IN THE SUPREME COURT OF NEW ZEALAND SC 138/2016

BETWEEN **MARK ALBERT HORSFALL**
Appellant

AND **DIANA JANE POTTER**
First Respondent

168 GROUP LIMITED
Second Respondent

AND **ATTORNEY-GENERAL**
Intervener

Hearing: 15 June 2017

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
McGrath J

Appearances: T G Stapleton QC and J H Coleman for the Appellant
J R Billington QC and T F Cleary for the First Respondent
R J B Fowler QC for the Second Respondent
M Deligiannis for the Intervener

CIVIL APPEAL

MR STAPLETON QC:

May it please the Court, I appear and with me Mr Coleman for the appellant.

ELIAS CJ:

Thank you Mr Stapleton, Mr Coleman.

MR BILLINGTON QC:

May it please the Court, I appear with Mr Cleary for the first respondent.

ELIAS CJ:

Thank you Mr Billington, Mr Cleary.

MR FOWLER QC:

May it please the Court, I appear for the second respondent and after the appearances have been recorded, I wish to raise a matter as to whether I could be excused.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

May it please the Court, Ms Deligiannis for the Attorney.

ELIAS CJ:

Thank you, Ms Deligiannis. Right, Mr Fowler, you wish to be excused?

MR FOWLER QC:

Yes, Your Honour. The position is that the second respondent's submissions would indicate to you that the appeal is generally supported in respect of its effect on 168 Group Limited but in reality, the position with 168 Group Limited as second respondent pretty much floats with the tide. In the Court of Appeal, the first respondent was appellant and counsel for the appellant accepted whether the appeal was allowed as it was. Then, issues regarding 168 Group Limited would be determined in the Family Court under section 44 and on that basis, I as counsel for second respondent took no further part in the appeal. I've checked with all other counsel. They don't have any issue with my being excused. I'm happy to remain if the Court wishes me to but as I indicated

before, the second respondent is very much the bridesmaid in this affair and probably doesn't have anything meaningful to add beyond what's already in the contest between husband and wife.

ELIAS CJ:

Do you have a problem with that? No, we don't have a problem with that, Mr Fowler, if you think your client's interests are sufficiently protected if you've put in your submissions. Yes, thank you.

MR FOWLER QC:

If it please the Court, I'm grateful.

ELIAS CJ:

Yes, Mr Stapleton.

MR STAPLETON QC:

Yes, may it please the Court. The leave which has just been given to my learned friend for the second respondent demonstrates the context in which this appeal takes place and that is it's a section 44(1) of the Act context only. As he has said correctly, subsections (2) and subsections (4) do not arise unless the appeal is dismissed and matters are then recommenced in the Family Court. The only section 44(1) element which has been an issue in this case throughout is the issue of Mr Horsfall's intention at the time of the payments of the proceeds of sale of the College Street property to 168 Group in March, April and June 2004.

The issue has always been, did Mr Horsfall make those payments? With that intention or in order to defeat Ms Potter's claim or rights under the Act and while the onus of proof on that issue is on Ms Potter, Mr Horsfall says the answer to that question is no, and he says it's no because of the parties' agreement about taking title to the College Street property to avoid the risk of tainting in circumstances where the purchase monies were provided not by the parties but by 168 Group as to $390,000 and 88 Riddiford Holdings as to $170,000 and if it pleases the Court, I make those remarks by way of opening

introduction to the submissions which I have filed and which I now propose to refer to in the knowledge, of course, that the Courts will have read them.

GLAZEBROOK J:

Mr Stapleton, can I just check, you accept, do you, that it follows that the decision on section 44 follows if, in fact, we're not with you on that point in terms of the intention at the time?

MR STAPLETON QC:

In what sense, Your Honour?

GLAZEBROOK J:

Well, you're not saying that if in fact there was an intention to hold it beneficially that the section 44 determination is wrong?

MR STAPLETON QC:

What I'm saying in a section 44(1) context –

GLAZEBROOK J:

Is wrong only because of the intention at the time, is that right?

MR STAPLETON QC:

Yes –

GLAZEBROOK J:

That's fine.

MR STAPLETON QC:

– but to take it further so that you understand my position, Your Honour, the final determination of the section 44 resulting trust component, for example, as between Ms Potter and 168 Group doesn't arise in this Court. It arises in the Family Court if the appeal is dismissed.

GLAZEBROOK J:

I know. I understand that.

MR STAPLETON QC:

And so that – I'm just gathering my thoughts, and so that in a section 44(1) context, because that issue does not fall to be determined here, all that Mr Horsfall has to do in terms of the 44(1) issue is to point to evidence in the nature of resulting trust, to point to evidence that the companies and not he or Ms Potter provided the purchased monies for the purchase of the College Street property.

ELIAS CJ:

So just point to evidence?

WILLIAM YOUNG J:

But say we reject it?

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Say you point to his evidence saying it was held on resulting trusts and we say, "Well, that's a lot of rubbish." I mean, pointing to is not going to get you anywhere then, is it?

MR STAPLETON QC:

Well, I'm trying to address matters by way of principle, Sir, in terms of section 44(1) as it stands.

WILLIAM YOUNG J:

Theoretically, it would be possible for the Court to hold, yes, the College Street property was acquired, it was relationship property, but Mr Horsfall didn't recognise that that was the case and therefore, he didn't intend to defeat Ms Potter's claims when he transferred the money. That would be a possible outcome. But no one's argued that or none of the Judges to date has seen that as a way through the case. They've all said, "Well, he knew perfectly well what the relationship property provided," and

basically, if it isn't the property of the companies then he's caught by section 44(1).

MR STAPLETON QC:
Subject only to the submission that's made that the essential issue in section 44(1) was not put to him in cross-examination.

ELIAS CJ:
The essential issue being?

MR STAPLETON QC:
"Did you have an intention at the time you made each of those payments to 168 Group Limited in March, April and May 2004 to defeat the claim or rights of Ms Potter under the Act?"

WILLIAM YOUNG J:
He would have said no.

MR STAPLETON QC:
Yes, but it must be put, Sir, so that one can then see and assess all of the other factors Your Honour has just referred to in the context of his answer to that question. It can't simply be assumed that, well, he would've said no to the question, therefore, it doesn't need to be put.

WILLIAM YOUNG J:
Was it never, ever put to him that section 44(1) applied?

MR STAPLETON QC:
It was never, ever put to him, "Did you have an intention at the time you made the payment" –

WILLIAM YOUNG J:
Sorry, but the whole case was –

O'REGAN J:

But he was facing a section 44 claim.

ELIAS CJ:

The whole case was heard –

MR STAPLETON QC:

And secondly, it was never put to him in cross-examination, "You know about section 44(1)" –

ELIAS CJ:

Well, what was his case?

MR STAPLETON QC:

– "did you have an intention?"

ELIAS CJ:

What was his case?

GLAZEBROOK J:

If he didn't know about it, isn't that his problem?

MR STAPLETON QC:

No, the –

GLAZEBROOK J:

I mean, if he knew that it was owned beneficially by the two of them and transferred it to someone else, isn't that an intention whether he knew about section 44(1) of – and I think there was a finding he did know anyway about the relationship property issues, was well aware of them. That's why I asked you the question in the first place whether you accepted that it turned just on that question of ownership and you're saying it doesn't just turn on that, it turns on it not being put to him in cross-examination. Is that the answer?

MR STAPLETON QC:

Correct.

GLAZEBROOK J:

And that's the only other point?

MR STAPLETON QC:

Well, it's not the only other point. The points are fully set out in the written submissions, Your Honour.

GLAZEBROOK J:

Well, just summarise them for me if there's another point.

ELIAS CJ:

Just before you do, does that mean the outcome here would have to be returning the matter to the Family Court for a determination as to his intent at the time, for a finding of fact as to his intention at the time of disposition?

MR STAPLETON QC:

That is one outcome, Your Honour. That outcome, to allow the appeal and remit to the Family Court along with the other issues, would enable all the section 44 issues to be addressed and determined at the one hearing. But of course Mr Horsfall's contention is that the appeal should be allowed outright, not allowed and remitted to the Family Court.

ELIAS CJ:

But on any view the line you're taking is that the essential question for the case was not determined, so wouldn't we have an unresolved issue that would have to be determined by the Family Court?

MR STAPLETON QC:

On that narrow basis yes, Your Honour.

WILLIAM YOUNG J:

I thought Judge Walsh, Justice Simon France in the Court of Appeal, all said, "Unless this isn't relationship property section 44(1) satisfied," there are findings of fact in three Courts on this.

MR STAPLETON QC:

Yes, there are.

WILLIAM YOUNG J:

Are you challenging those?

MR STAPLETON QC:

What I'm challenging is in the context of the remarks referred to earlier, the essential element of s 44(1) was not put to Mr Horsfall.

WILLIAM YOUNG J:

Yes, so the answer is you are challenging. You see, Judge Walsh says section 44(1) satisfied, Justice Simon France says, "Well, unless it's not relationship property section 44(1) satisfied," the Court of Appeal says section 44(1) is satisfied. So you're saying – never mind the reasons for a moment – but you're saying that those findings are wrong and we should set them aside.

MR STAPLETON QC:

Yes, in a context where the essential question wasn't put, and –

GLAZEBROOK J:

Is that the only reason, was what I was asking you, for that submission, the only reason you say that is because they weren't put, or is there another reason you say that?

MR STAPLETON QC:

Because it wasn't put and because Justice Wild in the Court of Appeal acknowledged that it was a fair point when I raised that point in the course of

my oral submissions. It's not something, in my submission, which can lightly be disregarded.

GLAZEBROOK J:
I'm not asking you to justify that, I'm just asking you whether there was anything else other than that which you say means that section 44(1) wasn't satisfied?

MR STAPLETON QC:
Oh, I'm saying that it –

GLAZEBROOK J:
It's just that – I think we're at cross-purposes so maybe it's not worth pursuing.

ELIAS CJ:
All right, carry on with your development.

MR STAPLETON QC:
If I can put it this way, in response to Justice Glazebrook's latest question, in terms of the well-recognised "but for" test, the submission is that but for the payments to 168 Group on the three occasions I've mentioned, would Ms Potter have had an interest in those payments, and the submission is that the answer to that question in terms of the conventional test is no, because of the parties' agreement and because the purchase monies were provided by the companies.

WILLIAM YOUNG J:
But I thought the purchase money was largely provided by Mr Horsfall.

MR STAPLETON QC:
No, the accounting evidence, the unchallenged accounting evidence from Mr Underwood, is that the capital profit outcome was properly recorded in the financial statements of 168 Group –

WILLIAM YOUNG J:

But you don't support here – the money to acquire the College Street property, as I understood it, came in part from one of the companies and in part from Mr Horsfall's sale of shares.

MR STAPLETON QC:

Yes, and what happened with the proceeds of the sale of Mr Horsfall's separate property shares was that they were advanced to 168 Group, they were recorded in the financial statements I've just referred to as being so advanced, and then applied by 168 Group to fund $390,000 of the purchase price. Now those two facts I can refer Your Honours to in the 2005 financial statements for 168 Group…

GLAZEBROOK J:

There are findings on this in the Courts below, aren't there, that it's too difficult to know where the money came from, so you're challenging those findings is that – that's right.

MR STAPLETON QC:

Yes, I am, and I'm saying it's not –

GLAZEBROOK J:

No, no, I'm just checking, sorry.

MR STAPLETON QC:

It's not when you look carefully at the evidence in a close way, and perhaps I can do that by first all referring in response to Justice Young's question to the relevant pages of the financial statements I've just referred to, and they are in volume 3B of the case on appeal, and the page reference is 1682 and 1684 in that volume. And Your Honours will see, if you turn to page 1682, the statement of financial position, the last entry under, "Current liabilities," is the advance from Mr Horsfall, you'll see that at the end of the 2004 year the balance was 69,250 owed by the company to him, and as at 31 March 2005 the balance had increased to $497,284, that being an increase of $428,034, in

the context where Mr Horsfall's evidence was that he sold his separate property shares realising $425,344 to enable 168 Group to fund 390,000 of the purchase price.

ELIAS CJ:

What's the reference to the evidence, or preferably to the findings in the…

GLAZEBROOK J:

The findings are contrary to Mr Stapleton's argument in the Courts below.

ELIAS CJ:

Yes, but I'd quite like to see what the Courts said about…

O'REGAN J:

Yes, it might be helpful to start with the findings.

ELIAS CJ:

To start with the findings.

WILLIAM YOUNG J:

Do we see the money going out to pay for College Street?

MR STAPLETON QC:

Yes, we do, Sir. We –

GLAZEBROOK J:

Do we know when these accounts were prepared, what date, did Mr Underwood say?

MR STAPLETON QC:

No, because they weren't prepared by him, they were prepared by the accountants for 168 Group.

GLAZEBROOK J:

Oh, okay. Do we know when they were prepared?

MR STAPLETON QC:

No, I don't know, Your Honour. But what they show is what I've submitted, that the monies were in fact advanced through Mr Horsfall's advance account with 168 Group, and then as Mr Underwood in his unchallenged evidence, "Properly accounted for in these financial statements," and Your Honours can see that in both of the statements I've referred to, the statement of movement and advances and the statement of financial position.

WILLIAM YOUNG J:

But is this the right year?

MR STAPLETON QC:

Yes, it is.

WILLIAM YOUNG J:

When was College Street purchased?

MR STAPLETON QC:

It's the sale, Sir, that's important. The sale was settled on the 1st of April 2006. Mr Underwood's unchallenged evidence – and I've set it out at paragraph 14 of my submissions on page 6 – the property was purchased on the 8th of May 2003 and the sale was settled on the 1st of April 2004. Mr Underwood's evidence was, as you can see at the middle of page 6, "That was the appropriate year to record the capital profit outcome because of course that was the first day of the 2005 financial year."

WILLIAM YOUNG J:

So is the property recorded in the accounts for the 31 March 2004 year?

MR STAPLETON QC:

No, it's not, because it was an off-balance sheet transaction.

WILLIAM YOUNG J:

Okay, well that just means it's not recorded.

MR STAPLETON QC:

Well, yes, it does, but the reason for that was that it was off-balance sheet and –

O'REGAN J:

You can't have it off-balance sheet if you have a beneficial ownership. You can have it off-balance sheet if it's a lease or something like that, but if it's beneficially owned it has to be recorded, and the fact that they didn't record it doesn't make it an off-balance sheet item, it just means the accounts are inaccurate.

WILLIAM YOUNG J:

Or accurate.

O'REGAN J:

Or they're accurate and there was no beneficial ownership, one or the other.

MR STAPLETON QC:

Well, no, they are accurate in the sense that the – Mr Underwood's evidence in response to the –

O'REGAN J:

You're saying that the company had a beneficial ownership –

MR STAPLETON QC:

Yes.

O'REGAN J:

– of the property and the accounts don't show that, so they must be inaccurate.

MR STAPLETON QC:

No, I'm saying that the accounts don't show it, Sir, until the capital profit outcome was recorded in the relevant financial statements.

O'REGAN J:

Yes, but the company owned the asset in the meantime, the accounts would have – you're saying the company was beneficial owner of the asset in the meantime?

MR STAPLETON QC:

Yes.

O'REGAN J:

If it were, the accounts would show that.

MR STAPLETON QC:

No…

O'REGAN J:

The fact that the accounts don't show that suggest it wasn't.

MR STAPLETON QC:

No, I'm submitting, Sir, that the accounts do show it when the capital profit outcome is properly recorded –

O'REGAN J:

Yes, but that's irrelevant to us. We want to know what happened when the property was actually in the ownership, in the name of the two parties to this litigation, what is there to show that 168 was really the owner, that's what we want to know. That's what you need to establish and that's what we want to know. So take us to the 2004 accounts and show us where the asset is recorded as being beneficially owned by 168.

MR STAPLETON QC:

It's not in the 2004 financial statements.

O'REGAN J:

Well, doesn't that count against your case then?

MR STAPLETON QC:

No, not when the evidence is that it was properly accounted for, the capital profit outcome –

O'REGAN J:

Well, it's clearly not property – if you own property and you don't put it into your accounts it's not properly accounted for. There's just no ifs, buts or maybes about that.

MR STAPLETON QC:

Well, that was Mr Underwood's unchallenged evidence in the Family Court.

WILLIAM YOUNG J:

Yes, but it's just rubbish though really. I mean, he can't say it's unacceptable but it's okay, because he says two things that are inconsistent. One is, well, it's not appropriate or it's not acceptable, but then he says it is. Well, I just don't accept that, I don't accept that that's a proper approach to a set of accounts.

MR STAPLETON QC:

Well, Your Honour, these matters must be judged on the evidence, and that was the evidence.

WILLIAM YOUNG J:

Well, I know, but what I'm –

ELIAS CJ:

Well, the accounts are evidence too though.

MR STAPLETON QC:

Yes, they are, and the expert evidence around them and the proper recording of the capital profit outcome is also evidence, Your Honour.

O'REGAN J:

Yes, but that's fine, that's recording a capital profit. What we want to know is where does it record ownership of the asset? It's a different thing.

MR STAPLETON QC:

It records ownership of the asset in the 31 March 2005 financial statements –

O'REGAN J:

But the company didn't own the asset then, it owned the asset the previous year, on your case.

MR STAPLETON QC:

Yes, but what it did, Sir, was to bring to account at the end of the transaction the purchase and the sale and record the capital profit outcome –

WILLIAM YOUNG J:

All right, where's the capital profit outcome recorded in the 2005 accounts?

MR STAPLETON QC:

If you look at page 1682 you'll see that total assets have increased from 1.2 million to 2.4 million, an increase of 3.1 million, you'll see that total current liabilities have increased from 330,000 –

WILLIAM YOUNG J:

Sorry, I just haven't got – I'm okay.

MR STAPLETON QC:

1682, Sir.

WILLIAM YOUNG J:

Yes, okay, thank you.

MR STAPLETON QC:

You'll see the increase in total assets from 1.2 million the previous year to 4.4 million at 31 March 2005, you'll see the increase in total current liabilities

and then the increase in total liabilities from 919,000 to 2.8 million, and you'll see the increase in net assets from 345,000 to $1.598 million. And this reflects the capital profit outcome in respect of the College Street transactions and also the purchase of the Kent Terrace property which was settled on the 2nd of June 2004 during that 2005 financial year.

