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IN THE SUPREME COURT OF NEW ZEALAND SC 97/2025
I TE KŌTI MANA NUI O AOTEAROA

BETWEEN **NIGEL DAVID RIMMER**
NICOLA RIMMER
Appellants

AND **CAROLYN MARY WILTON (AS ADMINISTRATOR OF THE ESTATE OF DAVID RIMMER)**
Respondent

Hearing:	17 March 2026
Court:	Winkelmann CJ Williams J Kós J Miller J Cooke J
Counsel:	V T M Bruton KC, N L Walker, J B C Trezise and L G Cable for the Appellants S P H Elliott, B J Lupton and J M McGuigan for the Respondent A S Butler KC and P D Hume for New Zealand Law Society | Te Kāhui Ture o Aotearoa as the Intervener

CIVIL APPEAL

MS BRUTON KC:

Tēnā koutou, e ngā Kaiwhakawā. Ms Bruton appearing for the appellants together with Mr Walker, to my right, Ms Trezise, and to Mr Walker's left, Ms Cable. I will say Ms Cable is starting at the top and it is her first ever court appearance.

WINKELMANN CJ:

Tēnā koutou. Congratulations, Ms Cable.

MR ELLIOTT:

Tēnā koutou, may it please the Court, counsel's name is Elliott and I appear for the respondent together with Ms McGuigan and Mr Lupton.

WINKELMANN CJ:

Tēnā koutou.

MR BUTLER KC:

Ata mārie, e ngā Kaiwhakawa. Andrew Butler and David Hume appearing for the New Zealand Law Society, Te Kāhui Ture o Aotearoa, the intervener.

WINKELMANN CJ:

Tēnā kōrua. Ms Bruton.

MS BRUTON KC:

May it please Your Honour, just some housekeeping matters. My friends and I have discussed how to divide up the time, which will very much depend on how much questions Your Honours have for us, but assuming we will need the full day, but be very happy if we don't, of course, Mr Walker and I will make submissions for the appellants to no later than 12.15 which gives us an hour and three quarters, then my learned friends for the respondent will have from

that time until 3 pm at the latest, which also gives them an hour and three quarters.

WINKELMANN CJ:

And what about the intervener?

MS BRUTON KC:

Half an hour at 3 o'clock for him.

WINKELMANN CJ:

I wondered if it was better for the Intervener before the respondent because is it a different – their legal analysis is closer to yours than the respondent's?

MS BRUTON KC:

Well, we're relaxed, hadn't thought about that. Mr Butler could slot in for half an hour.

WINKELMANN CJ:

Do you have a view, Mr Butler?

MR BUTLER KC:

Absolutely entirely in the Court's hands. Just here to help, so whatever –

WINKELMANN CJ:

Right well we'll go with the order that counsel have discussed then.

MR BUTLER KC:

Thank you.

MS BRUTON KC:

Then after that, that will leave half an hour at the end if we need it for Mr Elliott to reply to Mr Butler to the extent necessary and give me about 20 minutes for an overall reply, if necessary. Then the other housekeeping matter is that this morning we filed our outline of oral argument together with a very small table and so we have printed that table in A3 copies.

WINKELMANN CJ:

I'm very grateful to counsel because I can read this. It's wonderful.

MS BRUTON KC:

Yes, and I know I've perhaps been a bit naughty by exceeding the page limits but I will be speaking to that table and I will be respectfully submitting that it's quite helpful in trying to work just how all these different statutory regimes fit together when the Court comes to decide the big picture policy issues in this case. So with that introduction, if I may, I would like to take my 15 minutes free, please.

WINKELMANN CJ:

Surely.

MS BRUTON KC:

In terms of the oral advocacy for the appellants, I am going to start with the context, the core – the cohesion and concern which this case has – sorry, the confusion, I should say, and concern which this case has raised among the profession, then I am going to elucidate nine core principles which I will invite this Court to adopt on a path to achieving cohesion and clarity in this case and others than will arise in the future. Then my learned friend, Mr Walker, will conduct the case for the appellants on the construction of the particular Rimmer-Wilton contract.

So turning first of all to the context and the confusion and concern that has arisen, we've got the 2017 Law Commission Report which says that if a surviving spouse or partner wants to choose Option A on – wants to rely on the agreement on death of their partner they need to choose Option A to take under the Act effectively. We've got the Court of Appeal and the High Court disagreeing with that in this case and then you will have seen the various emails that I received from practitioners after the appeal judgment came out, they are at 05.039, but no need to look at those now and what they say is things like, I can't believe you lost in the Court of Appeal. "The Court of Appeal has turned estate planning on its head," and "I hope you're taking this to the

Supreme Court." So thank you for granting leave. Here we are and I think one of the problems that has arisen, and it's what Professor Peart has said in her writing, is that you have a statute dealing with classification and division of relationship property and then you have overlaid onto it through the new Part – Act – Part 8 in 2002, effectively succession provisions and –

WINKELMANN CJ:

Can you just slow down a little bit Ms Bruton, sorry. Slow down a little bit there. You're giving us a lot of material.

MS BRUTON KC:

Sure, sorry.

WINKELMANN CJ:

Don't change course, just slow down a little bit.

MS BRUTON KC:

I'll slow down. As Professor Peart says, that's created unpredictability and uncertainty but if – in the materials in the parliamentary debates from when the Part 8 was enacted, and the policy behind it was to ensure that a surviving partner was no worse off on death than if separation occurred inter vivos because under the previous 1976 legislation the surviving spouse could end up considerably worse off if, normally she, was only able to take her entitlements on succession, under the Will or on an intestacy.

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So, Parliament decides, well, no worse off is the approach, so the survivor either has a Property Relationship Act 1976 choice under Option A, or a succession choice under Option B. At the same time in 2002 you can see from the parliamentary debates that encouraging parties to reach their own agreements to contract out of the default provisions of the PRA was strongly encouraged. That was also to deal with the fact that with the 2002 amendments the legislation was also going to cover de facto relationships. So Parliament raised the bar for setting aside contracting out agreements from the test being given,

giving effect to them would cause injustice to the serious injustice test. So that's really the benefit, the basis of our contractual primary focus in this appeal.

Yes, there are default provisions in the Act which apply if there's no contracting out agreement. There's also default intestacy provisions if Wills aren't made, but parties can agree outcomes other than those default outcomes, and I think it is fair to say that ever since the amendments came in, in 2002, at the ground level with practitioners there has been some sort of general confusion about whether they choose Option A or Option B if there's an agreement and in practice it didn't matter terribly much because if you had a well-drafted contracting out agreement, and a congruent well-drafted Will, the outcomes would end up being the same. But what we are seeing more of is cases like this one, either where there's an intestacy and/or, we've got both in this case, a poorly drafted agreement, and/or a poorly drafted Will. So things do not fit together easily. So this is an important opportunity with respect for this Court to lay down some general principles which will provide cohesion and be a very useful guide for practitioners advising in this area, both in terms of estate planning at the drafting stage, and both after death of the first partner.

So the genesis of this table is that when I came to prepare my oral submissions a week or so ago, I thought, well, what would be really helpful was to draft some proposed provisions around section 61, which would help clarify this conclusion, and I thought, well, in order to do that I actually have to make sure I've got right and understand all the statutory, all the regimes that apply or potentially apply in this sort of situation, so that whatever approach is being proposed is a cohesive approach, and you're not doing one thing with the PRA legislation which is going to have adverse ramifications in the other areas.

So just looking at the table there's really six statutory regimes which all, which are relevant in this case. First of all there's the voluntary legal ownership regime. So what spouses often do is they own at least their homes, sometimes share portfolios, as joint tenants, and then on the death of the first, other inherits by survivorship. Easy. No problem.

That only becomes an issue potentially under section 88(2) of the Act, and I've noted *Public Trust v Whyman* [2005] 2 NZLR 696 in the table there when one, it's usually in a step-parent/stepchildren situation when there's an application to divide relationship property by the administrator, if they can get leave, because they want to bring the jointly-owned home back into the estate and then have a division made, so there's assets against which a Family Protection Act 1955 claim can bias, but generally if it's a couple who have been together for years, only one marriage or relationship, children of that relationship, joint ownership is quite a handy little estate planning tool.

Then column 2 is the statutory default situation and what the PRA does is it has default rules for determination of the status of relationship property, so there's section 8 which sets out all the things that are relationship property, everything that's not in that list is generally not relationship property, although under sections 9 and 9A if there's intermingling or contributions to separately owned property it can, in part, become relationship property.

Then the default provisions deal with division of relationship property. The principle is that it's 50/50, that's the default division, but also in the Act are provisions for adjustment to the equal sharing of relationship property principle so and the two exceptions are if equal sharing would be repugnant to justice or economic disparity is established then there can be the Court can make adjustments out of one party's share of the relationship property or divide other than 50/50. Then you've got your ownership and vesting provisions which follow from the above in section 3 and then there's a default choice of Option B on death if either Option A or Option B is not expressly chosen. So in the table there, I've set out section 61.

Then the next column, column 3, is voluntary contracts under the Property (Relationships) Act and what section 21 provides is that parties can contract out of the PRA default rules which otherwise determine the status, ownership and division of property, or they can – so that's a section 21 agreement – or they can settle those issues after separation by a section 21 agreement. So those are known as compromise or settlement agreements, generally.

So while we're here, I make the point, the parties aren't contracting out of the entire Act at all. What they are contracting out of are the default provisions which would otherwise determine status, ownership and division of relationship property and an added complexity is usually, as my friend Mr Butler has called them, is parties will often do omnibus agreements, so they don't – the agreements don't just deal with relationship property and separate property, they'll deal with other things like the life interest in this case and one of my submissions will be it's perfectly appropriate for a party to – people to make omnibus contracts and the law of contract applies, but the difficulty at times is working out which part of them is a section 21 or a section 21A agreement and in this, these principles that I am putting to you, I will put to Your Honours shortly, my submission is it actually shouldn't matter if we are respecting the law of contract and choice.

KÓS J:

And an example of an omnibus agreement might be one in which a party disclaims a right to the deceased spouse or partner's estate.

MS BRUTON KC:

Yes, yes, exactly, Sir.

KÓS J:

And you say this is one of those?

MS BRUTON KC:

Yes, in part. It is part, it's an omnibus agreement.

KÓS J:

Yes. Well, if it is not an omnibus agreement, you have got a problem, haven't you?

MS BRUTON KC:

Can I continue with my 15 minutes uninterrupted and then I'll come back to that?

KÓS J:

Well, we're 20 past 10, so I thought –

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MS BRUTON KC:

Oh sorry, have I finished? That's why I was speaking fast.

WINKELMANN CJ:

Well, if you want to continue, if you want to come back to Justice Kós' point because it is the heart of the issue and finish your overview, I think that's fine. Just ask Justice Kós if he's happy with that.

MS BRUTON KC:

Yes, sorry Sir, please repeat the question?

KÓS J:

Well, now?

MS BRUTON KC:

Oh, later is good.

KÓS J:

Later. I'll come back to it. Don't worry, it's burning. It's not going out.

MS BRUTON KC:

And so then our fourth column is succession by Will. Obviously testamentary freedom is a long-established principle of our law and provided the statutory safeguards are met under the Wills Act 2007, you can generally do what you like with giving away your property when you die. But of course succession by Will is always going to be subject to the survivor choosing part A, and then division under the PRA will trump.

Column 5 is default succession. So if there's no Will, there's the statutory trusts contained in section 77 of the Administration Act 1969, and the really crunchy-level issue between us on this appeal is how you interpret the word "must" in section 17(7). If a person dies intestate and leaves the other person referred to in column 1, their estate must be distributed according to the statutory trusts, and the case for the appellants is that the word "must" must be read as subject to any agreement or promise which precludes the statutory trust beneficiary receiving all or any part of the default entitlement, and so the case for the appellants is you can contract out of default entitlements on intestacy, and that's exactly what happened here, and there's no principal distinctions, as the respondent submit, between contracting out agreements under section 21 and compromise or settlement agreements under section 21A.

Then the sixth regime, if you like, which we can't ignore, are these funny statutory forms that have to be filed in when anyone is applying for probate, or letters of administration. So if we go down to the bottom of column 6, the statutory forms column. The surviving spouse – actually it's easier to work from the top. So under the Property (Relationships) Forms Regulations 2001. This is the – so if the surviving spouse wants to obtain the grant of probate or letters of administration, they have to fill out this form under the Property (Relationships) Forms Regulations. As you see there's a choice between Option A to made an application for division under the Act, or Option B, to elect not to make an application under that Act for a division of relationship property and to receive any, and I've highlighted in bold "any" in my table, any property to which I'm entitled as a beneficiary under the Will, or any beneficial interest to which I'm entitled on intestacy.

So, that is congruent with the case for the appellants that even if you choose Option B on an intestacy, you don't necessarily have to receive any entitlements. So, if you haven't received any entitlements on intestacy, then you've got no right to apply for letters of administration, and that's what the *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 case was concerned with and so then we it comes to an application for letters of –

WINKELMANN CJ:

Can you just repeat that submission again, Ms Bruton.

MS BRUTON KC:

So, in order to apply for letters of administration on an intestacy, and we'll now go to the High Court Rules 2016 Forms, there's at rule 27.35, there's an order of priority for the grant in cases of intestacy and to receive that grant the applicant must have a beneficial interest in the intestacy or on the intestacy. It's rule 27.35(3): "The first in priority is persons having a beneficial interest in the estate."

So, the case for the appellants and it's also what the *Warrender* case was about is that Ms Wilton had no beneficial interest in the estate because she had contracted out of the default entitlements or any entitlements on intestacy by the agreement so, as a consequence, she had no right to apply for the grant of letters of administration and then, next in line, and the two persons who could apply for the grant, were Mr Rimmer's two adult children, the appellants Nigel and Nicola.

KÓS J:

So we're back to my question about the omnibus. You say this is an omnibus agreement because it, one, determines what is relationship property on death.

MS BRUTON KC:

Yes.

KÓS J:

And, two, effectively disclaims in advance any entitlement under the intestacy.

MS BRUTON KC:

Yes.

KÓS J:

Actually, it's a great table, but at the end of the day the real question here is whether the second of those points is right. Whether there's a pre-disclaimer. Isn't that the only issue really?

MS BRUTON KC:

Yes, it is, in fact, and on that point, if I may now, I'll take Your Honours to this 1842 case of *Gurly v Gurly* (1842) 8 Cl & Fin 743, 8 ER 291 (HL), it's a House of Lords decision and it's exactly the same issue actually back in 1842.

If Your Honours have, and Your Honours will have read the respondent's submissions, what they submit is, well, there's not authority for the proposition that you can contract out of default entitlements on intestacy by a section 21 agreement, so colloquially called a prenup and none of the New Zealand cases concern prenups, they only concern settlement agreements. So part of the reason, the value in that table, I submit, is that it shows that there's no principled reason for a distinction between section 21 and 21A agreements and this question of whether you can contract out of default rights on intestacy.

But this *Gurly* case, and the language is a bit hard to follow and quite entertaining, and I can take Your Honours to page 297 with the page numbers down the bottom. So this relates to the days, of course, when women couldn't own property, so Jemima was marrying a fellow called Bagnal Gurly and £800 was settled on a trust and the interest on that £800 was to be paid to Jemima and Bagnal whilst they were both alive and then if Bagnal died first, the interest for life was to go to Jemima. So in my submission, very like the life interest we've got in the house –

KÓS J:

This is in an agreement or a Will?

MS BRUTON KC:

It's an agreement and so if Your Honours just look at that last paragraph, the settlement made on the lady was in these terms: "... the said provisions so made on the said Jemima, together with a further life estate hereby provided for her out of the within rents, should be paid to her, 'as and for her jointure, in full lieu, bar, and satisfaction of any dower or thirds ..." – so those were the historic intestacy provisions for a widow, the widow was entitled to life interest and a third of the deceased's property, usually including the house, and then on his death it reverted to the estate, so – "... in satisfaction of any dower or thirds which she could or might claim at common law, out of all or any of the estates, real, personal, or freehold, of which the said Bagnal Gurly now is, or [becomes] possessed of or entitled to.'"

And so then after Bagnal died, Jemima remarried and she and her second husband claimed that actually she should have a moiety or a piece of that £800 and the House of Lords and the lower courts said no, she is bound by the compact that she agreed to as a condition of entering into the marriage and she only gets the life interest until her death in the £800, so in my submission an old but relevant authority in support of the case for the appellants.

KÓS J:

And certainly women could always own property, the question was only what happened to their property when they married.

MS BRUTON KC:

Right, Sir. So my apologies, I have made an incorrect submission there.

COOKE J:

But on this basis, in the end, this comes to interpreting the agreement.

MS BRUTON KC:

Correct, Sir.

WINKELMANN CJ:

Women could always own property, it was just harder for them to keep hold of it.

KÓS J:

Absolutely, absolutely.

MS BRUTON KC:

Yes. So now, if I might, I'll turn to the nine core principles which are in my outline of oral opening which I am inviting the Court to –

WINKELMANN CJ:

Do you say nine?

MS BRUTON KC:

Nine. And I know you will interrupt me if I am telling you things you already know or –

WINKELMANN CJ:

Well, that would be ill-advised, because some of us may know it and others may not, so go ahead, Ms Bruton.

MS BRUTON KC:

And so, in my submission, these principles make this whole rather confusing regime or complements of regimes work. So core principle number one, the surviving partner can receive both relationship property and succession entitlements by choice. The parties choice is ascertained from their ownership instructions, so that is column 1, terms of any agreement, that is column 3, and any rule, which is column 4.

So, it is hard, with respect, to disagree with that. We have a system of contractual primacy and testamentary freedom and so interpreting those voluntary columns that way, in my submission, works and nothing surprising about that.

However, a survivor cannot receive both sets of entitlements by default, so they are your statutory default, or sorry, PRA default provisions at column 2 and your default succession provisions at column 5. So, if you've got no contracts, in this case Mr Rimmer died, there was no contract, he didn't leave a Will, so Ms Wilton would have had to choose Option A, apply for division under the PRA, get those PRA entitlements, or not do that, choose Option B and receive her succession entitlement, so that much is clear.

Core proposition 2, where there is no contracting out –

KÓS J:

Well, it is not entirely clear. The question is whether you would have to contract for the second element. In other words, do you need to disclaim by contract to exclude the succession right or whether that is simply a consequence of the – dealt with by default.

MS BRUTON KC:

We might be at cross-purposes, Sir. I'm saying if there's no agreement.

KÓS J:

Yes.

MS BRUTON KC:

And if there is no Will, survivor gets out this Act, looks at section 61, what do I do, and she's got a choice. Choice Option A is –

WINKELMANN CJ:

So you're constructing an argument and this is the first ladder on your argument, step on your argument, which is, if in a scenario where there's no agreement you cannot get both Option A and B by default, you have to choose.

MS BRUTON KC:

No, you can – you can get either, yes.

WINKELMANN CJ:

Both sets of entitlement. You can't get both sets of entitlement by choice or by default?

MS BRUTON KC:

Yes. You can get one or the other, A or B.

KÓS J:

Yes, but the question then is whether A or B simply relates to the Property (Relationship) property and does not relate to the other, the deceased spouse's estate. In other words, a division being Property (Relationship) and succession.

MS BRUTON KC:

Yes, so its all muddled together, if you like. So in this case we know from the agreement that Ms Wilton had her own house, which was maintained as separate property at Cowan Road. Now, assume they never lived in that property, we don't know, there's no evidence, but assume she's got Cowan Road as her separate property, and let's just say Mr Rimmer [*sic*] dies first, and he says, well, what do I do?

WINKELMANN CJ:

She dies first?

MS BRUTON KC:

No, Mr Rimmer dies – no, she dies first, yes, she dies first in this situation, and Mr Rimmer says, what do I do? If I apply for a default division under Option A, all I'm going to be entitled to is half our home at the Moumoukai Road, half the chattels, any incomes which has built up during our marriage, which will be relationship property. So his pot is, and we'll use the value that Moumoukai Road eventually sold for which is 1.2, so he'll get 600,000 choosing Option A, plus a bit of change. So he says, well, I would rather get my – well it is better to get my default entitlements on intestacy.

What's in her estate on intestacy? So the items in her estate are her half-share of Moumoukai Road because they own that as tenants in common, they're her Cowan Road, whatever that comprises, and maybe some other things, we don't know. So we say, well, we put into her estate the half-share of Moumoukai Road, that's worth 600,000, let's just say a million for Cowan Road at a guess, that's 1.6. So, out of that I get the prescribed amount of 155, plus I get one-third of the balance – let's assume she had children as well – so I get one-third of the balance, so that's about one-third of about 1.5, so that's 500,000 of the balance, plus the prescribed amount he's already got, so it's 650-odd, and then he also, of course, still has his half-interest in Moumoukai Road, so that's another 600. So he's netting about 1.2 million, so considerably better off choosing his default entitlements on intestacy.

So when you're advising the surviving partner, that's the analysis that you have to go through. But then it becomes more complicated if there's an agreement and he's like, well, what on earth, how on earth does the agreement fit with that default analysis?

WINKELMANN CJ:

So your point is that you can contract to receive your, both your succession entitlements and your relationship property entitlements under an agreement.

MS BRUTON KC:

Yes.

WINKELMANN CJ:

But you can't receive both. You can't receive both sets of entitlement by default?

MS BRUTON KC:

Yes.

WINKELMANN CJ:

By virtue of default provisions, might be a better way of saying it?

MS BRUTON KC:

It is Your Honour. And then what you can receive, where there's an agreement, depends on the correct construction of the agreement.

KÓS J:

Just as a matter of interest, if you choose Option A, that involves a division of relationship property, right, that's what it says?

MS BRUTON KC:

Yes.

KÓS J:

It doesn't deal with succession.

MS BRUTON KC:

I appreciate that, Sir.

KÓS J:

So that would be a separate exercise that would occur later?

MS BRUTON KC:

Well, I don't think so, Sir.

KÓS J:

Why not?

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MS BRUTON KC:

Because, yes, you're right, so say there's family, so say he's chosen, say Mr Rimmer has chosen to take on intestacy and however much we said was in the pot on the intestacy, yes, then that can be subject to FPA claims, Law Reform (Testamentary Promises) Act 1949 claims, all that sort of thing. So yes, if that's what you're asking, yes.

So the Option A default division trumps and then that will affect what's actually in the estate and then all these other issues come into play.

WILLIAMS J:

Can I ask a silly question. Option A, once you receive your relationship property division, that's it for you in the intestacy, you're not then receiving under the intestacy?

MS BRUTON KC:

Correct. If you're choosing Option A.

KÓS J:

Well, I doubt that for myself, that's not how I construe it. I think that deals with the Property (Relationships) aspects but it doesn't deal with the estate, which is then a subsequent question of administration.

MS BRUTON KC:

Well, let's make sure – 76 is where there's a Will or on intestacy – I might take Your Honours to section 76 which also throws a little twist in the tail here, which might be what your point is alert to that, Justice Kós. Just have a read of that. It's actually section 76 first, and then section 77.

KÓS J:

This if you choose A?

MS BRUTON KC:

Yes. Yes, so that's if you choose A, but remember we're not really talking about this situation at the moment, because we're talking about intestacy, so section 76 relates to – okay, sorry, my friend Mr Walker is just helping me here – so section 76(3) relates to an intestacy, surviving spouse.

KÓS J:

Right, okay, so that's answered the point.

WILLIAMS J:

That was the premise of the legislation, wasn't it, you can't double-dip?

MS BRUTON KC:

Yes, yes. And then but while we're looking at this part of the legislation, if Your Honours look below at section 77. Even if Option A is chosen, that leaves the Court with a discretion to allow what's provided under a Will, if that's necessary to avoid injustice or on intestacy.

So it's not, even though I said there's a complete answer and there's an absolutely stark choice, there in fact isn't, but for the purposes of working through these principles, I, at least, found it helpful to say, well, let's just start with the stark choice and the Parliamentary intention, yes.

WILLIAMS J:

So this is the equivalent of the set aside the agreement section? Section 77 is the equivalent of the application to set aside the agreement?

MS BRUTON KC:

Yes, if Option A is –

WILLIAMS J:

Under Option A.

MS BRUTON KC:

If Option A is chosen and Option A may be chosen if there's a contract and the survivor says, well, it's unjust, so I want to apply to set it aside. I'll come to that, though, in these principles because it's confusing.

WILLIAMS J:

And the standard is different, I see, not "serious injustice" but just "injustice"?

MS BRUTON KC:

Exactly, Sir, exactly. Yes, so undoubtedly it's a little bit of a pickle.

So then I come to core principle 3, Parliament allowed –

WINKELMANN CJ:
What happened to 2?

MS BRUTON KC:
Oh, okay, so 2, where there is no contracting out agreement, section 61 provides a stark choice for the survivor between Option A, so that's our application under the PRA for division, or Option B, not to apply under the PRA for division and receive any Will or intestacy entitlements.

So we look at the table, no contracting out agreement, we're in column 2 territory. So you work out the survivor's entitlements on the default analysis and then you say, oh, well, with the Option B choice, is there a Will or is there default succession, so that's columns 4 or 5. So in that scenario it's columns 2 plus 4 or 5 and if you're advising you go through that analysis that we worked through earlier and you pick the best one or you get your client to sign that notice of choice of options picking what is going to sound in the greatest financial provision to her.

Then we get to core principle 3. Parliament allowed, indeed, encouraged from 2002, partners to reach their own agreements about the status, ownership and division of their property, and to thereby contract out of the PRA default provisions.

When you read the parliamentary debates, part of the rationale behind that is that the Act was going to start to apply for de facto couples, as well as married couples, and when people got married they knew they were entering into this regime but often people don't actually even know whether they're, in fact, in a de facto relationship or not. It sort of creeps up and then, on top of that, no actual necessarily clear date of choice. So, Parliament said, well, we get around this by really emphasising the importance and sanctity of these agreements that are entered into under section 21 and it should be hard to set

them aside if the contractual – if the statutory safeguards at section 21F of the Act have been complied with.

So, the lens that the appellants approach this appeal on is, well, the agreement, all agreements, the agreement in this case, must be given primacy and real weight.

