpretation is correct neither would be entitled to any parental leave.

The next example I have here is the Family Proceedings Act. So here we have a meaning of "de facto partner" in part 6 which deals with maintenance and it has the same meaning as section 2 of the Property (Relationships) Act, unless the context otherwise requires. So I mean again the Court could reach a different view but would probably start with the PRA definition.

Section 64 provides that once de facto partners cease living together, each is liable to maintain the other, and section 65 provides that in assessing the amount of maintenance payable the Court must have regard to the financial and other responsibilities of each partner. So here, if the respondent's correct, then Lilach could make an application for maintenance as against Fiona when she left the relationship, but she probably wouldn't make one against Brett because he didn't have the means to pay. Section 65(2)(c) permits the Court to take into consideration the fact that Fiona is still supporting Brett. If Brett did have the means to pay maintenance then Lilach could make an application against both and each application would be considered, while also having regard to any maintenance awarded against the other partner because you look at the overall income of the parties, and if the appellant is correct, well, there would be no entitlement to maintenance even as between Lilach and Brett who would no longer be considered to be married because of their polyamorous relationship. No one could apply for any maintenance.

Then we have the Administration Act. Section 2 provides that de facto relationship has the same meaning given to it in section 2 of the Property (Relationships) Act. Section 77C deals with a scenario where a person dies intestate leaving two or more surviving de facto partners. Again, another example of legislature contemplating that we could have multi-partner

scenarios, and if they both choose option B, the intestate entitlement is equally shared between them, and this is exactly what happened in *Chapman v P* so that's a very good example of the Court applying this provision to a contemporaneous relationship. If the respondent's correct, well, if Fiona passed away without a will Lilach and Brett could choose between option A and B and if they chose option B the estate would be divided equally between them. If they chose option A, the PRA would apply, and if the appellants are correct, well, there would be no entitlements for Lilach or Brett if Fiona died without a will and they would have to bring a claim in constructive trust.

There's another provision that my learned friends refer to in their submissions. It's section 34 of the Administration Act. It's a rather obscure provision that I'd never looked at myself. It says that a charge on property of the deceased has to be paid primarily out of the property charged but this doesn't apply to an interest in a personal chattel that a deceased passes to a spouse, civil union partner or surviving de facto partner. So this means if Lilach passed away and left an art work to Fiona and the respondents are correct, well, there could be no charge on that property. But if the appellants are correct and if Lilach passed away and leaves an art work to Fiona, the art work could be sold to pay the charge if there was one.

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So again, a situation that causes an unfairness to someone in a polyamorous scenario. I could keep going but I think I've probably illustrated the point. Maybe the only other Act to refer to is the Social Security Act in section 8, and in that Act "de facto partner" has the same meaning as in section 29 of the Interpretation Act, which is now section 14 of the Legislation Act. Section 8 permits MSD to make determinations about whether a person is single or in a de facto relationship, and if someone is single they are not in a de facto relationship and live apart from their spousal partner. So Brett would be treated as being in a – if the respondents are correct, Brett would be treated as being in a de facto relationship and not single for the purposes of the Act, whereas if the appellants are correct Brett would be treated as being single for the purposes of the Act, despite no living apart from his wife or other partner.

As I say, I could continue, and if the Court does have any question for me on the other provisions that the appellants have set out, I'd be happy to address those.

GLAZEBROOK J:
So that's the end of the submissions?

MS TAEFI:
That is the end of the submissions.

GLAZEBROOK J:
Thank you very much. Mr Duckworth, I don't think we're hearing from you, is that right?

MR DUCKWORTH:
I mean, basically I support submissions the my learned friend counsel for the first respondent has made, and certainly I think she's presented those very capably and dealt with most of the questions that you've had to ask of her.

GLAZEBROOK J:
Thank you. So in reply?

MR JEFFERSON QC:
Yes, your Honour, and I did note your admonition that it would be brief, and indeed it will be, and as is the way of these matters, it's going to be really bullet points rather than careful elucidation.