WILLIAM YOUNG J:

Is there an analysis, has anyone done an analysis showing how the increase in fixed assets, which is I guess the critical figure, reconciles back to the capital profit? Did Mr Underwood do an analysis showing that?

MR STAPLETON QC:

No. No, his evidence was in the terms that I've already referred to, that it was properly accounted for.

GLAZEBROOK J:

So 1685, because that refers to the schedule of assets and depreciation, so page 1685 has a schedule of assets there.

MR STAPLETON QC:

Yes.

GLAZEBROOK J:

So where exactly does College Street come in?

MR STAPLETON QC:

The proceeds of sale from College Street were all applied –

GLAZEBROOK J:

So the answer is they're not at 1685 or they are at 1685?

MR STAPLETON QC:

They're reflected in the purchase of the Kent Terrace property, Your Honour, because that's where the proceeds of sale from College Street which were paid to 168 Group went.

GLAZEBROOK J:

So the answer is they're not there, they're not referred to?

MR STAPLETON QC:

No, the answer is yes they are, they're represented by the Kent Terrace property.

O'REGAN J:

So where's the previous year's equivalent of this showing the College Street property? That's what one would expect consistently with the accounting treatment here?

MR STAPLETON QC:

It's not there, Sir, for the reasons I've mentioned.

ELIAS CJ:

It's –

GLAZEBROOK J:

Well, actually, one would've thought you'd have it here because you'd have the sale there.

O'REGAN J:

Correct.

GLAZEBROOK J:

You'd have the purchase of –

O'REGAN J:

If it was owned on the 1st of April, it should be here and then recorded as being transferred, shouldn't it?

MR STAPLETON QC:

Yes, but it was there, and then the purchase monies, the proceeds of sale went to 75 Kent Terrace which is why the Kent Terrace property is recorded.

GLAZEBROOK J:

But you wouldn't normally do that, would you? You'd have a purchase price of sale and then another purchase and the sale, so your College Street would be here. It would just have been sold during the year.

MR STAPLETON QC:

It would depend on the accountant preparing the accounts, Your Honour.

WILLIAM YOUNG J:

What was the capital profit?

MR STAPLETON QC:

The capital profit on the sale of College Street is difficult to quantify in the sense that there was the joint venture with Ascot Resources, there was a calculation between Mr Scott of Ascot Resources and Mr Horsfall about the value of the interest of 168 Group and the joint venture. The purchase price agreed between the two of them was $560,000 but that reflected the fact that Ascot Resources had received the profit from the sales of the first two College Street properties. Grossed up, then, from 560,000 to a full 100%, you're at 1.12 million, and then the sale price was 1.575 million, GST inclusive.

WILLIAM YOUNG J:

At 1681, again, the 2005 account says a capital profit recorded of $431,000. What's that relate to?

MR STAPLETON QC:

Which page are you at, Sir?

WILLIAM YOUNG J:

1681.

MR STAPLETON QC:

Yes.

WILLIAM YOUNG J:

See there's a capital profit of 431,000?

MR STAPLETON QC:

Yes, I see that.

WILLIAM YOUNG J:

What does that relate to?

MR STAPLETON QC:

The capital profit during the year, I assume.

WILLIAM YOUNG J:

Yes, but does it incorporate – it doesn't incorporate College Street?

MR STAPLETON QC:

Well, it must do, given that College Street was bought and sold during the period.

WILLIAM YOUNG J:

But there's more profit on College Street than 481,000.

ELIAS CJ:

30.

WILLIAM YOUNG J:

431,000.

MR COLEMAN:

No, not necessarily, Sir. In terms of the numbers I've taken the Court through, at 1.12 million and the sale price of 1.575 million, the 431,000's about right.

WILLIAM YOUNG J:

Yes, but the base is never recorded. This is what – I just can't understand the accounts. Does anyone set this out, try to reconcile what happened to these accounts?

MR STAPLETON QC:

How this is calculated?

WILLIAM YOUNG J:

Yes.

MR STAPLETON QC:

No.

WILLIAM YOUNG J:

So they're just – well, I suppose it might be a bit unfair but they're just figures, are they? They don't correlate to anything that's actually…

MR STAPLETON QC:

Well, they're not just figures, Sir. They are – first of all the accountant who prepared these accounts, they are his rendition of what occurred during the financial year.

WILLIAM YOUNG J:

Did he give evidence?

MR STAPLETON QC:

No. Mr Jordan for Ms Potter gave expert evidence about them which was responded to by Mr Horsfall and then Mr Underwood gave the evidence that I have referred to.

ELIAS CJ:

It's not in contention, is it, that the profits were received by 168 Group Limited?

MR STAPLETON QC:

It's never been an issue that that's where the payments went, Your Honour.

WILLIAM YOUNG J:

Well, I think it is, because the money was originally paid from the joint account, wasn't it? The proceeds of sale initially went to the joint account?

MR STAPLETON QC:

No. Proceeds of sale went to Mr Horsfall's account.

WILLIAM YOUNG J:

All right, sorry.

MR STAPLETON QC:

And he then paid them as he said at paragraph 58 of his narrative affidavit to –

ELIAS CJ:

I'm just really wondering why all of this bears on the essential questions for the appeal.

WILLIAM YOUNG J:

Well, it's who owned the property.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

The claim is that 168 –

ELIAS CJ:

Well, no, I understand about the fact that the, the inconsistency and not showing – it's just the proceeds of sale that I'm not…

WILLIAM YOUNG J:
We haven't really quite got to that yet.

ELIAS CJ:
Okay.

GLAZEBROOK J:
Now I'm actually wondering also why the 2005 accounts show that the money came from the company.

MR STAPLETON QC:
Which page are you at, Your Honour?

GLAZEBROOK J:
Well, you say because there's been that increase, it shows that the money came from the company.

MR STAPLETON QC:
Sorry, which increase?

GLAZEBROOK J:
But it wasn't purchased in 2005. It was sold in 2005.

MR STAPLETON QC:
Yes, but –

GLAZEBROOK J:
So how does the increase in the liability to Mr Horsfall show that the company provided the funds the year before?

MR STAPLETON QC:
Because the figure of $428,000 shown corresponds with his evidence about sale of a separate property's shares for $425,000 which was used to fund the purchase and the accounts record those monies as –

GLAZEBROOK J:
But why in 2005?

MR STAPLETON QC:
Because that's what happened, Your Honour. It's recording the capital profit outcome and –

GLAZEBROOK J:
No, but you say that the company provided the funds to purchase it and that's shown by the 2005 increase in liability to Mr Horsfall or have I misunderstood you?

MR STAPLETON QC:
Two step process, Your Honour.

GLAZEBROOK J:
Okay, right.

MR STAPLETON QC:
The first is that the proceeds of sale of Mr Horsfall's separate property shares go through his advance account to 168 Group and 390,000 –

GLAZEBROOK J:
So when do they do that?

MR STAPLETON QC:
Those monies go in during May 2003, the purchase being settled on the 8th of May 2003.

GLAZEBROOK J:
But why are they – but I thought you said that they went through the accounts in 2005 so why would something that went to the company in 2003 as a loan only be recorded in 2005?

MR STAPLETON QC:

Because it's recording the capital profit outcome and it necessarily in that context has to record how the purchase monies for the College Street purchase on 8 May 2003 were provided.

GLAZEBROOK J:

Well, so the accounts in 2003 not only didn't show an asset but they didn't show a liability that was owed by the company? That's the submission?

MR STAPLETON QC:

That's correct.

GLAZEBROOK J:

But the accounts were totally wrong in that there was an asset and the corresponding liability that weren't recorded?

MR STAPLETON QC:

The accounts did not show the position Your Honour's referred to because these were off-balance sheet transactions and Mr Underwood's unchallenged evidence which I have referred to –

GLAZEBROOK J:

Well, on what basis can you have an off-balance sheet transaction that doesn't show the assets and liabilities of a company when you are purporting to put accounts that show the assets and liabilities and financial position of a company?

MR STAPLETON QC:

Well, you can have it because in Mr Underwood's expert opinion, which I have recorded at page 16 of my submissions, and you'll see in the middle of page 16 –

O'REGAN J:

But none of the Courts below have accepted it, have they? You've got concurrent findings in three Courts below that reject this.

MR STAPLETON QC:

No, they have accepted that these transactions were off-balance sheet. The Family Court accept that.

O'REGAN J:

But they've accepted – they found that the accounting treatment is inconsistent with the case you're putting forward.

MR STAPLETON QC:

Not as I understand the judgment, Sir, no. You see, to start with the Family Court, if Your Honour goes to paragraph 200(e) of the Family Court judgment, that's where the Family Court judge sets out his findings on these particular issues and if you go to paragraph 200(e) of the Family Court findings –

McGRATH J:

What volume are we in?

MR STAPLETON QC:

We're in volume 1, at tab 10, Sir, at page 154.

McGRATH J:

Thank you.

WILLIAM YOUNG J:

Sorry, what page are we, sorry?

O'REGAN J:

154, 155.

MR STAPLETON QC:

154 and 155.

GLAZEBROOK J:

That's not a finding that the funds were provided by the company, though, is it?

MR STAPLETON QC:

It is indeed because at paragraph –

GLAZEBROOK J:

Sorry, not in the way that you say.

MR STAPLETON QC:

What the Family Court Judge finds, Your Honour, at 200(e) is, "The funds required to complete the purchase were advanced by the respondent 168 Group Limited and 88 Riddiford Holdings Limited to the parties."

O'REGAN J:

Yes, but that's the opposite of what you said.

GLAZEBROOK J:

Yes.

O'REGAN J:

You said that the parties provided it to 168.

MR STAPLETON QC:

Yes, because my submission is that this analysis in the Family Court was wrong, there is nothing.

O'REGAN J:

I asked you, I said you were facing concurrent findings against you, you said, "No, I'm not," you're taking us to a finding which is a finding against you.

MR STAPLETON QC:

But what I'm submitting, Your Honour, is the finding is wrong. If you'll let me finish in respect of –

O'REGAN J:

Well, that's not answering the question I put to you, but okay, that's fine.

MR STAPLETON QC:

Well, if one looks at paragraph 200(e), you'll see that the Family Court Judge is proceeding on the basis that there was then an advance back to the parties who then completed the purchase in their personal capacities. Now the Family Court Judge's finding of advance back to the parties is wrong, there's no evidence to support that, it's contrary to the evidence in the financial statements I've referred to, it's contrary to Mr –

GLAZEBROOK J:

Well, can you take us to the 2003 or it might be 2004 financial statements to show what was recorded there, if anything, in terms of where the funds were provided? Because my understanding is that nothing was actually recorded until 2005.

MR STAPLETON QC:

Correct.

GLAZEBROOK J:

So basically you have absolutely no evidence from the accounts whatsoever as to what happened in 2003, is that right?

MR STAPLETON QC:

No, it's not right, because I have the evidence from the 2005 accounts, Your Honour. They record the movement in advances –

GLAZEBROOK J:

Well, you can record what you like, you don't have any contemporary evidence, I mean assuming even that the accounts were not all prepared at the same time, because we don't know when they were prepared because accounts can be prepared at any time, can't they?

MR STAPLETON QC:

They can. But they're prepared for the year ending 31 March 2005.

GLAZEBROOK J:

So there's no contemporary evidence in the 2003 or 2004 accounts that shows any of these transactions?

MR STAPLETON QC:

No, because they were off-balance sheet, Your Honour.

O'REGAN J:

That they were not recorded in the accounts, that's more accurate. They're not off-balance sheet transactions, they are just something which has happened which nobody's put in the balance sheet.

MR STAPLETON QC:

I can't do any better, Sir, than refer to Mr Underwood's evidence, he's the accountant, not me, he's the expert witness, not me. If one looks at paragraph 6, page 16 in my submissions, you'll see I've recorded verbatim at page 16 what the Family Court asked him, what his response is, and the fact that there were no questions.

GLAZEBROOK J:

Sorry, what page number?

MR STAPLETON QC:

Page 16, (ii) on that page.

O'REGAN J:

And he says it's not the appropriate way of doing it.

MR STAPLETON QC:

But it –

O'REGAN J:

And then he says, "But it's an acceptable way of doing it."

MR STAPLETON QC:

Yes, correct.

O'REGAN J:

Well, that's just a complete nonsense. It can't be both, can it? It can't be inappropriate but acceptable.

MR STAPLETON QC:

Well, it can, Sir, because the witness said so. He's an expert accounting witness, that was his evidence. It wasn't the subject of further questions –

O'REGAN J:

Which has not been accepted in any of the Courts below, that's the reality.

GLAZEBROOK J:

Are you saying the Courts aren't allowed to differ from an expert?

MR STAPLETON QC:

Well, if they make a finding that they are differing and there is no finding in the Family Court judgment that Mr Underwood's evidence was not accepted, which is why I'm pointing to it in this Court.

GLAZEBROOK J:

Well, it wasn't accepted because he had a finding that was totally opposite to it.

MR STAPLETON QC:

Well, let me come to that now, because –

O'REGAN J:

Well, I think what was accepted was his statement that it was inappropriate. Obviously what wasn't accepted was a statement that it was acceptable. Because you can't accept both of those statements.

WILLIAM YOUNG J:

He says it's black and then he says it's white, and the Judges seem to have taken the view that he was right the first time.

MR STAPLETON QC:

No, but he uses a different word on each part of the sentence, Sir. I mean, it was open for him of course to say, "It is not an appropriate way of doing it full stop," but he doesn't say that, his evidence is, as Your Honours have read in the verbatim transcript. Now –

McGRATH J:

When he says it's an acceptable way of doing it under some circumstances where you could take forever to sort it out, he's almost saying it's an acceptable way of doing it when it's too much trouble to find the accurate position.

MR STAPLETON QC:

No. In circumstances such as College Street, Sir, where you've had the purchase of a 50% interest in a joint venture on a net basis, the funding of the purchase price in the way I've described –

McGRATH J:

Yes.

MR STAPLETON QC:

– the sale of that property and then the use of the proceeds of sale of that property to purchase another property, what he's saying is that in those circumstances, it's not an appropriate way of doing it but it's acceptable where it would take forever to sort it out. And so that things are brought to account in the financial statements at the end of the process I have described.

GLAZEBROOK J:

Well, he might just be saying it was acceptable to do it that way in 2005, not that it was acceptable not to have accounted for it in 2003, so having got to the stage in 2005, it was acceptable just to do it in the way it was done because to go back and redo all of the accounts and do it properly might have taken a bit of time and if you are recording it, it's fine.

MR STAPLETON QC:

Not when you read this evidence in conjunction with his unchallenged evidence I have referred to earlier. What he's saying is that the capital profit outcome was recorded and he's saying in respect of the questions I've been answering about the off-balance sheet item –

WILLIAM YOUNG J:

But he doesn't really because Mr Jordan – I've seen para 66 of Mr Jordan's affidavit. He says the figures are just all wrong, they don't make sense. Mr Underwood didn't take issue with him. He left that to Mr Horsfall and as I understand it, Mr Horsfall didn't challenge in any significant way Mr Jordan's analysis of the capital statements component of the 2005 accounts.

MR STAPLETON QC:

One has to read, Sir, the Jordan affidavit and the Horsfall affidavit in reply in entirety to see what's accepted and what's not.

WILLIAM YOUNG J:

He does it – he deals with – I haven't read it with a ruler but he does engage para by para with Mr Jordan and he doesn't, as I understand it, take substantial issue with Mr Jordan's para 66.

MR STAPLETON QC:

Well, I'll turn to the affidavit, then, Sir.

WILLIAM YOUNG J:

Sure. Just one thing, sorry to disturb you, but I did notice that Mr Underwood's referred to, used the word "parked" in his evidence.

MR STAPLETON QC:

Yes.

WILLIAM YOUNG J:

Suggesting that it's okay just to park things until you later decide what should have been done and, as it were, the paperwork can catch up.

MR STAPLETON QC:

In circumstances where it might take forever to work it out, Sir.

WILLIAM YOUNG J:

Well, the circumstances we haven't decided.

MR STAPLETON QC:

No. He didn't say that.

WILLIAM YOUNG J:

Well, I think he did actually, and he said sometimes it's quite a good thing to leave it until later to sort out and the less documentation, the better.

MR STAPLETON QC:

Well, no, that's running a number of his responses together, Sir.

WILLIAM YOUNG J:

They're probably about two pages apart, I think.

MR STAPLETON QC:

One does have to read them, in my submission, in the sequence in which they were given against the backdrop of his unchallenged affidavit evidence.

WILLIAM YOUNG J:

Well, I don't know that it is unchallenged, actually. I mean, I think that…

MR STAPLETON QC:

If you look at the page, Sir, where the cross-examination, and I've noted it in the footnote –

GLAZEBROOK J:

Can we perhaps turn to it?

WILLIAM YOUNG J:

Perhaps go to Mr Jordan first, yes. Go to Mr Jordan.

ELIAS CJ:

What is the volume?

WILLIAM YOUNG J:

Sorry, it's, Mr Jordan will be in 2C, I think.

MR STAPLETON QC:

He's in 2A or 2B.

WILLIAM YOUNG J:

2A, is he? Sorry.

McGRATH J:

Green, right.

MR STAPLETON QC:

He's in 2B, at tab 5, and Mr Horsfall's response on a paragraph by paragraph basis is in volume 2C at tab 7.

McGRATH J:

So just giving us the top numbers, it's 576 in the green volume, is it we're at?

MR STAPLETON QC:

The paragraph 66 reference that Justice Young's referred to.

McGRATH J:

Paragraph 6?

MR STAPLETON QC:

Justice Young, I believe, was talking about paragraph 66 –

WILLIAM YOUNG J:

Yes, 66 and following.

MR STAPLETON QC:

– in Mr Jordan's affidavit. Is it 66, Your Honour, at 551?

GLAZEBROOK J:

That's in 2B, isn't it, we need 2B rather than 2C?