Core principle 4. Where there is a contracting out agreement, the survivor may still make a section 61 choice, otherwise they're deemed to have chosen Option B.

So, there's a slight difference there between the case for the appellants and the case for the Law Society where my friend Mr Butler has said, well, in fact, you contract out of even having to make the choice and I don't think anything turns on that but I think when you look at it as a cohesive whole, you've got to make the choice, because if you don't the Act makes it for you. Plus, as I've said, what you're contracting out of is the default determination status and division provisions, you're not contracting out of the entire Act, and you also have to make the choice if, say, the widow wants to apply for letters of administration or probate, to be able to fill out those forms that we looked at.

WINKELMANN CJ:
Is it also the case that allowing section 61 to apply on the case the agreement allows the fact that part – that not all assets may be dealt with under the agreement.

MS BRUTON KC:
Yes.

WINKELMANN CJ:
In fact, the parties might contract in a way that looks forward to an interplay between not like in the intestacy provisions, but the Will.

MS BRUTON KC:

Your Honour, that scenario gets quite complicated because if the agreement only covers some of the relationship property, and I've never had a case where I've had to work this out, I think you have to still go for your what's better analysis, but it gets even more complicated because some is in, some is out, what do you do.

Ultimately, what actually happens in practice and I think I can say the guidance that Your Honours gave in *Preston* in this Court was incredibly helpful to practitioners because you actually set out some principles and that's really assisted with actually working out how we deal with division of this trust property when we're getting round, having a mediation, or whatever, and it's a similar situation here.

If there are principles it will help, but in these tricky situations, there's never a completely clear answer and you work out all your numbers and what's best and you end up with all these debates about, well, is it relationship property, isn't it, you know, if there's a separate property element how much is it worth? So, you work out the overall pool then you look at possible carve-ups but they're never entirely certain how you would fare in court and then if the wife or the kids are really going to be hard done by, you've got your Family Protection Act claims which form adjustments. So, that's a very long response to your question, Chief Justice, but it's all case dependent and what we need is some principles to help work out the way through this, but –

WINKELMANN CJ:

Well, you could have a situation where the parties just say, which would be the argument for the respondent here, well, we're only going to deal with one asset on death.

MS BRUTON KC:

Yes.

WINKELMANN CJ:

And leave the rest to the others, to the wind, to my failure to make a decision about whether to make a Will or not.

MS BRUTON KC:

Yes, yes. So you could have, for example, just the relationship home and you have an agreement saying, well, that goes, that goes entirely to, say, that goes entirely to Ms Wilton, so $1.2 million relationship home, the agreement doesn't cover another thing, then what happens? Mr Rimmer's the survivor, so he has to decide, well, do I apply for division but I've already got this home, or do I just take the home and not worry about anything else that might be relationship property? Which in this situation, the only other thing that might be relationship – well, chattels will be relationship property and then the other thing that might be relationship property is some savings that she might have earnt in her – and put in a bank account in her own name from her job during the relationship. So in that sort of situation, so they're not worth that much, it's not worth him worrying about.

WINKELMANN CJ:

So the implications of this scheme, really, is that you actually have to allow people to contract out of intestacy or else the agreements won't be given effect.

MS BRUTON KC:

Precisely, precisely.

KÓS J:

Can we just test these two options. Option A, you receive the division of the relationship property and section 76 cancels any rights of succession beyond that, subject to section 77, have I got that bit right?

MS BRUTON KC:

Yes, yes, yes.

KÓS J:

Okay, let's take Option B.

MS BRUTON KC:

Yes.

KÓS J:

Option B, you do obtain rights, retain rights of succession, but you already start, don't you, in that process with whatever your Property (Relationship) rights are. So Option B gives you Property (Relationship) rights plus succession and Option A gives you only Property (Relationship) rights. Am I right about that? If not, why not?

MS BRUTON KC:

I'm looking at Mr Walker and he's – I think it depends and...

KÓS J:

I mean, this is a really basic point that every conveyancing practitioner really needs to know and as it happens a Supreme Court Judge needs to as well.

MS BRUTON KC:

Yes.

COOKE J:

Well, it will depend on whether the Property (Relationships) rights are different from legal ownership.

MS BRUTON KC:

Exactly, Sir, and that's what I was just going to say.

KÓS J:

All right, well –

MS BRUTON KC:

So a lot of people just get around this by having the home owned as joint tenants.

KÓS J:

Okay, all right. Well, you have, okay, so you have your joint tenancy right.

MS BRUTON KC:

Yes.

KÓS J:

Your legal right to the home plus then succession rights.

MS BRUTON KC:

Sorry, I didn't?

KÓS J:

Plus succession rights?

MS BRUTON KC:

Yes.

KÓS J:

And often that won't be very different. The difference between your legal rights and your property relationship rights?

MS BRUTON KC:

Yes.

KÓS J:

The primary asset is going to be the family home, whether it is held as a joint tenancy or as tenants in common.

MS BRUTON KC:

Yes.

KÓS J:

If it's tenants in common, it's 50/50.

MS BRUTON KC:

Yes.

KÓS J:

Property (Relationships) rights probably also 50/50 unless there is some differential basis.

MS BRUTON KC:

Yes.

KÓS J:

Plus you have the succession rights, so Option B is immediately sounding more attractive.

MS BRUTON KC:

Yes, yes.

KÓS J:

Yes, that's what I was getting at, thank you.

MS BRUTON KC:

Yes. So then we come to – is it core principle 4 I am up to?

WINKELMANN CJ:

No, I think you're up to 5.

COOKE J:

No, you've done 4.

MS BRUTON KC:

Five, core principle 5, a survivor would – and we've sort of done this, too – a survivor would only choose Option A if they wanted to apply to set aside the

agreement with claims under section 21J or section 21F and then apply for default division of relationship property, or as we have just discussed if the agreement covered some relationship property but not all of it and then there'd be the weighing of financial outcomes.

Core principle 6, where there is a contracting out agreement the extent of the survivor's Option B succession entitlements, either by Will or on intestacy, will depend on the correct construction of the agreement, the ownership arrangements, and the terms of the deceased's Will, if any.

WINKELMANN CJ:

Can I just ask you about principle 5? I imagine you'd only choose it if you'd get more assets under it, and is there no scenario in which you'd get more assets under Option B, other than the ones you've set out there?

MS BRUTON KC:

I think, again, Your Honour, I think it depends. So, say, for example, there –

WINKELMANN CJ:

About legal ownership. It depends on legal ownership again.

MS BRUTON KC:

Yes, it does, yes. It does. So, shall I continue with core principle 6 now?

WINKELMANN CJ:

Yes, sorry.

MS BRUTON KC:

So that is our column –

WILLIAMS J:

Can you just start from the beginning because there's a lot packed into that first sentence you delivered.

MS BRUTON KC:

Okay. Well, I'll take Your Honours through it by reference to the table. So, where there's a contracting out agreement, and so that is column 3, we're in voluntary territory. The extent of the survivor's Option B succession entitlements by Will or on intestacy, so we're in columns 4 and 5, one or the other of those, will depend on the correct construction of the agreement, ownership arrangements, so we bring in column 1 there, and the terms of the deceased's Will, if any. Contractual, testamentary and ownership autonomy have primacy.

This proposition is best demonstrated by the *Chambers v Chambers* [2016] NZHC 583 case, which is highly relevant to this appeal and all our thinking on it. So, in that case Sir Robert and Lady Deborah had owned their property jointly. By the time of the last iteration of the Wills and the relationship property agreement, they'd owned their property jointly. They agreed that the survivor would have use of all the jointly owned property. They agreed that when the survivor died the four children, two from each marriage, would be entitled to an inflation-adjusted capped amount of up to 2.5 million of the pool. Then they did Wills which were entirely congruent with that outcome. In the first iteration of the relationship property agreement it said if the survivor chooses Option A or Option B it won't matter, the outcome will be the same.

So that is an arrangement, so very, very much an omnibus contract, which also has very real testamentary succession aspects and that was largely upheld by the High Court when it was challenged by David Chambers, one of Sir Robert's sons.

So, obviously the parties to that put a lot of thought into these different regimes, and how to make it work and, with respect, it's the only way to actually come out with something that works in all these different scenarios, and makes sense of them all.

And the other case which I rely on is the case of *Thurston v Thurston* [2014] NZHC 2267, which is also in the bundle, and that was a situation where

Mr Thurston and Colleen Thurston, not yet Mrs, had been in a long de facto relationship. The 2002 amendments were coming into force. He wanted to make sure she was adequately, she was a bit younger than him, he wanted to make sure she was adequately looked after upon his death, but didn't get the lot.

So in that situation there was a trust, the Thurston Family Trust. The death arrangements with that were that a sub-trust was settled which held 2.5 million which could be used for her provision after his death. There was a personally owned relationship property home at Sanctuary Cove in Queenstown under the Will. In the contracting out agreement, she was to receive that, plus I think it was two million cash on his death, then the rest of the assets were preserved in the Thurston Family Trust for his heirs and those arrangements were – and then there were congruent Wills and in the relationship property agreement, Mr Thurston agreed, she signs up to it, that in the event of his death she will always at least get cash of one million. By the time he's died, that's increased to two million.

So, very carefully constructed suite of ownership, contracting out and testamentary arrangements which all work together and so she was deemed – she chose – she was deemed to have chosen Option B by default, because she didn't make the choice in time, and then she issued proceedings applying to set aside the choice of Option B and said, I want to apply for default division under Option A, because she wanted, even though it was in a trust, she wanted to try and secure outright ownership of the home in St Heliers, which was a valuable home, and so Justice Toogood said, no, these arrangements stand, but he did make some adjustments under the Family Protection Act for her and also for the adult son of the first marriage and the three grandchildren.

So, two cases where lawyers or judges have grappled with this regime and that's what they've come up with. In my submission, that's what has to actually happen and should be the message to practitioners to actually make this all work, have a contract, have a congruent Will, both of you, and think really

carefully about your ownership structures, whether they're jointly owned, tenancies in common or, you know, goodness me, trusts.

COOKE J:

Just teasing it out a little bit more, so you can have an agreement where you each agree what each is your separate property and then you can agree that you will divide the property 50/50 on death and the only thing the other partner will get is a life interest.

MS BRUTON KC:

Yes.

COOKE J:

Now, that's clear, but you could after making an agreement decide to give the other partner more.

MS BRUTON KC:

Yes.

COOKE J:

You could in your Will say, actually I'm going to give half of my 50% share of the property to my de facto spouse, and that operates. But when you make no choice, which is what you say has occurred in this case, the other spouse can't claim more than what they're entitled to under the agreement, if that is what the agreement provides.

MS BRUTON KC:

Exactly, Sir, and when we were doing these submissions, I found the clauses in the submissions, I actually found an agreement in another case I'm working on, where the drafters had actually turned their minds to succession and they say, if there's a Will, survivor can take in accordance with the Will, or on Intestacy. So, in that case they've specifically turned their minds to the intestacy result and said, well, if there's no Will, yes, survivor can take on intestacy.

So the case for appellants is, well, that didn't happen on this case and on the correct construction of this agreement, she's contracted out of intestacy entitlements. But, yes, so it comes back to what's in the contract –

COOKE J:

Yes, so –

MS BRUTON KC:

And then the other related point is Wills are voluntary dispositions, so in accordance with testamentary freedom, you can give anything away.

COOKE J:

Right and I could gift some of my separate property to my partner as well.

MS BRUTON KC:

Exactly, Sir.

COOKE J:

So that would mean this case, we've got this issue about whether you can contract out.

MS BRUTON KC:

Yes.

COOKE J:

But it will come down to the interpretation of this agreement.

MS BRUTON KC:

Yes, yes, and Mr Walker and I were having this discussion last night, because we were a bit on the fence in our written submissions, but our position is we have thought about things more, is that if Mr Rimmer had left a Will, on the correct construction of this agreement, of course Ms Wilton could have taken under that because that is a voluntary disposition in the column 4, right.

COOKE J:

Yes, you weren't quite brave enough in your written submissions.

MS BRUTON KC:

Yes.

COOKE J:

If you are now brave, that gives a logical coherence to your argument.

MS BRUTON KC:

Yes .

WINKELMANN CJ:

So can you just repeat that?

MS BRUTON KC:

So on the correct construction of this agreement and our submissions are a little bit fudgy on this.

WINKELMANN CJ:

Yes.

MS BRUTON KC:

The appellants case is that if Mr Rimmer had left a Will, making a voluntary provision, so that’s beyond the contract.

WINKELMANN CJ:

Yes, yes, I understand the point.

MS BRUTON KC:

Ms Wilton would have been entitled to receive that.

WINKELMANN CJ:

After this agreement.

COOKE J:

After, yes.

WINKELMANN CJ:

Yes, and the question, yes, the interesting question, if it was before this agreement.

MS BRUTON KC:

Yes.

COOKE J:

Well, the only confusion of that would have been how that might have affected your interpretation of the agreement.

MS BRUTON KC:

Yes and what I actually did, I just stuck it because it was the only place I had any room, in the bottom left-hand corner of column 1, is I actually tried drafting something in a Will that would actually make this clear, which is: "I intend my partner to receive the provision in this my Will in addition to the jointly owned property she inherits from me by survivorship and in addition to her entitlements under the PRA or any agreement between us under Part 6 of that Act." So you're covering all your bases.

WILLIAMS J:

So one question might be if it's possible to contract out of the default provisions.

MS BRUTON KC:

On intestacy, Sir?

WILLIAMS J:

On intestacy.

MS BRUTON KC:

Yes.

WILLIAMS J:

It is obviously possible to contract out of the default provisions by a section 21 agreement. Should the rule be, for the sake of certainty in estate planning, you must do so expressly? So that we don't get this uncertainty?

MS BRUTON KC:

Well, you, I mean...

WILLIAMS J:

Or by necessary implication, of course?

MS BRUTON KC:

You see, with respect Sir, I don't think a little rule like that would work in practice, and so –

WILLIAMS J:

Well it might if all the practitioners know about it.

MS BRUTON KC:

But that's not the – there is no such rule at the moment, so the rules by which we are guided with interpretation of this contract are –

WILLIAMS J:

You're asking us to set the rules, that was your opening stanza.

MS BRUTON KC:

I'm asking you to lay down some principles, but that is not an available rule with respect for...

WINKELMANN CJ:

I mean, what you're saying is that we can't set a new subset of contractual interpretation because to do so would be an injustice because everybody has been ordering their affairs, but there's nothing to stop us saying it's obviously very sensible for people to.

MS BRUTON KC:

Yes, yes.

WILLIAMS J:

Saved.

MS BRUTON KC:

Thank you.

COOKE J:

Yes, in other words there's no little rule, we've already got a rule. It's quite a big rule, how you interpret contracts.

MS BRUTON KC:

Yes, exactly, Sir. So, shall I go on to – and so does that –

KÓS J:

I mean, that just seems, to me, to be the consequence of section 61(3) anyway.

MS BRUTON KC:

Yes.

KÓS J:

Which is you're entitled to your survivorship rights unless it's clear that you contracted out from them. And that's, as I say, is what this case, for all we're arguing about, is what this whole appeal is about.

MS BRUTON KC:

Exactly, Sir.

KÓS J:

Whether that's what they did or whether they didn't.

MS BRUTON KC:

Exactly, Sir.

KÓS J:

It's really one nice little issue.

MS BRUTON KC:

Yes, yes, that's right, Sir. So, there's all these big issues, but when you distil it all down –

WINKELMANN CJ:

Can you remind us what the Court of Appeal said then? Because having gone through this, it seems so compelling, that I'm trying to understand what the Court of Appeal came to?

MS BRUTON KC:

Look, I think I might leave that to Mr Walker.

WINKELMANN CJ:

Okay, excellent.

MS BRUTON KC:

Who is dying to get up on his hind legs.

WINKELMANN CJ:

He hasn't looked like he is.

MS BRUTON KC:

Look, and with respect to the Court of Appeal, that judgment is very, very hard to follow. But anyway, so I think I'm almost at the end.

WINKELMANN CJ:

You'll move on, then.

COOKE J:

Well, I'm not sure that's quite fair, because it's what – the only difference between you and what they've done is they are saying, if you don't make a conscious decision to give more property to your other partner, you must be

taken to have agreed that the intestacy provisions will apply, so you have in a sense elected that. That's the only difference.

MS BRUTON KC:

That is partly true, Sir. The other difference is that they said, well, I suppose that's right, because they said you'd need very, very clear words to contract –

KÓS J:

So, they applied Justice Williams' rule in advance.

COOKE J:

Yes.

MS BRUTON KC:

Yes.

KÓS J:

So, he may claim credit for it, but it's really Justice Mallon's rule.

MS BRUTON KC:

Yes, that is right. So I don't like Justice Williams' rule. Now –

KÓS J:

Or Justice Mallon's.

WINKELMANN CJ:

But it's not a personal thing.

MS BRUTON KC:

So now I think I'm up to core principle 7, which is the guts of this case. So, the first part of that is that it is possible to contract out of default rights on intestacy. There's no principle distinction between section 21 and section 21A agreements. A Will as a one-sided opt-out of default intestacy entitlements, the parties must be able to have a two-sided opt-out by contract.

WINKELMANN CJ:

And you have a lot of authorities, or texts really, Dobbie's and…

MS BRUTON KC:

Authorities there, yes, and the two that are the most important in my submission are, well, there's *Warrender* of course, which Mr Walker will talk about if necessary, but that did concern a section 21 agreement. So the *Gurly* case that I took Your Honours to –

WINKELMANN CJ:

Don't you have *Dobbie's* as well?

MS BRUTON KC:

Yes.

WINKELMANN CJ:

Which is the handbook for lawyers?

MS BRUTON KC:

Yes, yes, and it says you can contract out.

WINKELMANN CJ:

So that's, your point is –

KÓS J:

Well, yes, based on *Warrender*.

MS BRUTON KC:

Yes, and in the Canadian case of *Re Rist* (1939) 2 DLR 644 (ABCA), which also turned on a section 21A settlement agreement.

The other really useful authority worth a look, and it's obiter only, because this wasn't the issue before the Court, is the High Court of Australia decision in *Penny v Milligan* [1907] 5 CLR 349 (HCA) and there they said, yes, of course you can agree to contract out of intestacy entitlements.

COOKE J:

Doesn't the actual Administration Act also help you? Because section 81 is overtly a section which says you can disclaim what you're entitled to, so – and decree by way of specific performance would be, you must disclaim under section 81 to give effect to the agreement.

MS BRUTON KC:

But I think, I mean that is one of the issues and where I differ from the Court of Appeal is they said, well, to contract out of your intestacy rights you have to disclaim and, unless the contract was abundantly clear otherwise, you have to disclaim in accordance with that section. But we say, well, you don't even get to the disclaimer under section 81 in this case, and perhaps other cases, because she'd already contracted out of intestacy rights before death.

COOKE J:

Well, it may be the way in which you would give effect to that contractual promise, and in addition section 81(6) says: "Nothing in the section shall affect any right which any successor may have to disclaim any property apart from this section." So you can either say that's how you get specific performance of a contract, saying you are compelled to disclaim, or you could say the contract itself was another mechanism, by which you do not claim.

MS BRUTON KC:

Yes, and that brings me to actually one of my concerns in this case in terms of how it unfolded in the first place. So, Mr Rimmer dies 10 years ago – exactly to the day, tomorrow – leaves a widow, or a surviving partner, two adult children. Now, to my mind *Warrender* has come out by then. We have got, what, *Warrender* is 2013, we've got *Dobbie's*, what it has to say, so to my mind the lawyers advising her should have actually raised these questions, well, is she even entitled to apply for probate, and how on earth can she appropriate, having got letters of administration, how on earth can she appropriate to herself all his cash, and all his Bonus Bonds worth about $145,000, which were preserved as his separate property under the agreement I entered into, which was to bind executors and apply on death. At that point, the children should have been

notified and, I mean, we're very scant on the evidence here, but in terms of the evidence that is before this Court, children don't find out anything until 2021 when the house –

KÓS J:

I just don't think this is particularly relevant.

COOKE J:

Yes and I'm not sure it's before us, any of this.

WINKELMANN CJ:

Can you just, can I – because your submissions do cover some of this, what is – the decisions keep on saying, they're troubled, but it's not before them.

MS BRUTON KC:

Yes.

WINKELMANN CJ:

What is the status of the administration of estate? I mean, is it being challenged in some other forum, or is it awaiting the outcome of this decision?

MS BRUTON KC:

It is awaiting the outcome of this Court and then, depending on whether this Court decides you can deal with all of the construction issues including the subsidiary ones – so, I'm getting some headshakes here – then it might have to go –

WINKELMANN CJ:

Well, those subsidiary ones, were they before the lower courts?

KÓS J:

No.

MS BRUTON KC:

I mean, I didn't do the High Court hearing. I came on board later.

KÓS J:

Well, the High Court was a very –

WINKELMANN CJ:

Can I just ask Ms Bruton to answer the question. Were they before the other courts?

MS BRUTON KC:

I don't think so.

KÓS J:

No.

MS BRUTON KC:

Because what the cost statement in the High Court says was that the hearing took 45 minutes. There are some issues around the subsidiary points.

KÓS J:

It was a narrow question which isn't in front of us now.

MS BRUTON KC:

That's correct.

KÓS J:

On agreed facts.

MS BRUTON KC:

Yes.

WINKELMANN CJ:

So what would – so the status of the administration of the estate, what will happen should your appeal succeed?

MS BRUTON KC:

Well, I will be inviting this Court, well, what in the orders we've sought, we've invited the Court to determine that half the proceeds, which are still sitting there from the sale of the home, go to the children. There's – Ms Wilton has to account for the –

WINKELMANN CJ:

Well, we're unlikely to do the accounting. The implications of it are that she would, if you were successful, she would not – she would've been in *Warrender* type situation. She would not have been entitled to be an administrator.

MS BRUTON KC:

Correct, yes and she will have to account for the shares and Bonus Bonds and everything back to 2016 when she took them, plus use of money interest.

KÓS J:

Yes, but that's –

COOKE J:

I mean, and I can see the temptation of saying, please solve all the problems, but the reality is it would be very rare for this Court to pick up and decide an issue where we don't have the facts, we don't have a lower court decision, and there are going to be issues that have to be –

MS BRUTON KC:

Yes.

WINKELMANN CJ:

You'd be left with an action for money you hadn't received or something against her probably, or for an account, but I don't know if she'd – anyway, probably an action for money you hadn't received.

MS BRUTON KC:

So I won't push that barrow uphill.

WINKELMANN CJ:

Sisyphean.

MS BRUTON KC:

But that is the sort of analysis that needs to be conducted if this appeal is successful and if this Court is not prepared to do it, and I can fully understand why, then it will need to go back to the High Court probably, but if there's some principles laid out, I mean –

COOKE J:

It should be able to be resolved though.

MS BRUTON KC:

Exactly, Sir, and then another point, too, which Your Honours won't resolve, is Ms Rimmer's – Ms Wilton's team are merrily paying all their costs from the estate still, without permission, without agreement. We're all doing this on a pro bono basis, so –

KÓS J:

Again, I don't know why that's relevant.

MS BRUTON KC:

There is issues around that, too. So, all of this just demonstrates the need for guidance and if this Court is –

WINKELMANN CJ:

It would follow, wouldn't it, if she's not entitled to be an administrator, she certainly wasn't entitled to be paying her fees out of the estate.

MS BRUTON KC:

Correct, but Nigel Rimmer is in court today. You know, he's waited 10 years and hasn't seen a cent from his father's estate. So, these are very, very interesting issues of principle to all practitioners, but let's not forget they concern real people and any amount of money for my clients would be life-changing.

So, I am almost done here. That brings me back to the search for cohesion and clarity, almost at the end. Point 8, the contractual primacy choice approach makes sense of all six statutory regimes, and respects contract, legal ownership and testamentary autonomy. There is no prohibition on double-dipping where that is intended by the parties. Absolutely fine.

Core principle 9, clearest outcome – we've done this – most likely to be respected on death are those where clients, with legal assistance, have exercised autonomy over the three voluntary regimes and prepared a package deal dealing with legal ownership, a PRA contract, or omnibus contract, and Wills, which are all congruent, as demonstrated by the *Chambers* and *Thurston* cases.

COOKE J:

Can I just ask one question, this is – the life interest that is granted by the agreement, does that mean that she would have been entitled to be administrator on your argument, because it is a form of entitlement?

MS BRUTON KC:

No.

COOKE J:

Is that you have to be beneficially entitled more than a right of occupancy?

MS BRUTON KC:

She'd have to have a beneficial interest on the intestacy. I say she doesn't. So, that life interest is the same as the *Gurly* case, it's a contractual entitlement, not an intestacy entitlement.

COOKE J:

Okay.

MS BRUTON KC:

So I might hand over to Mr Walker now, unless Your Honours have any questions for me?

WINKELMANN CJ:

You go ahead.

MR WALKER:

Tēnā e te Kōti, I've got 10 minutes before the break, Your Honours, I will crack on.

And so if the Court is with us, that the parties can contract out of intestacy entitlements prior to death, the obvious and essential question is, did they do that here? We submit that they did and if Justice Williams' rule were the law, that they did use the very –

WILLIAMS J:

It wasn't my rule.

MR WALKER:

That they did use very, very clear words –

WINKELMANN CJ:

Now you're disclaiming it.

MR WALKER:

Very, very clear words and that's the only interpretation of the contract that we say makes sense.

I will address the Court under five headings: first, the relevant legal principles, Mr Cooke's big rule about – Justice Cooke's big rule about contractual interpretation, rather; the second, the procedural points made by the respondent; third, the correct construction of the agreement; four, some responsive points; and then I was planning on dealing briefly with the subsidiary

construction issues but I shan't given the very clear steer by the Court now, but they still are advanced formally by the appellants.

WINKELMANN CJ:

Well, I mean, I'd like to hear maybe why you think we can deal with it, but you can come to that at the end.

MR WALKER:

I will, Your Honour. So, the principles of contractual interpretation are well-settled, I don't propose to dwell on them. I'll take the Court very briefly, if I may, to *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 which is tab 22 and I believe Ms Trezise will bring it up now, paragraph 43 of *Bathurst, q*uoting from *Firm PI*: "[60] … the proper approach is an objective one, the aim being to ascertain 'the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'." And just at the end of that indented paragraph 60: "… the context provided by the contract as a whole and any relevant background informs meaning."