We really part company right at the beginning of my friend's submission. She said in her very first sentence her client, Lilach, and Fiona were in a de facto relationship and we go no, they weren't. So that's where we part company. We part company a little later on with the emphasis on exclusivity or not. I don't need to take you through that, I just need to highlight those.

We went down a bit of a rabbit hole on 2D and my friend said: "Intentions are of assistance, the intentions of the parties are of no assistance." She didn't use the phrase but she was essentially saying – well, she used the phrase "it's evaluative test", by inference an objective test, but no, that can't be right. The intentions of the parties are part and parcel of the assessment, they're not irrelevant and they can't be.

I got a bit confused with one of my friend's submissions. The Court of Appeal was not determining this relationship, it was answering the broader question of whether the Act applied to polyamorous relationships. As I said first thing this morning and I repeat now, it's feasible – possible, not feasible – it is possible that it may be held that there are no de facto relationships and just the marriage, because there's got to be that evaluative exercise under 2D in respect of both of the asserted de facto relationships, and that was a point made in the *Public Trust v C* HC Hamilton CIV-2007-419-1046, 25 February 2009, which is part of our supplementary bundle where the Judge in that case, whose name eludes me for the name, made the point that one of the issues that had to be addressed was that the Judge in the first instance had not actually turned his mind – I think it was a him – his mind to the possibility of there being no de facto relationships, it was an observation in passing.

In terms of the interpretation issue, there are three cases to which I would draw your attention. The first is the case of *Phillips*, which is in the supplementary bundle, *Phillips v Phillips* [1993] 3 NZLR 159 (CA), hopefully we can bring that up – yes, thank you. If you scroll down a little bit there is Court of Appeal 1993, scroll down a little bit and there's an observation there which – it's the observations of Justice Cooke. Page 171 of this…

GLAZEBROOK J:

Are you looking at the head note or the actual case?

MR JEFFERSON QC:

Yes, I was trying to look at the head note because that was a nice attempt – and this was, he says, at head note (vii): "In particular circumstances there's no

reason why for," syntax obviously deserted the reporter, "there is no reason why for property sharing purposes a de facto union should not be treated as the equivalent of a marriage." So there was this discussion going on. "Reasonable expectations," said the Court of Appeal, "could lead to that result in a long de facto union where contributions had been particularly meritorious." This, of course, is all in the dark ages before de facto unions were being recognised. "But," said the Court, at that stage, "the truth remains that a de facto union is fundamentally different in the eyes of society and law from a legal marriage," as it was in those days, and my point there is polyamory is fundamentally different in the eyes of society and law from the couples that the PRA is focused on.

In the article which was provided last night and belatedly, the *Filling the Gaps* article, there is reference at page 8, Lord Wilberforce's dissenting opinion in the *Royal College of Nursing v DHSS*, and the key part there is towards the end of that quote where it starts: "They cannot ask the question 'What would Parliament have done in this current case – not being one in contemplation – if the facts had been before it?'" That is an inapt or inappropriate way to look at something that, as I say, wasn't within contemplation when it was passed. You can't go: "Well, what if this had been in contemplation? What would the legislature – what would Parliament have done?" and that, said Lord Wilberforce, is not the right way to go about it and, indeed, in my respectful submission, that's correct.

The third case in that same line is the *Wood-Luxford v Wood* [2013] NZSC 153, [2014] 1 NZLR 451 case. Now that was a Family Protection case, again it's in the supplementary submissions, and there there was much to-do about a child and whether it was a stepchild and whether a child en ventre sa mère came into the mix or not. Now the majority in that case, there was a dissent, a strong dissent as I read it, but the majority in that case said no, it doesn't fit within the Act and we can't make it fit within the Act. Now that's not as clear as the case my friend, the *Quilter* case, which said marriage is between a man and a woman, couldn't be more explicit. This is less clear but nonetheless the Court found, a majority of the Court, Supreme Court, found that they couldn't

shoehorn what was being sought into the terms of the Act as it then was, and I say that's precisely the position you've got here. My friends would like you to shoehorn polyamory into the PRA but to do so, if you like, the Court would be stepping beyond its remit to fill the gaps.