WILLIAM YOUNG J:

Yes 2B, it's 2B.

MR STAPLETON QC:

Yes, 2B is the Jordan affidavit. That's what I said, Your Honour. 551 is the, contains the paragraph the Justice Young referred to, and my reference to volume 2C was to Mr Horsfall's affidavit in reply to Mr Jordan's affidavit, the reply being at tab 7 in volume 2C page 813. And as I said earlier, what is done in the reply affidavit, if Your Honours turn to page 814, you'll see that Mr Horsfall there sets out at 814 his tertiary qualifications and work

experience, which include a Batchelor of Business Studies in Property Management and Valuation, and two-thirds of a Batchelor of Accounting and Finance degree. He then describes his work in the commercial property field and he then at paragraph 3 on page 816 says that, "Whilst some of the contents of Mr Jordan's affidavit is a correct reflection of facts, much of it is not correct in fact or the conclusions which have flowed from those incorrect matters. I have detailed the correct position below. I refer to the paragraph numbering adopted by Mr Jordan and detail these in my responses," and then he goes through paragraph by paragraph in response to Mr Jordan.

WILLIAM YOUNG J:

I know. Now Mr Jordan says there's an unexplained shortfall of 803,000. Mr Horsfall responds by saying he's wrong, the unexplained shortfall's actually $773,000, which I don't think's material, and he says it's the capital profit –

MR STAPLETON QC:

Correct.

WILLIAM YOUNG J:

– which I think Mr Jordan would probably agree with. But the point Mr Jordan makes, which isn't really answered, is that you don't get to that figure from the accounts, it's a figure that's unexplained on the accounts.

MR STAPLETON QC:

You don't get to that figure unless you bring to account the transactions that I've referred to in the 31 March 2005 accounts, Sir. But once you do bring them to account you get to that number.

WILLIAM YOUNG J:

Yes, but you don't get to it from the accounts.

MR STAPLETON QC:

No, but the accounts are simply one part of the evidence, Sir –

WILLIAM YOUNG J:

Perhaps what I'm saying it follows that the capital profit appears in an unexplained way in the accounts but the basis of it is never apparent from the accounts.

MR STAPLETON QC:

The capital profit outcome comes from the transactions I have described, the purchase and sale of College Street and the reinvestment of the College Street proceeds in Kent Terrace.

WILLIAM YOUNG J:

We understand that, but I'm just trying to track it through the accounts, and as I understand what Mr Jordan was saying and I don't really understand Mr Horsfall to challenge it, is that in the end it just appears there without explanation, without history, without provenance.

MR STAPLETON QC:

Well, one has to read the accounts against the backdrop of what actually occurred, Sir, and when one does the conclusion is as I've submitted, that's where the increase in the various numbers I've referred to come from, when these transactions are properly brought to account in those financial statements.

ELIAS CJ:

So this argument is all directed at saying that the accounts lay the evidential foundation that otherwise appears to be lacking. If they don't, if we don't accept that, what else do you point us to?

MR STAPLETON QC:

I point to Mr Horsfall's evidence in terms of the way this transaction was funded, that's in his narrative affidavit, and his narrative affidavit is at volume 2C, tab 1, and he describes the sale process at the foot of page 721 at paragraph 52, where the funding was to be provided by AMP but AMP withdrew for the reasons he's there set out. He then deposes in paragraph 53

to the sale of a separate property shares, in 54 to the fact that the deposit and the balance of 360, both those payments were made from his bank account, and he annexes the relevant bank statements. He then in paragraph 55 deals with the contribution of $170,000 from 88 Riddiford Holdings, and he then in 56 deposes that no personal or relationship funds were needed or used to effect settlement, the net effect of the money into and then out of 88 Riddiford Holdings' bank account meant that there was a requirement of only $390,000 to purchase the portion that wasn't already beneficially owned by 168 Group, and the 390 of course is the figure that I have referred to earlier as being funded from the separate property share sales which the financial statements record as being advanced by Mr Horsfall to the company by the increase in his current account balance from $69,000 to $497,000. So that in answer to the Chief Justice's question Mr Horsfall deposes to it and then refers to the relevant bank statements at the time and to the financial statements.

Now Your Honours, unless there are any further questions arising from the matters we've discussed I would go back to my written submissions if I may. And given the discussion, I only need to touch briefly on the following paragraphs.

Your Honours will recall that the parties' agreement to take title to the College Street property in their joint names where the purchase monies were provided by the companies was to avoid the risk of tainting, and that's referred to at paragraph 9 of my submissions to demonstrate that this concern about this concept was not something thought of for the first time in 2003 but Mr Horsfall, given his tertiary qualifications and experience, was aware of it from at least 1999 onwards when the Riddiford Street property was purchased and when after taking advice, separate company incorporated, a new trust created to beneficially hold the shares in 88 Riddiford Holdings. So that this concern, this issue, this awareness of tainting, was not something first thought of in 2003 as a convenience, it was a matter which had concerned Mr Horsfall in his advisory property capacity throughout.

If you turn to page 5 you'll see that page 5 of my submissions at paragraph 12 deals with the purchase price issue which we've canvassed, deals with the sale, and over the page at paragraph 6 deals with Mr Underwood's evidence at paragraph 14 –

WILLIAM YOUNG J:
Can I just pause there?

MR STAPLETON QC:
Yes, Sir.

WILLIAM YOUNG J:
I don't want to go through a huge process of the accounts, but I take it that no entity associated with Mr Horsfall recorded in their accounts the joint venture interest?

MR STAPLETON QC:
No. All one has in respect of the contemporaneous evidence in relation to the joint venture is the way it's described in Mr Horsfall's narrative affidavit, that's at –

WILLIAM YOUNG J:
Is there any contemporary evidence pointing to the joint venture partner being one entity or another?

MR STAPLETON QC:
No, the –

WILLIAM YOUNG J:
Ascot never knew, it was just seen as someone associated with Mr Horsfall?

MR STAPLETON QC:
Correct.

WILLIAM YOUNG J:

Someone associated –

MR STAPLETON QC:

Correct. And there is discussion about it being perhaps 88 Riddiford Holdings, 168 Group. Eventually –

WILLIAM YOUNG J:

Or Mr Horsfall?

MR STAPLETON QC:

It's put to Mr Horsfall that perhaps it could have been him and Ms Potter. He says no.

WILLIAM YOUNG J:

But there's no decision. He can't point to anything – sorry, he can't point to anything contemporaneous in, say, 2002 that makes it clear beyond doubt that at that time, the joint venture partner was 168 Limited?

MR STAPLETON QC:

No, only what he's detailed in his narrative affidavit and again, he's gone through it carefully and where there is documentary evidence available, for example, such as letters that he and Mr Scott exchanged, memoranda and that sort of thing, they are annexed.

WILLIAM YOUNG J:

But there's nothing that says it's 168 Limited, or is there?

MR STAPLETON QC:

Well, Ms Horsfall, who's the sole director and shareholder of 168 Group was asked about this in cross-examination and she spoke about 168 Group funding the whole way thing – the whole – funding the thing the whole way through, that 168 Group had the interest in the College Street property and so on.

WILLIAM YOUNG J:

I think 168 Group may have made some payments at the start of the joint venture.

MR STAPLETON QC:

There was an issue, Sir, you'll remember, about $100,000 perhaps being paid and who was going to pay it and how it was going to be paid. The cheque was drawn but then not banked and so on and ultimately, if my memory is serving me correctly, but it's probably best to go to the narrative affidavit if you want the detail. Mr Horsfall sets out in sequence what actually happened and how the payment was funded, and we're back at volume 2C at the narrative affidavit at tab 1 and the description of the joint venture starts at paragraph 34 on page 715 and if Your Honours have open at the same time –

WILLIAM YOUNG J:

Sorry, what page number is that on?

MR STAPLETON QC:

We're at page 715 at paragraph 34 at the foot of the page, Sir, and if Your Honours have open at the same time volume 3A, the relevant documents referred to as Mr Horsfall goes through this description are at tab 4 of volume 3A and you'll see for example in paragraph 36, "The contract was subsequently declared unconditional. 168 Group became the beneficial owner of 50% of the contract for the Hutt Road property," and the third to last line, you'll see the reference, pages 99 to 101 of the bundle of documents. If you look across to 3A at tab 4, 1469, you'll see has the original Family Court number page 99 which corresponds with this reference in the narrative affidavit. And Your Honour will see in paragraph 37 your reference to the $100,000 cheque and why it wasn't banked. And Mr –

WILLIAM YOUNG J:

"A convoluted court case" is presumably because Mr Horsfall's wound up on both sides of the transaction.

MR STAPLETON QC:

Well, I doubt that, Sir, because he explains –

WILLIAM YOUNG J:

What's the convoluted Court case he's talking about, then?

MR STAPLETON QC:

I don't know. Some argument, no doubt, between the vendor of Hutt Road and perhaps Ascot Resources and perhaps himself and to avoid it.

WILLIAM YOUNG J:

Yes, so perhaps because he's on both sides of the transaction?

MR STAPLETON QC:

Well, I don't know.

WILLIAM YOUNG J:

But I just – it's a reasonably obvious point that there is something in the Real Estate Agents Act 2008 about this and it would provide an explanation as to why he didn't want his name on it.

GLAZEBROOK J:

Well, doesn't he say so at paragraph 37?

WILLIAM YOUNG J:

The convoluted Court case?

GLAZEBROOK J:

Yes, but it's in connection with him reneging on paying the agency fee.

WILLIAM YOUNG J:

Why did the vendor not want to pay the agency fee?

MR STAPLETON QC:

Don't know, Sir.

WILLIAM YOUNG J:

Okay.

MR STAPLETON QC:

But you can see from the paragraphs you've read thus far that he goes through the history of the joint venture transaction in considerable detail all the way through to the passages relating to the purchase of the College Street property that I referred to earlier and end with the paragraph 56 on page 723 and as he does so, referencing what he's saying to contemporaneous documents where they're available.

WILLIAM YOUNG J:

Okay, so para 41, 168 Group does pay $100,000?

MR STAPLETON QC:

Yes.

WILLIAM YOUNG J:

To 88 Riddiford Holdings Limited which funds the deposit?

MR STAPLETON QC:

Yes, and then he annexes the bank statements demonstrating that.

GLAZEBROOK J:

But does he actually say it was 168 Group?

MR STAPLETON QC:

Yes, he does, because he talks –

GLAZEBROOK J:

Whereabouts is that?

MR STAPLETON QC:

Right back at paragraph 36, he talks about 168 Group becoming the beneficial owner of 50% of the contract for the Hutt Road property.

GLAZEBROOK J:

Okay, I see.

WILLIAM YOUNG J:

So presumably, these transactions would have, it would be treated as advances by 168 Group to what, Mr Horsfall?

MR STAPLETON QC:

No.

WILLIAM YOUNG J:

How would that appear in the accounts for 2000 and –

GLAZEBROOK J:

Well, it's off-balance sheet.

MR STAPLETON QC:

Correct, this is just all out balance.

WILLIAM YOUNG J:

But surely the money – I mean, the money's in the bank statement. It has to be accounted for somehow, doesn't it?

MR STAPLETON QC:

No, they are off-balance sheet as Justice Glazebrook said. These –

GLAZEBROOK J:

I was just saying what no doubt you would say. I wasn't…

WILLIAM YOUNG J:

But purely, wouldn't the accounts at a bare minimum have to account for movements in the bank account?

MR STAPLETON QC:

Well, not in the way these transactions were finally accounted for, Sir. I mean, again, I can't do anything other than refer to the expert evidence of Mr Underwood because –

ELIAS CJ:

But that does sound very much as if they hadn't made up their mind.

MR STAPLETON QC:

No, Your Honour, not when you read back to paragraph 36 and the way in which this commences that 168 Group was a 50% owner of the Hutt Road contract and when one reads from that point forward all the way carefully through this affidavit, the narrative affidavit, 168 Group is ultimately the partner in the joint venture. There may be issues in terms of what Justice Young has said about 168 Group being advanced the deposit by 88 Riddiford Holdings. There may be issues between those companies as to entitlements but that doesn't affect the overall position as described.

ELIAS CJ:

Yes, but that's after the event. In terms of the contemporary documentation, it's very difficult to escape the view that flexibility was being preserved as to how all of this would be accounted for. I mean, you can't point us to anything which unequivocally – apart from the evidence, the later evidence, can you?

MR STAPLETON QC:

All I can do is to point to the narrative affidavit.

ELIAS CJ:

Yes.

MR STAPLETON QC:

And it may be that this is the position, that there was a degree of flexibility for reasons of tainting, perhaps, but nevertheless, there was a degree of certainty in terms of the way things moved forward between Mr Horsfall and Mr Scott of

Ascot Resources, because that is the effect of Mr Horsfall's evidence. He describes in detail what happens from the time of first engagement with Mr Scott, all the way through as I've mentioned –

GLAZEBROOK J:
But does Mr Scott care who the other joint venture partner is?

MR STAPLETON QC:
No. He acknowledged that it didn't concern him who the joint venture partner was. All he was concerned about –

GLAZEBROOK J:
Was the money?

MR STAPLETON QC:
Correct, so he could pay his GST.

WILLIAM YOUNG J:
The documents – initially, the documents that are at 1485 and following suggest that in the middle of 2002, it was 88 Riddiford Holdings that was seen as the joint venture partner or at least the vehicle to take the interest?

MR STAPLETON QC:
Correct. That appears from the second paragraph.

WILLIAM YOUNG J:
But that then – but you say – Mr Horsfall says that's not right. It was actually always 168 Limited.

MR STAPLETON QC:
Well, Mr Horsfall talks in his affidavit about 168 Group being involved initially, Sir, and again, all I can do is point to the way in which this matter developed from the time the joint venture was first mooted through until its conclusion with the purchase of the Ascot Resources 50% share and I say again, yes, there is a degree of flexibility but there is a degree of certainty about the way

in which the matter progressed. It's to be expected in a commercial transaction or transactions of this nature.

And you can see how matters continued to develop in terms of Justice Young's reference to 88 Riddiford Holdings at page 1485. If Your Honours go to paragraph 49, you can see that the initial contract –

ELIAS CJ:
Sorry, 49 of what?

MR STAPLETON QC:
49 of the narrative affidavit at page 720, Your Honour.

ELIAS CJ:
Thank you.

MR STAPLETON QC:
You can see how initially, 88 Riddiford Holdings was to be the purchaser of the Ascot Resources interest in the College Street property for 560,000. Can't find the original contract but at the top of page 721, annexes the true copy of the only record of the contract which Mr Horsfall has and he then moves into the discussion –

GLAZEBROOK J:
Sorry, where is that?

MR STAPLETON QC:
That's at, you'll see at the reference, Your Honour, at the top of page 721 as to 119 of the bundle of documents and that's at page –

GLAZEBROOK J:
1489?

MR STAPLETON QC:
14 –

ELIAS CJ:

89?

MR STAPLETON QC:

Yes, correct.

GLAZEBROOK J:

148?

WILLIAM YOUNG J:

9.

MR STAPLETON QC:

1489.

GLAZEBROOK J:

89, thank you.

MR STAPLETON QC:

Yes.

McGRATH J:

That's a record, what sort of record is that?

MR STAPLETON QC:

Well, that's simply the only contemporaneous record that's available, Sir.

McGRATH J:

It's the only record but what sort of record is it?

MR STAPLETON QC:

It's a computer record of the relevant parts, I imagine, of a standard agreement for sale and purchase.

GLAZEBROOK J:
1489, okay.

MR STAPLETON QC:
And of course, I've already referred to the paragraphs from 52 onwards in respect of the funding arrangements when AMP didn't provide the agreed funding.

The next step in the contemporaneous evidence, given the backdrop that I have taken the Court through from paragraphs 34 onwards of the narrative affidavit up to the sale of College Street is referred to at paragraph 16 of my submissions at the foot of page 6, top of page 7, and this again is taking place against the backdrop of what Mr Horsfall says the parties' agreement was as deposed in his affidavit, his version of their agreement being upheld by Justice Simon France in the High Court. Your Honours will recall in the paragraph 200 of the Family Court judgment, the Family Court Judge simply set out the two competing versions but didn't make a finding in respect of which one was to be accepted. In the High Court, Justice Simon France said, having gone through them in detail, "I accept Mr Horsfall's version of the parties' agreement."

And against that backdrop at paragraph 16, I draw Your Honours' attention again to contemporaneous evidence relating to the parties' agreement and this time, it comes not from Mr Horsfall but from Ms Potter and Your Honours will see again Mr Horsfall's narrative affidavit at paragraph 59, 2C tab 1, 723, foot of the page –

GLAZEBROOK J:
79? Sorry?

MR STAPLETON QC:
Yes, paragraph 59, Your Honour, at the foot of page 723.

GLAZEBROOK J:
Yes.

MR STAPLETON QC:
He describes how the $50,000 which was agreed was received by Ms Potter and he annexes as page 133 of the bundle of documents the document which is at volume 3A, tab 4, page 1503, and it's in her handwriting. And what it records, working down the page, is this. Your Honours will remember that the sale of the parties' family home at Hall Street was settled a day after the College Street purchase, that no monies from Hall Street were used in the College Street purchase. Those monies were placed on term deposit from May 2003 until the 11th of November 2003, the first line item in the handwritten page when the parties lent $240,000 to Ms Potter's brother at 5% per annum.

The next entry in her handwriting is an interest calculation to the end of March 2004, remembering that the settlement of the College Street sale was on the 1st of April 2004 and what she does on that day, consistent with Mr Horsfall's version of the parties' agreement, is she reviews matters as at that date and she adjusts the $120,000 each to 70,000 for Mr Horsfall and 170,000 for her. That's contemporaneous evidence, in my submission, not from Mr Horsfall or from contemporaneous documents that he produces but from Ms Potter herself of the nature of the parties' agreement and she gets her $50,000 on the date of settlement of the sale of the College Street property.