So those general principles of contractual interpretation are equally applicable to section 21 agreements as well as to Wills and Trusts and there is two useful cases referred to in the section of the roadmap and the submissions which are *M v H* [2018] NZCA 525, [2018] NZFLR 918, a Court of Appeal decision from 2018, and *Harrison v Harrison*, a 2015 High Court decision which did go on appeal but this issue wasn't discussed. I'll go briefly to *M v H* –

KÓS J:

Can I ask you how we are supposed to deal with this? I mean, you know that I like the objective approach to contract interpretation, but in this case we have no evidence, we have no evidence from Ms Wilton as to the background to this, and we have no evidence from the Rimmer children as to the background to this, to the extent they could give any, because the question that went to the High Court was a legal question and not the question this Court is now seized

with. So, we seem to now be trying to interpret a contract by reference to what the parties' common intention is, without any really clear factual matrix evidence.

MR WALKER:

Yes, Your Honour, we obviously do urge this Court to answer the question of contractual interpretation and we say you safely can, respectfully.

KÓS J:

Why can we safely do so?

MR WALKER:

A number of points. First, in distinction to *Bathurst*, for example, this is not a case where there would have been a definitive feasibility study which is one of the core contextual factors relied on by the parties in the *Bathurst*. There's not expert evidence as to the meaning of the word "shipped" as there was in *Bathurst*.

WINKELMANN CJ:

Is your answer, Mr Walker, really that it's an objective exercise?

MR WALKER:

It's an objective exercise that further contextual evidence wouldn't add much to the interpretive exercise. I'll come to that.

So the first point, Your Honour, is that we submit further contextual evidence wouldn't add much to the interpretive exercise. The contract is clear, we submit, I will come to that.

Second, it's not clear that there would be much further contextual evidence available to the Court. Your Honour has talked about potentially evidence from Ms Wilton. It's unlikely that the children would have any real evidence about the circumstances of the signing of the contract.

WINKELMANN CJ:

And it would be problematic if the surviving partner wants to tell us what the contract was intended to achieve.

MR WALKER:

Quite. Her declarations of subjective intent would be not relevant to the objective exercise.

KÓS J:

So what sort of disclosure, for instance, was there on the legal question?

MR WALKER:

So, Sir, I wasn't acting in the High Court, Sir, but I understand there was effectively no disclosure. It proceeded by way of agreed statement of facts.

KÓS J:

I mean your best point seems to be this point is not really much taken by the respondent's bit.

MR WALKER:

Yes, there was not very much taken by the respondent, and there also were, I understand, enquiries made in the Court of Appeal about accessing the solicitor's files, which could potentially have shed light on the objective intention of the parties. My understanding is that no one could locate those solicitor's files. Mr Blank, who was the solicitor for Mr Rimmer is deceased, and a Mr John Gray who acted for Ms Wilton later joined the current instructing solicitors for the respondent, and the instructing solicitors for the respondent advised that they had no relevant files. So, my submission, Sir, would be even if we did go and try and find that evidence, we might not be able to get much.

COOKE J:

So, we've got all the relevant context in the agreed statement of fact?

MR WALKER:

My submission will be we have all the relevant context in the agreed statement of facts. We have a clear agreement, and we have the wider context provided by the statutory schemes which will assist Your Honours.

COOKE J:

Well, we don't have a completely clear agreement. You'd have to accept there is a degree of ambiguity about it.

MR WALKER:

Yes, there is a degree of ambiguity about it, Sir, but when I read clause 5.1, which I will come to in some granular detail, when it refers to any claims under any statute whatsoever, I say it means what it says on the tin.

COOKE J:

Sure.

MR WALKER:

And this point was argued in the Court of Appeal, and decided by the Court of Appeal. The Court of Appeal concluded that it could safely do that without prejudice to either party, and we urge this Court to take the same approach.

Yes, picking up on Your Honour's point, it's not quite clear whether my learned friends say this Court shouldn't rule on the contract as a result of these issues, or whether they are just making complaints about the procedural points that have been fairly raised.

So I think, Your Honours, based on those questions, we've now dealt with my first two topics, which is the relevant legal principles, and those procedural points made by the respondent.

I will start on the agreement in the time I have left. If I can take Your Honours to 301.001, which is the agreement itself, and before talking about the terms, the appellants submit that this is a reasonably orthodox section 21 agreement

for a second relationship. That's intended to define and demarcate property that is up for grabs, and property that is to be protected.

COOKE J:

Do we know to the extent to which this is a standard form? Obviously it's a Short & Co standard form, but is there a standard New Zealand Law Society agreement or…

MR WALKER:

There are various standard forms available on different databases.

WINKELMANN CJ:

Well, there's one in the Regulations, isn't there, but it's very vestigial.

MR WALKER:

Yes, and much of this is consistent with other section 21s I have seen. In terms of recital E, for example, that just repeats what is in section 21D: the defining and demarcating what is separate property and providing that that would be kept separate, very standard; defining and demarcating relationship property and divvying that up, standard; and then a full and final settlement clause, very standard.

So we submit there's an underlying protective intent that is the purpose or aim of this agreement, consistent with that second relationship context, and it was, in fact, Ms Wilton, who brought greater assets to the relationship, so if anyone got the benefit of that it was actually Ms Wilton, and that point is borne out in the terms of the agreement itself, because the schedules listing the separate property of each of the parties includes a house for Ms Wilton, that is separated out as her separate property, and Ms Trezise can take us to that. All schedules are on one page. It's a model of brevity, this agreement.

KÓS J:

It's not exactly a model of an agreement, though.

MR WALKER:

What was that sorry?

KÓS J:

It's not exactly a model of an agreement.

MR WALKER:

Correct, Sir. There are some issues with it.

WINKELMANN CJ:

All right. Well shall we take the morning adjournment Mr Walker.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.47 AM

MR WALKER:

Picking up where we left off, Your Honours, with the terms of this agreement. I wanted to briefly describe the structure of it before focusing my submissions in on clause 5.1 which I say is the central clause.

So first, conceptually, we have separate property. The agreement defines quite broadly what separate property is and then that separate property is protected very thoroughly and carefully. I won't go into the language in clause 2.1 but it has extensive protection provided to that property. Quite interestingly, we have clause 3.1 of the agreement as well, which deals with the concept of intermingling, which is a concept in the PRA itself, and what this clause does is provides additional protection for the person whose separate property it was but providing them with a charge over intermingled property to secure the benefit of that property.

So we submit that this very strong protection of separation property is consistent with a second relationship agreement where the parties are looking to define and demarcate what's up for grabs and what is not.

Your Honours will have seen, and I will come back to it, clause 2.1 provides that the parties will make "no demand" on the other's separate property and I will come back to the word "demand" in more detail.

So after dealing with separate property in clause 2 and 3, the contract deals with relationship property, and clause 4, it quite narrowly defines that property. It is effectively limited to the house they shared, and chattels, and it turns out over the 14 years or so between the signing and Mr Rimmer's death, they didn't actually acquire any other relationship property so the agreement served its purpose in that regard.

The agreement – the property that is relationship property is the property that is up for grabs and then that quite narrow class of relationship property is dealt with somewhat unusually. Unusually in two senses. First, clause 4.2 provides that relationship property is not shared equally, which is the default, but instead by reference to capital contributions. Again, that is protecting the initial assets that these people brought to the relationship. There is a buyout regime in clause 4.3, which is I think largely…

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KÓS J:

Well, that protects Ms Wilton primarily, doesn't it?

MR WALKER:

Yes, precisely, Sir, precisely.

KÓS J:

Yes.

MR WALKER:

Yes and then clause 4.4, the survivor on death is granted a life interest in all relationship property, effectively in the home, and the intent of this clause, of

course, is to ensure that the survivor isn't kicked out of the home so that it's sold.

And we submit that clause 4.4 is quite an important one in the present context. It clearly shows the parties were dealing with matters other than relationship property in the strict sense. It is an omnibus agreement and the parties had turned their mind to what would happen on death. They had decided that the only thing they would give, by virtue of this clause, was a life interest in the property.

COOKE J:
So that the only word that's missing, from your perspective, is the word in the first line: "... the remaining parties shall [only] have the right..." would help you out, but that's what you say it means.

MR WALKER:
Quite, Sir, and I say that that interpretation is a natural consequence of reading the agreement as a whole and in particular clause 5.1.

WINKELMANN CJ:
Well, are you taking us – have you taken us to the recitals?

COOKE J:
Yes, because it's recital E(c) that actually is critical, isn't it?

WINKELMANN CJ:
Because isn't that your starting part?

MR WALKER:
Yes.

COOKE J:
E(c) is critical because it tells you what 4. –

WINKELMANN CJ:

Isn't that your starting point?

MR WALKER:

Yes, yes, and so we did, I thought we had addressed the recitals briefly in my 12 minutes before morning tea.

WINKELMANN CJ:

Well, it was just such a flying – well, I mean, I would have thought it's where your starting point is. It was so fast, I hardly noticed it, Mr Walker.

MR WALKER:

Okay, well...

WINKELMANN CJ:

So if we go back to your starting point, E, so?

MR WALKER:

They're: "... [entering] into a contracting out agreement pursuant to section 21 of the Act, with respect to the status, ownership and division of their property (including future property) which is to provide [for a number of things] ...". As I said, these largely track the purposes that are set out in section 21D of the statute and most importantly (c) is: "...[defining] the share of the relationship property, or any part of the relationship property, that the survivor of Caroline or David and the estate of the deceased partner is to be entitled to on [death]."

WINKELMANN CJ:

And so that's not an ancillary purpose, it's a purpose all of its own.

MR WALKER:

Quite, Your Honour, quite. And so we submit that that is an important contextual indicator when one comes to interpreting the substantive provisions in the contract.

COOKE J:

Which is why you read it for the word “only” is implicit.

MR WALKER:

Quite, Sir, quite. The remainder of the purpose is reasonably self-explanatory, Your Honours, so won't dwell on it any further.

So, we’ve got this purpose in mind, we’ve got a vigorous protection of separate property, demarcation of relationship property, and then a testamentary decision about the creation of a life interest, and we then get to clause 5.1: “...subject to the provisions of this agreement the parties agree that this agreement shall be in full and final settlement of all claims which each of them may have against the other under any statute whatsoever or at common law or at equity.”

And we submit that that language is deliberately and extraordinarily broad. The Administration Act is, of course, a statute and we submit that claims under the Administration Act are barred by it and I will come to the claims entitlements distinction, Your Honours.

WINKELMANN CJ:

And this clause looks a lot like the one in *Warrender*, doesn’t it, and maybe in the other case that’s referred to in *Warrender*.

MR WALKER:

Yes, Your Honour, it's almost identical. I believe the *Warrender* clause said “claims and rights” and then the *O’Donoghue v Comia* [2023] NZHC 2735 one, the *O’Donoghue* case, just uses the word “claims”.

And so we say here the parties did turn their mind to what would happen on death. They decided to give a life interest and otherwise they give up all claims that they might have.

And there's quite an important clause over the page which I will briefly mention now and then I'll come back to 5.1, that's clause 6.1, which confirms that the agreement is binding on the executors or administrators of the estates, once people have died, of course.

And we submit that this is a helpful clause when one is looking at the rest of the agreement because it shows, again, the parties had turned their mind to what would happen on death and they wanted this to apply in those circumstances.

COOKE J:

And you would accept 5.1 would not prevent one or other of the parties making further gifts to the other?

MR WALKER:

Quite, Sir, quite.

COOKE J:

Yes.

MR WALKER:

Because a gift under a Will is not a claim under a statute, or at common law, or at equity, which is excluded by clause 5.1.

COOKE J:

It wouldn't have – not just in Wills, but just generally I could have given some of my separate property to the partner and it would be effective as a transfer.

MR WALKER:

Yes, but this sets the binding contractual framework in which they were going to operate. Now there's another point made against the interpretation of clause 5.1 that the appellants advance.

KÓS J:

The respondent?

MR WALKER:

What was that sorry?

KÓS J:

Are these points you're making, or the respondent is making that you are responding to?

MR WALKER:

Points that the respondent makes to which we respond, and also that the Court of Appeal made, because the respondent largely adopt the Court of Appeal reasonings, so I'm doing a little bit of pre-rebuttal by way of responding to the Court of Appeal judgment.

The respondent submits that this clause is boilerplate language, this clause being 5.1, included to comply with the requirements of section 21D of the PRA, and so that's what they say, my learned friends for the respondent, at paragraph 8.5, and that's not correct. Section 21D of the PRA does not mandate the form of a release. Nothing of the sort. It deals with what can be included in a section 21. And we'd also submit that the fact contractual language is boilerplate, does not mean that it is any less binding on the parties. I'm not aware of any rule of construction to that effect.

So on this claims versus entitlements distinction, the Court of Appeal held that the word "claim" was "an inapt description … [of] intestacy entitlements" under the Administration Act. The argument is that it was only claims that were given up, not an entitlement, and so they draw quite a sharp distinction between those concepts.

Now we submit that by clause 5.1 the parties were giving up all rights, claims, interest that they might have in the others property, and that that's the only sensible to read this clause, and the only correct way to read this clause, and that was in favour of the asset planning bargain they have struck. So at a conceptual level we say "claim" is sufficiently broad enough to include all of those. If one needed to draw a technical legal distinction that was unlikely to

be in the minds of the drafters. A claim is the procedural vehicle by which one enforces or pursues an entitlement or a right, and we see that most starkly, of course, in the limitation context, Your Honours.

So, section 43(b) of the Limitation Act 2010, which is not in the bundle of authorities, it must have been the only statute that didn't make it into the voluminous bundles but we'll file it over lunchtime, and I'm sure everyone in this room is well familiar with how limitations work. Under section 43(b) it's a defence to a claim if one has a limitation defence, but that does not distinguish the underlying entitlement interest, right or title. So one may have an entitlement, but no ability to pursue it by way of a claim as a result of the Limitation Act.

There are, of course, a wide range of entitlements provided by statutes. Entitlements are generally seen as a chosen action. It's enforced by way of a claim or an ordinary action. A good example that's dear to my heart for other cases I'm involved in, is the *Earthquake Commission v Insurance Council of New Zealand* [2014] NZHC 3138 decision, with the full Bench of Justices Kós, Heath, and Gilbert, and one issue in that case was how are entitlements, statutory entitlements, enforced against the Earthquake Commission? They are entitlements, they're not discretionary, if you meet the criteria you get them, and what the Court said, quite correctly in my respectful submission, is that you enforce that entitlement by way of a claim and so we submit that in this agreement "claim" must include any mechanism of enforcing a right, an entitlement, or an interest.

COOKE J:

Of course under the Administration Act you don't actually have to make a claim because the Act says you get it. But you do, interestingly, disclaim your right.

MR WALKER:

Quite, Sir, and that's a point made by my learned friends for the respondent, of course, and my respectful submission is that that confuses the, or conflates the mechanism of distribution under the Administration Act with the underlying

entitlement, and so the "must" is an instruction to the administrator as to how they must do things, but that is dependent on the existing of the entitlement or not. So if one has given up that entitlement by way of a full and final clause, the administrator is not required to distribute in that manner.

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WINKELMANN CJ:

Well, you could say, actually, if someone is making the claim under section 60, because they have the choice not to do that, couldn't you – section 61, sorry, you could say that that is what's happening.

MR WALKER:

Yes.

WINKELMANN CJ:

By electing to – by making election B, you're pursuing that aspect.

MR WALKER:

Sorry, Sir, and sorry, Ma'am, I don't quite follow that point.

WINKELMANN CJ:

Because it's not necessarily automatic because of the operation of the PRA is – can remove the right.

MR WALKER:

Yes, of course, Ma'am. There is multiple ways to get out of it. There's the disclaimer after the fact. There's obviously the choice in section 61.

WINKELMANN CJ:

So my point is, you could construct the choice in section 61 as pursuing a claim under that Act as opposed to under the PRA.

MR WALKER:

Yes.

COOKE J:

Also, you interpret these words purposively, because the word "claims" is used but it goes on: "... under any statute whatsoever or at common law or at equity." So it's intending to be comprehensive.

MR WALKER:

Quite, Sir, and the whole purpose of this agreement, of course, was to give up entitlements under the PRA and they are often referred to as entitlements, what one is entitled to under the PRA, sometimes the language of rights is used, rights and entitlements, but there is no suggestion that this clause didn't fully and finally settle entitlements under the PRA, so it would be quite odd if that's all this clause did and so what we submit that the interpretation that's advanced here, it's in the roadmap, is you have to add some quite big words into the clause. It has to say any statute whatsoever (except under the Administration Act) and we submit that's quite a difficult reading to take of this clause.

KÓS J:

Well, I'm not sure about that. If you read clause 5.1 on its own, it seems to me you could read that as simply defining the parties' estates at the point of death.

MR WALKER:

Clause 5.1 Sir, or clause 6.1?

KÓS J:

No, clause 5.1.

MR WALKER:

Yes.

KÓS J:

The provision of the contract we're looking at.

MR WALKER:

Yes.

KOS J:

The problem for the respondent is recital E(c) which suggests you can't read clause 5.1 as narrowly as that. That it actually does extend to dealing with succession rights.

MR WALKER:

Yes, I –

KÓS J:

The question I suppose then is, if clause 5.1 has the effect that you say it has, does that effectively oust Option B. I mean, they've got to do something, so what option can you choose.

MR WALKER:

No, I don't believe it does oust Option B or Option A, Sir.

KÓS J:

Well, it does not oust Option A, certainly.

MR WALKER:

Sir, the point we make in our written submissions is that Ms Wilton could either choose Option A and try and challenge the agreement or she could choose Option B, but when she chooses Option B –

COOKE J:

She's not entitled to more than what the agreement gives her.

MR WALKER:

Yes and so that's the point that my learned senior Ms Bruton made, that although the Law Society says you contract, you get out of section 61 option entirely, now we don't agree with that, but the practical result is quite similar, because if one chooses Option B, one doesn't have any Intestacy entitlements.

Now, of course, if there were a Will and one were to choose Option B, then you would be able to, on this contract, take under the Will and take what you are provided for under the agreement.

WINKELMANN CJ:

But if the Will was earlier than this, you might read this as a disclaimer of provisions under the Will.

MR WALKER:

Yes, one might.

COOKE J:

There are other variations too. Look, this agreement appears to deal with future property but maybe there was some property that was obtained after this agreement was executed that might have to be dealt with under the intestacy provisions.

MR WALKER:

Yes.

COOKE J:

So, if the agreement didn't deal with future property and if someone won Lotto, that might have to be distributed under the intestacy provisions.

MR WALKER:

Quite, Sir, quite. One thing has become clear in preparing for this and there's any number of permutations.

So I'll comment briefly on the reasoning of Justice Woodhouse in *Warrender v Warrender* which is at tab 38 and the argument made there by the plaintiff was that by contracting out of rights the survivor had failed to contract out of entitlements and at paragraph 36 his Honour Justice Woodhouse says, in the final sentence of that paragraph: "There is nothing in the distinction." And then over the page at paragraph 40, Justice Woodhouse says: "... the agreement as

a whole is wider. A settlement of all claims against Mr Warrender, as provided in cl 21, is plainly intended to include claims of any nature to any of the property of Mr Warrender."

Now, my learned friends for the respondent tried to distinguish *Warrender* because they say the contents of that is a separation agreement, a settlement agreement, rather than something done in anticipation of an ongoing relationship and we don't accept that that distinction is a meaningful one in this context. The contracts should be interpreted in the same way and the parties should be held to their bargains.

COOKE J:

The surrounding circumstances will be different but you're still applying the approach to, a normal contractual interpretation approach.

MR WALKER:

Quite, Sir.

WINKELMANN CJ:

I mean, you might think that there's more of a tailwind for your argument if it was at the termination of relationship when people are sorting things out between them.

MR WALKER:

Yes, yes, that could be the case, Your Honour. And a similar conclusion to *Warrender* was reached in *O'Donoghue v Comia.* I won't take Your Honour's to that case, it is discussed at paragraph 4.33 of our written submissions, and there the Court concluded that claims included entitlements on intestacy and that was in the absence of a provision saying that the agreement would apply on death. So it's quite a helpful case, I think, for the appellants, that one, Your Honours.

So responding now to a few of the points made, further points made against this. So, the Court of Appeal in this case buttressed its quite narrow reading of

clause 5.1 at paragraph 60 of its judgment and if Ms Trezise could bring that up, please. And what the Court said is: "... that cl 5.1 was intended to address the potential for common law and equity to apply, for example if the de facto relationship lasted less than three years." I believe it was just over the page, the final sentence of that. And as we understand the Court of Appeal's sentence here, the PRA is a code and it applies in place of common law and equity, that is what section 4(1) says; however, that is not the case for relationships of short duration, for less than three years and the rules of common law and equity continue to apply.

And so, as I understand the Court of Appeal, here it is saying clause 5.1 is intended to capture those potential common law and equity claims that might exist for a relationship of short duration. Now, we would agree that such claims are ousted but it means that the words "any statute whatsoever" do effectively no work, it gives no meaning to those words, and so we submit that that is not a reason to read down this clause.

WINKELMANN CJ:

So your point is that this agreement was meant to be, it's not, that clause is not setting up a limited contracting out, it's setting up a code.

MR WALKER:

Quite. It's the parties making their private code, as they're entitled and as Ms Bruton said encouraged to do, and they'd already been, as Ms Bruton said, they'd already been together for two years by this point so there was only 12 months left of a potentially short duration relationship, so we find that a very strange interpretation, with respect of this clause.

KÓS J:

Can I ask just one background fact which is not stated in the agreed statement of facts. Does Ms Wilton have issue? Is that, do we know that fact? Is that, we are able to say?

MR WALKER:

Yes, I believe she does, Sir, yes.

KÓS J:

Does have issue?

MR WALKER:

Yes. Maybe my learned friends – children, yes.

KÓS J:

Well, I was using the Administration Act provision, so you knew why I was asking the question.

COOKE J:

And sort of in a way the related issue and I think this might be the more important point is whether, because you accept that he could have given her more by way of a gift or by way of a Will, is the argument that deciding to let his estate being dealt with by intestacy he is, in effect, making a choice to give her more?

MR WALKER:

So, my learned friends for the respondent say at a couple of points in their written submissions that the default regime under section 77 is the presumed intent of the deceased.

COOKE J:

Yes.

MR WALKER:

Now, we don't accept that, Sir. That the cite they give, that my learned friends give for that, is actually the Law Commission Report in 2017 which doesn't say that at all, it says it's what an average person would be expected to do with their estate. So there isn't some deeming by which what the State has imposed in a default regime becomes the wishes of the deceased.

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COOKE J:

So no one uses that language.

MR WALKER:

Sir, there is one case, Sir, that the respondent cite *Lynch v Lynch* (HC Napier, CIV 2006-441-000242, 20 December 2006, Frater J) and it does use those words, the presumed intent. We submit that case is actually talking about a very different issue. It is trying to find intent for the purposes of the FPA in the context of a Will that had been thrown over by a marriage that had been entered into. It is not espousing a principle of law that what the Administration Act is, is the presumed intent of the deceased.

WINKELMANN CJ:

Well, you would submit that's not, that would be a very strange principle to adopt, since the Administration Act normally applies when people have failed to exercise any choice.

MR WALKER:

Quite, Your Honour.

COOKE J:

And we don't know why. We don't know why he didn't make a Will.

MR WALKER:

We do not know why.

COOKE J:

He may have been – may not have known how to resolve a problem. He may have thought the agreement dealt with it.

MR WALKER:

He may have been anti doing a Will.

COOKE J:

He may have been happy that the Administration Act would deal with the way, but we just don't know.

MR WALKER:

His estate was relatively modest. He may have thought, I have protected myself via this contracting out agreement, I'm happy for intestacy to run its course, we simply don't know.

COOKE J:

And in the end, we don't go into actually what his subject of intention was, we just look at what he did.

MR WALKER:

Quite. I'm very mindful of time and I'm mindful of my learned friends for the respondent wanting to get up on their feet.

WINKELMANN CJ:

So, do you have anything else to say on the substantive point? Because I did just want to understand the basis on which you say we can deal with those ancillary points?

MR WALKER:

I have a few further points to make on the contract, that's –

WINKELMANN CJ:

Okay, well, carry on then.

MR WALKER:

Cool. So very briefly, my learned friends and the Court of Appeal say that clear words would have been needed to override the mandatory terms of section 77 of the Administration Act and we submit, of course, that clear words were used and that there's no higher standard when one is interpreting this clause.

Again, my learned friends in the Court of Appeal make various comments to the effect that the agreement didn't purport to place any other limit on what each of the parties could do with their estate and we accept that, but we say it's not the question that's before this Court or that was before the Court of Appeal.

And relatedly, my learned friends also submit that our approach must apply equally to all the succession entitlements and that's not accepted for the reasons we have already addressed between bench and bar. We accept that if there was a Will then Ms Wilton would have benefited pursuant to that.

And the outcome of the interpretation and approach taken by the Court of Appeal, Your Honours, is that the protections afforded by this agreement to each party's separate property are completely undone because Ms Wilton is able to take her benefits under the agreement, including the quite material protection of her separate property which absent the contracting out agreement there would have been every chance of it becoming mingled over the course of a long-term relationship, so she keeps all of her separate property, gets the relationship property benefits under the agreement and then also gets via the intestacy entitlements, so we submit they're entering into a comprehensive deal and that the purpose in effect of the document, read as a whole, was to limit her entitlements.

KÓS J:

I mean, you can't actually personify it in terms of her, it protects each of them.

MR WALKER:

Quite, quite.

KÓS J:

And in this context, we have a situation where she is the older of the two, she has children and she has more property.

MR WALKER:

Yes.

WINKELMANN CJ:

What is the age?

MR WALKER:

I'm not sure, Your Honour.

KÓS J:

I think I'm right about that.

MR WALKER:

Mr Rimmer died when he was 66, but I can come back to Your Honour on the other ages.