One should not lose sight – Mr Fuscic made the point that we were talking about the whole Act. My friend very quickly said the purpose of the Act is to divide property when a relationship ends. That is one of the purposes, clearly, but it's not the sole purpose by any means. One of the purposes is to enable parties to create their own arrangements. That's a section 21 situation. Another is to create some degree of certainty upon death. It ventures into the succession area. That's part 8 of the Act. It's much broader. It also does some classification of property, of course. That's the other thing. The classic way to approach this, back into a field I'm much more familiar with, a couple, dealing with a couple, you identify the property, step 1.

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Step 2, you classify it, is it relationship or is it separate, step three, you value it, and step four you divide it, and that's the very simplistic approach. So the Act provides that step-through process, that four-stage process. There's a fifth stage about adjustments for economic disparity and post-separation contributions and so on but you needn't, that detracts from the broad submission.

My friend put a lot of emphasis on section 25(2) of the Act, but I do take you to section 25(3) of the Act which follows. Because whilst 25(2) says you can make orders when the parties cease living together or, sorry, when the parties are living apart, not cease living together as a married couple, so there's a differential in the terminology there. But have a look at 25(3): "Regardless of (2), the Court may at any time make any order or declaration relating to the status, ownership, vesting or possession of any specific property." So you're not limited to just dealing with the matters at the end of a relationship.

52A and 52B. One of my questions is what's the point of those sections? If my friend's argument, they're pretty clear, what is the point of those sections, why were they brought in and why were they, when they were brought in, so explicitly limited to two, and in 52B the numeral "2" appears in the heading of the section, and very clearly it's just for two. And my friend two or three times said 52A, 52B –

GLAZEBROOK J:

You're not suggesting that if there were four de facto relationships those wouldn't apply, are you?

MR JEFFERSON QC:

It's, well, 52A is about *a* marriage and *a* de facto relationship, that's 52A, and the successive and the possibility briefly of overlap. 52B is two de facto relationships, and it's very explicit about that, and my friend says those sections contemplated multiple relationships and I say no, they didn't. I agree with my friend, we have to assume that Parliament meant what it said, but it's a very difficult section to understand, it does have all the hallmarks of something being bolted on at the last minute when they suddenly realised you could have contemporaneous relationships which until then you could, brought within the rubric of the Act when before that you couldn't because you couldn't have two marriages.

WILLIAMS J:

That argument probably counts against you in the end though, doesn't it? If it's really about the gap between separation and dissolution and that's all, separation of the married couple and dissolution of the marriage. On separation a new de facto relationship is formed but the marriage isn't dissolved for a year or whatever and you've got to deal with that overlap. If it's really all about that and nothing more, then doesn't that strengthen the argument that it doesn't speak to polyamory, which is covered by these other provisions we've been taken to?

MR JEFFERSON QC:

No, with respect your Honour, no, I wasn't saying it just covers that. If you go to 52A it talks about these contemporaneous relationship and in 52A it's a marriage plus a de facto an how do we deal with it. Now, it does talk about successive and that's easy, that's quite simple, but it also talks about contemporaneous relationships.

WILLIAMS J:

But your point was that these are *briefly* contemporaneous relationships.

MR JEFFERSON QC:

No, they could be briefly but they needn't be. They can be, if you look for example at 52A(2)(b): "If the marriage or civil union and the de facto," so those two, "were at some time contemporaneous," so they could be contemporaneous. And so I don't think, with respect, it does detract from the argument. Parliament turned its mind to contemporaneous relationships and limited itself to 52A and 52B, and with respect to my friend I can't read 52A and 52B as contemplating, as she's put it, "multiple relationships", it was clearly beyond Parliament's ken to think any more than two at the time…

I need to address the fairness point, because I get the fairness point and my friends –

GLAZEBROOK J:

Well, I still – the singular usually includes the plural, there doesn't seem any reason to say if you happen to have three contemporaneous relationships: "Sorry, you don't come under 52A or 52B at all."

MR JEFFERSON QC:

Well…

GLAZEBROOK J:

I just can't imagine anyone saying that. Now of course it's very unlikely you have even two contemporaneous relationships, but if you did have three I can't

say somebody's going to say 52A and B don't apply. Because on the heading on the second one there's a "two".