It was suggested, at least in the Family Court, that a section 21 agreement was required in respect of matters between Mr Horsfall and Ms Potter in relation to the agreement. That was objected to when it was raised in cross-examination with Mr Horsfall, objected to on the basis that as a matter of law, a section 21 agreement is required only between spouses or de facto or civil union partners, only between transactions between those people in the circumstances prescribed in section 21A and section 21B but here, the transaction is not between two spouses. The transaction is between the spouses and the companies who provide the purchase monies, 390 from 168 Group and 170 from 88 Riddiford Holdings, so that no agreement is required

in terms of section 21A. All that's required to demonstrate and prove the receipt of the consideration for the agreement is the note that I have referred to in Ms Potter's handwriting and that clearly records receipt of the 50,000.

And as I have noted at the top of page 7 of my submissions in paragraph 16, "Simon France J observed that, 'the $50,000 payment is consistent with Mr Horsfall's overall version of events and would be a surprising event as explained by Ms Potter."

What happened next, again contemporaneously, the payments were made out to 168 Group, March, April and June 2004, and they were then used to purchase Kent Terrace as stated in paragraph 17 of my submissions. But to be able to do that, to be able to fund that purchase, 88 Riddiford Holdings and 168 Group had to borrow monies from the Bank of New Zealand. And what had to happen for 88 Riddiford Holdings to borrow was that someone had to execute on behalf of that company, and Ms Potter executed the security documents on behalf of 88 Riddiford Holdings as the attorney for Sarah Horsfall, the sole director and shareholder of 88 Riddiford Holdings. And Your Honours will see that I've described in paragraph 18 what happened on the 1st of June 2004 and you'll see that I've footnoted at footnote 20 the references, in particular volume 3A, at tab 6 of volume 3A, because if Your Honours look at those documents, tab 6, volume 3A, you'll see that they set out from page 125 a power of attorney given by Ms Horsfall to Ms Potter on the 5th of August 2003, and at page 1527 a letter from Mr Langford's firm to the Bank of New Zealand enclosing the relevant letters of offer and the signed documentation. And I've noted in the footnote that Ms Potter's signature as attorney appears at the pages noted in the footnote, and of course she had to initial each of the pages which formed part of this documentation, and Your Honours can see at page 1528, right in the bottom right-hand corner, her initials are the one on the line, that she has initialled as 88 Riddiford Holdings attorney an agreement to provide 88 Riddiford Holdings with a loan from the BNZ of $607,000 and that next, if Your Honours turn to page 1459, you'll see that again she has initialled –

GLAZEBROOK J:

You mean 1459?

MR STAPLETON QC:

Yes, 1459.

O'REGAN J:

1559 or 1459?

MR STAPLETON QC:

1549, Your Honour – oh, I'm sorry, did I transpose the numbers? And you'll see there she has again initialled a term loan facility letter for 168 Group there to borrow 1.875 million from the Bank of New Zealand to complete the purchase. So that you see when one looks at the continuum of the evidence here from the start of Mr Horsfall's description, paragraph 34 narrative affidavit, all the way through to the point where we're now at, we go through the funding arrangements that we've discussed in detail, we go through the settlement on the 1st of April 2004, and the acknowledgement in Ms Potter's handwriting of receipt of the $50,000 agreed to here on the 1st of June 2004 where she is completing security documents for $607,000 and 1.875 million to enable the settlement of the Kent Terrace property which was settled the next day, 2 June 2004. And that is where the contemporaneous evidence ends.

GLAZEBROOK J:

So what do you take from that, what's the submission based on her signing that?

MR STAPLETON QC:

The submission based on her signing that is that there is a pattern of conduct here consistent with what Mr Horsfall says was the agreement.

GLAZEBROOK J:

So you say it shows that she knew that the College Street property was owned by 168 Limited?

MR STAPLETON QC:

And she knew –

GLAZEBROOK J:

But how do you get that from her signing documents in relation to borrowing for Kent Terrace?

MR STAPLETON QC:

Well, she knew that the parties were not the beneficial owners of College Street because the agreement between them was –

GLAZEBROOK J:

No, I understand that part of it, but where does the signing of the loan to buy Kent Terrace come into it?

MR STAPLETON QC:

It comes into the process at the end in terms of –

GLAZEBROOK J:

Well, I understand how it comes into the process at the end, but what does it prove?

MR STAPLETON QC:

Well, it proves again her involvement in these processes, Your Honour. Here she is signing documents to enable that purchase to be settled the following day.

GLAZEBROOK J:

But how does it show that she knew that the College Street property was owned by 168 Limited?

MR STAPLETON QC:

Well, there's no evidence, for example, of any enquiry by her between the 1st of April 2004 when she writes the handwritten note acknowledging the 50,000 to the 1st of June when she signs the security documents, no enquiry

of her that you might expect, Your Honour, if she was the beneficial owner of the College Street proceeds of sale, there's no evidence of any enquiry of Mr Langford about, "Where are my share of the proceeds of sale of my property?"

GLAZEBROOK J:
Well, did she know about it? She'd signed something had she, earlier?

MR STAPLETON QC:
Signed what earlier, Your Honour?

GLAZEBROOK J:
So – never mind, you probably have it here somewhere. She knew about him, was involved in the Kent – but did she know about the sale?

MR STAPLETON QC:
The sale of College Street?

GLAZEBROOK J:
Yes.

MR STAPLETON QC:
Yes, Your Honour, because on the 1st of April 2004 in her own handwriting…

GLAZEBROOK J:
So that's the knowledge, you say, through that?

MR STAPLETON QC:
Yes.

GLAZEBROOK J:
Okay, thank you.

MR STAPLETON QC:

And you see, after the Kent Terrace sale is settled there is nothing further until the 6th of March 2009, when the proceedings are commenced in the Family Court following the parties' separation on the 2nd of April 2008, and I've noted that at paragraph 20 of my submissions.

Now I've then set out from paragraphs 21 onwards the application for declarations that the companies and the trusts were shams, those applications were dismissed in the Family Court and not appealed, and they're then set out in sequence from paragraphs 22 through to paragraph 29 the subsequent events which followed, and I don't need to refer Your Honours to any of those particular paragraphs because they simply recount the sequence of events of the proceedings as they proceeded through the Courts.

Before I move now to the appellant's submissions at paragraph 30, which refer to the grounds of appeal in respect of the Court of Appeal's judgment, I note two matters. First of all going back to the Family Court judgment at paragraph 200, subparagraph (e), I've already referred to my submission that the Judge's finding is contrary to the contemporaneous evidence and the financial statements, that's the submission. Because the Judge then proceeds on the basis of these notional advances – and that's all they can be – that Mr Horsfall and the two companies somehow advanced to the parties the $560,000 to complete the purchase. There is no evidence of any advances of that sort from the companies to the parties, the evidence is the other way around for the reasons I've mentioned. But this finding is important because the Judge then uses the finding, as you can see from paragraph 201, to reject the resulting trust's submission, because he says, "No, they weren't advanced in the way that I've submitted, the companies and Mr Horsfall in fact advanced them to the parties who then completed the purchase." Then in the High Court Justice Simon France looked at the nature of the parties' agreement, said that it was central to the determination of the issues, upheld Mr Horsfall's version of events and held that a resulting trust applied in all the circumstances. He said that it didn't matter if perhaps 168 Group had received more than it was entitled to under the funding arrangements for the

purchase, and my submission is that's a matter as between the companies, if it's in issue, it's not a matter which is relevant to the determination of the resulting trust issue, that turns, in my submission, on the funding arrangements.

I now turn, if it's convenient for the Court, to paragraph 30, unless the Court would prefer now to take the morning adjournment.

ELIAS CJ:
Well, it might be sensible to take the morning adjournment now.

COURT ADJOURNS: 11.28 AM
COURT RESUMES: 11.46 AM

MR STAPLETON QC:
Your Honours, I had reached paragraph 30 of my submissions and I mentioned earlier in terms of the need for a s 21 agreement that I objected to that issue or that question when it was put to Mr Horsfall in the Family Court. Your Honours will see that the objection is recorded at volume 2D of the case on appeal at page 1055. And I turn now to speak to the paragraphs from paragraph 30 onwards, and I've said in my written submissions that the appeal or grounds of appeal in respect of this appeal from the Court of Appeal's judgment can best be advanced by going through the Court of Appeal's judgment, seriatim as I do in my submissions, referring to the various aspects of it that are under appeals. And Your Honours will see at paragraph 33 that I start with the opening paragraph of the Court of Appeal's judgment and –

ELIAS CJ:
Why do you say this is a second appeal solely on a question of law? Because it's not limited to questions of law and the question on which leave was given doesn't – I know it's prefaced by saying it's a question of law, but it doesn't seem to me to be a question of law.

MR STAPLETON QC:

Well, again, all I can do, Your Honour, is to point to the opening line and half of the Court of Appeal's judgment, or leave judgment, which expressly refer to it as a question of law…

ELIAS CJ:

But it's not, it's clearly not a question of law.

MR STAPLETON QC:

That may be a view open to Your Honour.

ELIAS CJ:

And there's not impediment to it being a general appeal, it just has to get leave.

MR STAPLETON QC:

Yes. All I can do is refer to the terms in which leave was given, and I note the distinction, for example, between the leave given in the Court of Appeal, which referred to question of law, and the leave given by this Court, which does not. But –

ELIAS CJ:

For myself, I'm not terribly fussed about all of this, I'm not sure that it goes anywhere, the point that you're making about it being…

O'REGAN J:

I don't think the Court of Appeal can limit its own jurisdiction.

ELIAS CJ:

No.

O'REGAN J:

I mean, it gave leave on a question that involved fact in law, it has to deal with it.

MR STAPLETON QC:
It may just be the way it was expressed in the leave judgment.

O'REGAN J:
Yes.

MR STAPLETON QC:
And that's all I'm pointing to, is that is the way it was expressed, and noting the difference between the leave judgment in that Court and the leave judgment in this Court.

But turning to the substantive judgment now of the Court of Appeal, you'll see that I refer to the opening paragraph in paragraph 33 of my submissions and refer to two matters. First of all the Court's finding that all but $50,000 of the sale proceeds were disposed of by Mr Horsfall for his separate commercial interests, the money went to 168 Group Limited, a company he controlled. Now the $50,000 payment can be addressed in short order because it clearly did not come, on the evidence that I've taken Your Honours through this morning, from the proceeds of sale of the College Street property, it was clearly an adjustment made in Ms Potter's handwriting in respect of the proceeds of sale of the parties' family home at 37 Hall Street. And the point is important because had that payment been made from the proceeds of sale then it might support an argument by Ms Potter under section 44(1) that she was entitled to rather more than $50,000 from the proceeds of sale. But when it's made in the way that is clearly and carefully recorded by her it militates against such a claim.

GLAZEBROOK J:
How does that follow? I mean, she's paid 50,000. Whether it comes from the proceeds of sale or it's an adjustment is neither here nor there is it? I mean, either she was paid the 50,000 for allowing her to be on the title or she was paid 50,000 for her explanation of keeping her quiet wasn't she?

MR STAPLETON QC:

No, she was paid 50,000 for her name being on the title in terms of the agreement.

GLAZEBROOK J:

Well, I know, but does it matter where – if the proceeds of sale came in and she was paid 50,000 from those proceeds as against an adjustment, what does that prove one way or the other?

MR STAPLETON QC:

Well, in my submission it's important, Your Honour, for the reasons I've mentioned. She's paid not from the proceeds of sale –

GLAZEBROOK J:

But if she was paid from the proceeds of sale, and you say it was because she was actually being paid for having her name on the title, why would that matter?

MR STAPLETON QC:

But I'm not saying she was paid from the proceeds of sale, I'm saying that –

GLAZEBROOK J:

But does it matter one way or the other is what I'm saying? Isn't what matters to you why she was paid it?

MR STAPLETON QC:

If I can put this – no. It matters in my submission to parties proceedings in the Court of Appeal to have the Court proceed on a correct factual basis, and the correct factual basis really ought to be recorded in the opening paragraph. It is not helpful in my submission for parties to proceedings to start reading a Court of Appeal judgment and see that a central fact, which I've taken Your Honours through this morning, is stated wrongly, and it's stated wrongly in the opening sentence of this judgment.

McGRATH J:

So, Mr Stapleton, I've noted you as saying that the $50,000 payment was an adjustment of monies received on the sale of the parties' home, that's your position?

MR STAPLETON QC:

Correct, Sir.

McGRATH J:

It's got nothing to do with the commercial property?

MR STAPLETON QC:

Correct, Sir The second point that emerges from the opening paragraph is the statement about Mr Horsfall's separate commercial interests, the money going to a company he controlled, and I've developed my submissions in respect of that statement in paragraphs 35, in paragraph 36 I make the point that both these errors are fundamental and make the point about the correct position. And I then submit in paragraph 37 that the effect of these errors, particularly the error as to control, is compounded by the fact that not only were they not later corrected, but the error on the matter of control is extended at paragraph 17 by the statement set out verbatim in paragraph 37 of my submissions. Because what one had here in respect of this issue of control, which was relevant to the sham companies and sham trusts claims, were affidavits from Ms Horsfall, sole director and shareholder of 168 Group, and Ms Horsfall, sole director and shareholder of 88 Riddiford Holdings, that Mr Horsfall did not control those companies, that was the sworn evidence of those witnesses in the Family Court. And in paragraph 38 I refer to Ms Horsfall's evidence in cross-examination about the control issue, and I make the submission in paragraph 38, after referring to Ms Horsfall's evidence, the correct finding is the one that Justice Simon France made in the High Court, not one of control of these companies by Mr Horsfall, but simply Mr Horsfall and his family are involved in commercial properties, that's an accurate statement of the factual position. And what I've done in terms of Your Honour's observations earlier about the findings in the lower Courts is to

look at the Family Court judgment in respect of findings of control and the like, because they're compartmentalised, findings in respect of one aspect of the judgment are not carried over to other aspects, and the principle issue in the Family Court was whether the trusts as pleaded and the companies then as extended in counsel's closing submissions were shams, and Judge Walsh went through those claims in substantial detail – and Your Honours will find his judgment –

O'REGAN J:
But they're not before us now, so why do we need to go to them? That's over isn't it, nobody's suggesting they are?

ELIAS CJ:
Are you saying that that was the focus in the findings of fact that were made?

MR STAPLETON QC:
I'm saying that the findings of control were made in the context of the sham claims, they were not carried over to the section 44 claim, and –

ELIAS CJ:
How could they not however be the same…

GLAZEBROOK J:
I think that's your point isn't it, the finding there wasn't control to show there wasn't a sham should have been –

ELIAS CJ:
Oh, the finding that there wasn't.

GLAZEBROOK J:
But I think they're probably looking at it in a slightly different context aren't they? Because "sham" means that these were total fronts, and in fact everything was owned beneficially by Mr Horsfall presumably. So that's in a different context. And the fact that whether or not he controlled that is

probably relatively irrelevant to that question, because you might control it as a shadow director wrongly, but they're still owned by the, the companies are still not shams.

MR STAPLETON QC:

Correct. But the point I'm making is that in respect of the section 44 claim there was no finding of control made by Judge Walsh in the Family Court by Mr Horsfall of these companies, that there was no such finding made in the High Court either, and my submission is that the Court of Appeal ought not to have made such a finding in all the circumstances. It wasn't open –

GLAZEBROOK J:

Well, the best thing is to tell us why they shouldn't have made the finding rather than having it as a pleading point. So if you're wanting it as a pleading point I'm not very interested. If you're wanting to show us why it's factually wrong then by all means do so.

MR STAPLETON QC:

I thought that I should take Your Honours through the findings of the lower Courts, given the observations made to me earlier this morning. But the position is this: in the section 44 claim analysis in the Family Court judgment the findings that the Judge made in respect of the sham arguments are not carried over to the s 44 analysis and, moreover, there is no finding of control made in the s 44 part of the judgment save only that Mr Horsfall controlled the disposition of the proceeds of sale, that's never been an issue in this case, it's been admitted from the outset that he made the payments to 168 Group on the three dates in question, and the submission is, Your Honours, that if the Family Court did not make a finding of control and the High Court did not make a finding of control in the context of the s 44(1) claim, then the Court of Appeal was wrong to do so in all the circumstances given the findings of the lower Courts and given the evidence that I've referred to in these submissions, and it is submitted the finding of control ought not to have been made in the opening paragraph and then by extension in paragraph 17.

GLAZEBROOK J:
Well, if it can be an appeal on fact then why can't the Court of Appeal differ from the High Court and the Family Court?

MR STAPLETON QC:
If the Court of Appeal was going to differ on appeal then one would expect it to go through the reasoning process, in my submission, that I've just taken Your Honours through. To set out the reasoning why –

ELIAS CJ:
But is that really just a submission that the evidence doesn't support the conclusion that the Court of Appeal came to?

MR STAPLETON QC:
Well, no – twofold, Your Honour. That submission certainly, but certainly the submission that there's no evidence really referred to at any great length by the Court of Appeal to substantiate the control finding. One would have expected, in my submission, if a Court was going to make those findings for the first time on a second appeal, to actually go through and traverse the evidence that supported the control finding, opening paragraph, extended in paragraph 17.

The next point that is developed is that which starts at paragraph 39 of my submissions, and the submission is that the proper consideration and determination of a section 44(1) claim does not require the separation of the only element in dispute in this case into the separate components at paragraph 6 of the Court of Appeal's reserved judgment, which were then analysed at paragraphs 7 to 34 of the judgment. And I make that submission having regard to what I've recited in paragraph 40 and recited at the opening of these oral submissions. But the issue about the making of the payments, the issue of the dispositions of property pursuant to section 44(1) has never been an issue in this case, the issue has always been whether Ms Potter could prove the intention required in terms of that subsection, and

Your Honours will see that that submission is recorded in paragraph 41 of my written submissions. And I go on in the next –

O'REGAN J:
As you point out in the beginning, we have read these submissions, so you don't need to go through every single part of them, we know all this stuff, you just need to develop it.

MR STAPLETON QC:
Thank you, Sir. Developing then the submissions that are set out in paragraphs 42 –

ELIAS CJ:
Sorry, I just don't understand why paragraph 6 of the Court of Appeal judgment is one that you attack – anyway, it doesn't matter because I think that it's just the way it's expressed perhaps.