And so in the written submissions, we did do a cross-check of what would happen if Ms Wilton had died first and Mr Rimmer, so completely take your point, Sir, that it can't be personified as she, it is both parties that get those protections. What that cross-check demonstrates is that he would have done remarkably well under this interpretation if she didn't leave a Will.

So those are our submissions on the construction of the agreement itself. Very briefly on the subsidiary construction arguments, which is how one interprets clause 4.2 and how one interprets clause 4.4.

WINKELMANN CJ:

So, what I want to know is not what the arguments are, we can read those, but how they're before us.

MR WALKER:

Yes, Your Honour, and they – accept entirely they weren't used raised in the first instance, they weren't pleaded. They were addressed in the Court of Appeal hearing, but the Court of Appeal declined to rule, as Your Honours will, of course, seen. The submissions that we make on this front are that the parties need finality. It's been almost 10 years. This estate can't sustain another 10 years of litigation. It couldn't sustain 10 years of litigation to begin with.

The interpretation that we advance of the life interest, in particular, in clause 4.4, is very important, because if the respondent is correct as to the interpretation of clause 4.4, then Ms Wilton gets the benefit of Mr Rimmer's half-share in that property until she dies. That property has been sold and so there is cash sitting there now, $600,000 that we say belongs to the estate. It's a very powerful, powerful life interest if she's able to have –

WINKELMANN CJ:

I mean, life interest used to be absolutely redolent throughout the law. That's how husbands dealt with their wives in the earlier iteration, earlier ages. Is there not clear law on this?

MR WALKER:

There isn't Your Honour. We did look into it, and it's actually just a matter of contractual interpretation –

COOKE J:

Yes.

MR WALKER:

– how does one read clause 4.4? And so for all of the reasons, we say Your Honours are equipped to interpret the contract as a whole, we say Your Honours are equipped to interpret clause 4.4.

There's a final point on that, which is my learned friends raised the spectre of the FPA claim, if the interpretation that we advance is adopted. Now, we submit –

WINKELMANN CJ:

Just on the previous point. When these proceedings were started, I assume she hadn't sold the property, had she?

MR WALKER:

No, the property was sold in – yes, the property was sold in 2021 Your Honour.

WINKELMANN CJ:

So when did the proceedings start?

MR WALKER:

In 2022, I believe. Yes.

WINKELMANN CJ:

Okay.

MR WALKER:

Because I believe that was the genesis for the whole proceeding, that the property had been sold and the children were wondering, you know, whether they might get some money from their father's estate.

WINKELMANN CJ:

Now, your next point?

MR WALKER:

The final brief point was my learned friends for the respondent raised the potential for an FPA claim if the interpretation that we advance is adopted. Now, we submit that there's no possible FPA claim because that's been contracted out of by virtue of clause 5.1, and the reason for saying that here, Your Honours, is there is the potential to bring this largely, or hopefully entirely, to an end by ruling on the construction of the agreement in terms of contracting out of intestacy entitlements, and determining how this life interest is dealt with. That will largely bring things to an end. There may be some accounting and cost issues, but they will be relatively modest in the scheme of things.

WINKELMANN CJ:

How are FPA claims contracted out by clause 5.1?

MR WALKER:

Because a FPA claim is a claim “under any statute whatsoever”.

WINKELMANN CJ:

But it’s not for them. Are you talking about the Family Protection Act?

MR WALKER:

Yes, yes.

KÓS J:

By her?

WINKELMANN CJ:

Oh, by her?

MR WALKER:

Yes. And I'm sure my learned friends for the respondent will say you cannot contract out of the FPA. Now, we accept that this issue is not squarely before the Court as well. We submit you clearly can, there’s no statutory bar to it. In the same way that one can contract out of section 77 of the Administration Act, you can contract out of the FPA.

COOKE J:

Well, isn't the other point that she’s already getting half, a little bit more than half actually, of the joint property anyway?

MR WALKER:

Quite.

COOKE J:

And keeping her separate property.

MR WALKER:

Our written submissions also address the clause 4.2 adjustments, that is whether the clause 4.2 capital contributions applies only on inter vivos separation or just on death.

WINKELMANN CJ:

That's another subsidiary construction argument.

MR WALKER:

Quite, yes.

WINKELMANN CJ:

I mean, I really do think you are taking a – it's a bold attempt to get us to do something which has not been pleaded and hasn't been tested in the lower courts. I understand this, the justice points you raise, but it's just procedure, you know, is there for fairness.

MR WALKER:

Understood, Your Honour. Unless there are any further questions, those are my submissions.

WINKELMANN CJ:

Mr Elliott.

MR ELLIOTT:

Thank you, Your Honours. Through no fault of his own, counsel –

WINKELMANN CJ:

Now, you might have to move your microphone closer, because it is very...

MR ELLIOTT:

Through no fault of their own, the appellants have run over a little so I will try to make up the time.

WINKELMANN CJ:

No, that is our fault, I think you are implying there, Mr Elliott.

MR ELLIOTT:

In short, this case is not as complicated as the appellants make out and indeed it can't be that complicated. These are rules and regimes that need to be simple, easy to follow, because every case is not a *Chambers v Chambers*. You cannot spend, you know, tens of thousands of dollars on legal advice and perfect contracts and so on. This is the nuts and bolts, the bread and butter, of estate practice across the country.

I have handed up a road map there. I'll just make a start on that. You'll see I am going to deal with some introductory matters, the legislative history and the contract and my learned friend Ms McGuigan is going to deal with the broader question of whether, even if you agree, contracting out of the intestacy regime is compatible with the Administration Act. And although I understand that may seem a bit back-to-front, we have dealt with it that way because of the procedural issues arising from the latest case that has been advanced which I will come to in a minute.

The first thing that I would like to address is Ms Wilton. So, Ms Wilton couldn't be here today. She is 79, she turned 79 last week, I believe, and she's old and she lives on Waiheke now and it was too far to come. I have endeavoured to explain the livestream and my sincere hope is that she is watching that. Ms Wilton has two daughters, one of whom is with her there, Bronwyn, and Rosalind Wilton is in the back of the court today. She wanted to make sure there was a presence here and the reason for that is my next point.

This case, from the outset, has been characterised by a degree of vitriol directed at Ms Wilton personally. While that might be understood from, you know, the emotional component of the family, my learned friend is –

WINKELMANN CJ:

Well, we don't really have evidence about that. I don't know that it is a proper submission to make.

MR ELLIOTT:

That what, sorry, Your Honour?

WINKELMANN CJ:

About vitriol. It's not a proper submission to make, because how are the appellants to respond to it? Is there –

MR ELLIOTT:

Your Honour, this is about what the appellants have alleged.

KÓS J:

There was a degree of it this morning.

WINKELMANN CJ:

I don't think there was, actually.

MR ELLIOTT:

Yes, so my learned friends' written submissions throughout this proceeding have variously accused Ms Wilton of keeping Mr Rimmer's share of the property sale proceeds for her own profit, denuding Mr Rimmer's estate, helping herself to so much, having her cake and eating it too, substantially bettering her position and taking the benefit of the section 21 agreement when it suits her. Now, those personal accusations have had a profound impact on Ms Wilton.

WINKELMANN CJ:

All right.

MR ELLIOTT:

It would be no underestimation to say that she has been truly traumatised by those, she is terrified someone is going to take her house, or fine her, or arrest

her and the only submission I wish to make in relation to that is that there is no call for that sort of personal rhetoric here. There is a genuine legal issue here and that is fine, but Ms Wilton is not sued in her personal capacity, she's sued in her role as administrator and while she's –

WINKELMANN CJ:

Well, I mean, I don't think that's correct, because the issue is whether she is administrator, isn't it?

MR ELLIOTT:

Well, Your Honour, she has been sued, and I will come to this in a moment, the claim –

WINKELMANN CJ:

As administrator, I suppose so.

MR ELLIOTT:

– is a breach of fiduciary duty in her role as administrator.

WINKELMANN CJ:

But the outcome will determine whether she is administrator.

MR ELLIOTT:

Yes, but the claim, as pleaded, is about –

WINKELMANN CJ:

Yes, I understand, Mr Elliott. Can we move on to the legal argument now, though.

MR ELLIOTT:

Well, Your Honour, I have promised Ms Wilton that I will make this submission, that I will clarify that she is, as most administrators are, a layperson. She's a 79-year-old retired librarian. She has no knowledge of administrative law. She is following the advice of the estate solicitors and all she wants is for the law to be followed. All of the estate funds that would go to the appellants have

been held in trust. Ms Wilton has been open from the outset and my learned friends have speculated about what went on in the earlier stages of the proceedings and I was there, she has been open from the outset to waiving her life interest and distributing the –

WINKELMANN CJ:
Do we have evidence of this?

MR ELLIOTT:
Do we have? No, but I have instructions and I can confirm that is her position.

WINKELMANN CJ:
So you confirm that she is open to waiving her life interest, on what conditions?

MR ELLIOTT:
As soon as the litigation is resolved. The only reason it hasn't occurred is because the appellants have continued to take litigation and on, for the reasons I'll come to, on fundamentally disparate positions.

WINKELMANN CJ:
So you are asking us to accept that that offer is on the table, but we don't have evidence of it.

MR ELLIOTT:
No, but I'm making –

WINKELMANN CJ:
I'm just a bit, I'm anxious about this, Mr Elliott, not, because I fully accept that this has been traumatic, but I am just anxious about the amount of evidence that is coming in through the bar, because then the appellants will wish to respond and...

MR ELLIOTT:

Certainly, Your Honour, well, what I am conveying is the instruction that I have that following this proceeding that the estate will be distributed. She is 79 years old. I mean, if we wait much longer, she might not be here to do it.

COOKE J:

Does that include the other claims that have been raised in submissions that we have been invited to address, which your side opposes being addressed in our decision? Those are the further issues that would have to be resolved first?

MR ELLIOTT:

Your Honour, I have, respectfully, lost track of the number of position changes in this proceeding.

COOKE J:

Sure, but my question is do all issues need to be resolved before that offer is given effect to?

MR ELLIOTT:

Well, I think what would happen is it would be distributed on the basis of this Court's decision as far as that goes and to the extent that the appellants want to pursue further litigation in respect of further issues, well, that would just have to be dealt with in the fullness of time.

WINKELMANN CJ:

So, I mean, I'm not quite sure what we're meant to be doing with this, though. Because as you say, it's a legal issue, so we don't know what the conditions – are we meant to take down all the terms and conditions attaching to this offer, or?

MR ELLIOTT:

No, no, Your Honour, I'm simply –

WINKELMANN CJ:

So what are we to do, what's the relevance of it, is my question to you, Mr Elliott?

MR ELLIOTT:

The relevance of it is that the appellants' case is replete with personal inflammatory accusations against Ms Wilton personally when she's not sued in that capacity, she has no – she's exercised no discretion, she has simply distributed the estate as per the solicitors instructions which accords with law, as found by two courts so far.

Let me put it this way, she's done so wrong the appellants haven't received a cent – I notice, I know they haven't paid a cent either, they haven't paid High Court costs, security on appeal in the Court of Appeal, Court of Appeal costs or security on appeal in this court, so they haven't paid a cent either – but what would they have had her do differently?

Back at the beginning when she, as my learned friend Mr Walker put it, shouldn't have boxed on, the appellant's position was that and this is in the statement of claim paragraph 8, in a cause of action for breach of fiduciary duty, what is pleaded is Ms Wilton was required to distribute the estate in accordance with Part 3, section 77, by distributing the prescribed amount and then the residue divided three ways. That is exactly what she's done.

But apparently, at that point, she was supposed to have elected Option A if she wanted to rely on the section 21 agreement. Well, if she had done that –

WINKELMANN CJ:

She hasn't distributed the estate, though, has she, Mr Elliott?

MR ELLIOTT:

I beg your pardon?

WINKELMANN CJ:

She hasn't distributed the estate, I think, are the facts?

MR ELLIOTT:

So, this is in – and I'm not giving evidence from the bar on this – this is in the, there's an email in the bundle at in the case on appeal from the estate solicitors explaining the distributions.

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Distribution began being made as matters were called in. So, Ms Wilton has received, I think, the prescribed amount with about 16,000 still to be paid, but then proceedings arose and distribution was stopped.

WINKELMANN CJ:

Well, okay, so now can we get onto the law.

MR ELLIOTT:

Yes, Your Honour. What we can determine here, Your Honour we have to consider the issues within the bounds of what this case is actually about and unfortunately, and I'm sorry if it's aggravating, but it –

WINKELMANN CJ:

It's not aggravating, Mr Elliott. I'm just thinking about the issues before the Court.

MR ELLIOTT:

Yes, right, well the issues before the Court are difficult because of the way this case has been advanced. What we have now is a – we started in the High Court with a breach of fiduciary duty. A single legal question was put to the High Court and that was as a matter of efficiency. Presumably that was all that was required to resolve the dispute between the parties. Agreed statement of facts. No evidence. That was decided. The appellants didn't like that decision. That's fine.

They appealed to the Court of Appeal. My learned friend Ms Bruton came on board and a polar opposite position was adopted in the Court of Appeal. Not a new legal argument on the same position. The polar opposite. So first they said you can get under the Intestacy regime but not under the agreement. The Court of Appeal, they said, you can get under the agreement but not under the Intestacy regime. So that question, the "new argument" as it was called, was never the subject of the High Court proceeding and bears no relation to the case as pleaded.

Then we've gone on to the leave application. That maintained the same position as in the Court of Appeal. Then in the written submissions on the substantive appeal, my learned friend's, quite properly, made some concessions, but what they conceded was effectively all the issues of broader public importance and what we are left with now is a fact-specific construction issue about this single agreement and query if that had been advanced as the sole grounds of appeal, whether the Court would have granted it because it only relates to this case.

The issue that we have more fundamental than that is that there is no evidence before the Court and I want to deal with this directly and Your Honour Chief Justice I'm very aware and do not seek to give any evidence from the Bar, but I don't want this Court to be under the impression that this is a case where there might be evidence, there might be something to be said. My learned friend Mr Walker has said that enquiries were made, and nothing was found. I have absolutely no idea where Mr Walker's got that position from. It is absolutely incorrect.

In the case, Dr John Gray is the solicitor who drafted the agreement. He was with the firm Short & Co, and I don't know whether it merged with, or he moved to Insight Legal. I have spoken with him repeatedly. He has very clear views and is capable of giving clear evidence on what his instructions were in regards to the agreement.

WINKELMANN CJ:

Are you saying there is a file available?

MR ELLIOTT:

I am saying there is no doubt a file available and that even if there isn't, Dr Gray has clear recollection and is able to give evidence, not about the subjective intention of the parties but about what collectively he was asked to do and what collectively they wanted to achieve in this agreement. Beyond that, Dr Gray has also indicated that Mr Rimmer, who had lung issues for a long time and then was diagnosed with lung cancer and was given, I think, a couple of months to live, there is – Dr Gray is able to give evidence that surrounding Mr Rimmer approaching his firm at that end period regarding making a Will and –

WINKELMANN CJ:

But this is really evidence from the Bar –

MR ELLIOTT:

I'm not, I'm –

WINKELMANN CJ:

And it wouldn't be relevant to construing an agreement what Mr Rimmer was doing many years later in any case and so again, I think we're just pursuing – I take your point, you say there is no doubt a file available and even if there's not Dr Gray would be able to give evidence about what happened.

MS BRUTON KC:

But I'm very reluctant to do this, Your Honour, and interrupt, but I, when I was onboard and I raised this new argument in September 2024 and we can produce it, I emailed Mr Elliott and said, can we please have permission to locate the section 21 agreement file for Mr Rimmer and does Ms Wilton, is there any file? Mr Elliott after several follow ups emailed me back and said, there's no files available. So I don't know what we do with that, but I definitely made the enquiries and was definitely told by Mr Elliott, that Mr Gray had no available file.

WINKELMANN CJ:

Mr Elliott?

MR ELLIOTT:

The end point, Your Honours, is that –

WINKELMANN CJ:

Would, I mean, Ms Bruton says there's no available files, that you told her that?

MR ELLIOTT:

I would have to – I don't –

WINKELMANN CJ:

You don't know there are available files, anyway, do you, Mr Elliott?

MR ELLIOTT:

I beg your pardon?

WINKELMANN CJ:

I think you said, there are no doubt available files.

MR ELLIOTT:

Sorry, turn of phrase Your Honour. I shouldn't have put it in such unequivocal terms. What I mean is Dr Gray, whether on the basis of documents or otherwise, could give evidence about what he was asked to do, why certain language was used and what it was intended to convey.

WINKELMANN CJ:

Right, well, thank you for that. Okay, I think it's a side issue and unless we have evidence on it, I do not see what the Court can make of it.

MR ELLIOTT:

Well, that's the point, Your Honour, is that we don't have any evidence. This Court made very clear in *Bathurst* –

WINKELMANN CJ:

Well, I mean, Mr Elliott, if you're going to the point, then we might have to allow Ms Bruton to produce evidence that there are no files available, so.

MR ELLIOTT:

Your Honour, absolutely. I mean, the difficulty with it is that the time to do that was at first instance. If you don't raise it at first instance and you don't seek leave to adduce evidence on appeal in the Court of Appeal when you raise it for the first time and you don't raise any evidence a second time when you're on a final appeal, then what are we supposed to do? We're just supposed to decide it in a vacuum?

WINKELMANN CJ:

All right, well, perhaps you should move on to the legal arguments, in any case, and we'll park that issue for now.

MR ELLIOTT:

Certainly, Your Honour. In that case, I'd like to move on to really the election, the section 61 election and what I want to drive at here is the theme of this sort of unfairness inherent in the appellant's position that Ms Wilton is double-dipping and that that was contrary to the intention of section 61.

WINKELMANN CJ:

So can you tell us, it might be helpful, Mr Elliott, if we start off with how you differ from the appellant in relation to your construction of section 61?

MR ELLIOTT:

Yes, Your Honour. The appellants' characterise the section 61 election as an either/or, it's a choice and you have to take either your relationship property rights or you take your succession rights and they say that it's contrary to the purpose of the section to take both. In my submission, Your Honour, that's not what section 61 does at all.

On a proper understanding of section 61, it is an election not to choose between two alternative bases for making a claim, but to either make a claim under PRA or to not make a claim under the PRA, in which case the Administration applies unfettered.

WINKELMANN CJ:
What's the difference?

MR ELLIOTT:
I will come to that. Your Honour, the difference is, if we go back to the Working Group, the 1988 Working Group, so this was the genesis for the whole Part 8 and section 61. It was the Working Group's rationale and recommendations that was largely adopted when Part 8 was implemented.
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The Working Group wanted to ensure that a surviving spouse or partner on death had the same recourse to the PRA and the ability to get a fair share of relationship property on death as on separation, but it wasn't about equivalency between death and separation. They're fundamentally different contexts.

What section 61 was about, was about giving a surviving spouse a choice to go under the PRA if they hadn't otherwise made their own arrangements. So it was never about double-dipping. It was about giving the surviving spouse more options not less, and this is apparent in the reasoning of the Working Group where they talk about, and you see it echoed in the Law Commission reports as well, be no worse off, at a minimum they are to have the same rights.

So, it wasn't that they were to have the same rights, it was that they were to have at least the same rights, and the reason for that is, and the Law Commission covers the, you know, contextual differences between separation and death comprehensively, but in a nutshell: separation is acrimonious and there's one division of property; on death there's a, in the Law Commission's words, a presumption that the deceased would want to support the survivor in their lifestyle that they have enjoyed when they've been together and there is a second round of divvying, if you will, or a distribution of

property, you have the relationship property division and then you have the distribution of the deceased's own separate property.

So if you go to –

WINKELMANN CJ:

So I think Ms Bruton did say there, on her construction this would secure that. That you were no worse off than people who had their marriage break down during the course, during life.

MR ELLIOTT:

Yes.

WINKELMANN CJ:

And the difference between you and the appellants is what, on this point?

MR ELLIOTT:

Well, as I understand Ms Bruton's position, it's that – well, I mean it's made, it's stated as plainly as this in their submissions. You can only get both sets of entitlements if the section 21 agreement or a Will expressly says so. Which is remarkable for an intestacy regime that is there as a backstop. It is a default regime. It would effectively convert the intestacy regime into an opt-in. So they say you can only get, under the relationship property agreement, and on – and your succession rights under intestacy, if you've expressly provided for that in the section 21 agreement. So you have to opt in to the intestacy regime in a context where the regime is by very design supposed to be there when you don't think about it.

WINKELMANN CJ:

I don't think that is their argument.

MR ELLIOTT:

Well, I'm just looking at 1.10 of their written submissions Your Honour.

WINKELMANN CJ:

Okay, I thought, well, as I heard them today, and I may be incorrect, but as I heard them today, their argument seems to be that it is open to parties to contract for a combination of rights but you don't have to expressly opt in, in a relationship property agreement. It may be that, properly construed, the relationship property agreement does not exclude the intestacy provisions.

MR ELLIOTT:

Right, I didn't understand it quite that way, but I appreciate the clarification. So I presume, then, that's a step down from what they've got in their written submissions, which a bit more emphatically –

WINKELMANN CJ:

So what is the paragraph in their written submissions, Mr Elliott?

MR ELLIOTT:

Paragraph 1.10. So I'm looking at 1.10 of the appellants' submissions Your Honour. It says: "Third, a survivor cannot receive both their relationship property entitlements and their succession (ie will or intestacy) entitlements unless expressly provided for by the s 21 agreement and/or will. If such 'double dipping' were allowed, the result would be the precise outcome that s 61 was designed to prevent …".

COOKE J:

And your argument really is that by leaving it to intestacy he made the conscious decision that any further entitlement she got under intestacy was legitimately hers.

WINKELMANN CJ:

Doesn't have to say that.

MR ELLIOTT:

In part, Your Honour. I've got three points in response to that, very briefly. One, I don't know why Mr Rimmer didn't make a Will. Nobody here does and

we don’t have any evidence about that, but it seems to me there is two possibilities. One, he just didn't get around to it or just didn't think of it, but that would seem remarkable in circumstances where the appellants are saying the parties specifically turned their mind to this and they specifically intended to contract out of the intestacy regime. The question that raises for me is if the clear intention of the parties was to exclude any succession rights or rights on intestacy, why didn't they do the same thing that everybody else does, the established process, and make a Will?

WINKELMANN CJ:

So Mr Elliott, you don’t need to put it as high as saying that you can infer from Mr Rimmer’s failure to make a Will that he intended that Ms Wilton take, you don't need to put it that high, do you? You just say, I think your argument is simply, that the agreement didn't deal with the situation.

MR ELLIOTT:

Absolutely.

WINKELMANN CJ:

I mean, because is there a significant difference between you in relation to section 61 or does the difference come down to the interpretation in the agreement?

MR ELLIOTT:

You’re correct that the issue for determination in this case really is, is there an intention to contract, yes, is there an intention contract out. The reason I go into section 61 is because the context, in the sense of, you know, is someone sort of getting an unjustified windfall is an import sort of overlay in this case and I will come back in a minute, I would just like to just finish my answer to Justice Cooke, but when I come back to the Working Group, it's actually very clear from their analysis that section 61 was never intended to make you choose between rights.

It's as Justice Kós said, you already have your relationship property rights, the election is simply about if those aren't being recognised you can apply under the MPA then or the PRA now to have those recognised in accordance with the presumption of equal sharing. But if you've already made your own provision, whether in a Will or whether in a section 21 agreement, you don't have to do that. Why would the –

WINKELMANN CJ:

I think the appellants agree with you on this. They're saying it's really a matter of a contract, so I can see your point about paragraph 1.10, but perhaps I'm reading it wrong, but perhaps I'm reading it wrong, but it does seem to suggest you need to, if you've got a section 21 agreement at all, you can't have an intestacy, but as the submissions are advanced today, it was made clear that it's a matter of construing what the agreement is provided for, so it may be perfectly consistent to have a section 21 agreement and a claim on intestacy, in the intestacy, but so that was what was said this morning. I take your point about paragraph 1.10.

MR ELLIOTT:

If I could just respond to Justice Cooke's question before, as there are three points.

WINKELMANN CJ:

Go ahead.

MR ELLIOTT:

One, he didn't just think about it. Two, the other possibility which the Chief Justice alluded to is that it was a conscious choice not to make a Will. One of the things that often concerns people with estate planning is the scope for it raising infighting within the family, right? I mean, this case is the quintessential paradigm, the second partner, the children from an earlier marriage, and it may be that Mr Rimmer didn't, you know, think about treating everyone equally, but didn't want to take sides and provoke a fight and there's a rationale, in my submission, to saying, well, look, it might not be exactly what

I would've done but if I just let it go to intestacy, well, that's an objective default regime, no one can accuse me of taking sides and, you know, it'll minimise the scope for dispute. And that's a choice, too, to your point, so I think either of those is possible.

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Would it be all right if I came back to the Working Group paper, you've heard enough from me on that Your Honour.

WINKELMANN CJ:

No, no, carry on.

KÓS J:

What was your third point?

MR ELLIOTT:

It's been, I'm afraid I've circled around. I've lost my third point.

KÓS J:

Okay. We'll find it later. It'll be in there somewhere.

WINKELMANN CJ:

So you're taking us back to the Working Group paper?

MR ELLIOTT:

Yes. So I'd just like, it's very difficult Your Honour, the dongle that's provided for the Court is USB-CA, not USB-C, so it won't fit. It looks like we might have one now. Okay. We've recovered. I just want to deal with this briefly.

KÓS J:

It's always option B and option A.

WINKELMANN CJ:

Or it's option C, USC.

MR ELLIOTT:

The short point is, so this is at page 44 of the Working Group – sorry, we had this all marked out but now we can't use our computer so it's a bit more confused.

WINKELMANN CJ:

Mr Elliott, this wasn't entirely picked up, was it? The Working Group's recommendations were not entirely picked up?

MR ELLIOTT:

They – I haven't, I don't have a clause by clause analysis to hand Your Honour, but my understanding is certainly the way the Law Commission reflected it in their reports, that it was essentially their recommendations and the rationales for them. If you'll allow me, I have the references, I don't know if I'll have time to go through all of them, of what the Working Group's rationales were and where those were reflected in the Law Commission's reports.