MR JEFFERSON QC:

Yes, well, yes.

KÓS J:

An of course each of them only has two relationships.

MR JEFFERSON QC:

Where, in this case, yes. But arguably, and I think Justice Glazebrook's alluded to it in passing, you could have several. I mean, why would you, and you may not be able to get through the various criteria, but arguably you could on that reading, on your Honour's reading of that section.

I noted the comment that my friend made that each relationship has its own beginning and its own end, and I suppose that too is that we call in favour of our interpretation, but we're saying, you know, if each relationship has its own beginning and its own end, we've got to be looking at that. When did they end, when did they begin? Did the, as we say, the marriage end when the polyamorous relationship began? And we say it did. Or did somehow the marriage carry on, despite the fact that we'd begun another relationship, the polyamorous relationship?

GLAZEBROOK J:

I'm assuming you accept that they wouldn't have been able to say they were separated for the purpose of getting a divorce?

MR JEFFERSON QC:

No, that would have to be right, wouldn't it, that they – well, actually, no, that would have to be right, that would have to be right. They would have difficulty saying that they were living apart, which is the criteria for the dissolution of the marriage, or had been living apart for two years at the time of the making of the application.

I don't disagree, in fact I completely agree with my friend that our proposition looks desperately unfair, it doesn't leave the parties without remedy but it leaves them with the equitable and other remedies. Now I'm old enough to remember that in the days leading up to 2002 de facto couples who were well established in our society at that time were forced to resort to the mysteries of constructive and the resulting trusts and so on and so forth, and nobody thought that was a good idea, and that was in many ways the thrust for what happened, which was a change in the legislation, and I'm saying that's what needs to happen here, that there needs to be a change in the legislation. In the meantime, the parties are stuck with a *Lankow v Rose*-type analysis, which is wholly unsatisfactory.

Even in 52A and B the division, if you get down to, say, (2)(b)(iii), the division is in accordance with the contribution of the marriage or civil union on the one hand and the de facto relationship on the other hand to the acquisition of the property, unlike the PRA which you're dividing a net property, section 20D, you're adding up the assets, you're taking away the liabilities, you get a net pool, 52A echoes the old constructive trust thing, you've got to be looking at the plight on a property itself, and I have no idea how you would work out the contribution of the marriage and the contribution of the de facto relationship. The contributions under section 18 are the contributions of the parties, monetary, not-monetary, list of them. Suddenly you're now talking about the contributions of the marriage on the one hand and the relationship on the other, and that just seems to me to be frightfully complicated, it's not even talking about the contributions of the parties. So I do suggest there is a problem here, and it does, in fact, if you do get to that part, and I understand my friend to say it's unlikely you will, but if you do get to that part you are back into the *Lankow v Rose, Gillies v Keogh* [1989] 2 NZLR 327 (CA) type analysis for a specific item of property, and that can't be a good place to be, it's already been discounted before and it needs to be discounted again.

I'll just, on one point and one point alone, I listened to my friend's impressive analysis of the impacts on the other legislation. We did in our supplementary authorities lodge with you a document pulled off the MSD website, that's under

number 7 of the supplementary authorities, if you just scroll down to the actual letter behind that and just stop there: “Multiple marriages are not recognised as under the Social Security Act should a circumstance arise where a person applies for a benefit with multiple wives,” which would be the polyamorous, “then the Ministry could only treat one wife,” you can only have one wife under the Social Security Act. And so again there are clearly issues in the administration of the law and that’s just a simple example.

Now all of this could be dealt with as it was in Alberta, I’ve forgotten, Alberta, by either including or expressly excluding. The unsatisfactory situation we’ve got is it’s neither one thing nor the other, in our proposition.

Now unless I can assist your Honours further, that concludes the case for the appellant.

GLAZEBROOK J:

Thank you, counsel. Thank you all counsel for their assistance, and I include Mr Duckworth in that obviously as well, and thank you for the parties who have been here for the case. We will take time to consider and give judgment in due course, thank you.

COURT ADJOURNS: 4.12 PM