MR STAPLETON QC:
Well, if I can answer the question this way, Your Honour, in the context of the live issue in this case, all that the Court needed to do was to pose the "but for" test. Just as Simon France expressed it on the basis of, "Which of the competing versions of the events do I accept? I accept Mr Horsfall," the issue in terms of the live issue under section 44(1) could be put on a "but for" basis in these terms: but for the payments of the proceeds to 168 Group would Ms Potter have been entitled to share in them? To which the answer in my submission is, no, because of the parties' agreement and provision of the purchase monies by 168 Group and 88 Riddiford Holdings, that's all that was required in terms of convention property principles analysis, in terms of the only live issue in these proceedings.

GLAZEBROOK J:
I actually don't understand that "but for" test. I mean, isn't it did she actually have a claim to the proceeds, did she own beneficially the proceeds, so did

she have a claim or rights in respect of the College Street property, which is what they've said?

MR STAPLETON QC:
Yes, well…

GLAZEBROOK J:
It's not but for the sale, it's whether she did.

MR STAPLETON QC:
I respectfully don't wish to disagree with Professor Peart, but that's how she expresses the test in the various articles that she's published, Your Honour.

ELIAS CJ:
Well, leaving that aside, what's wrong with what's said in 6 of the Court of Appeal judgment? Did Ms Potter have rights and, if she did, was the disposition in order to defeat them? Those must be the issues under section 44(1).

MR STAPLETON QC:
Yes, and the submission is it wasn't necessary to divide the components in that way.

McGRATH J:
You don't like the segmentation of the section 44(1) elements?

MR STAPLETON QC:
No, I don't, Sir.

McGRATH J:
But what's wrong with it?

MR STAPLETON QC:

Well, it blunts the focus in a case where the only issue is the one of intention. If that's the only issue in a case then that should be the question that is addressed, and the classical in way in which –

O'REGAN J:

But it isn't the only issue.

GLAZEBROOK J:

But intention wasn't the only issue in the case, actually intention wasn't the issue in the case. It often is: somebody says, "Well, she did have a claim or right but I sold it perfectly legitimately and I didn't have any sort of intention at all, it was sort of an agreed thing." So normally it is intention but here the issue was did she have a claim or right, and then if she did it was actually virtually accepted that the disposition was intended to defeat it.

MR STAPLETON QC:

No, he –

GLAZEBROOK J:

At least by the time it got to the High Court and the Court of Appeal.

MR STAPLETON QC:

No, Your Honour, the position has always been that there was no intention to defeat –

GLAZEBROOK J:

Well, there was no intention to defeat because she didn't have a claim. So how can you defeat – that's as I understand Mr Horsfall's case.

MR STAPLETON QC:

Correct.

GLAZEBROOK J:

There was no intention to defeat because she had no claim. If she had a claim then my understanding was it was basically accepted that it was an intention to defeat.

MR STAPLETON QC:

No, because that –

GLAZEBROOK J:

Apart from it not being put to him.

MR STAPLETON QC:

It wasn't put, correct. Well, again, all I can do is come back to the submission and say that instead of this analysis that is then worked through in 27 paragraphs, all that needed to be asked was the "but for" question that I postulated, that's regarded conventionally in the writings and in the cases as the question that is asked.

O'REGAN J:

But look at the section.

MR STAPLETON QC:

Yes.

O'REGAN J:

All the Court of Appeal does is set out the elements of the section. How can you say that's wrong?

MR STAPLETON QC:

I'm saying that the analysis in paragraphs 7 to 34, Sir, was not necessary.

O'REGAN J:

Well, if a Court analyses a case based on a section by referring to the section itself, making a submission that they were wrong just seems to me to be completely pointless.

MR STAPLETON QC:

Well, in my written submissions I advance at paragraph 42 that when you're looking at the critical element in this case it's not assisted by endeavouring to classify aspects of the purchase and sale as relationship property in terms of the Act, because that classification is required in respect of the other subsections I've referred to, but it's not required in terms of section 44, and not only is it not required by section 44 because the terms used is "property", it's also contrary to the well-established principles in *Fisher on Matrimonial and Relationship Property* which I set out in paragraph 43. And note halfway through the first extract, in the line immediately after the emphasised text, the reference to "dispositions to third parties". Now that's what this case is concerned with. The disposition of property in this case is not the sale of College Street but it's the three payments made by Mr Horsfall from the proceeds of sale to 168 Group, they are third parties in terms of classification, and any analysis of the position has to be undertaken, as *Fisher* says, in accordance with conventional principles applicable at the relevant time, and the relevant time here is the payments March, April, June 2004, and Your Honours will note that in the next paragraph on page 12, paragraph 43, I've emphasised the term "conventional property rights" at law and equity prevail until the statutory regime is invoked, noting that the statutory regime was not invoked here until the 6th of March 2009.

McGRATH J:

I'm not sure myself, Mr Stapleton, that looking at the concept of conventional treatment in a much-respected text helps a lot in this Court. I mean, I think really what is helpful is to focus on what the Act says, and in a way the Court of Appeal has approached it in exactly that way. Now I don't see – I think you may be taking us up a side route to no purpose. That's not a criticism of your basic argument. So let's find out where the Court of Appeal in applying the section went wrong, and doing it step-by-step to me seems at least, you know, you should be able to pinpoint where you think they went wrong.

MR STAPLETON QC:

All right, well, let me do that, Sir, by taking you to the top of page 14, paragraph 46, and this comes in the context of the Court of Appeal's use in its judgment of the term "concealment of the position", which was not a term used either in the Family Court or in the High Court or, indeed, at the Court of Appeal hearing in terms of the arrangements. And what I've submitted in paragraph 46, I've drawn Your Honours attentions to the relevant passage in the transcript where Justice Wild and I were discussing matters, His Honour says, "Anyway, we don't need to go into that," and then turns to the GST issue, Justice Mallon raises the issue again, not raised in terms of concealment, and she apologised to counsel for her inaccurate paraphrase. The point of this discussion is that the discussion between the Judges and counsel, at least as counsel understood the discussion, was about the risk of tainting and the avoidance of that risk by the parties' agreement to take title in their joint names, and concealment wasn't mentioned, there was a discussion simply –

O'REGAN J:

Well, let's deal with tainting and taking title, forget about concealment. Just tell us why the Court of Appeal's analysis about who had beneficial interests in this property and in the proceeds of sale of it was wrong.

MR STAPLETON QC:

Oh, because of the provision of the purchase monies by the company, Sir.

O'REGAN J:

I mean, you're just getting lost in the woods here. Just concentrate of what the case is about. Concealment or some other word doesn't make any difference to the outcome at all, we just want to know did she have rights to the property, the proceeds of the property, or not? That's what your case comes down to, doesn't it?

MR STAPLETON QC:

I understand, Sir, but again you'll understand I'm addressing, given that this is an appeal from the Court of Appeal, what the Court of Appeal said.

O'REGAN J:

Yes, I know you're addressing, but we're now at quarter past 12, you've only got three-quarters of an hour to go, and you're just getting lost in minor details about exchanges with the Judges in the Court of Appeal. Get to the issue.

GLAZEBROOK J:

Maybe 48, your paragraph 48, because you are, or – well, I mean, you've already taken us through the funding –

MR STAPLETON QC:

Correct.

GLAZEBROOK J:

– so you say it was funded, the evidence for that is in the 2005 accounts, it was funded by Mr Horsfall providing a loan to the company to make the purchase, in the company's own name.

MR STAPLETON QC:

As to 390, yes. The balance of 170 coming from 88 Riddiford Holdings.

WILLIAM YOUNG J:

Which had in fact got it from, essentially got it from Ascot hadn't it?

MR STAPLETON QC:

Yes.

WILLIAM YOUNG J:

So the only real money is the 390.

MR STAPLETON QC:

No, the real money – once Ascot pays 88 Riddiford Holdings the 166,250 it –

WILLIAM YOUNG J:

Yes, the only new money that comes in. Because the 166,000 comes back as 170,000.

MR STAPLETON QC:

Correct. But nevertheless, Sir, at the point of transfer the $170,000 is 88 Riddiford Holdings' money, comes out of its bank account. Now Justice Glazebrook helpfully drew my attention to paragraph 48 –

GLAZEBROOK J:

I mean, what you say is it was funded indirectly by Mr Horsfall because he funded the company which then made the purchase, and that's shown by the 2005 accounts, and the Court of Appeal was wrong because they said Mr Horsfall funded it personally, is that the submission?

MR STAPLETON QC:

Yes. I don't use the word "even indirectly", Your Honour.

GLAZEBROOK J:

Well, I'm speaking loosely.

MR STAPLETON QC:

But that is the point, and –

GLAZEBROOK J:

It's the company's purchase and they funded it via a loan that was made to them by Mr Horsfall?

MR STAPLETON QC:

Correct, through the advance account movements that I've drawn your attention to this morning.

GLAZEBROOK J:

Yes. And so it wasn't as the Court of Appeal said, funded by Mr Horsfall, and they were wrong on that?

MR STAPLETON QC:

Correct, it was funded by the company from an advance from Mr Horsfall. All I've done, in conventional terms I hope, on a judgment under appeal, is to go through and review the judgment under appeal. Now I've set it all out in my written submissions, bearing in mind what Justice O'Regan said to me, it may be that I don't need to read all of this material if Your Honours have already read them, but at the foot of page 16 I do draw Your Honours attention to the fact that College Street was not the only asset which these spouses held in their joint names for beneficial owners, and I note at the top of page 17 the BNP Paribas investment in which there was $850,000 held in their joint names, 600,000 for 168 Group and $250,000 which was Ms Potter's and her brother, Andrew Potter. The next point that I need to –

GLAZEBROOK J:

And that was recorded in the accounts, unlike that College Street property, is that what you're saying?

MR STAPLETON QC:

Correct. The 168 Group interest –

GLAZEBROOK J:

That was an on-balance sheet transaction?

MR STAPLETON QC:

That was an on-balance sheet, yes, Your Honour, it was. That is recorded in the financial statements.

The next point is the GST point and I refer to that at paragraph 50, because the Court moved away from the tainting issue if you like to the issue of GST –

GLAZEBROOK J:

Was it ever explained what the tainting issue was?

MR STAPLETON QC:

Yes, it was, it was –

GLAZEBROOK J:

Just give me reference if you would.

MR STAPLETON QC:

It's set out in Mr Horsfall's narrative affidavit, but there are findings in the judgments, Your Honour, that might…

GLAZEBROOK J:

Yes. Frankly the findings seemed absolutely peculiar to me, which is why I wanted to go to what was actually said.

WILLIAM YOUNG J:

He gives an explanation at page 769, volume 2C.

GLAZEBROOK J:

It's an explanation that is actually, well, it was actually an explanation of an intention to evade tax, because if it's bought with the intention of sale then it's taxable, whether it's held by a person or not, in their own name.

MR STAPLETON QC:

Yes, but when one looks at the whole of the evidence it wasn't bought with that intention, Your Honour.

GLAZEBROOK J:

Well, he says it was.

MR STAPLETON QC:

Well, he says this is one part of his evidence, he's cross-examined about it, and there's extensive references to the fact that it wasn't bought with this intention: no intention at the time of purchase, which is when the intention must exist, for any later profit to be treated as income tax and therefore taxable.

GLAZEBROOK J:
So where's his tainting?

MR STAPLETON QC:
Well, that's his description in his affidavit evidence and in his cross-examination – I'll just have to find it in my notes. I can't immediately find my notes of my review of the cross-examination of Mr Horsfall, but he was asked about it in detail in cross-examination. Perhaps if I can locate them and come back to Your Honour later on that question.

Can I deal with the GST issue at paragraph 50? And what happened in respect of the GST issue in the Family Court was that having initially disagreed with Mr Horsfall on the GST treatment, Mr Jordan then agreed that Mr Horsfall's treatment was correct and the Family Court Judge referred to that at volume 2B page 700. It was the first question that His Honour addressed to Mr Jordan following the conclusion of Mr Jordan's evidence, and if Your Honours turn to volume 2B at tab 6, page 700, Mr Jordan's oral evidence, and you'll see immediately his evidence concludes Judge Walsh refers him to his first affidavit, paragraph 142 page 26. Now that is at 2B, tab 4, page 565, Mr Jordan's paragraph 142.

GLAZEBROOK J:
Sorry, you're going a bit fast.

MR STAPLETON QC:
Sorry, Your Honour. I'm referring to Mr Jordan's –

GLAZEBROOK J:
Yes, I know. It was the page number I didn't catch.

MR STAPLETON QC:
Yes. If Your Honour goes down page 700 –

GLAZEBROOK J:
Oh, no, I've got that.

MR STAPLETON QC:
Yes.

GLAZEBROOK J:
I'm sorry, you were referring to the affidavits I thought.

MR STAPLETON QC:
No, I'm referring now to –

GLAZEBROOK J:
I know, I've got page 700.

MR STAPLETON QC:
Yes.

GLAZEBROOK J:
I thought you were referring to the underlying evidence.

MR STAPLETON QC:
Yes, I am, and I was saying if you –

GLAZEBROOK J:
And that's what I'd missed.

MR STAPLETON QC:
If Your Honours go down to line 28 on page 700 you can see that the Judge refers Mr Jordan to paragraph 142 page 26.

GLAZEBROOK J:
Yes, well, where's that is what I was asking you.

MR STAPLETON QC:

And that in this Court is at volume 2B tab 4 at 565. And then His Honour refers to, in the last line on page 700, Mr Horsfall's affidavit in reply, and if you turn to the top of page 701, to Mr Horsfall's response at paragraph 123 to Mr Jordan's observations about GST, Mr Horsfall's response paragraph is at volume 2C, tab 7, page 849. And you will see at page 701 Judge Walsh then asked Mr Jordan, "Just unclear from your answer today whether you now accept it as explanation or disagree with that?" and right at the end of the long response Mr Jordan acknowledges that Mr - it's recorded as a question at line 5 but in fact it's Mr Jordan's answer to the Judge's question. And right at the end, the last three lines, he records that, as Mr Nicholas pointed out to him, Mr Horsfall was correct, there was a window when exactly how he described could have occurred. And Your Honours will recall that there was a discussion in the Court of Appeal about zero rating as to what the GST effect would have been if 168 Group had taken title, taken title to the sale, or to a purchase, where there was a going concern, because there were sitting tenants, that the transaction would have been zero rated for GST. And the point is simply made in terms of examining the judgment under appeal that again there is error if a court addresses an issue which in all the circumstances is unnecessary, and it was unnecessary in this case, given Mr –

WILLIAM YOUNG J:

I don't quite understand their GST treatment. If it was bought by Mr Horsfall and Ms Potter as a commercial property, they would presumably have been entitled to claim a GST input tax credit?

GLAZEBROOK J:

Unless it was zero rated when they purchased it.

MR STAPLETON QC:

Yes.

WILLIAM YOUNG J:

Yes.

MR STAPLETON QC:

And it would have been zero rated for the reasons I've just mentioned.

WILLIAM YOUNG J:

Okay, so it was zero rated because it was tenanted?

MR STAPLETON QC:

Yes, and similarly on the sale zero rated because it was tenanted.

GLAZEBROOK J:

So there was actually nothing –

WILLIAM YOUNG J:

But did none of the GST refund get claimed by the purchaser on settlement?

MR STAPLETON QC:

Because Mr Horsfall's evidence was, with which Mr Jordan agreed, that there was a time when the –

GLAZEBROOK J:

No, no, that's irrelevant, that must be irrelevant. I don't understand that at all, because either they should have been registered because they owned it beneficially and therefore it would have been a zero rated transaction, or somebody else should have been accounting for whatever the GST was in relation to rent et cetera.

WILLIAM YOUNG J:

But what was the rental? Was the rent perhaps under the threshold?

GLAZEBROOK J:

Well, it couldn't have been, can it?

WILLIAM YOUNG J:

There wasn't much rent on it.

GLAZEBROOK J:

Well, maybe it wasn't, maybe that was it.

WILLIAM YOUNG J:

It was a "peppercorn" rent I think it was described as or something.

GLAZEBROOK J:

That might have been the issue then.

MR STAPLETON QC:

Well, I'm simply making a submission that the GST issue in the circumstances, given Mr Jordan's evidence, didn't arise, that's what he said.

O'REGAN J:

But even so, if –

WILLIAM YOUNG J:

I don't think it's really his opinion actually that matters, it's our opinion that's more significant. I would actually quite like to understand it. But anyway, no doubt we'll…

O'REGAN J:

But if it was zero rated it would still have to have been returned as a zero rated supplier, wouldn't it, there would still be a GST return showing a zero rated supply? And if 168 was the beneficial owner it would have been obliged to make that return.

GLAZEBROOK J:

And the purchaser would not have been able to claim the GST back, because it would have been zero rated. So if they were pretending to own it, as you say they were, then in fact they've led the purchaser into claiming a input tax deduction to which it was not entitled.

MR STAPLETON QC:

Well, they weren't pretending to own it, they held –

GLAZEBROOK J:

Well, you say they were pretending to own it.

MR STAPLETON QC:

No, they held title, Your Honour, for the beneficial owners. It's a conventional way of holding property. It can't be characterised as a pretence.

O'REGAN J:

But they were pretending they were the beneficial owners, because otherwise 168 would have been accounting for all this in its accounts.

WILLIAM YOUNG J:

You see if 168 Limited was the beneficial owner, it almost certainly would have been registered for GST.

MR STAPLETON QC:

It was, Sir.

WILLIAM YOUNG J:

Okay, the transaction, the sale to 168 that we're hypothesising would have been zero rated presumably because it's a sale of a going concern –

MR STAPLETON QC:

Correct.

WILLIAM YOUNG J:

– as would be the sale by 168 Limited to the eventual purchaser, in which case the eventual purchaser wouldn't have got a GST tax credit and would presumably have been prepared to pay a little bit less for the building.

MR STAPLETON QC:

Well, the price agreed was one five seven five inclusive of GST.

GLAZEBROOK J:

On the basis that the purchaser was going to get an input tax deduction, and did, as I understand it.