So, if we look at page 44, I'm looking here, so there is paragraph number 1, number 2, and then under that it says: "A majority of the working group considers that, on death, the survivor should have a choice whether to take under the terms of the will or to receive a half share of matrimonial property …".

So they're talking about that choice, and then they go on to list the considerations that they've taken into account, and number 1 there says: "Research undertaken by the Department of Justice some years ago shows that about two thirds of all husbands leave their entire estates to their wives. Nearly half of all wives leave their entire estates to their husbands, or to the husband and children. The Public Trust Office has indicated that these trends are still evident. A compulsory allocation of half the matrimonial property on death would complicate the administration of wills unnecessarily."

The second point they've taken into account, number 2 there: "Survivors could be obliged to receive half the matrimonial property even where they may not wish to do so." But this is the important point. "Different arrangements may

have been agreed upon during the joint lives of the spouses, or the survivor may prefer the property to go straight to other beneficiaries …".

But point 3, the conclusion is: "There appears to be no persuasive reason for forcing spouses into a legislative straight jacket to implement a principle when the objective of reform can be achieved by a more flexible and pragmatic approach."

So in my submission, what the Working Group is saying there is that this should be a choice. This should be another option for you if you haven't otherwise provided for yourself, and you might have provided amongst yourselves by way of a Will, or the term here is "different arrangements … during the joint lives of the spouses", and I would suggest that that is alluding to something akin to a section 21 agreement. In other words, if the whole point of this introduction of Part A is to make surviving spouses better off than they were before, to make them at least in as good a position as on separation, why would they introduce section 61 to limit your options, make you choose one of two avenues?

In my submission, that is not the intention. The intention is to give you the option to make a claim under the PRA if you have not otherwise made arrangements, but it says nothing about succession entitlements.

So, we agree with Justice Kós when his Honour said, you already have your relationship property rights, that's your separate property, so if you go into Option B and take your succession entitlements that doesn't mean that you don't have your relationship property rights anymore, those were already yours, it's only if you have to go the PRA to collect them.

The double-dipping only really comes in, in section 76 of the PRA. So, to the extent it was ever, it was a policy goal of the statute, it is reflected in section 76. So this is the provision that says, if you elect Option A all gifts under a Will are revoked, but the reason for that is because of the sections 81–84 that come into application under Option A which are the ones that say, all property of the deceased, all property of the estate, is presumed to be relationship property. In

other words, what happens when you make an application under the PRA is all the property of the parties is scooped back into the pot.

WINKELMANN CJ:

Which sections, Mr Elliott?

MR ELLIOTT:

So this is sections 81, 82, 83 and 84. So, sorry, Your Honour, just to backfill a little bit then. If you elect Option A, section 75 says that sections 76–94 apply. Section 76 says, all gifts under the Will are revoked if you elect Option A.

WINKELMANN CJ:

To you, gifts under the Will to you, I guess.

MR ELLIOTT:

Sorry, Your Honour.

WINKELMANN CJ:

Sorry, I'm sorry, I didn't know you were waiting for us, yes.

MR ELLIOTT:

Yes, no, sorry. Yes, so any gift under the Will to the surviving spouse is revoked, but the reason for that is because of the application of sections 81–84 which provide that all estate property is presumed to be relationship property and is then –

WILLIAMS J:

Unless the context otherwise provides.

MR ELLIOTT:

I beg your pardon?

WILLIAMS J:

Unless the context otherwise provides.

MR ELLIOTT:

Yes, unless there is evidence to the contrary. But the overarching point is that when you make an application for distribution under the PRA, all the property is scooped back in and presumed to be relationship property unless shown to be otherwise. It just means that you're scooping in all the property into the pool and then reconsidering it afresh through the lens of equal sharing under the PRA and that's the reason for section 76 because you would conceivably have a situation of double-dipping if you didn't have section 76.

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Because all the property gets scooped in, it's all considered as to what should be distributed, surviving spouse, let's say, gets their 50% share of that, the other 50% goes into the estate and then they say, oh, yes, but I'm also entitled to a further X amount under the Will. So that would be double-dipping because you're taking two bites out of the same property pool.

But when you're not making an application under the PRA, such as when you've got a section 21 agreement, you're not doing that. You are taking your share of relationship property as agreed under the agreement, which is your property, and you take that over there and the deceased's share goes into their estate.

Now, what each of them then does with their separate property is entirely a matter for them and I accept the point of my learned friends for the appellants that it's possible for persons to agree to forego or grant compromises on those rights. So the life interest is a perfect example. You can agree to qualify or grant an interest in your property. Looking at another case on different facts, it might be that you can contract out of the intestacy regime, but we say for reasons I will come to in a minute, that's just not clear here.

KÓS J:

So you do accept you could pre-disclaim your rights under intestacy by contract.

MR ELLIOTT:

No, Your Honour. This is one of the issues that we run into. That's a very big question and it's a question that will depend on the particular facts in every case.

WINKELMANN CJ:

No, but notionally. So you're saying factually you accept. Do you, factually you say it's not happened here, but do you accept as a matter law that you could say, in a section 21 agreement, disclaim your rights under an intestacy?

MR ELLIOTT:

No, we don't accept that.

WINKELMANN CJ:

Okay, all right. Well, it's lunchtime. We'll take the luncheon adjournment.

MR ELLIOTT:

Thank you, Ma'am.

WINKELMANN CJ:

We'll come back at that point, Mr Elliott. If you Post-it note that point in your mind, we'll come back there.

MR ELLIOTT:

Thank you.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:

Mr Elliott.

MR ELLIOTT:

Thank you, Your Honour. With regard to the question raised before lunch, that is the area Ms McGuigan was going to deal with, but so to answer it as it's been asked, I'm going to turn over to Ms McGuigan and then we'll circle back and I'll deal very briefly with this agreement after she's addressed that legal point.

WINKELMANN CJ:

Thank you. So can you remind us what the legal point was, Ms McGuigan?

MS McGUIGAN:

I'll start with that first.

KÓS J:

Disclaimer.

MS McGUIGAN:

The question before the break was, do you accept the parties could agree pre-death to contract out of the intestacy regime.

WINKELMANN CJ:

Yes.

MS McGUIGAN:

And my friend's response to that was no, and I thought it might be helpful just to explain that response a little further. We say no, and that is because in the context of this case the issue is, what are the duties of an administrator in these circumstances? Is an administrator – any administrator, it doesn't matter that it happens to be Ms Wilton here, it could be an independent administrator and the legal position would be the same – are they required to follow the Administration Act regime or are they relieved of that obligation because of a prior contract entered into between the parties?

We say the answer is they are required to follow the Administration Act, just as they'd be required to follow a Will, and that the prior contract does not override those statutory duties. If Your Honours –

WINKELMANN CJ:

So that's for all purposes?

MS McGUIGAN:

I was just about to say.

WINKELMANN CJ:

Okay.

MS McGUIGAN:

If the question, rather, was directed at whether purely as a matter of contract law –

WINKELMANN CJ:

Well, that was the question.

MS McGUIGAN:

Well, purely as a matter of contract law, could the parties enter into an agreement between themselves? Of course they could, parties can enter into any number of agreements as between themselves, but the submission is, that's not this case. This case, against the administrator –

WINKELMANN CJ:

No, but can you just answer at the level of general principle, if people had agreed between themselves, say to use Ms Bruton's Mickey and Minnie had agreed between themselves, that they're going to divide their assets now and also going to divide them as to what happens when they die, could that override the provisions of the Administration Act, if they said so clearly and explicitly that on death they wanted X, Y and Z to happen?

MS McGUIGAN:

Could it override the provisions of the Administration Act? No. Could it otherwise be an enforceable obligation as between those parties? Possibly, depending on the terms of that agreement.

KÓS J:

The question was mine originally. It was simply, you can disclaim after the event.

MS McGUIGAN:

Yes.

KÓS J:

Can you disclaim in advance of the event by contracting?

MS McGUIGAN:

Not in a way that binds the administrator, because she's operating under statutory obligations. Perhaps if I just step back. The claim here is that the administrator has failed to comply with her obligations. It's a fiduciary claim and it begs the question, what are those obligations?

The pleaded claim and I appreciate that we've moved some way from the pleadings, is that the administrator was obliged to distribute according to Part 3 of the Administration Act which is the intestacy regime, but the appellants claimed that Part 3 did not leave room for the section 21 agreement life interest.

So, their original claim was you must, you have to, distribute the first 155,000 to yourself plus one-third of the residue of the estate and I'll come back to that, but in addition, the remaining two-third residue of the estate is not subject to a life interest because you can't have both. That was the original claim.

Now, what the High Court and Court of Appeal said was, well, that's wrong. Just like any other contract entered into between a deceased and any other party during their lifetime, so here it's a section 21 agreement giving a life

interest but it could be a mortgage document, a lease document, a contract for the sale of land, that agreement continues to attach to the property when it is dropped in, if you like, into the estate. So the life interest here continued to attach to Mr Rimmer's share of the family home, his half-share of the family home. It couldn't be washed away by his death and an administrator could stand in no better position than Mr Rimmer did during his lifetime.

That position would be the same whether it's a Will or an intestacy. So we say, that's the relevance of a section 21 agreement on death, in the same way that other contracts are relevant on death, mortgage, sale of land.

WINKELMANN CJ:

Can I just go back again. Do you say that there is no possibility of disclaiming in a way that has legal effect in an intestacy the – in advance through a section 21 agreement, an entitlement under the Administration Act?

MS McGUIGAN:

Three submissions on that. First, so the answer is –

WINKELMANN CJ:

Just, no way, so can you answer yes or no, do you say there is no way or is it dependent on the facts?

MS McGUIGAN:

I say as a matter of administration, no.

COOKE J:

What does that mean? If I promise to disclaim any right I have under the Administration Act, is that an enforceable obligation?

MS McGUIGAN:

Well, that's a matter of contract.

COOKE J:

Sure.

MS McGUIGAN:

Yes, and all I would say, Sir, is that that's not this case. There is no breach of contract claim. Ms Wilton is not joined in her personal capacity to the proceeding at all. There would be a real question about whether the appellants even have standing to enforce the section 21 agreement.

What I am saying is that the section 21 agreement, when sadly Mr Rimmer dies, what does that mean to the section 21 agreement? The administrator steps into the shoes of Mr Rimmer and has a right to enforce that section 21 agreement in the usual way. The question, though, and the interplay that this Court is dealing with is, what does that mean for an administrator? Are they obliged, required, to enforce that agreement or would that be inconsistent with the Administration Act.

WINKELMANN CJ:

Well, wouldn't they be entitled, and since they're bound, it's not a far-fetched point of view of construing a contract to say that they're entitled to the benefit under it, too, so a benefit in terms of the administration. If they can step into the shoes of Mr Rimmer in terms of his rights to an estate under it, can't they also say, and you have disclaimed this, so therefore we're not going to give you your rights under the Administration Act?

MS McGUIGAN:

The answer to that question depends on the interpretation of the Administration Act and I would like to go there shortly, but first, I think it would be helpful to go directly to the parliamentary history around the interplay between the PRA and the Administration Act because what that says is you cannot contract out of the intestacy regime by way of a contracting out agreement, so let's go there.

So, just stepping that through, section 77–77C of the Administration Act were amended as part of the Matrimonial Property Amendment Bill, that big omnibus Bill which laboured its way through Parliament over a number of years and it began its life within that Matrimonial Property Bill 1975. Two days before the third reading of the Matrimonial Property Amendment Bill, the amendments to section 77–77C were siphoned off and they became the Administration Act Amendment Act 2001.

WILLIAMS J:
Section 77 to?

MS McGUIGAN:
Section 77C, Sir. And perhaps first, apologies to my friend here, if we go to the Administration Amendment Act 2001, because there are a couple of points that I think need to be made about section 77 just while we're here.

So, the first point around section 77, so this is it's section 8 of this Administrative Amendment Act. The first, if we just go up to that there. So here we are, section 77: "Succession to real and personal estate on intestacy." And if you go down to the table, column 2 of the table, it talks about how the estate is to be distributed, and it talks about the residue of the estate. The intestacy rules don't apply to all of the assets of the estate. They apply –

WINKELMANN CJ:
Are you reading from something there?

MS McGUIGAN:
Sorry, Ma'am, oh, gosh. No signal.

WINKELMANN CJ:
It's on that screen over there. Sorry, you can't see one.

MS McGUIGAN:

Sorry, Ma'am. I am reading from something here. Or I'm just looking at that where it says "residue of the estate".

WINKELMANN CJ:

We've got a bold heading "residue of the estate", okay.

MS McGUIGAN:

Yes.

WINKELMANN CJ:

And it says: "This stands charged with the payment to the husband or wife or partner of the prescribed amount, plus interest … on that amount from the date of death until that amount is paid or appropriated."

MS McGUIGAN:

That's right Ma'am.

WINKELMANN CJ:

"Anything that remains of the residue is held in trust for the husband or wife or partner absolutely."

MS McGUIGAN:

But it's only the residue. So there will be other contracts and statutes which determine what is actually left as the residue of the estate. So some statutory examples might be the Law Reform (Testamentary Promises) Act, and if you have a successful claim under the TPA, then that portion of the TPA is said – oh, sorry, that portion of the estate which is said to be subject to the TPA is charged for you. So, it comes out of. The effect of the order of the Court is that the portion of the estate affected by the order is held subject to the provisions of the order, and the amount is deemed to have been bequeathed by the deceased. So, it doesn't matter whether it's an intestacy or a Will, if you have a successful TPA claim, then that award is treated as a bequeath,

essentially, whether it's a Will or an intestacy. So, that would affect, obviously that would diminish, the residue of an estate.

Another example would be the maintenance provisions in the Family Proceedings Act 1980, and I won't take Your Honours to those, but the relevant sections are 70, 71 and 181.

WINKELMANN CJ:
But this is quite a different point, though, isn't it?

MS McGUIGAN:
Well, it's not, Ma'am, because my friend's submission is that you can contract out of section 77 of the Administration Act, and what I am saying is that there are two different, well, section 77 is only dealing with the residue and there will be other matters – contract, constructive trust, estoppel, the Wills Act, mutual Wills – which diminish what is actually left. But that is the point, when the question around, you know, what is in the estate, what's the relevance of the section 21, that's going to that issue. It's not dealing with how you distribute the residue of the estate.

WINKELMANN CJ:
Well, can I ask you this. Say a mother and child enter into an agreement, and the mother says, I'm paying you a million dollars now but you agree in writing that you will not take anything on my death, and it's all assumed that – and you can't pursue any claim whatsoever on my death, and it's assumed that she's going to leave a Will but actually she leaves an intestacy. You're saying that even so, the administrator would be required to distribute to that child in the intestacy?

MS McGUIGAN:
The administrator would be under the provisions of the Act. There is a separate question about whether there might be an inter-party argument or, you know, it's then held on constructive trust.

WILLIAMS J:

Does it really matter then?

MS McGUIGAN:

Well, it does, Sir, because this case, there's no breach of contract here, breach of contract claim here, this is just –

MILLER J:

Well, that's a pleadings point, but the substantive law would be to say you would just take it out earlier than the application of section 77.

MS McGUIGAN:

Well, no, I don't think it is the same. Perhaps if I just step through the parliamentary history, because I think that might be the kind of clearest example, way through here.

So as I was saying, the sections 77–77C were introduced, they were siphoned off, but the point here is that all of these provisions went through together, hand in hand with the amendments that came through from the PRA.

So if we look at, sorry, if we go to the Hansard and page 7 of the .pdf.

WILLIAMS J:

Do you know which tab this is?

MS McGUIGAN:

This is in – it's in the bundle, in the respondent's authorities as Hansard 2001, March 2001 volume 591. If we look there with Mrs Tolley: "I would like to speak to Part 2, which deals with the changes to the Administration Act and the Family Protection Act." So, these are sections 77, what became sections 77–77C: "During the select committee process we were advised that, while it was possible to contract out of the property-sharing regime," that is the PRA, "it is not possible under the amendments in this part to contract out of those two Acts." That is the Administration Act and the FPA: "Therefore, while a couple

might have a formal or an informal agreement about what is to happen to their property if one partner dies, that can effectively be overturned on the application of the surviving partner ... We are extremely concerned" –

WINKELMANN CJ:

So this is not the Minister in charge, this is opposition?

MS McGUIGAN:

This is the opposition and all of the –

WINKELMANN CJ:

So that's their interpretation?

MS McGUIGAN:

Well, that's correct, although the supplementary order paper refers to the same interpretation, meaning that you cannot contract out. So if we just carry on: "We are extremely concerned about the implications of that, and we raised the issue continuously through the select committee process, particularly where it concerns older couples ... The children of one partner could well be denied a fair share of their parent's estate, in favour of a partner who may have been in the deceased's life for only a short period of time. Previously, [you could] avoid the [FPA] simply by ... not getting married," and that is no longer going to be possible. But if we carry on down –

WINKELMANN CJ:

But it is the opposition. It will quite helpful, if you do have a supplementary order paper saying it, if we could look at that?

MS McGUIGAN:

There is no – the supplementary order paper is also from the opposition, saying – but if we, I would just like to finish this point.

She goes on: "We actually think that this is an abhorrent piece of law. It defies the rules of natural justice. Two people make an agreement, but after one of

them dies there is only one person left who can speak about that agreement and who is capable of overturning the contract. The contract should be taken into account, because it is, in effect, the voice of the deceased partner." And then "fairness" and "equity".

And if we carry on there with the Hon Mr Ryall, middle of that first paragraph: "The first is the point that Mrs Tolley made, that one can make agreements before death and have both parties abide by that agreement, but the Minister's intention is that that agreement will be set aside by this legislation, and one party can seek to enforce rights differently from what would have been expected, without reference to the family or the agreement, and to seek to ignore that agreement."

Then carry on down to page 14.

KÓS J:
I mean, he's not saying that was the Minister's intention, I think. He's giving, I think, an account of Mrs Tolley's argument.

MS McGUIGAN:
Yes.

KÓS J:
Yes.

MS McGUIGAN:
Yes and then if we carry on here, Mrs Tolley raises it again: "I come back to the Administration Act. The relevant provisions of the Administration Act that apply to this legislation are those that provide for the distribution of intestate estates ... The intestacy provisions provide a formula by which the deceased estate will be distributed without the need to go to court. We believe, and we argued again at length in the select committee, to no avail, that the court should be able to take into account in that formula," ie, the intestacy formula, "any agreement to contract out of the property regime. We felt that that was only fair and right."

Next paragraph: “The officials’ advice to the select committee was along the lines that this has the potential to undermine completely the certainty of current intestacy rules and would require every case that involved a contracting-out agreement to be considered by the High Court.”

WINKELMANN CJ:

So I am a bit troubled by this, because we don’t – the Court is very careful about the materials that they take into account from Parliament and normally only the Minister who is speaking in support of a bill is given any kind of standing at all. This is the opposition saying what they said and what was said in the select committee, but where do we see any of this represented in the materials, the relevant materials that courts take into account?

MS McGUIGAN:

Well, it’s not, my submissions on that would be, first, no amendments were made to section 77.

WINKELMANN CJ:

No, but if you answer my question. Is any of this reflected in the report from the select committee?

MS McGUIGAN:

The supplementary order paper it is, Ma’am.

WINKELMANN CJ:

No, the report from the select committee.

MS McGUIGAN:

Not that I've – the trouble is Ma’am, is that this was a really big Bill, and this was one issue. So the report from the select committee doesn’t specifically address that, that I have been able to find. I asked Parliamentary Library whether it would be possible to delve through some of these materials, none of which were available online, and was told that there are just so many files that

it just wouldn't be possible, they don't have the resources to actually go through it, so I would have loved to have been able to have come to court today with that.

WINKELMANN CJ:

But this is really just Ms Tolley's interpretation of what is proposed, which in that job is really for us.

MS McGUIGAN:

I accept that, although I do think it goes to saying that this issue was raised squarely in Parliament, and no amendments were made to the Bill, and it may be that's as far as I can take it, but it –

WILLIAMS J:

Well, it may be the government thought that interpretation was wrong.

MS McGUIGAN:

Well, there's no suggestion of that in any of the papers that I've been able to find.

WILLIAMS J:

Well, there's no suggestion either way, that's the problem you've got.

MS McGUIGAN:

I understand.

WILLIAMS J:

Which is why it's best to rely on government statements.

MS McGUIGAN:

Yes. What I would say about the appellants' approach though, in terms of being able to contract out of the intestacy regime, it goes beyond what the Law Commission is recommending in its succession report. So the Law Commission does not recommend blanket contracting out of an intestacy

regime by a section 21 agreement. Not at all. Rather, and if we perhaps just bring up the succession…

COOKE J:

It would help me, at least, because I'm going through my own version of these authorities, tell me where it is in the bundle?

MS McGUIGAN:

Yes, sorry Sir, I'm just about to get there. So it's the Law Commission, it's paragraph 64 and –

WINKELMANN CJ:

What's the document?

MS McGUIGAN:

Sorry, it's the Law Commission report into succession law.

WILLIAMS J:

Do you have a tab?

MS McGUIGAN:

It's in the appellants' authorities. Tab 72, sorry Sir.

COOKE J:

That's the Law Commission *Review of succession law*?

MS McGUIGAN:

That's the issues paper, yes.

WINKELMANN CJ:

Is it dividing relationship property, tab 72 of the appellants? Because 73 is review of succession –

MS McGUIGAN:

It's *Review of succession Law: rights to a person's property on death*.

WINKELMANN CJ:

That's 73.

MS McGUIGAN:

And it's paragraph 64 and 65: "In general we favour an approach that enables adults to contract out of the entitlements …". We believe that this reflects the principles of Aotearoa New Zealand.

But at paragraph 65: "Consequently, we recommend that partners or people contemplating entering a relationship should be able to enter contracting out agreements that deal with relationship property entitlements and family provision claims under the new Act." It doesn't refer to intestacy or general succession entitlements.

WINKELMANN CJ:

Sorry, what paragraph is that?

MS McGUIGAN:

Paragraph 65, sorry, Ma'am. Then if we go down to recommendation 75, which I think is page 91. It's recommendation 75, we're just trying to find the page reference.

KÓS J:

Page 282.

MS McGUIGAN:

Page 282, thank you, Sir. So this is the recommendation in terms of being able to contract out for what would be this new statute. You'd be able to contract out: "An agreement between former partners on their separation," so it's former partners on their separation, "that purports to be a full and final settlement of relationship property claims should be presumed to be a full and final settlement of the surviving partner's entitlements and claims under the new Act unless the agreement provides otherwise."

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So even the Law Commission's recommendation to change the law is that contracting out of the Administration Act by an agreement could only be done in the cases of separation, that is section 21A agreements.

COOKE J:
So is there anywhere in the report that explains why it wouldn't apply on death?

MS McGUIGAN:
Why?

COOKE J:
This agreement shouldn't apply on death.

MS McGUIGAN:
I think, Sir, that's paragraph 10.5 and all it says is that, it's pretty lukewarm about the whole thing, it just says that there are authorities – paragraph 10.5, no paragraph 10.50.

COOKE J:
Paragraph 10.50.

MS McGUIGAN:
Paragraph 10.50, sorry: "Under the current law, it is unclear whether a relationship property settlement between partners during their lifetimes precludes them from later making an FPA claim and/or precludes them from entitlements under the intestacy regime…". And that's when they make their recommendation. So it simply says "it is unclear". It does say elsewhere in the report, and I'll get that for you.

WINKELMANN CJ:
Sorry, what paragraph was that?

MS McGUIGAN:
Sorry, Ma'am, that's paragraph 10.50.

WILLIAMS J:

Paragraph 10.50.

WINKELMANN CJ:

Paragraph 10.50. So this would be us clarifying that it does enable them if we accept the appellants' arguments or clarifying that it doesn't enable them if we accepted the respondent's.

MS McGUIGAN:

Well, it would be, Ma'am, but elsewhere in the report, the Law Commission says that it's understandable that the Administration Act itself doesn't refer to whether you can contract out because the most obvious and 100% of the time-effective way of doing so is to make a Will.

WINKELMANN CJ:

Yes, there is that, isn't there.

MS McGUIGAN:

There is that. So, and maybe I'll just stay there to make a couple of brief points, because obviously the intestacy regime only applies where there is no Will. The law has strict formal requirements for a Will and the submission would be that those strict formal requirements reflect the importance that the law places on a person's final testamentary wishes. Since 2007, the Court has had power to declare a document that does not meet those strict formal requirements as a valid Will, so long as it is satisfied that it reflects a person's testamentary intentions.

Your Honours, you can pretty much make a Will now on the back of an envelope because if we look at the High Court authorities since 2007, for what would be validated as a Will, it's things like handwritten notes, draft documents on a computer, solicitor file notes, Will questionnaire forms, emails.

WINKELMANN CJ:

So can I ask you this. What happens if, this is a technical question you may not be able to answer but I think you probably will, what happens if one of these documents deals with part of the estate but not the other part? Is it dealt with –

MS McGUIGAN:

You'd have a partial intestacy there, Ma'am.

WINKELMANN CJ:

Be a partial intestacy, right.

MS McGUIGAN:

Yes, so it's bit of a Venn diagram. You've got a Will or an intestacy.

WINKELMANN CJ:

It's what you'd think it would be.

MS McGUIGAN:

Yes.

WILLIAMS J:

The different context here though is there are two parties to the agreement and one of them is still alive, so it's not just expressing the wishes of one, it's expressing the wishes of both.

MS McGUIGAN:

Yes, that's right, Sir. But in –

WILLIAMS J:

So that brings in those cases that refer to the waiving by a living person of their interests, doesn't it.

MS McGUIGAN:

Well, those cases, do you mean *Gurly, Rist*, those cases?

WILLIAMS J:

And so on.

MS McGUIGAN:

Yes, and so my submission in relation to those old authorities, and I would say I have had a very close look at whether there are any modern authorities, by modern I mean in the last 100 years, applying any of those principles, and I haven't been able to find any. I see my friends haven't either, since they're not referred to.

The most that can be taken from those cases, is that the courts are saying, as a matter of public policy, can you contract out of the particular legislation that has been given effect to in those cases? So *Gurly*, Statute of Distributions 1640, *Rist*, I think that was the Widows Relief Act., we've got Dower Act 1954, all this different legislation and it's about, as a matter of public policy, can you contract out?