MR STAPLETON QC:

I don't know what the position was with the purchaser, but the position with the vendor is as described in Mr Horsfall's affidavit and as agreed with by Mr Jordan that was properly accounted for.

McGRATH J:

It was expressed as inclusive of GST, if any, is that right?

MR STAPLETON QC:

When you look at the relevant page of the contract in the exhibits, one can't distinguish, Your Honour, whether it says, "Inclusive of GST (if any)," one can make out the words, "Inclusive of GST," and I can show you that in volume 3A –

McGRATH J:

Well, look, don't bother, I didn't realise it was a matter of some difficulty. I'd rather get on.

O'REGAN J:

But there's nothing to indicate that 168's GST returns recorded the purchase and/or sale of College Street?

McGRATH J:

No, because 168 Group's not been a party to these proceedings.

O'REGAN J:

But it is on your case, it's the beneficial owner, so it would be the party first of all receiving the GST supply then making the GST supply as the beneficial owner.

MR STAPLETON QC:
Yes.

O'REGAN J:
Or else an agent on its behalf, one or the other.

MR STAPLETON QC:
But there's no evidence of that, of what the position was in respect of the GST treatment for the reason I've mentioned. All that the evidence is as between Messrs Jordan and Horsfall is as I've outlined to Your Honours.

Now the next submission is at paragraph 54 and it relates to the Court of Appeal holding that the parties' agreement to take title was a fraudulent purpose in terms of the *Potter v Potter* [2003] 3 NZLR 145 (CA) line of authorities, and my submissions on that are developed from paragraph 55 onwards. The parties' agreement to take title in their joint names was not to avoid paying tax but was to avoid the risk of tainting and, as correctly stated by Simon France Justice in the passage which I've recited. Now *Potter v Potter* did not –

GLAZEBROOK J:
But there can only be tainting if they were right and they were going to flick it on couldn't there? Because how else is it going to taint anything?

MR STAPLETON QC:
Correct. Because that's why it's described as a "risk of tainting". The assessment was, Your Honour –

GLAZEBROOK J:
Well, if they were going to have a long-term hold how can – I mean, I can understand the other way around, but if you're going to have a long-term hold and that's your intention, then how can it taint?

MR STAPLETON QC:

I agree. My assessment, as counsel, is I can't see how the issue arose as a matter of fact at the time, but the parties' assessment, Mr Horsfall's assessment in particular, was that there was a risk, and this is how he addressed it. For myself, as I say, I can't see how it could arise on the facts. But that's nevertheless why the transaction was structured in this way.

Now I next refer to *Tinsley v Milligan* [1994] 1 AC 340 (HL), which was not referred to in *Potter v Potter*, and I've set out the relevant extracts from the speeches in *Tinsley v Milligan* at pages 19 and 20. And then in paragraph 57 I address the alternative argument: primary submission, not a fraudulent purpose, if it is then in terms of the *Potter* line of authority the effects of such a holding are as set out in paragraphs 57 of my submissions. And since the submissions were first filed in this proceeding attention of course has been drawn to the very recent United Kingdom Supreme Court decision in *Patel v Mirza* [2016] UKSC 42, [2016] 3 WLR 399, that's in the bundles of authorities, which had been filed by the first respondent and by the Crown, and my submission is that if *Tinsley v Milligan,* if the result in that case was correct, then necessarily in terms of the result in *Patel v Mirza* where the advance was for illegal insider dealing, then in this case applying both of those results and the reasoning in the latter case, Ms Potter fails in her claim under section 44(1) of the Act.

The next point that I make is in paragraph 60 of my submissions. It's a point which has been discussed already about the putting to Mr Horsfall in cross-examination the section 44(1) issue, and there is authority for the proposition that it must be put, the authority is the judgment of the Court of Appeal in *Coles v Coles* (1987) 3 FRNZ 101 (CA), and that's at tab 9 of the first respondent's authorities, the judgment of the Court being delivered by Justice McMullin.

O'REGAN J:

Do you want us to go to that case?

MR STAPLETON QC:

Yes, I do please. And that case, as here, was a section 44 case, and if Your Honours turn to page 104 of the report you will see two-thirds of the way down the page in the main paragraph on that page the sentence commencing, "Mr Jones realistically accepted that although he asked this Court to draw that inference Mr Coles had never been cross-examined in the High Court on this point by the counsel who then represented Ms Coles, in fact that in the only evidence which he had given on the matter, namely what he deposed to in his affidavits, Mr Coles had denied his wife's suggestion that the transactions between the estate and the company had been made in order to defeat her claim under the Act."

Now in this case in the various affidavits filed by Ms Potter there is no assertion by her that the dispositions of the proceeds of sale by Mr Horsfall to 168 Group were made with the intention of defeating her claim or right under the Act. There's no assertion of that sort in any of her affidavits.

WILLIAM YOUNG J:

How did it come to the attention of the Judge in the Family Court that that's what she was contending?

MR STAPLETON QC:

I'm sorry, Sir?

WILLIAM YOUNG J:

How did it come to attention of Judge Walsh in the Family Court that that was her contention?

MR STAPLETON QC:

By crystallising the essential issue: were these dispositions made with the intention to defeat her claim or rights?

WILLIAM YOUNG J:

Was it identified in an application?

MR STAPLETON QC:

It may have been identified in the pleadings, Sir. But my point is it wasn't deposed to then in the affidavits –

WILLIAM YOUNG J:

But how could she – I mean, all she can say is what the facts are, from her point of view, she can't see inside his mind.

MR STAPLETON QC:

Well, she could also state her belief that the dispositions were made with intent to defeat her claim or rights. The position is that there were no statements to that effect at all, primarily I submit because of the nature of the parties' agreement, and she knew when she made her handwritten note on the 1st of April 2004 that the agreement had been performed, that she'd received the $50,000 which had been agreed. And in those circumstances where it's not deposed to, where it's pleaded but not deposed to in affidavit evidence, the parties whose case that point is has an obligation, as evidenced in *Coles* and in section 92 of the Evidence Act 2006, to put that to the relevant witness in cross-examination, and it was not put. And I referred earlier to Justice Wild's comment in the course of argument and that's referred to again at paragraph 60.

Now the remaining paragraphs of my submissions simply draw together by way of summary the points that I've already advanced, and unless there are any further questions those are my submissions in support of the appeal.

ELIAS CJ:

Yes, thank you, Mr Stapleton.

MR STAPLETON QC:

As Your Honours please.

ELIAS CJ:

Mr Billington.

MR BILLINGTON QC:

If the Court pleases, I want to start my submissions by giving an overview of what, in my submission, are the essential legal issues in this case. My friend and I, with due respect to my friend, start at different positions altogether. In my submission he starts in the middle, I prefer to start at the beginning. I don't intend to repeat the written submissions that I have filed because with the able assistance of Mr Cleary the analysis could not be better put in my submission, bar one exception which I will come to.

But the issues, in my submission, fall into four categories, and this is a conventional approach in my submission for cases under this Act. The first is the classification of property under the PRA, the second is the argument as to whether the classification is ameliorated somehow by the existence of a resulting trust, the third legal issue for the attention of this Court is the effect of the rule, if I can call it that, in *Potter v Potter* [2003] 3 NZLR 145 (CA) of the Court of Appeal, and the final point is the analysis of section 44(1) in terms of the decisions of this Court in *Regal Castings Limited v Lightbody* [2009] 2 NZLR 433 and the Court of Appeal on this instant case and *Ryan v Unkovich* [2010] 1 NZLR 434 (HC) which was a first-instance decision, and it's bringing those authorities together which, in my submission, would be a useful exercise legally in terms of the facts of this case.

I want to start then on this basis. In terms of section 8 of the PRA, College Street, when registered in the joint names of the appellant and respondent, became relationship property. It became relationship property either under section 8(1)(c), "All property jointly by the husband and the wife is defined as relationship property." "Ownership" is defined in section 2. In respect of property it means, "The person whom apart from this Act is the beneficial owner of the property under any enactment or rule of common law or equity." Registration in joint names, in my submission, is indicative of a presumption of ownership, which can only be rebutted by compelling evidence to the contrary. So on the agreement for sale and purchase –

GLAZEBROOK J:

Well, it's not necessarily presumption of beneficial ownership is it?

MR BILLINGTON QC:

It's evidence of ownership.

GLAZEBROOK J:

Well, it's a conclusive indication of legal ownership.

MR BILLINGTON QC:

It is.

GLAZEBROOK J:

But there's not necessarily any presumption of beneficial ownership is there? Are you putting it a bit –

MR BILLINGTON QC:

It's been expressed as a presumption but in fact I'm quite happy to, with respect, to adopt what Your Honour says. It's evidence of ownership, that's it.

McGRATH J:

And is it also expressed in the authorities that there must be compelling evidence to "displace the presumption", because that's the phrase you used is it?

MR BILLINGTON QC:

Well, in my submission there would need to be compelling evidence because it's conclusive of ownership in the absence of evidence to the contrary, it's expressed in *Gissing v Gissing* [1971] AC 886 (HL)…

McGRATH J:

It's just a presumption that has to be displaced by the evidence, doesn't it?

MR BILLINGTON QC:

Yes, that's right. I'm content with it either way, but that's the starting point, which is a conventional starting point for a relationship property case. It's in the names of the husband and wife, it's relationship property, unless, and "unless" of course is where we go in this case. So my friend and I start in different positions. I start with the classification of property because of course that then engages section 44, was there a right or interest that was defeated? So I have to start on that basis.

GLAZEBROOK J:

Well, there is the point I suppose that relationship property doesn't become such, which was the point he was making I think, until separation or until there agreement in respect of it. But I didn't quite understand where Mr Stapleton was going with that because if it has the potential to be relationship property then presumably section 44(1) can operate in respect of it.

MR BILLINGTON QC:

That's right. my friend starts on the basis that, well, it's owned on some other basis and therefore you don't look at section –

GLAZEBROOK J:

Well, that's probably right.

MR BILLINGTON QC:

But it's half way through the analysis in my submission, the analysis has to be what he is confronting is registration of a property in joint names. How does he avoid that as a matter of law? That's his problem in my submission, that is the way it was put the Court of Appeal and that's the scheme of the Court of Appeal's judgment.

The alternative position is section 8(1)(e), which is property acquired during the course of the relationship by either spouse, and that's the subject of sections 9(2) to (6), 9A and 10. It's a subsidiary position, but the Family Court Judge used the word "acquired" in the course of his judgment because the

property was acquired during the course of the relationship. Now that extends back, because this Act reaches back into section 9A concepts, section 17 concepts, so what might have been separate property, and if one thinks about the source of the funds here you've got funding through the sale of shares, which were Mr Horsfall's, you've got funding through Riddiford Holdings, but you've also got a significant, if I can use the words, "sweat equity" component, because the acquisition at 550,000 was a discount to value of almost 300,000 which arose because of Mr Horsfall's efforts in engaging in the joint venture, so arguably those efforts would amount to relationship property. So to the extent that that property is dragged into the College Street purchase, which it was, and the subsequent sale, then it could be said that the property was acquired if not in whole but in part through relationship property, so –

WILLIAM YOUNG J:
Just to get one thing clear, do you accept that the share sales proceeds were separate property?

MR BILLINGTON QC:
I think I have to accept that.

WILLIAM YOUNG J:
Because there are findings to that effect.

MR BILLINGTON QC:
Yes, there are findings to that effect.

So the real focus I think is on what is the effect of the acquisition for below-market value, which I'll also come to in the tax context later? That only arose because of Mr Horsfall's efforts during the course of the relationship, so that immediately engages an examination of section 9A in particular. So confronted with that proposition the Court had to look at – and this is what Justice Simon France didn't do – is the classification of property, we have relationship property.

Now I want to just digress slightly because this has all been put on the basis that 168 Group was the beneficial owner. There are references in the evidence, and I'll give you the references: they are volume 2C at 769 and 775, and I should tell you why I'm giving you these references rather than give them to you first. This is evidence that Mr Horsfall gave that he too had a beneficial ownership interest in College Street. So when it is put on the basis that 168 Group was the beneficial owner that is not his evidence. His evidence was in fact that he had a beneficial ownership interest in the property as well.

GLAZEBROOK J:
Was that in the first bit of the property or the second bit of the property?

MR BILLINGTON QC:
When it was acquired. So when it was acquired – this is the second bit, yes, the College. When I speak about College Street I'm speaking about the bit that remained, the remainder.

GLAZEBROOK J:
The second bit, yes.

MR BILLINGTON QC:
And he said in his evidence, in his affidavit evidence at volume 2C, 769, 775, he had an ownership interest, and during the course of cross-examination at 2D, 1038 –

WILLIAM YOUNG J:
Where does he says he's got an ownership interest?

MR BILLINGTON QC:
It's 2C at 776, 769.

WILLIAM YOUNG J:
Yes, I've got that, I've got 769.

MR BILLINGTON QC:

"I was a part owner," paragraph 10, Your Honour, midway down the second paragraph.

WILLIAM YOUNG J:

I'm looking at the wrong…

MR BILLINGTON QC:

And 769…

GLAZEBROOK J:

I'm not sure it is actually. Do you say paragraph 10?

WILLIAM YOUNG J:

It's 775 in my volume.

MR BILLINGTON QC:

Yes, 775 was the statement in the affidavit, "I was a part owner," paragraph 10.

GLAZEBROOK J:

Well, that's a bit odd.

MR BILLINGTON QC:

Yes, it's not been apparent in the way the case has been developed that he in fact had this part ownership. I'm not sure what it means in effect.

GLAZEBROOK J:

Well, in fact it means if that right he provided the only funds –

MR BILLINGTON QC:

That's right.

GLAZEBROOK J:

– for that second part of the purchase. Mr Stapleton says in fact he did provide those but they were provided through a loan to 168 Limited as shown in the 2005 accounts of 168.

MR BILLINGTON QC:

The post, yes, the post transaction accounts effectively, yes.

GLAZEBROOK J:

Yes. So where was the 769 reference thought?

MR BILLINGTON QC:

Well, I think I'm probably using that as – can I just read that again? Because this is the core to the tax issue, the serendipitous opportunity to create the suggestion that, "College Street was our home," yes.

GLAZEBROOK J:

Oh, that was because it was likely to be on-sold in short order, yes.

MR BILLINGTON QC:

Yes. Because it was, it was sold within 12 months.

GLAZEBROOK J:

Oh, "Her name as well as mine," is that what you're…

MR BILLINGTON QC:

Yes, that's right. But the more significant feature is the evidence that started with his sworn evidence in his affidavit that he was a part owner, and here we're speaking in a time of when College Street was acquired under the agreement for sale and purchase by he and Ms Potter, and he developed that in his oral evidence at 2D 1038, around lines 20 to 25.

McGRATH J:

Can I have the page number again?

MR BILLINGTON QC:

1038, Your Honour.

ELIAS CJ:

Sorry, and the volume number?

MR BILLINGTON QC:

2D, the blue volume. We can stay with that volume. This is passage of cross-examination out of a letter that Mr Horsfall wrote to Mr Langford, you may recall, quite a crucial letter saying, "This is a home and therefore there's no GST," it was when he came to sell it, and Mr Newberry put it to him, "You were one of the beneficial owners, right?" and there's no answer to that question but there's no, it's consistent with the affidavit evidence. And then at –

GLAZEBROOK J:

Well, he actually says, "I was one of the beneficial owners."

MR BILLINGTON QC:

Yes, "So I was one of the beneficial owners," that's right. Then we go to 1063 at lines 10 to 15, "I was a beneficial owner of that transaction as well and I wasn't registered for GST."

So when we're looking at the classification of property, and probably the best lens is section 8(1)(c), you have joint ownership. So any interest that one of the parties has in it with the other joint tenant is an ownership of the whole, basic joint tenancy, so immediately in my submission College Street, apart from the fact of registration in joint names and the holding of it in joint names, in addition you have a financial contribution or a claim of contribution, makes it beyond doubt that this is relationship property. Now once that is accepted then the Court was then concerned with and the Courts have been concerned with the section 44 application.

GLAZEBROOK J:
What about the source of those funds being separate property, what do you say about that?

MR BILLINGTON QC:
I discuss that in terms of section 8(1)(e) in sense that 8(1)(e) is subject to section 9, separate property is excluded, but the sweat equity component arguably raises that, so that's as much as I –

GLAZEBROOK J:
No, exactly, it's just it's never been put on the basis that a portion of it was separate property.

MR BILLINGTON QC:
Mr Newberry's submissions, which are summarised at paragraph 215 I think, do put it on that basis, and I was going to take you to that either, but yes, there's –

GLAZEBROOK J:
Okay, just come to it when you come to it, that's fine.

MR BILLINGTON QC:
Yes, I think it's probably I do that, Your Honour. And it is then perhaps helpful just to look at some key documents that relate to the acquisition of this property and the subsequent sale of it, because they bear on the overall intention, which is what the Court's asked to determine with regard to resulting trust, and on that basis if we go to volume 3A and again when the Court of Appeal spoke about concealment and in particular control, this is what the Court was talking about in my submission, if we go to 3A, tab 4, this is the yellow volume 3A, tab 4, at page 1483 and 1484, you have a letter which Justice Young discussed with my friend some time ago now, which is this notes on the joint venture. At paragraph 5 we've got this due to Lovering problems, who was the vendor of the road, we have taken risks, and in the second letter it's to be an entity of –

WILLIAM YOUNG J:

Sorry Lovering is the vendor, I take it, of that property?

MR BILLINGTON QC:

Yes, and Your Honour, with due respect, rightly observed there's a tension, obligations under the Real Estate Agents Act 2008 here, he's on both sides of the transaction . In fact he's a purchaser for himself as an agent. And then the next page, 1484, is the choice of the beneficial owner, which is Mr Horsfall's sole choice, and it goes on, the next letter 1485, 1486, Riddiford Holdings will take a half share and then the qualification at 1486, should 88 Riddiford end up taking over the contract, Mark Horsfall will guarantee it. Well what we finished up with is the agreement for sale and purchase dated 18 March '03 at 1490 and significantly 1491, which is the acquisition for 560,000 and it's conditional upon, clause 14, the purchaser selling their house at 37 Hall Street, and serendipitously, as Mr Horsfall said, they did and that created a tax opportunity. The opportunity, in my submission, was to conceal, if that was the true position, the ownership from the IRD, and I'll come to the consequences of that perhaps after lunch if that's convenient?

WILLIAM YOUNG J:

Could I just ask you something, which you might look at over lunch. The cross-examination on whether there was ever an intention to develop an apartment in the College Street property was sort of rather limited, as I read it, but I may have missed it. Mr Newberry, when cross-examining Mr Horsfall basically seems to have proceeded on the basis well, that's what you said at the time, here's the letter to Mr Langford, and that seems to be pretty much where it was left. Ms Potter was cross-examined and was put to her it was a pack of nonsense, just a lot of lies, and then at page 367 she said –

MR BILLINGTON QC:

This is volume, I don't think I've got that in front of me.

WILLIAM YOUNG J:

Volume 2A.

MR BILLINGTON QC:

And page 367.

WILLIAM YOUNG J:

And said, well you never, no one's ever put an apartment on this building and she says, "True, but why did we buy all the product to move in there. Mark's still got, probably still got the flooring sitting up there that we were going to use, that we bought from Jacobsens. The big double oven that we bought from Radfords, all the bits and pieces that we bought to move there." Then the cross-examination seems to peter out on that point and goes on to something else. Now I just wondered if there was any more cross-examination either way.

MR BILLINGTON QC:

I'm not sure there was cross-examination. The other evidence was they'd moved from one property to live in the Riddiford property on the top of that property.

WILLIAM YOUNG J:

Yes, I understand the narrative.

MR BILLINGTON QC:

Yes.

WILLIAM YOUNG J:

The only other material I'd be quite interesting in seeing is that Mr Horsfall in one of his affidavits said, well I did get some engineering reports, which he's referred to, but I couldn't, no doubt due to my lack of familiarity with the way the exhibits document has been prepared, locate those engineering reports.

MR BILLINGTON QC:

I'm going to look at this because last night at the back of the volume that I referred you to, 3A, there are reports from engineers to putting a property on the roof of a commercial property that says Vivian Street, and I'm not really in a position to say from the Bar whether that was the same property.

WILLIAM YOUNG J:

Well he talks about, he gives references in I think one of his affidavits to them and gives numbers.

MR BILLINGTON QC:

Yes, the references are, I looked, I wasn't sure myself and I was trying to satisfy myself. On the cross-examination issue, if you want to hear me briefly on the other aspect of it, I can, in terms of whether it was put, I'll probably come back over the 44 I think.

WILLIAM YOUNG J:

Sure, no after lunch is fine.

GLAZEBROOK J:

I think Mr Stapleton was also going to give us at least the references to where there's been, there was a backing down from we're going to sell it, flick it on immediately, but that was presumably after lunch as well.

MR STAPLETON QC:

If I can help on the engineering reports before we break for lunch, they're in volume 3A, tab 4, at page 1511, 1512 to 1513, and following.

GLAZEBROOK J:

Sorry, 1511 did you say?

MR BILLINGTON QC:

Correct.

WILLIAM YOUNG J:

But these refer to Vivian Street.

MR STAPLETON QC:

Yes, but it is the same property Your Honour.

WILLIAM YOUNG J:

I see, okay, thank you.

MR BILLINGTON QC:

So this was, can I just clarify because I wasn't sure myself trying to read the documents because I saw the address, are we being told these are the reports that were obtained for this property at College Street with regard to the rooftop development?

MR STAPLETON QC:

Correct, because you'll see the covering document at page 1509 refers back to Mr Horsfall's affidavit, 15 March 2010.

GLAZEBROOK J:

And what's the date on those compared to the agreement?

WILLIAM YOUNG J:

It's July I think, July 2003.

MR STAPLETON QC:

July and October from memory.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

So, okay.

MR BILLINGTON QC:

Yes, July, October. Residential, yes, of the third floor.

ELIAS CJ:

Yes, we'll have to take the adjournment because I have an engagement.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.17 PM

MR BILLINGTON QC:

Would Your Honour Justice Young like to have those references now or should I do it later? The cross-examination on College Street?

WILLIAM YOUNG J:

Yes.

MR BILLINGTON QC:

There are two references, they're in volume 2A Sir. The affidavit evidence is at page 230, at paragraph 8.

ELIAS CJ:

Sorry, what was the volume?

MR BILLINGTON QC:

Sorry, volume 2A, a green volume. The page reference is 230. I'll move through it and stop me if I'm ahead of you. The next reference is at 255, paragraph 19, and 256 at paragraph 21. The oral evidence, the first reference is at 347, and that's lines 10 to 15, and 24 to 26. The next reference is at 350, lines 11 to 18. The next reference is at page 352, at lines 24 to 27. Line 30 really. Then finally at page 87 –

O'REGAN J:

353?

MR BILLINGTON QC:

That's correct Sir, at line 15 approximately. They are the references to the –

WILLIAM YOUNG J:

There's another reference actually. If you look at page 367.

MR BILLINGTON QC:

Yes. Oh, the one you referred me to earlier this morning?

WILLIAM YOUNG J:

Yes.

MR BILLINGTON QC:

Yes, that's right.

WILLIAM YOUNG J:

So that – but there's no other evidence, no one ever goes back to whether they bought the wood for the flooring?

MR BILLINGTON QC:

No. Well when I say "no" Mr Cleary has looked at this for me. I'm accepting that he does this properly and accurately. I haven't looked at I personally but no that's – and really that underpins the decision in the Court at first instance, and the Court of Appeal, and I've commented on –

WILLIAM YOUNG J:

Can I just ask one other question, to get the narrative clear in my mind?

MR BILLINGTON QC:

Yes.

WILLIAM YOUNG J:

At what point in the proceedings did the letter from Mr Horsfall to Mr Langford surface. Was it before or after Ms Potter had sworn her affidavit saying that they were going to live in College Street?

MR BILLINGTON QC:

I don't know when it surfaced. I know it was the subject of extensive cross-examination and also examination by the trial Judge.

WILLIAM YOUNG J:

No, I mean it may be of some significance. If that letter was on the table when she first started swearing affidavits then it may not add quite as much to her case as would otherwise by the case, but if she goes on oath and says we were buying College Street to live in and then later serendipitously to use the word that's featured here, a letter turns up saying the same thing, then that's what would be of some assistance to it.

MR BILLINGTON QC:

There are two aspects to that. I had discussed this. Mr Cleary has a search mechanism, and I'll ask him to look for it while I'm speaking to you, I was going to take you to that correspondence as part of the narrative in any event shortly. But of course that comes at the end of the ownership so when one looks at the chronological events –

WILLIAM YOUNG J:

I know that. What I'm saying is she said, gives an account of events saying, we've bought it, it's in our names because it's going to be where we're going to live.

MR BILLINGTON QC:

Yes.

WILLIAM YOUNG J:

He says that's a load of rubbish.

MR BILLINGTON QC:

That's right.

WILLIAM YOUNG J:

Now if it is the case that the letter turns up after that, then that gives her some support.

MR BILLINGTON QC:

Yes. Well it turned up as an exhibit, as an exhibit to the affidavits. I'm looking at the exhibit volume so, Mr Cleary could you give me the reference, because I'm going to take you to this in any event, which was the next step in the process because I was… can I just pause for a moment and just regroup because what I was outlining to you at the start was I wanted to deal with this matter under four headings. They are four points of principle and they're four points of principle where the Court of Appeal, in my submission, was correct to the law, and they were the classification of property, the two – the next two are inextricably linked and they are the resulting trust or not, and also the *Potter v Potter* rule. The Court of Appeal looked at this evidence in particular and it, in my submission, explains some of the phrases and expressions used by the Court of Appeal. I just want to digress to the extent –

GLAZEBROOK J:

So which evidence in particular?

MR BILLINGTON QC:

This is, I'm going to take you to it, the documentary in paragraph 3A, and you'll recall before lunch I took you to the –

ELIAS CJ:

Sorry, where are we going, just tell me the volume?

MR BILLINGTON QC:

Sorry, 3A, the yellow volume Your Honour. Prior to the luncheon break, I had taken you to the acquisition, the sale and purchase agreement, which had the reference to the sale of the Hall Street property in it.

GLAZEBROOK J:

I was going to ask you about that, whether anybody said why that was the case, and in particular Mr Horsfall.

MR BILLINGTON QC:

Not as far as I'm aware. I'm not sure why it was said to be the case but the fact is it's there. I don't know why.

GLAZEBROOK J:

Because again that might provide some indication that it might be seen as a replacement home, else why be conditional on that because, in fact, the funds from that were not used, as I understand it.

MR BILLINGTON QC:

No, they weren't. They were used for a different purpose altogether. You could look at it on two bases. One is it's part of the narrative that it might have been a home. The other is it was part of creating a trail, which you're familiar with and which we'll come to.

GLAZEBROOK J:

Well, I just wondered whether there was an explanation given, whether it was the explanation was smoke-screened for the tax issue rather than being pejorative.

MR BILLINGTON QC:

It certainly would be that and it may be the other but that's as far as I can take it. So I took you to the documents going into College Street. It's relevant to now look at what happened whilst the parties owned College Street, so in the same volume at page 1467 and 1468 is a joint bank account because the rental payment for that particularly was paid into a joint account in the names of the parties. The reference for that can be seen in the left-hand margin for those two bank statements.

GLAZEBROOK J:
So what's the rental?

MR BILLINGTON QC:
Having said that, I may be overstating it but that's the joint account for that property. I'll just leave that for the moment.

WILLIAM YOUNG J:
I think that might be the account for Hall Street, isn't it?

MR BILLINGTON QC:
I'll come back on that. There is a bank statement with the rental going in, in joint names. If I can then go back to 1307 and 1308, that's the contract for sale for 1.687 million inclusive of GST. At 1335 is the letter addressed to Mr Langford which on page 2 at 1336 sets out the proposition that it was to be a home and therefore GST had not been claimed.

Then the following pages include a rates invoice of 1337 in the joint names of the parties. Insurance at 1338, again, in joint names.

WILLIAM YOUNG J:
Was there any – I take it the insurance was just in joint names, no disclosure of any other interest.

MR BILLINGTON QC:
No.

O'REGAN J:
Sorry, what was the page for the insurance?

MR BILLINGTON QC:
1339. No, it doesn't note an interest in behind, no. 1343 is the certificate of title. And then there is Mr Langford's correspondence regarding the settlement which was intended to take place before the end of the financial

year but didn't. And then at 1376 is a letter by Mr Langford to the tenant, Pablos Art Studio. "We act for your landlords, Mark Horsfall and Diana Potter," and redirecting future rental payments. 1389 is a tax invoice addressed to M Horsfall and D Potter by Mr Langford for the sale. 1392 is the QV records for Potter and Horsfall for the property.

O'REGAN J:
But I mean these just show that legal title was held by the parties. It doesn't help us with the beneficial ownership point, does it?

MR BILLINGTON QC:
No, it probably helps, not probably, it does help in reverse, because if the situation is other than the records show, and was intended to be otherwise, then one would look for evidence and there were statements in a number of cases, some of which I'll come to. *Regal Castings*, you look at the totality of the evidence to determine what the parties' intentions were, and this is part of the totality of the evidence, and what you're not seeing is a reservation of interest for any of the three entities that subsequently have claimed an interest in it. And then subsequently the payments were received, that is the settlement proceeds were received by Mr Horsfall from John Langford Law, and were paid out, described as repayments of loan, which of course they weren't, and I'll just ask Mr Cleary, I'll pass you that, would you just mark those bank statements and I'll come back to them.

Now if I can then take you to volume 3B, these are the financial statements for 168 Group which you were referred to this morning at page 1674 and they have the comparative figures for the previous year. Now these are the financial statements my friend says actually record the true and correct position and I'm going to invite you to consider whether that is in fact the case because in my submission they don't. They perpetuate the concealment which the Court of Appeal referred to. But if you go to the income statement at page 1679, the income is unchanged for the previous financial year, so any income that was received from College Street was not returned by 168 Group.

If you look at the schedule of assets at 1685 you've got 2 Park Road with a depreciated value of 4.1 million. If you go back to 1671 you've got the same schedule of assets for the same property except you don't have Kent Terrace, so there is no College Street property brought in, reminding ourselves of discussions with Justice Glazebrook this morning, you've got no entry for College Street being as being an asset during that financial year. Then you have a capital profit referred to at 1681, which apparently is part of a profit of a capital nature on College Street but not so recorded. But it's 431,000. Now, that figure wasn't finally clarified if, indeed, it was at all, until the year ended March 2008, and you go to page 1723. You see a change from the '07 to the '08 year of something like $900,000.

Now, as I understand the evidence as it was given by the appellant, that was bringing to account correctly the balance of the capital profit on College Street, and it's very hard to work out what the profit was because we don't know what the starting figure was, whether it was 550,000 or 860,000. So it's taken some time but what is in my submission in simple terms College Street is invisible, so the euphemistic description of off-balance sheet is better in my submission simply expressed as being it's invisible and concealed, and therefore it was entirely appropriate for the Court of Appeal to discuss the matter in that way.

Likewise, it was entirely appropriate for the Courts to say that the appellant controlled the entities because he did, and you get that from his correspondence with his joint venture partner. You get that from the introduction of funds into Riddiford and then through 168 and you get that through the subsequent payments out of the proceeds of sale from Mr Langford's office to Mr Horsfall's personal bank accounts and then mis-described as repayments of a loan. I'll pull up those entries later.

So on a proper perspective and analysis, what you see is control of each of the entities by Mr Horsfall, so properly described as that by both Courts, and what you see from an accounting perspective is a post-event reconstruction which in itself conceals the alleged involvement – if, indeed, there was an

involvement – of 168 Group – and there's no reference to the financial interest that Riddiford was said to have, and nor is any reference to the beneficial interest that the appellant deposed to in his evidence and subsequently in oral evidence.

So all of that – and there is much, much more of it – in my submission as a matter of principle entitled the Courts to conclude that the property jointly registered was relationship property under section 8, and that such evidence as there was being advanced to suggest that the ownership was pursuant to a resulting trust was simply not available. Whilst the principle of resulting trust is that – and this is discussed in *Potter v Potter* in the Court of Appeal – there is no evidence that ownership was intended to pass. The only way to discern that is to determine from the contemporaneous records what can be inferred as intention in the conventional way from the conduct of the parties, and the conduct of the parties and the conventional analysis, in my submission, leads to the irresistible inference that what was intended was that the College Street property be taken on the joint names of both parties for ownership, beneficial ownership. On one basis Ms Potter's evidence because it was to be a home and there's evidence supporting that. And on the other basis for Mr Horsfall that it was to ameliorate the possibility or actually guard against the possibility of tainting an assessment for income tax purposes.

WILLIAM YOUNG J:
Can I just take you to a document that may be of some significance? 1514.

MR BILLINGTON QC:
That's in volume 3A? Yes. 1514.

WILLIAM YOUNG J:
This is a letter from Mr Horsfall in response to the engineers' reports about the structural strength.

MR BILLINGTON QC:
Yes.

WILLIAM YOUNG J:

"And then after discussing the fees, to this end could I get a fee proposal on engineering fees for the following options?" The first one is to allow residential use of the third floor and possibly above.

MR BILLINGTON:

That's right.

WILLIAM YOUNG J:

Was that addressed by anyone in evidence? It does seem to provide some support for Ms Potter.

MR BILLINGTON:

It does. To the best of my recollection, this was exhibited by Mr Horsfall. I have to say, I looked at this last night and I wasn't 100% sure that it related to the property.

WILLIAM YOUNG J:

You weren't sure what street it was?

MR BILLINGTON:

Yes, I wasn't exactly. But it seemed to me to be a significant document irrespective of being the address because it corroborates exactly what Ms Potter was saying, that that was the intention. It undermines to a significant degree the basis upon which Justice France reached his conclusions.

WILLIAM YOUNG J:

There's one other thing. There's a letter from Mr Langford, I assume, to Mr Porter which actually encloses the purchase file or sale file.

GLAZEBROOK J:

Yes, I had it too.

MR BILLINGTON:

The exhibit to which you refer, I think I'm correct here, is in Mr Horsfall's affidavit at 38. It was exhibit F. I'll get the reference but that letter is an exhibit to Mr Horsfall's own affidavit.

WILLIAM YOUNG J:

Well, I'm still trying to identify the date when Ms Potter got hold of the Langford purchase file or sale file.

MR STAPLETON QC:

It's at 3A, 1517, a letter from myself to Mr Newberry dated 18 December 2009, and you'll see the sale file is subparagraph 15 of paragraph 1.

WILLIAM YOUNG J:

I think that's after her first account of the purchase being for the purposes of a home, which I think was November.

MR BILLINGTON:

I'm just asking Mr Cleary for the reference to the exhibit to Mr Horsfall's affidavit. In the meantime, if I move on. There are two legal issues to be addressed against the background of that evidence and the first is, does that evidence support the concept of a resulting trust? The Court of Appeal, also adopting the reasoning of the Court of Appeal in *Potter v Potter*, said it was antithetical to the concept of a resulting trust because to have the effect that was intended, that was to avoid the tax obligations, then there had to be an absolute transfer. Anything short of that left the property in the hands of the beneficiaries of the trust, if there was such a beneficiary, and therefore there could not be conceptually a resulting trust.

The way in which that was put in *Potter v Potter*, which is in the appellant's authorities at tab 3, appears at paragraph 14 through to paragraph 21. Paragraph 14, "The essence of a resulting trust is that the party providing the purchase price retains a beneficial interest if there is nothing to indicate he or

she intended to confer the beneficial interest on the legal transferee." Well, in my submission the factual narrative here indicates the reverse, there was an intention to do so as a minimum for the tax purposes.

I'll leave for a moment the issue of fraudulent purpose, which I'll address separately, but as Justice Fisher described it at paragraph 20, "In this situation the settlor is the unwilling beneficiary of a compliment to his honesty," and I think in that there are echoes of the master of the roles, Lord Denning in *Tinker v Tinker* [1970] 1 All ER 540 (CA) where he said the husband was an honest man and therefore must be presumed to have honestly intended to transfer the property to his wife in the event of a subsequent insolvency.