Now, I'm going to get to policy considerations, so it's not that I don't accept that starting point, but if my friend's submission is that there is a standalone principle at the common law that you can contract out of the intestacy regime in a way that would be binding on an administrator who is obliged to follow the Will or an intestacy, I don't agree with that.

All they are saying is that the question is for the Court, as a matter of public policy, can you contract out? And I will absolutely get there.

WINKELMANN CJ:

Well, yes, taking you up on the policy point, then this legislation in the Property (Relationships) Act actually contemplates that parties will deal with how their assets will be distributed at death.

MS McGUIGAN:

No. The section 21 agreement deals with the nature of the assets that go into the estate. The only possible way to deal with distribution of those assets on death is a Will or the intestacy rules.

I think there is a bit of a fundamental misunderstanding, well, not misunderstanding. I think, stepping back, what is testamentary freedom? One, it's unilateral. You don't need the agreement of any other party to enter into a Will. That's the whole beauty of testamentary freedom is that you can do what you like with your affairs.

KÓS J:

What is section 21D(1)(c) doing then?

WINKELMANN CJ:

And what's section 21(3) doing?

MS McGUIGAN:

Section – can I have a look? The PRA?

WINKELMANN CJ:

Section 21(3).

KÓS J:

Subsection (3)?

WINKELMANN CJ:

Yes. Sorry, subsection (2): "An agreement made under this section may relate to the status, ownership, and division of property in either or both of the following circumstances…when one of the spouses or partners dies."

KÓS J:

And then section 21D(1)(c) is the partner of that one.

MS McGUIGAN:

We're getting there.

KÓS J:

"Define the share…entitled to on the death" so that's part of the function of this legislation or the agreements under it.

WINKELMANN CJ:

And if you look at section 21(2)(b) –

KÓS J:

Yes.

WINKELMANN CJ:

That might have caused a lot of people confusion if they can't actually do that.

MS McGUIGAN:

If they can't do what, sorry, Ma'am?

WINKELMANN CJ:

Well, people have been told that they can contract out of this provision of this so that they can stipulate how assets are dealt with when one of their spouses or partners dies. They understand that's what they're doing and you're saying they can't.

MS McGUIGAN:

I'm saying that they can do that in relation to their relationship property so that goes back to my initial point, which a difficult one to explain, which is that a section 21 agreement is going to say, of all of the assets in a deceased's estate, what is the nature of those assets, and some of them will be relationship property, some of them will be subject to a section 21 agreement. But a contracting out agreement is not dealing with the second issue which is how that has to be distributed. A section 21 agreement is not a Will. It could be

validated as a Will, that's a possibility, but it's not a Will and an administrator is obliged to follow either the Will or an intestacy. Just –

COOKE J:

So just what property do you say a section 21(2)(b) agreement can deal with. Only what is yours or what is not yours.

MS McGUIGAN:

Sir, it can deal with, this is ours, this is mine, this is yours.

COOKE J:

And what happens to it, those categories of property.

MS McGUIGAN:

Well, that "on death" means if it's relationship property and there's an agreement about how that's going to be split, then it will be split according to that relationship property agreement.

So here, for example, the family home was split according to the section 21 agreement. But it doesn't speak to what you can do. A section 21 agreement can't bind a testator to not later be able to enter into – to execute a Will, of course it can't.

What the Court of Appeal is saying in I think it's paragraphs 40 and then 61 and 62 of its judgment is, by way of a section 21 agreement, Mr Rimmer couldn't, and if he were to have made a Will, he couldn't leave less than what was provided for in the section 21 agreement. He could've left Ms Wilton the same and she obviously wouldn't have a breach of contract claim in that case, and he could've left her more.

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That's the fundamental point here about testamentary freedom, is that the respondent's case actually enables, it encourages, Will-making. Because I think what the appellants have not done here is properly distinguish between a

Wills case and an intestacy. Why do they say it would've been fine for Mr Rimmer to have left Ms Wilton the first 155,000 of his estate and a third of the residue by Will, all fine, couldn't be challenged –

WILLIAMS J:

That's the autonomy principle, they say.

MS McGUIGAN:

Yes, but –

WILLIAMS J:

Which isn't engaged when the Rules are default.

MS McGUIGAN:

Well, that's where I disagree, because not entering into a Will is just as much a choice as entering into a Will and testamentary freedom requires us –

WILLIAMS J:

Well, no, it's really saying, not entering into a Will is saying, someone else decides this.

MS McGUIGAN:

But that's a perfectly acceptable position for a person to take by way of testamentary freedom. The law doesn't – you know, I'm not suggesting it's perfect, I'm not suggesting –

WILLIAMS J:

Well, most New Zealanders, I would suggest, the many, perhaps most New Zealanders who don't have Wills and die, don't make an active choice: they simply don't do it.

MS McGUIGAN:

Well, that may be, Sir, but the law respects it either way. Testamentary freedom means we have just as much respect and give effect to the decision not to make a Will.

WILLIAMS J:

But you see, you've got a conflict then between an active decision and an imposed one.

MS McGUIGAN:

Well, I disagree, because there are lots of different ways you can have an intestacy. So, one, and these are examples from the cases, one might be a son finds out that he's dying. He enters into a Will to give 50% of his estate to his parents and 50% to his fiancé. It's not validly executed. Awful, but Justice Heath had to hold the intestacy regime applies. So, it's not always going to be the case that someone has not made a Will.

Another example in the case law, Mum's diagnosed with a terminal illness, teenage daughter, she sets up all of her affairs, so her teenage daughter will receive all of the benefit of her estate when she dies. She makes the decision a day before she dies to marry her partner. The Wills Act means that revokes the effectiveness of the Will. Gone, just like that, all that careful planning.

It is not the case that intestacy only applies when somebody doesn't make a, you know, intentionally doesn't make a Will.

WILLIAMS J:

No, I understand your point, but I suggest that's not the norm. That's not normally how this thing ends up in an intestacy.

MS McGUIGAN:

Well, but the whole point of these blanket – sorry, Sir, I didn't mean to speak over the top – the whole point of these blanket rules is that they apply whenever there's an intestacy.

WINKELMANN CJ:

So, Ms Anne Tolley said, well, look, this is all flawed lawmaking because it should've provided for the ability for people to contract out of the intestacy regime and the Law Commission says, well, actually it's not clear if it does

provide people with the ability to contract out of the intestacy regime. So, your submission to us is that is clear, that it doesn't.

MS McGUIGAN:

It is, Ma'am, on the text and purpose of the Administration Act and conscious of time –

WINKELMANN CJ:

And that's the word "must".

MS McGUIGAN:

No, it's more than that, Ma'am, and perhaps –

WINKELMANN CJ:

Okay, well, perhaps we need to look at that, yes.

MS McGUIGAN:

So, let's go there. So, let's start with sections 5 and 6 of the Administration Act and I don't think I need – I'll just if it's all right with the Court, make pinpoint references in the interests of time, we don't need to go through all of these – but what is really clear is that the grant of administration, the administration of estates, and the distribution of estates, is a wholly separate regime to the Property (Relationships) Act and it's the starting point for any administrator. It's under the supervisory jurisdiction of the Court.

So, what you will see, when you carefully work through the Administration Act, is that every single element is subject to a prescriptive rule. My friends referred you to one in terms of High Court Rule 27.35, who can apply for the grant of administration. But these, every single aspect of it, is prescribed and it's subject to the supervisory jurisdiction of the Court and that is because who is – and being an administrator or an executor is actually an awesome role in the sense that you go out to the world, and you represent everything in terms of the deceased – so the Court is really clear and very careful about ensuring, you know, these prescribed rules exist for a reason, the Court wants to ensure both

that the person who is given the grant of administration has a beneficial interest but, second, and really importantly, that in an intestacy, all possible successors are identified and there are processes for that.

Perhaps I might just refer, rather than, it's just looking at these forms, so this is the application for a grant of administration made in this case. So this is the application. It's a prescribed form. You have to say to the Court the grounds on which the order is sought for letters of administration, the deceased died wholly intestate, and that she is the surviving de facto partner with a beneficial interest. And I hear Your Honours are saying, that begs the question, but we're getting there.

Then if we look at document 301.015, this is the affidavit which is under the High Court Rules required to be filed at the time that an application for grant of letters is made. So if we look there, you know: one, you had to say you knew the deceased. Two: "I attended the Deceased's funeral". Three: "At the time of his death, the Deceased resided at Auckland in New Zealand." Four: "I have made full enquiries and searches for a Will … [and] I am satisfied that the deceased died without leaving [one]." Five: "I am the surviving de facto partner of the Deceased." None of the choices made in the PRA mean that I have lost my entitlement, and (b), 5(b): "My interest is not affected by section 77B of the Administration Act [which would be a] de facto … relationship of short duration …". So there's no reference there at all to I have contracted out, I otherwise don't have a beneficial interest. This is the prescribed form that you are required to file.

Seven to 10, if we just keep scrolling on down, and I won't take Your Honour to the Status of Children Act 1969 provisions, but they're relevant. An administrator must be certain, and the Court must be certain, about the deceased's parents and children.

So, the pinpoint references are the Status of Children Act 1969, and it's sections 5A, 6, 6A and 6B, and in summary what they say is that: "Letters of administration with or without a will annexed … shall not be granted … unless

the applicant shows that he has made reasonable inquiries to determine whether their exists … any parent or child of the deceased person who could claim an interest in the estate." It deals with what sort of inquiries would satisfy the Court, and it protects the administrator if she goes on to make distributions without being aware that there were further issue of the deceased, but she's made the appropriate inquiries, she's protected. So it's prescriptive.

I won't take Your Honours to High Court Rules 27.35(4), though it sounds like I am, I won't. My friends have already taken Your Honours to those. But what that deals with is those are the only situations in which somebody will have lost a beneficial interest, and they're all laid out in the High Court Rules, and it's things like, are you subject to a separation order? Here, no. Do you have a de facto relationship of short duration? Here, no. Would the deceased have multiple partners, you know, a husband plus a couple of de facto partners? Here, no. Have you entered into an Option A, meaning you don't get your intestacy entitlements? Here, no.

COOKE J:

Is section 81 disclaimer covered?

MS McGUIGAN:

Section 81 disclaimer provides for disclaimer only after death. So if we bring up section 81 of the Administration Act: "Subject to the provisions of this section, where a successor has become entitled under this Act to an interest … in the whole or any part of the real and personal property ...". So it's where you've become entitled, only after death.

The respondents don't apply a disclaimer or a gifting or a contract lens to the Administration Act. We simply say that the ordinary principles of statutory interpretation will do, and what the text and purpose of the Administration Act is, to have certain predictable rules which people can look at and say, this is when I have an entitlement, this is when I don't, and bear in mind these are heartbreaking circumstances, and that's it.

WINKELMANN CJ:

I mean, a lot of the rules are actually just to assist the administration of justice, aren't they, because there's this form-filling, want things to be as predictable as possible, and the Rules are secondary legislation, so –

MS McGUIGAN:

They are, although I think it is section 57 of the Administration Act provides the power on which the Rules can be made.

WINKELMANN CJ:

Yes, yes, I'm not suggesting they're ultra vires, the making of them.

MS McGUIGAN:

No.

WINKELMANN CJ:

I'm just saying they're secondary legislation.

MS McGUIGAN:

But I – it's not like I don't agree with Your Honour, of course they assist with the administration of justice, but they go further. They go further and they actually –

WINKELMANN CJ:

I'm just saying, they can't define the rights, they give effect. They give effect to the Administration Act.

MS McGUIGAN:

Oh, no, no, all I am saying, Ma'am, is that this a whole regime and the Administration Act sits at the heart of it and we've got the High Court Rules, we've got the Administration Act, we've got the Testamentary Promises Act, we've got the Wills Act, we've got Succession (Homicide) Act 2007, there is – we've got the PRA and I'm not suggesting you ignore the PRA. All I am saying is that this is, in itself, a prescribed regime and it's mandatory.

WINKELMANN CJ:

And the PRA is actually part of it, obviously.

MS McGUIGAN:

And the PRA is part of it because section 61 is, like sections 77A–C, a way in which the section 77 entitlements can be lost. Shall we head there next?

I think, just before I go there, the only points I would make about sections 24 and 25 of the Administration Act make it really clear that an administrator holds the estate according either to the terms and provisions of the Will or the terms and provisions of an intestacy.

So, can we just go, sorry, to the original version of the 1969 Act. So a couple of points. I have made the point in relation to section 77 that we are only dealing with the residue, so it's only what has been tipped into the estate that's affected by the intestacy rules, after things like, you know, a Family Protection Act claim, all of that sort of thing, has been taken into account.

And we have got this word "must" and my submission would be it's deliberate. It was introduced in 2001 and it switched from the word "shall". So, the original Administration Act section 77 didn't use the word "must", it said "shall" be distributed. The amendment was made as part of section 8 of the Administration Amendment Act 2001 – which we have already been, that I have already taken Your Honours, so I won't go again – but the submission is that this is deliberate: "must" is used where a duty is imposed that must be performed; "shall" can, of course, also be used to impose a duty but it can also mean the future tense.

This Court, in the decision of, a very different decision, it's an identification case, but it's *Fukofuka v R* [2013] NZSC 77, it's referred to in the road map, a 2013 decision. There, the Court noted that there was a switch from the Crimes Act 1961 referring to "shall" to "must" in the Evidence Act 2006 when dealing with interpretation.

WILLIAMS J:

Sorry, I thought you were talking about some French litigant.

WINKELMANN CJ:

We thought you were talking about a French person, but we've interpreted you.

MS McGUIGAN:

There, the Court noted that the new word "must" emphasises the need for compliance and I would say in a way that the word "shall" doesn't. So, the legislative history is relevant here.

Now, my friends say that – I will just very briefly touch on this point – my friends say that "must" can be read as being subject to a pre-existing agreement between the parties and in reliance on this they refer to a number of, for example, section 61C of the PRA deals with, you know, if you have an interest under a Will you take under the Will, if you have an interest under the intestacy regime you take under intestacy regime, and they use this as a way to introduce the concept that you might fall between two stools, as it were. There might be no Will but you don't have an interest in the intestacy regime because of a section 21 agreement. I don't propose to deal with that in any detail other than to say that section 95 of the PRA says that nothing in the PRA deals with how estates are distributed on death.

COOKE J:

You accept, though, that section 77's obligation is subject to a section 81 disclaimer?

MS McGUIGAN:

No, I don't, Sir, because it's a different point in time. So the section 81 disclaimer can only occur after you already have your entitlements. That's what you are disclaiming.

WINKELMANN CJ:

Well, what's the magic of the timing?

MS McGUIGAN:

Well, it's what section – oh, sorry...

COOKE J:

But presumably you don't distribute to someone who has disclaimed?

MS McGUIGAN:

There will be a timing issue, but the point is, Sir, is that as a matter of law they have their successor entitlements and they are disclaiming them. What the appellants are arguing is that by virtue only of a section 21 agreement you don't even fall within the section 77 table.

COOKE J:

What if I make a contractual promise that I will disclaim under section 81 of the Administration Act?

MS McGUIGAN:

That may well be one way of getting around it, but that's not this case, there's no –

WINKELMANN CJ:

Can I just take you back to section 95, it doesn't say quite what you said it says. It says: "If the surviving spouse or partner chooses option B, nothing in this Act ... applies to the distribution ...".

MS McGUIGAN:

Sorry, Ma'am, I'm talking in shorthand, it's what happens when you think about a case for too long: "If the surviving spouse or partner chooses option B", which is what we have here and that's choosing to take under the Will or intestacy, "nothing in this Act ... applies to the distribution of property under the will of the deceased spouse or partner or under Part 3 of the Administration Act ...", which is the intestacy rules.

WINKELMANN CJ:

Yes.

MS McGUIGAN:

So the submission would be that the section 21 agreement is relevant in terms of working out what forms part of the residue of an estate and what the nature of those assets might be, but it is not relevant and section 95 says it's, you know, nothing in the PRA is to be taken into it, it's not – the PRA itself isn't to interfere with distribution of the residue.

WINKELMANN CJ:

Yes, but that's not the agreement though, is it? It's contracting out of many of the provisions. I don't know that that's sufficient to say that nothing in an agreement, would have no effect on the administration of estate. Is that, which is what you're trying to build on that, I think, is that right?

MS McGUIGAN:

Yes. And my submission is that these provisions, perhaps not perfectly worded, are actually all trying to work together and because the changes to sections 77 –77C were made at the same time as part of these PRA changes.

WINKELMANN CJ:

But isn't it the likelihood that that's just dealing with the obvious point which is that the distribution default rules are not bearing upon the – you're choosing the Administration, you're choosing the Will or the intestacy regime and you're not choosing a division under PRA, that's what it's saying?

MS McGUIGAN:

I think, the submission, Ma'am, is that it would go further and it's saying, you've chosen the Will or an intestacy and now nothing about the PRA affects how Wills are going to be distributed or how an intestacy is going to distributed and in my submission that is consistent with the Administration Act and a wider framework for State succession law in New Zealand.

Looking at section 77, we make the point in our submissions that a person's entitlements under column 1 have meaning in the wider legal framework. So, you can't call yourself – well, I suppose you can, you can of course call yourself a husband or wife – but in terms of as a matter of at law, are you a spouse depends on whether you were married according to the Marriage Act 1955 and whether that relationship has been dissolved by an order of the Family Court. It's not something – these aren't statuses that can be changed by agreement.

So, in terms of how section 77 works, the submission is, first, you know, how does this work for an administrator? An administrator says, first, I have to determine who the successors are, do they meet the threshold of issue or de facto partner or whatever the question might be. Once they do, once they meet that status of having that relationship to the deceased, the administrator must distribute according to the column 2 entitlements. There is no discretion, the submission would be, to do otherwise.

COOKE J:

Unless they have disclaimed.

MS McGUIGAN:

Well, Sir, I think that the disclaimer point is, my submission would be, they can't disclaim unless they have a section 77 entitlement, because that's how, they have to be a successor at law in order to be able to disclaim their interest.

COOKE J:

But if they have disclaimed, then there's no duty to distribute to them.

MS McGUIGAN:

Yes, that's right.

COOKE J:

And if you enter a contract to say, I will disclaim any entitlement?

MS McGUIGAN:

Then I would say that doesn't change the administrator's obligation under section 77 to –

COOKE J:

To distribute to you?

MS McGUIGAN:

To distribute to you. Now there might be a – sorry, Ma'am?

WINKELMANN CJ:

And who would, well, who would they then seek their relief from? Because ex hypothesi the person they might complain to the claim about has died?

MS McGUIGAN:

Well, yes, they would have a claim against that person's estate if – there may be some, there could be all manner of claims.

WINKELMANN CJ:

But the claim against the estate is the intestacy, which would be the administrator saying don't do that, because this person bound themselves.

MS McGUIGAN:

Sorry, I think – I'm not sure I'm following.

WINKELMANN CJ:

So, if they bind themselves, if someone binds themselves not make a claim in the intestacy and then makes a claim in the intestacy, who is going to hold them to that if it is purely contractual on your account?

MS McGUIGAN:

Well, it would depend who the parties were.

WINKELMANN CJ:

Well, I don't think it does depend on who the parties are, because we know it's between a person who is now deceased and –

MS McGUIGAN:

Yes, if it's between just those two parties, then my submission is, is that, and I'm not suggesting it's not a challenging – it's not – I think everybody's first instinct is, of course you should be able to hold these people to account. But my submission is, is that you have to look at this from the perspective as an administrator, because that's how Ms Wilton has been sued. What is an administrator to do in those circumstances?

My argument is, accepting there might be some tensions around this, section 77 requires her to distribute according to that table.

COOKE J:

To herself.

MS McGUIGAN:

Well, Sir, it wouldn't matter at law, it shouldn't matter at law who the administrator is. There's no particular interest in identity of an administrator.

COOKE J:

I agree there's a lot of problem about the pleadings and what was argued in this case, but at least at the very beginning it was a claim for breach of fiduciary duty for essentially preferring herself.

MS McGUIGAN:

Sir, I don't accept that. It was obviously a breach of fiduciary duty. But if we look at the elements of the claim and my friend's just going to bring it up.

COOKE J:

I accept the criticism of the pleading but is the point you're taking ultimately a pleading point that –

WINKELMANN CJ:

No, it's not.

COOKE J:

If she'd been sued both as an administrator and as a party to the agreement, would your argument still run?

MS McGUIGAN:

Well, my argument would be that she – let's just, if we just bring up the claim. So we've got –

WINKELMANN CJ:

Isn't the strange thing with the claim originally that she was, in one iteration, the appellants are listed as the administrator, or is that my imagination?

MS McGUIGAN:

No, I don't – well, I wasn't involved. I've only been involved in this Court so –

WINKELMANN CJ:

Can we look at the parties at the beginning of this? Can we go scroll to the parties at the beginning of the thing?

COOKE J:

No, the parties are fine.

WINKELMANN CJ:

No, the intituling?

MS McGUIGAN:

Sorry, Ma'am. So under the High Court Rules, you are required to bring these proceedings against the administrator.

WINKELMANN CJ:

Yes. Doesn't that list the appellants as the administrator in this?

MS McGUIGAN:

No, I think that might be Ms Rimmer's –

WINKELMANN CJ:

Oh, no, a public administrator, they say "administrator", that may actually be their job.

MS McGUIGAN:

Yes, I think that's her occupation.

WINKELMANN CJ:

In a further confusing twist.

MS McGUIGAN:

Yes, that's right, yes. Apologies about all of that. So, look, I think if we just go down to pleading 8, this is: "As Administrator, the defendant was required by part 3 of the Administration Act 1969 to distribute David's estate … in the following way…" and that's just the table. That was admitted.

Then if we go down there's, one: "CAUSE OF ACTION – BREACH OF FIDUCIARY DUTY … gave rise to fiduciary obligations … owed the plaintiffs a duty of loyalty … act in good faith, not make a profit", all of the rest of it and, "The defendant breached her fiduciary obligations ...", in the following way and these are all steps taken in accordance with Part 3 of the Administration Act.

The submission would be that this case is not about holding Ms Wilton to her bargain, though I appreciate the instinct, and I don't mean anything by that, I just mean, of course, everybody has that instinct.

WINKELMANN CJ:

But who would hold her to her bargain, which is my question to start out with?

MS McGUIGAN:

Well, if this had been pleaded as a breach of contract claim, then yes, it may be different, so perhaps that's the answer.

WINKELMANN CJ:

No, but who would be the plaintiff?

COOKE J:

She would be.

MS McGUIGAN:

I think, in that situation, the administrator – there probably, I mean, this happens a lot in terms of reverse relationship property claims and all of the rest of it, somebody applies to remove her as administrator, a new administrator gets appointed and that person brings the claim, so that's a possibility.

KÓS J:

I think the other beneficiaries must have a right of action under the Court's supervisory jurisdiction.

MS McGUIGAN:

That's possible.

KÓS J:

So I don't see a reason why the children couldn't bring an action here.

WINKELMANN CJ:

Well, it's said to bind the administrator, though, isn't it?

MS McGUIGAN:

Yes.

WINKELMANN CJ:

So why can't it bind the administrator in a straightforward way which doesn't have all this legal complexity?

MS McGUIGAN:

Because an administrator is operating under a statutory obligation in a way that other parties aren't.

WINKELMANN CJ:

Yes, but they are entitled to take into account the extent of the estate, and if there's a contractual obligation on someone not to make a claim against the estate, why can't they just give direct effect to that?

MS McGUIGAN:

But that's not what this case is. This isn't a case trying to extend or, you know, bring more assets into the estate. This is a case, as between competing beneficiaries, about who gets what, and the executor's obligations are different in that context. I'm hyper-conscious of time now.

WINKELMANN CJ:

Yes.

COOKE J:

Can I just ask you one question. If the contract had been absolutely clear, and that she had made a promise to disclaim any entitlement under the Administration Act, and this had been properly pleaded, would you accept that the obligations could have been enforced?

MS McGUIGAN:

I'm only hesitating, because I see that as being very –

WINKELMANN CJ:

You don't have to answer the question if you find it too complicated.

MS McGUIGAN:

It's not that it's too complicated, Ma'am, it's just that –

WINKELMANN CJ:

No, no, I mean it's binding, you don't have to give a concession. You don't have to make any concessions.

MS McGUIGAN:

No, it's simply not this case. It's simply not this case. We are far from that sort of case, and I think what I was just going to very briefly finish on is just these policy considerations, because my friends in their submissions rely a lot on the decision of Justice Woodhouse in *Warrender*. What I would say about the decision is that Justice Woodhouse goes from, well, can you – is there an express prohibition in the Administration Act of contracting out? No. Let's go to public policy. What I would say is that there is this middle step where you look at would contracting out be consistent with the text and purpose of what we would say is a prescribed mandatory regime, which applies in every case of a Will or an intestacy, and that that middle step has not been addressed as part of the *Warrender* reasoning.

I would say, in terms of policy considerations, my friends talk a lot about testamentary freedom, though I think it's in some respects broader than how they have phrased it, because I think it takes into account, in respects, a whole lot of different ways in which a person can organise their affairs. The respondent is absolutely not saying that freedom of contract is in any way constrained by the Administration Act, or that parties can't enter into arrangements which – in terms of how they want to structure their affairs, but it's just the law that the law operates on a basis of testamentary dispositions, not private contracts between individuals. That's the framework of our succession law, and it has been for a very long time. A very, very long time.

So, I appreciate that just make a Will seems like a very simplistic response to Justice Woodhouse's justifications for why freedom of contract is so important here, but it actually, it is one that has force, and the idea that the respondent's approach is curtailing freedom of contract, I think that whether you can contract out of the Administration Act, that the freedom of contract principle doesn't apply with any particular force here, because of course you can avoid the

intestacy rules by making a Will. And it's not a matter of weighing section 77 against this, what Justice Woodhouse describes as this more fundamental right to choose not to take a benefit.

WINKELMANN CJ:

I'm just looking at the time.

MS McGUIGAN:

Yes, I know. Perhaps just some pinpoint references, Ma'am, in terms of what are the policies underpinning the intestacy regime.

WINKELMANN CJ:

Yes.

MS McGUIGAN:

The Law Commission succession report at 2.4: "The State succession law," that we have, that's a Will or an intestacy, "follows logically from the law that recognises property rights during a person's lifetime ...".

2.5: "The most common means of succeeding to the property … is by being named a beneficiary of their will … Where there is no will, the Administration Act 1969 sets out rules for how a person's estate is to be distributed (the intestacy regime)."

2.6: "The deceased's will or the intestacy regime only governs the distribution of the deceased's estate."

At 2.102, the Law Commission sets out the criteria for good succession law and that includes: "(a)... (iv) making law that is clear and accessible; (b) sustaining property rights and expectations; (c) promoting positive outcomes for families and whānau; and (d) promoting efficient estate administration and dispute resolution."

A couple more important references, 7.12 this is the idea that: “The intestacy rules are designed to reflect what most people who die intestate would do [if they had] a will.” That is actually footnoted with a reference to Hansard on the introduction of the Administration Bill 1969, so that is actually the authority for that proposition.

And at 7.14, the Law Commission makes the point that any unfairness in having these blanket rules can be avoided by making a Will or in its absence make an application under the Family Protection Act, for example.

The conclude at 7.17: “The rules should be simple to understand and efficient to implement. People should know what will happen to their property if they die without a will. Beneficiaries in an intestacy ought to be able to consult the regime to understand their entitlements. This is particularly important given that individuals eligible to be administrators ... are beneficiaries and are unlikely to be [professionals].”

I think that is it. I would just say, it is not relevant at all, but just in response to my friend’s submission at the start, I am also conducting this appeal on a pro bono basis. Otherwise, unless Your Honour’s have any other –

WINKELMANN CJ:
Thank you, Ms McGuigan.

MS McGUIGAN:
Yes, thank you, unless Your Honours have any other questions, that’s...

WINKELMANN CJ:
Thank you.

MS McGUIGAN:
As Your Honours please.

WINKELMANN CJ:

We won't ask you to describe your financial arrangements.

MR ELLIOTT:

Your Honour, I have done my share of freebies. I am conscious of the time.

WINKELMANN CJ:

Yes.

MR ELLIOTT:

We haven't addressed the agreement in this case.

WINKELMANN CJ:

No, so do you want to address the agreement?

MR ELLIOTT:

Look, absolute bullet points, there is nothing like doing this under time pressure, is there?

WINKELMANN CJ:

Well, you take your time if you want it, we can sit a little past four.

MR ELLIOTT:

A fundamental distinction and this relevant to the agreement. The PRA is concerned with property, in terms of relationship property vis-à-vis separate property, so what each of you gets out of the relationship property, that is its scope. The Administration Act deals with the distribution of a person's separate property upon death.

The reason this is relevant is that if we go up to the agreement here, now, this was the point that was raised before by, well, I believe by Justice Cooke or Chief Justice, I can't quite recall, but Your Honours raised the point about this agreement and I think it is recital E and particularly subsection (c): "Define the share of the relationship property or any part of the relationship property ...

entitled to [upon] death ...". The fundamental distinction here is that this agreement is all about what is relationship property and what you each get out of that relationship property. It does not go beyond that and the Act doesn't go beyond that to say what each party can then do with their separate property.

So, if you look at subsection (c) there, it says: "Define the share of the relationship property, or any part of the relationship property, that [they're] ... entitled to on the death." It does not say the share of their separate property that the other is entitled to. That's not what it's about and in my submission this is the fundamental distinction.

When you come to look at the wording, there is the distinction between claims and entitlements, first. This excludes claims, not entitlements, and that's not just a legal nicety, there is a rational basis for that. One can understand why Mr Rimmer and Ms Wilton may have wanted to exclude future claims, thereby avoiding, you know, disputes and litigation, without excluding entitlements which can include and we say apply equally to gifts under a Will or automatic distributions under intestacy.

But the broader point is that when you're looking at the word "claims" and the exclusion of claims in clause 5.1, you have to sit back and look at the purpose of the agreement and the subject matter of the agreement in considering the scope of claims contemplated there. What they are talking about, this whole agreement is, look, I've come from an earlier marriage and you've come from an earlier marriage, we're each bringing some property in, we want to make sure we know where we stand when we kick this relationship off, two years in. So I've put in 56% in the family home. You've put in, I can't do that maths, but whatever the balance is.

KÓS J:

44.

MR ELLIOTT:

Thank you, Your Honour, and if the relationship ends, for whatever reason, we want to be clear that we each get out that proportion. Whatever else you've brought in is your separate property, whatever else I've brought in is my separate property. That is what is being agreed, and the full and final, any claims language there, is directed at not relitigating that relationship property split. It is not about what each of them then, in turn, does with their own property. That is not what this agreement is about, and that is not what is contemplated, and the – you just have to look at the contortion that you have to make. If the intention was to exclude any further claims against an estate, why wouldn't you make a Will? Why not? That is the established practice. Section 21 agreements and Wills are made together all the time.

Instead, you have to jump through these hoops where to apply the appellants' argument, Mr Rimmer and Ms Wilton entered into a section 21 agreement. But despite going to that effort, he didn't make a Will, with the result that the intestacy provisions would apply. But then at the same time they thought about it so specifically that by means of indirect wording –

KÓS J:

I mean, that is the precise thing on which I would like to hear what Dr Gray has to say.

MR ELLIOTT:

Absolutely, Your Honour.

KÓS J:

I mean, it's the one simple point.

WINKELMANN CJ:

But how could he give evidence?

MR ELLIOTT:

It's the one simple point, and I think the –

WINKELMANN CJ:

Yes, let's not go down that path again, because we don't know what he can say, and I doubt he could say anything that would be admissible. Unless he had files, unless there are records, and even then.

MR ELLIOTT:

Yes, I do wish simply to clarify – because I don't want to be taking you, have misled the Court about what evidence there was – Mr Lupton is the supervising partner at Insight Legal now, he has clarified there is no longer any section 21 file, because that was with another firm that has since gone defunct.

There is an archived file, I don't know what's in it, relating to Mr Rimmer, discussions around a Will.

So, my learned friend Ms Bruton is right that, and I haven't seen the email but I'm sure she's correct, that there is no existing file anymore relating to the drafting of the section 21 agreement, but Dr Gray has his recollections of what he was asked to do. I will take it no further than that.

WINKELMANN CJ:

Well, is it his file that's lost?

MR ELLIOTT:

So Short & Co was the firm that he was with. That effectively broke up or went – I mean it's far before my time.

WINKELMANN CJ:

All right, you need take it no further.

MR ELLIOTT:

Yes, it's neither here nor there, but if we were going – and I know there's some frustration, because we all want to engage in the substantive issue around, you know, can you contract out of intestacy, but I would plead for some

sympathy for Ms Wilton's position, where we have been shooting at a moving target for 10 years.

WINKELMANN CJ:

So did you take the pleading objection in the Court of Appeal?

MR ELLIOTT:

Yes, we objected to leave on the basis that it wasn't, the argument hadn't been raised at first instance.

WINKELMANN CJ:

No, before the Court of Appeal, because the Court of Appeal seems to have allowed the argument to proceed in that way.

MR ELLIOTT:

Yes, yes, the Court of Appeal, we opposed leave, so the appellants' quite properly sought leave to introduce a new argument. We opposed it on the basis that –

WINKELMANN CJ:

Right, and it was granted.

MR ELLIOTT:

That, no – well, no, it was a little bit worse than that actually. Hadn't been raised at first instance, the Court of Appeal, with respect to them, sat on the lead issue until the substantive hearing, and then as we stood up said, you know, do you still oppose leave? By which point we'd obviously had to prepare for the argument but, yes, we opposed it because it wasn't just a new argument in respect of the same position, it's a totally different position.

If we had this case properly advanced at the beginning, if someone said, Ms Wilton shouldn't be the administrator, she would have said, fine, I don't care, somebody else do it. She doesn't want to be sued. She doesn't want to be here. She just wants to do whatever the law says and get on with it.

The reason we have had 10 years of litigation is because the appellants can't make up their own mind about what their case is and that really underscores the problem with this. The problem, if you ran this case again, on the basis of the appellants' argument, if it's successful, the Working Group and the Law Commission's, the whole point of these rules should be to avoid litigation. They just erode the estate, which is what's happened here. If we accepted the appellants' position and reset this case, we would have to go through all the same litigation again to work out whether or not there had been an effective contracting out.

In terms of guidance going forward for the profession, I would endorse Justice Williams' position which is, there's already a remedy, make a Will and, look, if you're going to purport to contract out and that can be left for another case where it's actually the case, just be express about it, be unequivocal. Say, we are waiving, you know, intestacy rights. But we can't make law on hypotheticals.

WINKELMANN CJ:
All right, so anything else about the agreement?

MR ELLIOTT:
No, Your Honour.

WINKELMANN CJ:
Okay, so those are your submissions?

MR ELLIOTT:
Those are our submissions.

WINKELMANN CJ:
Thank you. Thanks, counsel. Mr Butler.

MR BUTLER:

Can you hear me okay?

WINKELMANN CJ:

We can hear you okay, but I think you might have actually have to move your rostrum, maybe lift the microphone up. I don't know, they seem to be made for...

MR BUTLER KC:

Not for people of my size.

WINKELMANN CJ:

No, they seem to be made for people who are shorter than you, Mr Butler.

COOKE J:

There aren't many of them.

MR BUTLER KC:

Lá Fhéile Pádraig sona daoibh go léir, so happy Saint Patrick's Day to one and all in the courtroom today.

WILLIAMS J:

Oh, yes, quite right.

MR BUTLER KC:

So I am here representing the New Zealand Law Society. I have handed up some speaking notes just to keep me on track. Could I just show you what the speaking notes cover and then I am very much in Your Honours' hands as to which of those items you'd like to hear me on, so I will talk in a moment about what the focus of the Law Society's submissions are, that's item one. Item two is the intersection between section 21 agreements and Part 8 and in particular this issue of if there is a s 21 agreement or indeed any Part 6 agreement whether one is in election territory or not, come back to that. The third issue is contracting out of other statutory regimes.

WINKELMANN CJ:

I'm not sure I have a copy of your outline, actually, strangely enough.

WILLIAMS J:

It was on our tables.

MR BUTLER KC:

Oh, well, that's, no, that's been handed up.

WINKELMANN CJ:

Thank you, I have it.

MR BUTLER KC:

Thank you, Your Honour. And then at item 4 on the first page, I've got particular points of largely disagreement rather than agreement and I try to be balanced in the way of an intervener by having a box for the appellant and a box for the respondent and targeting, just outlining my disagreement for each. The boxes don't correlate, so it's just a list going through the various submissions that have been made.

I did think it would be helpful, because the case is a curious one and there's no criticism meant of any of the parties at all by putting it that way, but it does seem that the case has evolved in over the – since leave was granted, frankly, to the submissions to today, because I think a number of Your Honours have put the proposition, I think Your Honour Justice Kós most forcefully, that isn't this really now just a case about the correct interpretation of a particular agreement in front of the Court and it is certainly starting to look an awful lot like that, if I can put it that way. So, it did seem to me rather important that somebody at least put forward a recitation of what the relevant principles of interpretation of Part 6 agreements, because it's not quite right to say that you just interpret them just like every other contract. So I just thought it was useful, I've tried to gather together at point 5 which is on the third page of the hand up, what I say the principles of Part 6 agreement interpretations, well, what the principles are.

WINKELMANN CJ:

Where is that in your?

MR BUTLER KC:

So that is, if you look at the third page, and it's got a heading: 5 Principles of Part 6 agreement interpretations. So, I used that notion of a Part 6 agreement as being the generic term to refer to the three types of agreements set out in Part 6. You will see that I think there can be differences in the approach to interpretation of an agreement depending on whether it is, for example, a prenup, so a section 21, or it's a section 21A which is a settlement agreement and I can come to that shortly.

Then the last point is a plea for legislative reform and it would be really good if Your Honours –

WILLIAMS J:

We'll get right on it, Mr Butler.

MR BUTLER KC:

Please, Sir, because one often hears, in what we might refer to as the chatterati or the commentariat, comments about the Court doing the job of the legislature and I might suggest here is an opportunity, at least, for a message to be communicated. This is meant to be legislation that applies to some of the most common problems that people encounter at some of the most stressful points in their lives and this statute ought to be capable of ready interpretation the length and the breadth of the country, without cases having to come up to this Court.

You have got far too many cases under the PRA coming up to this Court. There is a disproportionate number of cases coming up here. Now, that is a reflection of the importance of the legislation, that is true, but it is also, in my submission, a reflection of the poor drafting, if I may say, and the way in which the Act has become like a moose: an animal designed by committee. It's just got odd bits kind of added on and that means it's not particularly elegant and it

is time for Parliament to be assisted to try and prioritise where it's valuable law reform focus goes.

This issue shows why it is necessary, when we're looking at some pretty fundamental questions. Can you contract out of the Administration Act? By the by, can you contract out of the PRA and how do you do it? Can you contract out of the Family Protection Act? And so on. They are pretty fundamental issues and what you are hearing from the parties is, we're not clear on many of them, and it's not just the parties who say that, there's been reports prepared by the Law Commission. This is hard stuff but it needs to be done. So, I have begun with the plea for legislative reform but I do think it's an important message that this Court can lend its weight to.

So if I come back then to the first point I wanted to make which is the focus of the Law Society submissions. I am saying it out loud. Your Honours have the written submissions but you will know and it is important that people in the Court and those watching not the livestream understand, that from the Law Society's perspective we are not here to pick a side when it comes to the correct interpretation of this agreement. Our concern is a broader one about how it is that these difficult elements of the statutory scheme intersect, how they work with each other.

That is against a context where to take the view of one of the leading, if not the leading academic commentator on this area, Professor Nicola Peart, just taking one of many articles she has written, for example, one she prepared for the NZLS CLE Death and the Property (Relationships) Act 1976 Workshop in 2020, when she said the following and I can provide this afterwards –

WINKELMANN CJ:
Is that in your materials?

MR BUTLER KC:
It's not, so I just found, was able to locate it yesterday, but it just and I can provide copies of this if it's helpful afterwards, but just to set the scene:

the death provisions in the PRA are widely seen as complex and confusing. That is not surprising. They do not fit well in an Act designed to operate on separation and are conceptually inconsistent with the inter vivos regime. For surviving spouses, the death provisions are a step backwards, et cetera, et cetera.

And she provides similar criticism or commentary on the provisions in this article and in a number of others, and so I think it's very important that I start there when I'm talking about the intersection between, say, a contracting out agreement and the death provisions because you must tackle this issue from a starting point that the underlying philosophy of Part 8 is one that is contested and not clear and the suggestion from the leading academic on it is, is confused.

So the first proposition that we've advanced for the Court to consider and it's not a proposition that either of the two parties appear to adopt, but it's important that it be made, is that where one is in a situation where a section 21 agreement has been agreed, then the section 21 agreement must be the starting point for analysis in any particular case.

A section 21 agreement shows that the parties have at least turned their mind to whether they want to be within the PRA regime and they have chosen to be outside the PRA regime in whole or in part. They have decided they want to create their own private code, I think was the phrase that we heard earlier, in whole or in part and I think it's important that the Court sends a signal that it is plain, on the statute, that parties are free to do so and where they do so the Courts will, generally speaking, look to give effect to, in other words to respect, that choice that they make.

COOKE J:

And do you make that point as a matter of statutory interpretation, or do you make that point as a matter of contractual law?

MR BUTLER KC:

So I make that as a matter of both, but importantly I say that that proposition is one which sits well with the statutory scheme. So in particular, I am thinking of section 21O of the Act, that's the one which says and I'm not going to be – I'm hoping that Mr Hume will be able to keep up with how I go through the statutes, I'm old school, as Your Honour's know, so I will just use the hard copy.

So, section 21O says: "The application" –

COOKE J:

O(b)?

WILLIAMS J:

"Big O".

COOKE J:

Not BO, OB?

MR BUTLER KC:

Yes, so section 21O: "Application of Act to relationship property not subject to agreement." What it says is: "Relationship property is subject to the provisions of this Act if neither of the following kinds of agreement applies to the property ..." and then they set out the Part 6 agreements.

WINKELMANN CJ:

Ms Bruton says you're wrong, that it's – with your approach generally, well, in this specific perhaps, because when you contract out, you contract out of the default rule, so that's all you contract out of.

MR BUTLER KC:

And I would accept that what section 21 says and it's worded differently, and I pointed that out in my written submissions, it is worded differently to the other, to the language of the other two types of Part 6 agreement.

So, if you look at section 21, what it says is that spouses – and I'm just going, because just for short – spouses "may" and here's the words that appear in section 21 but which don't appear in sections 21A or 21B: "... may, for the purpose of contracting out of the provisions of this Act ...".

So, the first point I'd make is, it's for that wide purpose, for the purposes "of contracting out of the provisions of this Act".

Then what it goes on to say is, well, what can you do for the purposes of contracting out of the provisions of this Act? You may: "... make any agreement you think fit with respect to the status, ownership, and division of" – and here's the important phrase that I have emphasised frequently in my written submissions – "of their property (including future property)."

So, the agreement is one which can focus on "status, ownership and/or division of their property", allowing you, for example, to – the parties to classify. You can use the language of separate or relationship property, but if you don't want to use that language because it is clunky in terms of giving effect to what you guys, so to speak, want to achieve, then you can make an agreement in respect of your property, dealing with status, ownership and/or division.

So what this doesn't allow you to do, however, is it doesn't allow you, for example, to contract out of section 21J. So that's the provision that allows you to set aside, sorry, allows the Court to set aside an agreement if it would cause serious injustice.

It doesn't allow you, for example, to contract out of section 26. Section 26 is the provision that deals with orders for the benefit of children of the marriage. So, the Court retains a power to make orders for the benefit of the children of the marriage, notwithstanding the contents of a Part 6 agreement.

Similarly, a contracting out agreement, a section 21 agreement, doesn't allow you to contract or to defeat creditors, so that's section 47 and that's confirmed by the language of section 47(5) as well as the language of section 21(3).

KÓS J:

I mean it's simply about whose it is and who gets it.

MR BUTLER KC:

Yes.

COOKE J:

Including after death.

MR BUTLER KC:

Including after death which is what's confirmed by section 21(2)(b). Now what's interesting in my submission about the width of the language of section 21 which isn't always appreciated, I don't think, and you'll see I've tried to raise it in my written submissions, is that when you think about the width of that language in section 21, it's very wide language.

It is language that, because of the presence of section 21(2)(b), it's almost as if it can have testamentary effects. It's not quite a Will, but Parliament is allowing you to set up your own private code through the mechanism of a section 21 agreement to decide amongst yourselves, make whatever agreement you think fit as to the status, ownership, and division of their property.

Now, while the normal assumption is that that is status, ownership, and division of their property inter se, you could imagine a situation where somebody makes a section 21 agreement which deals with property, it might be separate or relationship property, and actually instead of divvying it up between themselves, might say, well, a particular piece of property goes to somebody else, a third party like children or something of that sort, right. There's no prohibition on that, so I really want to emphasise the width of the language, because it's easy to approach it on the basis of a norm but the language is quite broad.

KÓS J:

And that's a good example of a situation where someone might then intervene to sue a frustrated recipient, a donee?

MR BUTLER KC:

Absolutely, correct, and so that was one of the things I thought when the questions were coming from the Bench in that regard. To me, it's whatever we now call the Contracts (Privity) Act 1982.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

Whatever – that's hidden somewhere in the triple –

WINKELMANN CJ:

Commercial and Contractual – CCRA [*sic*].

MR BUTLER KC:

Contract and Commercial Law Act 2017. I can't see in principle why the Contracts (Privy) Act wouldn't apply depending on – by reference to all the usual principles and that fits, in my submission, when you look at enforcement. So one of the things –

WINKELMANN CJ:

Can I just take that idea and shrink it back a bit. Say if it's still inter partes and they agree that this is how it's going to be dealt with post-death, and someone makes a Will thereafter which is inconsistent, then that would be a grounds to challenge the Will.

MR BUTLER KC:

Absolutely. Now, here's a point again that's really important, because I heard what my friend Ms McGuigan said about how we, and she's right, and as a general starting point or orientation, that testamentary disposition is the way in

which you deal with property about death. But that's not the full story, because it is possible for parties to make contracts between themselves during their lifetimes as to how one or other of them, or just one of them, will deal with a particular item of property upon death by Will. So, contracts to bequeath property by Will are enforceable.

There's a pretty good article by Audley Sheppard in the (1985) 15 Victoria University of Wellington Law Review, page 157, which helpfully, it's looking at the issue from the point of view of how such contracts, when they're in force, how they work in the context of the Family Protection Act.

KÓS J:

I think you'll find there's a whole Act of Parliament about it, Mr Butler.

MR BUTLER KC:

Indeed, but my point is what's useful about Audley Sheppard's article is that it goes back and looks at all of the material to do with the old common law in terms of the enforcement of those sorts of contracts. So, it's not a new phenomenon, is the point I'm trying to make, and the way in which they're enforced is, of course, they are enforceable.

WINKELMANN CJ:

So you would say that they shouldn't be able to defeat that by just not making the rule.

MR BUTLER KC:

Correct. So my point is, in the same way as, by not meeting that contractual obligation, either by not making a Will, or by making a Will that's contrary to such an agreement, and the law does do something about that, then in answer to Your Honour's question, yes, if a later Will was inconsistent with the section 21 agreement, then of course you would expect the Will to be challenged by the beneficiary of the –

COOKE J:

Wouldn't it be open to one of the partners to decide to be more generous and to make a gift of property to the other, without it being a breach of the agreement?

MR BUTLER KC:

Yes, yes.

COOKE J:

And why couldn't they do that in a Will?

MR BUTLER KC:

Of course they could. That's my point. My point is there's nothing in the propositions that we've advanced to the Court that would be inconsistent with what Your Honour has said. What you're always trying to do when you're looking to interpret a section 21 agreement, or often an omnibus agreement, is what you're trying to figure out, what actually, what level of freedom of movement has been left –

COOKE J:

Yes, committed to.

MR BUTLER KC:

– to the parties as a result of the agreement? Have they tried to tie everything down, and what does tying everything down actually mean in the context of the particular agreement?

KÓS J:

That's just varying performance in a more generous way to the recipient. If I agree to give you six oranges for a dollar, and I give you seven, you're hardly likely to sue me.

MR BUTLER KC:

That's correct.

WINKELMANN CJ:

And you can just disclaim it.

WILLIAMS J:

But if you promise the residuary oranges to someone else, they might sue.

MR BUTLER KC:

Exactly. That's exactly my point. That's exactly right. So the point then becomes whether or not that residuary actually has an interest, and where that comes from, and here the hard part, as I understand it, is figuring out whether or not the parties to this particular section 21 agreement intended to completely tie – is a complete package deal from which there was to be no departure, this is all you're getting, except if I choose to give you more, and the question then, it seems to me, boils down to saying, well, is the debate that was being had with Ms McGuigan, about whether or not intestacy is a choice. So Your Honour Justice Williams put to Ms McGuigan, well, it's not as active a choice as the making of a Will, to which her answer was, well –

WILLIAMS J:

Sometimes it is.

MR BUTLER KC:

Sometimes it is. That's what makes it hard – sorry, Sir?

COOKE J:

And it goes back to interpreting the first agreement too, doesn't it?

MR BUTLER KC:

It does. It does.

COOKE J:

Which is something you're not addressing us on.

MR BUTLER KC:

Which I'm not addressing you on, and you'll understand why. But the important thing, from the point of view of the Society making submissions, was to say, you know, starting with rules, one way or the other, is probably not necessarily the right way of thinking about how to give effect to this, because what you're trying to do is in the context of each particular agreement. You're trying to figure out, using the relevant principles, what freedom of movement was available to the parties.

COOKE J:

And you haven't actually said it yet, but on your argument that would mean you can contract out of the Administration Act?

MR BUTLER KC:

Yes, yes, we definitely take that view, yes, absolutely.

WINKELMANN CJ:

So if you don't – so let's take – well, are you moving to section 61 now?

MR BUTLER KC:

Yes, that's exactly where I was going to come to, section 61. So I've put forward a proposition that none of the other counsel have – I, so as to speak it, I haven't heard it put to any of the counsel for the other parties by members of the Court, so I may be –

WINKELMANN CJ:

No, we were leaving it untrammelled Mr Butler.

MR BUTLER KC:

So, the submission for the Society is, is that where the parties have, indeed, entered into a private code through a section 21 agreement, or a section 21A, or 21B, for that matter, settlement agreement or a compromise by an estate, what they have effectively done is made choices that render the exercise of an election under section 61 redundant. I've tried to capture it in the speaking

notes as succinctly as possible. I've said by entering a section 21 agreement the parties have already elected now, of course I'm just trying to pick up the language of section 61, but in other words you could say they have decided how they wanted to deal with their property, so there's no need for an election to be made. They've already decided.

WILLIAMS J:

There's, in effect, a third option.

MR BUTLER KC:

And so when I wrote my original submissions, I said what actually you would think, if section 61 was really being designed for a contracting out through – section 61 was meant to apply in the context where contracting out agreements were present, you would expect there to be a third option.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

An Option C, which allows you to stick with the contracting out agreement. Now, of course, I would be saying, well, the reason there isn't an Option C, when you think about it, is because by entering into a section 21 agreement you have effectively foreclosed the possibility of having an election between Option A and Option B because you –

WINKELMANN CJ:

If you enter into a section 21 agreement which purports to deal with the assets post-death.

MR BUTLER KC:

Yes, yes.

COOKE J:

All of the assets.

MR BUTLER KC:

Because section 61 is only relevant to death, yes.

WINKELMANN CJ:

Well, no, not necessarily. But you've got your 2.3, which deals with partial codes.

MR BUTLER KC:

Correct and –

KÓS J:

But that's not entirely consistent with your earlier argument that all you are doing under section 21 is shifting around the assets, who owns them and who gets them. Whereas obviously the PRA deals with a whole more than that, including the reserve provisions you talked about before. And it's interesting that section 61(1) says that they may do that: "... (except in a situation described in section 10D(1)) ..." which is about live proceedings, it doesn't say and where you have a section 21 agreement.

MR BUTLER KC:

Correct, but it doesn't, in my submission, it doesn't need to because the whole point of the section 21 agreement, if my interpretation is correct, is you've already opted out of Part 8, of the general rules established by Part 8, the rules that deal with status, ownership and division. So, it makes sense that you –

WINKELMANN CJ:

So, I mean, it's just a purposive reading, you're saying, is required of section 61 because the Act is really a bit of a mess. It says you're opting out of the Act but actually parts of the Act continue to apply.

MR BUTLER KC:

Yes, that's right. That's right, exactly.

WINKELMANN CJ:

And this Part doesn't apply.

MR BUTLER KC:

But this Part and more importantly this act of election doesn't apply because when you think about it, why would it apply? Why would Parliament give you a faux election? The only way to get out of a section 21 agreement isn't by electing Option A or Option B, it's by challenging the agreement and saying the agreement should be set aside, otherwise the agreement is the agreement and you're stuck with it. There's no reason why somebody magically should be given an Option A or an Option B just because their spouse has died. That just – there's no logic to it. It doesn't make sense that death would suddenly enliven an Option A or an Option B choice.

WINKELMANN CJ:

So say you have a section 21 agreement which provides that on death, provides that during life and during death all of these assets are separate property of the deceased person.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

And then they die and you opt Option B, that sidesteps the agreement.

MR BUTLER KC:

Yes and I say you just can't, you can't do that. What you would be doing, if you felt that that was a one-sided bargain that you'd entered into at the time, for whatever reason you did, you would challenge it. You can still challenge it under section 21J as modified by the terms of section – I've just forgotten the provision in Part 8 that allows you to challenge, allows the survivor to challenge – section 87. So, section 87 allows the surviving spouse or partner to challenge a section 21 agreement.

WINKELMANN CJ:

Your arguments become more attractive the longer, as a third option, between there's a simplicity of the respondent's option, there's a simplicity of yours, and there is the complexity that Ms Bruton has outlined for us. Well, to my understanding, to my mind, it seemed complex, so maybe do you a – yes.

MR BUTLER KC:

Well, I got to where I got to, just – it wasn't, the proposition I'm putting to you, wasn't where I started when I was preparing the submissions. So if that's of any assistance to the Court in terms of the level of grappling that might be required with the statute to make it work, that's why I emphasised the clunky nature of it.

KÓS J:

So far, very few of your members have demonstrated the courage that you're showing. Most of them go through these Option B elections that we have just seen examples of.

MR BUTLER KC:

Because, of course, in the absence of guidance, you know, one – so first of all, in fairness to members of the profession, it's important to recall that the number of section 21 agreements is, relatively speaking, low and that's one of the points I made in my written submissions. Historically they're, relatively speaking, rare and there is some Borrin Foundation research which I footnoted in my submissions which bears that out.

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So, typically in first marriages and relationships they are not entered into at all, at all – it is St Patrick's Day, so I am sure you will allow me that – and whereas second time arounds, what it looks like from the research is roughly 10% might enter into some sort of agreement. So, I think it's really important that the Court understand that the day-to-day work of practitioners in this field is Option A/Option B territory. Contracting out agreements are not the norm.

COOKE J:

And presumably, when the section 21 agreements are entered, it's also very common for there to be a Will entered at the same time.

MR BUTLER KC:

Indeed, correct.

WINKELMANN CJ:

And there's a time lag between entering into agreements and them ever coming into this space.

MR BUTLER KC:

Exactly. All of those things and often, you know, often the Option B, for example, just presents itself and when you are just – I was going to say, a news-cranking handle, but I don't mean that – what I am trying to say is when you're just used to doing these things on a regular basis, you know, just reflexively going Option A/Option B is the reflexive action.

So, that's why I'm saying that when actually we come to this Court and having to work the way through this, carefully, through the statute, as I did it, it seemed to me that actually there is no election of an Option A or an Option B where you've got a comprehensive section 21 agreement, because it's inconsistent with the whole notion of a section 21 agreement for you to be left with any such option.

What I do accept is that where the section 21 agreement only covers part of the field and, just so you know, that is not unusual, it is not unusual for the parties to construct an agreement which only deals with some of their property or only identifies, for example, what property is certainly to be treated as separate property, all right, because especially becoming second time around, if you identify, well, each of us is bringing a house, or savings, or Kiwisaver, or whatever maybe, and we're very clear that that is to be treated as separate property and we deal with that in some length, which might leave other property

that you're not aware of, you just leave that at large and then the Act will apply to that.

So, in respect of that property that is not dealt with by the section 21 agreement, the PRA applies and on death you will have to exercise an option in respect of that property and that is consistent with the language of section 21O that I took you to. If we go back to that again: "Relationship property is subject to the provisions of this Act if neither of the following kinds of [property] applies to the property ...", so in other words, if the Act would classify property as relationship property and if section 21 agreement does not deal with it, then the Act applies.

Now another way in which the Act –

COOKE J:

There is still an administration in this situation? An administrator is still appointed?

MR BUTLER KC:

Yes.

COOKE J:

But the Schedules don't apply, is that right?

MR BUTLER KC:

So, is the context of the question being a comprehensive agreement?

COOKE J:

Yes.

MR BUTLER KC:

Yes.

COOKE J:

And the administrator is bound by the agreement, in a sense, is that right?

MR BUTLER KC:

Indeed, absolutely, like the administrator is bound by all agreements. The administrator, for example, in the context of a contract to bequeath by a Will, must respect the contract.

COOKE J:

All right.

MILLER J:

So who may be the administrator in that situation?

MR BUTLER KC:

So that's where obviously you look at whatever the relevant rules are going to be and you work your way through that and there is always, it must be recorded, there is always the fallback of an application to court if choice of administrator is not obvious.

WINKELMANN CJ:

What do you say about the arguments regarding language of the Administration Act?

MR BUTLER KC:

I think the language of the Administration Act has to be understood within the context of foundational principles of our legal system, being the parties have high levels of autonomy to decide and to make agreements and arrangements for themselves, and so that when you're looking at the words of that statute, it's almost as if you're reading: "unless there's a contract to the contrary, the administrator shall…".

COOKE J:

Isn't that in a sense what section 81(6) says?

MR BUTLER KC:

Indeed. I think it does and so one of the things that I thought is important, because my friends in front of me emphasise in their written submissions the fact that disclaimer, you know, is basically their proposition – I hope they don't think I'm mischaracterising this – is governed by section 81 and that is the way to disclaim, but section 81(6), of course, contemplates the ability to disclaim by other means and one obvious means of disclaiming would be, for example, put to one side a section 21 agreement environment, would be to take Option A under the PRA, because if you elect Option A under the PRA the effect of that, as we know, as a result of section 76, is you'd give away any entitlements you have under a Will or entitlements you have under Part 3 of the Administration Act.

So, in other words, section 81 is not the only way in which you can disclaim, if you're talking about disclaimer proper, but recall disclaimer, in my submission, I've addressed it in some length in the written submissions, a disclaimer is about declinature, is a unilateral declinature of a gift that is made to you. It's saying, I don't want that interest that has been left to me.

A contract is a bilateral agreement between two parties. It's got a completely different origin, different focus, and a different set of law, in my submission, around it. Our submission is there's no reason why parties cannot choose and reflect that choice in the contract, to choose to not take up – anticipate they might have entitlements under the Administration Act and say, to the extent that I would have entitlements under that Act, I do not want them, I agree with you, I will not have them.

WILLIAMS J:

Given the use of "must" then, what degree of clarity would be required?

MR BUTLER KC:

In the section 21 agreement?

WILLIAMS J:

Yes.

MR BUTLER KC:

It just has to be an agreement, I mean if what Your Honour is saying is, well should we adopt a rule which says if it's a bit fuzzy, I know Your Honour wouldn't put it so crudely as this, I'm just trying to get a sense –

WILLIAMS J:

I probably would, actually.

MR BUTLER KC:

If it's a bit, because that language is so mandatory and because, and there's a fair point that's made by my friend Ms McGuigan, you know, it's a real fair point about the Act being directed to the duties of an administrator, right, so it's designed to guide how it is that administrators go about doing their function and their job and it was implicit, in what she was saying, and therefore the rules are clear because they need to be clear, I think was the submission that was being made. You might say, well, then, the agreement needs to be very, very clear, you might say, from that.

It seems to me, we wouldn't go that far, we'd just say, the parties have made an agreement, if they've made an agreement and the question then becomes whether they have or not made an agreement, then that agreement should be given effect to just in the same way as a contract to leave property in a Will. Some are better written than others, but if ultimately the Court takes the view that is indeed a contract to bequeath by Will, then that should be enforced.

So I say, there's no particular rules of construction that apply, Sir.

WINKELMANN CJ:

Right. Anything else, Mr Butler?

MR BUTLER KC:

So, contracting out. You've got the statutory regimes, you've got my written submissions in relation to the Administration Act and why it is that we adopt the approach that we do. It's a general approach to contracting out, so I've tried to provide some principles that might guide the Court in the written submissions.

A starting point should be respecting party autonomy. That is a foundational principle of our private law system, but it will always be a question of statutory interpretation and/or public policy as to whether contracting out of a particular statute is allowed and, if so, how it should be done.

I don't think I need to take you through to the particular –

KÓS J:

May I just ask you a question about section 77's application?

MR BUTLER KC:

Certainly, Sir, yes.

KÓS J:

If I am the subject of the provision, but I have promised you my Bentley, is that – and let's assume we did that by contract, so you offered me a –

MR BUTLER KC:

A Volvo.

KÓS J:

Yes, in exchange, well, what would the status of the Bentley be in my intestate estate if I promised it to you, we've agreed it?

MR BUTLER KC:

So then, so the common law would say, those principles would say, that Bentley, sorry, the administrators are bound by that contract and must get it to me.

KÓS J:

Correct. So if that's the case in relation to a third party, it must also be the case if I did that, made that arrangement with my wife?

MR BUTLER KC:

Quite. Quite, and so the point, again, to be fair to the argument as I understood it coming from Ms McGuigan, she would say that's fine because that's just a question as to what is or isn't in the estate.

KÓS J:

Exactly, that's what I'm getting at.

MR BUTLER KC:

Right, whereas she says, once you've resolved what's in the estate, then the duties, the table, section 77 table, is mandatory.

KÓS J:

Correct. It may just be that there's nothing in that to administer.

MR BUTLER KC:

Quite.

KÓS J:

Because you promised it all away. Just as if I agreed that my entire estate was to go to you, Mr Butler.

MR BUTLER KC:

Quite.

WINKELMANN CJ:

Right, okay.

KÓS J:

Thank you.

MR BUTLER KC:

Thank you.

WINKELMANN CJ:

Thank you, Mr Butler.

MR BUTLER KC:

Thank you, so –

WINKELMANN CJ:

Anything else to conclude on this St Patrick's Day?

MR BUTLER KC:

No, I think you got the interpretation principles that I have set out, I would just simply, I just think it is important to note that there are distinctions between, say, a prenup and a section 21A agreement. For example, so many prenups are done looking into the future, what I've said in the hand ups is, in that case, there are still cards in the pack, there are cards that are not yet out on the table fully. When you're dealing with a section 21A agreement, however, all the cards should be on the table, facing up. So, that does mean that when you're looking to interpret an agreement that is a settlement agreement as opposed to a prenup, the context in which you will be coming to interpret the agreement may be different.

So, for example, in the context of a section 21A agreement the principle that you see often stated is that a section 21 agreement is normally intended to embrace all the parties' assets and liabilities, so that's in point 2.5. We'll, that makes sense when what the purpose of the agreement is, is to settle all relationship property issues between the parties. That is what you would expect.

WINKELMANN CJ:

Like the *Warrender* case. *Warrender*?

MR BUTLER KC:

Yes, exactly. You might not take the same view – you might take the same view – if what you're looking at is a prenup, is the only point I'm trying to make. So, it is important, because you are who you are, it is very important, it seems to me, that when you're setting out what the principles are of interpretation of these Part 6 agreements that there might be generic principles that apply to all of them but that you emphasise, I believe it would be appropriate to emphasise, that within Part 6 there is a tripartite style of agreement and the reason Parliament has separated out three different types of agreement is that they are doing different things and have different features and therefore may need to be interpreted differently.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

Thank you, Your Honours.

WINKELMANN CJ:

Thank you, Mr Butler. Ms Bruton.

MS BRUTON KC:

Just very quickly to wrap things up. In reply to Mr Butler, we are ad idem on contractual primacy, I think, and parties should be able to make their own agreements.

In terms of the one area of difference between us, I'll have to think this through more, but I think my friend may have a point about section 87 of the PRA rendering the requirement to make an election otiose because that would mean that –

WINKELMANN CJ:

Section which, sorry?

MS BRUTON KC:

So section 87, so what my friend said is if the surviving spouse decides they don't like an agreement that they've entered and want to apply to set it aside, and my case was and Justice Toogood in *Thurston* said, well, then they choose Option A and apply for division by default. But what my friend says is section 87 of the PRA does the job and that says if there's an agreement, one spouse dies and this section applies: "... the surviving spouse or partner may apply to the Court— (i) to have the agreement declared void for non-compliance with a requirement of section 21F [or] (ii) to have the agreement set aside under section 21J.

COOKE J:

So you don't have to have made an election?

MS BRUTON KC:

What was that?

COOKE J:

The point is, you don't have to have made an election?

MS BRUTON KC:

Yes and so I'm not conceding that point, but what I am recognising is that there may be something in it and that that gets around the problem, arguably, in the policy of not holding parties to an agreement which has either been entered into without the appropriate statutory safeguard or has become substantially unjust with the passage of time.

And then turning to a brief reply to the respondent is, and just picking up on what is the key issue in this appeal as I apprehend it is, can you disclaim intestacy entitlements in advance by contracting. As I understand –

WINKELMANN CJ:

Can you just pull the microphone a bit closer to you, because I think it might not be being picked up on the...

MS BRUTON KC:

And as I understood Ms McGuigan, she said as a matter of contract your starting point is yes, but then the answer becomes no, because of the overlay of the provisions of the Administration Act and in support of – and I may have mischaracterised that – but I think the question for Your Honours is, what trumps? Is it contractual primacy or is it the provisions of the Administration Act and the meaning of the word "must" in section 77? That is what this comes down to.

Then my learned friend, Ms McGuigan, took Your Honours to the 2017 Law Commission Report –

WINKELMANN CJ:

But doesn't, well, Mr Butler's analysis sidesteps all that issue, because it just says that, effectively, this is a contract that binds the administrator and therefore binds the estate that is being administered.

MS BRUTON KC:

Yes, and I completely –

KÓS J:

Well, and takes the property out of the estate.

WINKELMANN CJ:

Yes, well, binds the estate.

WILLIAMS J:

And so you're in violent agreement with Ms McGuigan, really.

MS BRUTON KC:

I absolutely agree with Dr Butler.

WILLIAMS J:

Well, with Ms McGuigan, that's what she said, too.

MS BRUTON KC:

Well, I'm not entirely sure about that.

WILLIAMS J:

She said the thing is taken out of the estate.

WINKELMANN CJ:

No, no, she didn't.

WILLIAMS J:

Well, that's what I thought she said. Well, she, yes, she danced a little, but that was the essence of it.

MS BRUTON KC:

It sort of moved around a little bit, I thought, but in any event, may I tell you what the Law Commission said about this in 2021? So, Ms McGuigan took you to the Law Commission Paper from 2017 and the 2021 report, their Issues Paper is tab 10 of the respondent's bundle of additional authorities. So I will just point out what Your Honours need to look at in this regard, it's paragraph 11.13: "In our preliminary view, the law should respect the wishes of partners or people contemplating entering a relationship to have their rights and claims against each other's estates determined by agreement rather than the relevant statutes, provided the parties are capable of looking after their affairs and have entered the agreement informed of their rights."

So, the Law Commission there is talking about both contracting out of claims under the Family Protection Act and under the intestacy regime so they are also saying contractual primacy should trump.

KÓS J:

What was the reference?

MS BRUTON KC:

It is the Law Commission's Succession Issues Paper, so it's –

COOKE J:

Number 46?

MS BRUTON KC:

2021, yes.

COOKE J:

What paragraph?

MS BRUTON KC:

It is paragraph –

WINKELMANN CJ:

Paragraph 11.13.

MS BRUTON KC:

Paragraph 11.13 and the respondents have filed that whole report at their tab 10.

Then I just want to briefly talk about pleadings and whether the Court can actually determine the contractual interpretation issue that applies to this contract. So, I fully accept that there were issues with the pleading and the way the case was run in the High Court, but by the time we got to the Court of Appeal and I came on board, and the amended notice of appeal is at page 101.009, and if Your Honours look at that, and this was the new argument, it's pleaded from paragraph 1.3. There's –

WINKELMANN CJ:

So, normally in High Court proceedings we amend the pleading as well, the claim. I mean, I know that's kind of like it has a slight Family Court feeling of a rolling maul.

MS BRUTON KC:

Yes, and look, I agree, Your Honour, but there was nothing I could do about that, because I came on later.

WINKELMANN CJ:

Well, you can actually apply for leave to amend. You can still amend your pleadings even at the Court of Appeal stage, I think.

MS BRUTON KC:

Well, I did with respect in terms of – if Your Honours look at 101.010.

KÓS J:

I would like to look at it. Is it going to be put up or not?

WINKELMANN CJ:

Who's taken over?

COOKE J:

Who's driving the Bentley.

MR BUTLER:

Or the Volvo.

WILLIAMS J:

I think we prefer a Volvo.

KÓS J:

Speak for yourself.

WINKELMANN CJ:

No one wants a Bentley, reputationally damaging.

MS BRUTON KC:

It's 101.009.

WINKELMANN CJ:

Carry on anyway, Ms Bruton, because you're running out of time.

MS BRUTON KC:

So what I pleaded there is that: "The judgment or order that ought to have been given is that: (a) A party to a s21 agreement may, by that agreement, contract out of the default intestacy entitlements they would otherwise have had under section 77 of the Administration Act on the intestacy of the other [partner]. (b) On the correct construction of the Agreement, both Mr Rimmer and Ms Wilton contracted out of the default intestacy entitlements ... (c) Mr Rimmer having died first, Ms Wilton had no entitlements to Mr Rimmer's estate on his death and intestacy, other than to the extent provided for in the Agreement – ie the right to lifetime occupancy and use of Moumoukai Road, together with all plant and equipment used in relation to the property and all stock depastured thereon (cl4.4)."

Then I pleaded: "(d) on the correct construction of the agreement:", here we go, "(i) Mrs Wilton's life interest under clause 4.4 ended on the sale of the Moumoukai Road [and] (ii) On the sale of that property Mr Rimmer's estate was entitled to 50% of the net proceeds of the sale, as 50% owner of that property. (e) To the extent Mrs Wilton chose or was deemed to have chosen Option B, she had contracted out of her rights under s77 ... [and] had no entitlements on intestacy. Accordingly, the appellants are the sole beneficiaries on Mr Rimmer's intestacy. (f) Mrs Wilton must account to the appellants for Mr Rimmer's entire estate, together with interest and costs, with any disputes as to the accounting to be determined in the High Court."

And then the alternative, so that –

WINKELMANN CJ:

So this is styled as a notice of appeal, is it?

MS BRUTON KC:

What's that?

WINKELMANN CJ:

This is styled, this document is a notice of appeal, is it? What is this document called?

MS BRUTON KC:

It is: "First amended notice of appeal." So, that was accompanied by an application for leave to amend the grounds of appeal and that – and my friend, Mr Elliott, is quite right, it was a bit of a shame that it didn't actually get determined until the hearing.

But I do seek leave to file these documents and this is why I say Your Honours can deal with this construction point now, because I emailed Mr Elliott in December 2023 and said: "The appeal will turn on whether on the correct construction of the contracting out agreement your client was entitled to take under the agreement and also on the deceased's intestacy. The agreement is not clear on that and in such cases pre-imposed contract communications are admissible and the quest to ascertain the intention of the parties objectively assessed. I think the first step is to ascertain whether any relationship property/estate files for Mr Rimmer still exist and for Ms Wilton as administrator to secure them, then we can talk about whether you are prepared to disclose them and whether or not they can be adduced on appeal by consent." And the answers that I got, both from Mr Rimmer's – well, his former solicitor was dead, and then through from Mr Elliott after making enquiry with Insight Legal, is there are no files.

So, I was alive to that issue in the Court of Appeal, tried to get to the bottom of it without success. So, I think and I will, with Your Honours' leave, file these emails, if you want to see them.

WINKELMANN CJ:

We'll come back to you on that.

MS BRUTON KC:

But so all we have, Your Honours, is the contract and that is capable, entirely capable, of being interpreted by this Court on the basis of that sole document, in my submission.

COOKE J:

Was the application to amend the notice of appeal opposed on the basis that if it was granted evidence would need to be filed?

MS BRUTON KC:

I can't, I...

WINKELMANN CJ:

Well, do we have those papers in the bundle?

MS BRUTON KC:

We don’t and I can't remember the answer to that, sorry.

WINKELMANN CJ:

Right, well, perhaps if we could have those documents filed.

MS BRUTON KC:

Yes. I do recall it was opposed and I said – and I can't remember why, so with Your Honours’ leave I file the relevant documents.

WINKELMANN CJ:

So perhaps if you could file, just confer with Mr Elliott and make sure we get the right documents.

MS BRUTON KC:

Yes, yes, including the emails with the enquiries –

WINKELMANN CJ:

Well, I’m not sure about the emails, I’ll come back to you on that, it's a different thing, but this, what's in front of the Court, is quite material, I think.

MS BRUTON KC:

Yes, yes, I appreciate that, we'll attend to that after conferring.

And then, just finally, my final point and just in case Your Honours wonder when you're going through the written submissions, as I said in my earlier submissions, there's a couple of areas where the appellants' position has not changed completely but perhaps softened, in terms of the way these submissions are worded, so if I could just ask Your Honours to make a note of those paragraphs.

WINKELMANN CJ:

Paragraph 1.10?

MS BRUTON KC:

Yes, paragraph 1.10. So what that actually says: "Third, a survivor cannot receive both their relationship property entitlements and their succession … entitlements unless …", and then the rest of it should be deleted and it should say "on the correct construction ...".

WINKELMANN CJ:

Hang on. Unless, right, "... on the correct construction"?

MS BRUTON KC:

"... of the agreement between the parties, any other property ownership arrangements and any Will."

COOKE J:

Is the way to deal with this for you to file something rather than for us to be…

WINKELMANN CJ:

Yes. Perhaps you could just file a corrected…

MS BRUTON KC:

Yes. I'll correct that. So it is softened and the other one that is softened is paragraph 4.3. So I said in my oral submissions this morning that we come to the conclusion that if Mr Rimmer had done a Will, there was no prescription on Ms Wilton inheriting pursuant to that Will, which is a bit different from what paragraph 4.3 says.

WINKELMANN CJ:

Thank you. So can I just ask you, because you didn't really engage with Mr Butler's analysis. Do you say, what's unworkable about his analysis?

MS BRUTON KC:

The main thing, the area that I didn't agree with when I read his written submissions, was that you didn't have to make an Option A or B choice, and that is because of the deeming provision at section 68, and also, and I know these aren't primary legislation, but also because to fill out the forms, if it's the surviving spouse who's applying for letters of administration, you're required to have made that choice.

COOKE J:

But do you back off that now because of section 87?

MS BRUTON KC:

Well, in respect of the first issue, yes, in respect of the section 68 deeming, but not in respect of the forms, because I'm not quite sure what else is supposed to happen, because the forms are mandatory and if anyone doesn't fill out the forms, the probate or the administration application gets sent back from the registry.

WINKELMANN CJ:

Well, isn't Mr Butler's point though that it's sidestepped, because it's just an ordinary claim on the estate? A contractual claim which is saying…

MS BRUTON KC:

To that extent, yes, Your Honour, but there will still be other property in the estate that has to be the subject of administration. So someone –

WINKELMANN CJ:

May or may not be.

MS BRUTON KC:

Well, who knows. Again, it's case-by-case, but as a matter of principle, and a matter of practice usually, unless it's a small estate, an application for probate or letters of administration has to be made.

KÓS J:

But that's not really a problem because A and B are not on the table if the matter's been dealt with by agreement, on your argument.

MS BRUTON KC:

Well, that's correct, Your Honour, with regard to the parties to the agreement, but what about other beneficiaries and claimants? So there has to be an application, almost always, for probate or a grant of administration.

KÓS J:

Yes, that's right, but your surviving spouse doesn't need to make an application or make an election.

MS BRUTON KC:

That's absolutely – that's correct Sir, and that ties into, and it's most easily explained by reference to my spreadsheet in terms of the statutory forms. The applicant must have a beneficial interest in the estate to apply for their grant.

WINKELMANN CJ:

So, they wouldn't have an –

MS BRUTON KC:

Exactly.

WINKELMANN CJ:

On Mr Butler and your analysis, they wouldn't have a beneficial interest in the estate.

MS BRUTON KC:

Yes, and that would solve this problem. And the other thing, and if the Court is providing some guidance about next steps, is I have thought, well, how do you actually solve this problem in situations where the interpretation of the contract is not necessarily all that clear?

So, in a probate application, if there's an absence of clarity or issues around validity, because of lack of capacity or undue influence, you make the application in solemn form and similarly there's scope, I think, I mean it's not provided for in the Regulations, for in cases like this where this is a contracting out agreement that's less than clear and it's unknown who should get the grant for a solemn form type application for letters of administration to be granted where the contract is also provided.

WINKELMANN CJ:

Right, okay.

MS BRUTON KC:

So those are my submissions in reply.

WINKELMANN CJ:

Thank you, counsel, for your very helpful submissions and we will reserve our decision.

KÓS J:

Is there leave for response to Mr Butler?

WINKELMANN CJ:

Well, did you want to respond, Mr Butler or Mr Elliott? I am sorry, I may have just foreclosed you?

MR ELLIOTT:

No. If you require clarifications or a response position I am happy to give that, but otherwise I am happy to let it lie.

WINKELMANN CJ:

Thank you, Mr Elliott. We will take an adjournment.

COURT ADJOURNS: 4.30 PM