Now the Court of Appeal in the instant case applied the same principles to the effect that if it was intended by Mr Horsfall to avoid the tax obligations on the part of one of the other entities, then there had to be an absolute transfer and therefore the resulting trust concept is antithetical to that, both that conduct. And that, in my submission, is good law, has been and remains so. So the case reaches a point, as it did in the Court of Appeal, that on a conventional analysis of the law College Street was relationship property. That it remained relationship property and the attempt to rebut that presumption on the basis of a resulting trust failed because the facts were antithetical to the concept of a resulting trust, and that is as far as the case actually needed to go in my submission on that point before one moved to section 44 and that's exactly what the Court of Appeal did and that's exactly what the Family Court Judge did.

But in the event that that is insufficient the evidence also raises a principle which I apprehend this Court may well be interested in and that is what I may call the *Potter v Potter* principle, which is expressed in charmingly simple terms in paragraph 14, sorry paragraph 20. "Each of the Courts have adopted this principle." That's the Courts below here. "As a general principle a party will not be permitted to adduce evidence that in transferring legal title to another he or she intended to retain the beneficial interest if the effect of the evidence would be to disclose that the transfer had a fraudulent purpose."

Now that was applied by each of the Courts in this case on the basis that if you accepted what Mr Horsfall had to say, then his purpose was fraudulent and that it was tax evasion, and therefore in accordance with that principle, as the Court understood it, on the authorities as they then were, then that evidence could not be given in support of the claim. Now it's interesting in the sense that I had, I prefer, with respect, the proposition that it's not a rule of evidence, it's a principle of equity based on the non turpi causa rule, and it's evolved from that.

WILLIAM YOUNG J:
So it must be a personal disqualification affecting the party who has acted fraudulently.

MR BILLINGTON QC:
Yes.

WILLIAM YOUNG J:
So for instance it couldn't work against creditors?

MR BILLINGTON QC:
No, that's right. It has to be - does the part – this is where the rule has become subject to judicial modification based on the facts, which Judges have an alarming habit of doing, and it's led to some confusion and some interesting authorities as a consequence, but it's expressed in very simple terms here, and I apprehend my friend for the Crown will submit that in New Zealand that is how the rules should remain. Now whether it's a rule of evidence, or whether it's a principle of equity, I rather suggest it's a principle of equity because it's actually, whilst it's expressed here as, you can't adduce evidence on it really it's because of the principle that lies behind it, but In any event if Mr Horsfall is attempting to establish he has an interest, either he or 168 Group, to do so he has to say, "I engaged in this exercise for the purpose of tax evasion." That's what he's saying.

ELIAS CJ:

Is tax evasion fraud?

GLAZEBROOK J:

Yes, yes.

MR BILLINGTON QC:

It feels like it when you go to prison.

ELIAS CJ:

I understand that it might be an offence.

WILLIAM YOUNG J:

Well, it's telling a lie to obtain a pecuniary advantage.

ELIAS CJ:

Yes.

GLAZEBROOK J:

You'd be using a document, as well.

MR BILLINGTON QC:

Typically tax evaders are prosecuted under the Crimes Act 1961 rather than the Tax Administration Act 1994. There is an offence under the Tax Administration Act. That carries five years' imprisonment. But typically the Revenue chooses to prosecute under the Crimes Act for use of a document for fraudulent purposes.

I'm not so sure we need to be concerned with that, because it's a question of what is meant by fraudulent purpose and I submit that it doesn't have the strict criminal law context. It has a broader meaning than that.

WILLIAM YOUNG J:

Well, it can mean to defeat creditors.

MR BILLINGTON QC:

Yes. That's right. Exactly. *Regal Castings* is an example. So insofar as it was necessary for the Courts to determine this case on the third limb, then reliance was made by each of the Courts on the principle as it's enunciated. Now, that principle is enunciated in fairly stark terms and the question, with respect, perhaps, for this Court is whether it ought to be modified in the light of subsequent authorities, and I just want to move on to that, if I may. I'm speaking perhaps without reference to the evidence totally because in terms of the rule, it comes from a line of authority, *Tinker v Tinker*, and the most recent expression up until recently was *Tinsley v Milligan*, which in a sense – and this is tab 10 of the appellant's authorities – has two elements to this case. The first is the judgment of Lord Goff, which is in the minority. Lord Goff expresses the concept in conservative and narrow terms in that if there is a fraudulent purpose then that is, as the Court said in *Potter v Potter*, the end of the matter. That party cannot rely on that evidence to establish the resulting trust, whereas the majority in *Tinsley*, Lord Browne-Wilkinson adopted a more broad principle, and that was this: that if there was a fraudulent purpose, and I'll use "purpose" as opposed to "transaction" then provided the party who was asserting their interest could do so without relying on a fraudulent transaction then that evidence would be admitted and the consequences would then follow if that party would uphold their claim.

So on the one hand Lord Goff preferred the narrow rule, and unless Parliament was prepared to change it then that is how the matter remained, whereas Lord Browne-Wilkinson put it in a different basis that provided one didn't have to rely on the illegality then that would enable the argument to be had.

Now, there's a significant distinction between *Tinsley v Milligan* and this case because *Milligan* relied on the presumption of advancement and presumption of advancement is a doctrine separate to itself, and the payment of monies for the acquisition of the property were founded on the presumption of

advancement. That's independent from any illegal purpose because the illegal purpose was to defraud the Department of Social Welfare or its equivalent in the UK by purporting to not own property. But the presumption of advancement was called in aid to enable Ms Milligan to establish her position.

Now, the presumption of advancement is not available to the parties in this case because it's expressly repealed by the operation of section 4(3) where the equitable presumptions of advancement and resulting trusts are appealed. So litigation as between husband and wife, evidence of these presumptions is no longer available. The Act is a code. So to the extent that Mr Horsfall had an interest – and he told us in evidence that he did have – then that presumption can't be relied upon to support his case. So it is distinguishable on the facts and on the law.

Tinsley v Milligan has been overtaken by *Patel v Mirza* [2016] UKSC 52, [2016] 3 WLR 399 which is in the respondent's casebook, and this is really, in my submission, where we in New Zealand should now be engaging on this issue. That's at tab 6. Lord Toulson delivered the judgment. I thought I'd summarised the, there's a summary of the judgment, summary and disposal appears at paragraph 120. You may recall the facts of this case involved the attempt to enter into an insider trading transaction and Patel –

GLAZEBROOK J:
Did you say paragraph 120 of the case?

MR BILLINGTON QC:
Yes I am, but I'll just indicate the facts to you.

GLAZEBROOK J:
Yes, I was just answering Justice McGrath's question.

McGRATH J:
Thank you.

MR BILLINGTON QC:

Paragraph 120, before I go though I should just give you a slight background of the facts, because the facts are really very straightforward. Patel paid Mirza I think it's £600,000 for the purposes of engaging in an insider trading transaction on the basis that Mirza would receive information with regard to the sale of securities which was based on insider information, and as a result an unlawful gain would be made. As it turns out the transaction was not consummated because the share information didn't come through and there was no insider trading. So on that basis Patel asked for his money back and the Court was faced with this issue of, as expressed in *Tinsley v Milligan*, how does one deal with the issue of there being an unlawful purpose on one hand, and was, was there any other basis upon which Patel could put his case, which would suggest that it was independent from untenable purpose, and the answer is Patel couldn't because it was an illegal transaction. The Court was then faced with the issue of balancing the concepts of unjust enrichment in the hands of Mirza, how to deal with that issue. It was based on the Scottish concept of locus poenitentiae, that is the withdrawal before the end of the transaction, dignified retreat, or alternatively developing a rule that this Court felt was a better expression of the legal position that the House of Lords had expressed in *Milligan*. So ultimately the Court expressed its conclusions at paragraph 120, and it's not simply a public, didn't rely simply on the public interest, and it's expressed, subparagraph (a), "To consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim… and to consider any other relevant public policy on which the denial of the claim may have an impact," and thirdly the proportionality response.

Now I haven't referred to the Australian authorities, but the Australian authorities have dealt with this differently again on the…

McGRATH J:

Just before you head away from the United Kingdom authorities, if we go back to *Tinsley*, Lord Goff, one of the points he was making, he illustrated by referring to the New Zealand Illegal Contracts Act 1970.

MR BILLINGTON QC:
Yes. That's right.

McGRATH J:
And he, his basic point as I understood it was that if there was to be reform of the law along the lines of alleviating the very strong rule of policy that had been applied for centuries through the Courts, legislation should be passed in the United Kingdom along the lines of the legislation passed in New Zealand. And you see this, really, at page 364 of his judgment in *Tinsley* and he says, referring to the Illegal Contracts Act at B, "The provisions of the Act demonstrate how sweeping a reform was considered necessary by the New Zealand legislature in order to substitute a system of discretionary relief for the present system of rules founded on the pari delicto principle.

I suppose at some point – and you may want to go to the Australian cases first – but I would ask you whether if we are developing the law we really have to give some consideration of the impact of the Illegal Contracts Act.

MR BILLINGTON QC:
That's exactly where I was going to go next. I think Lord Goff said – my words, not his – said, "If you wait for Parliament, you wait for Hell to freeze over," but I think he said it more elegantly than that.

McGRATH J:
Well, he was really saying, "We can't do this. This has got to go off to the Law Commission. These are very important issues, but New Zealand has done it and we should be developing the law perhaps or arguably along the lines that reflect the policy of the Illegal Contracts Act." I mean, there's an argument here, I suggest, that indicates given that the Illegal Contracts Act deals with contractual situations in this way by allowing the Court a discretion to do as it thinks just, despite the fact that it's an illegal contract that's being relied on, perhaps we should be developing the law in relation where we're applying it to relationship property issues by importing that principle into the

law or in other words by following the line taken by the majority in *Tinsley* and not Lord Browne-Wilkinson's line rather than this line. Now, at some stage I'd like you to address that.

MR BILLINGTON QC:
Actually, I was going to invite this Court to do exactly what you've asked of me. I do submit that we cannot look at this in isolation. We actually have to look at it in the context of where New Zealand has got to in terms of this issue and the Illegal Contract Act is exactly –

McGRATH J:
Yes, when you're ready.

MR BILLINGTON QC:
I was really going to – I wasn't going to dwell on the Australia position because it doesn't really take us much further in terms of the New Zealand context, and I'll just simply tell you what I understand it to be.

McGRATH J:
Sorry, I thought you were moving off this.

MR BILLINGTON QC:
No, I'm not going to move off. I'm going to move on to the Illegal Contracts Act because I think that is far more relevant and pertinent to this discussion. But the Australians had to grapple with it slightly differently, but to summarise that position there are two elements to it. The first is whether the illegal purpose has been carried out or not, and if it's not then the Courts have departed from the English position. So if a party repents from the illegal purpose before it has been carried into effect, that is relevant.

The second element is, what does the Court do when the illegal purpose has been carried into effect? That's probably more pertinent here and also pertinent in relation to the Illegal Contracts Act. The Court has taken the view, and the reference I'm referring to for subsequent analysis is Professor Brian,

resulting trusts, paragraph 21 at 21.240. In this situation, it claimed that the return of property no longer turns on the application of the equitable presumptions but upon whether it would be contrary to the policy of the statute infringed to allow the respondent to recover their position having regard to the seriousness of the unlawful conduct. So that's a public interest component but it also relates back to the statute and relief may also be refused where the beneficiary of the resulting trust has not come to equity with clean hands.

Now, if you applied that to the present case, the illegal purpose of Mr Horsfall's analysis is correct. It has been carried out and that is to avoid the incidence of taxation. The question then is contrary to the statute that's been infringed, and this is in my submission not a BG1 case where it's voidable simply only against the Commissioner, it's actually illegal, in a sense it's tax, it's a fraud on the Commissioner, and thirdly he doesn't come to the case with a clean hand, so in Australia the result would probably be a lemon for Mr Horsfall as opposed to anything else. But it's, that's really only by way of background as to how another jurisdiction has dealt with this issue.

McGRATH J:
Is that in your written submissions?

MR BILLINGTON QC:
No it's not.

McGRATH J:
You better give us the case then.

MR BILLINGTON QC:
Because it only really, I have to confess that it was on reading *Patel* that I rather thought that this is an area where this Court I thought should have some interest, and obviously does have some interest, because the *Potter v Potter* expression is economical to say the least. The law has moved and it seemed, with respect from my perspective, the Illegal Contracts Act is

relevant, and I hadn't put this in the submissions because I had to confess it came to me later. But it does –

McGRATH J:
So the Australian case that you're, is there a case or cases you can just give us a reference to?

MR BILLINGTON QC:
They're in the text to which I referred.

McGRATH J:
Okay and that's in your materials, is it?

MR BILLINGTON QC:
It's not, no, and I'll get this copied and made available to the Court, just the reference.

McGRATH J:
Thank you.

MR BILLINGTON QC:
But the Illegal Contracts Act and if I can explain why from my perspective –

ELIAS CJ:
In *Patel* they also referred to the Illegal Contracts Act, didn't they, and was the position there that the Law Commission report, because there was a Law Commission report I think in England, but it hadn't been acted on so they decided they had to move the law.

MR BILLINGTON QC:
That's right. So we are ahead of the English position because we actually have a statute and standing back and looking at it, it appears, with respect from my perspective, there are two elements to this now. The first is if you have an illegal contract then that's –

ELIAS CJ:

What's the illegal contract here though?

MR BILLINGTON QC:

We don't, and that's what I was about to –

ELIAS CJ:

I see, yes.

MR BILLINGTON QC:

You cut me off midstream Your Honour.

ELIAS CJ:

Sorry.

MR BILLINGTON QC:

If you have an illegal contract then it falls under the Act. If you have an illegal transaction then it doesn't fall under the Act and the question arises for this Court whether you develop –

ELIAS CJ:

Develop by analogy.

MR BILLINGTON QC:

Exactly, that is exactly right. And in a sense I'm arguing against myself but I rather suggest that even if you develop it by analogy the result will still be the same, because the Illegal Contracts Act, the presumption that illegal contracts are void, they aren't enforceable. That is the starting position. So there is only an exception under section 7 in certain prescribed circumstances, and they are set out in subsection (3), section 7(3), "In considering whether to grant relief under subsection (1), and the nature and extent of any relief to be granted, the court shall have regard to – (a) the conduct of the parties; and (b) in the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof," and that's

the Income Tax Act and possibly the GST Act here, “And (c) such other matters as it thinks proper,” but the Court, “Shall not grant relief if it considers that to do so would not be in the public interest,” and that echoes the submissions of the Solicitor-General in my submission who is to follow me.

Now if one takes that as an analogy, to use the Chief Justice’s expression, then the other feature of the Illegal Contracts Act is that the Court considers the nature of the conduct in terms of how egregious was the conduct of the parties, and there’s a – this is not in my materials either but it’s the judgment of Justice Richardson in *NZI Bank Ltd v Euro-National Corp Ltd* [1992] 3 NZLR 528 at 546, “If the conduct was not a deliberate contrivance then in that circumstance the Court would be more willing to grant relief under section 7.” So there’s a question of proportionality and that’s what the section says in a sense, but I ask Mr Cleary to give me a case which, in fact, whether it’s been applied in practice, and that’s at the appellate level Justice Richardson, so that’s an application of the Act. Now the other case that is in my authorities is *Farquhar v Property Restoration Ltd* (1981) 1 NZ ConvC 190,804 (CA). That is a tax case and it states the principle at paragraph 102 that the tax system depends on persons properly paying their tax in the nature of the tax system. That’s, again, developed more fully in submissions for the Solicitor-General.

The last case that I referred to was *Cox v Cox* [1992] 1 NZLR 390 (CA), case 8 in the respondent’s authorities. To put it in clearly understood terms, the Court said if you make your tax avoidance bed you lie in it, and that seems to have been echoed through a number of cases.

So coming back to the point that you raise with me, Justice McGrath, in New Zealand it does seem, with respect, that we have a parallel jurisdiction to deal with illegality and that relates to illegal contracts. We don’t have at the moment, short of *Potter v Potter* where there is no discretion to grant relief, anything where there is a fraudulent transaction. That might be seen to be anomalous in the social context in which we now live and operate and it would, with respect, at least commend itself to this Court’s consideration as to

whether there should be some alignment between the *Potter v Potter* principle in terms of transactions with a fraudulent purpose as opposed to simply illegal contracts per se and illegal contracts, of course, are breaches of credit contracts and various statutes that render certain contracts illegal, but they're easily understood and they're catered for. What we don't have is short of looking at *Patel* in the UK or looking at *Potter* here which are in conflict, now, any jurisprudence around how a Court should view illegal transactions that have a fraudulent purpose and in my submission if Mr Horsfall's evidence was admitted then his evidence is of a fraudulent purpose, and the purpose emerges from his own evidence in that the serendipitous opportunity arose to put the property in the joint names and thereby avoid tainting, the effect of which would be that any capital profit in the hands of the concealed owner would be taxable as income. It avoided the possibility or any need to file a GST return, whether zero-rated or otherwise, on the sale and purchase. So to all intents and purposes it remained invisible to the Inland Revenue.

Mr Horsfall put it himself very clearly, he was driving with his lights off in the dark so he couldn't be seen. That's quite a good description of what he was doing because he was keeping out of sight of the Inland Revenue and when you study, as I invited you to do, the financial statements of one of the owners, 168 Group, you cannot discern any involvement of 168 Group in College Street at all.

McGRATH J:
Wouldn't it have been open or isn't it open to a party, to put it hypothetically, to organise his or her affairs to handle a transaction through a separate company so as to not to put at risk of their classification as a dealer or whatever and becoming affected – and property already owned becoming affected or tainted?

MR BILLINGTON QC:
That's perfectly correct.

McGRATH J:

I think we need to be pretty clear as to exactly the culpability that you're putting to us occurred here.

MR BILLINGTON QC:

Well, you're exactly right because as the Court of Appeal said once the property was transferred into the names of the husband and wife, which he was entitled to do, then it became relationship property and it therefore fell outside the ambit of the tax system. One is entitled to do that. Husbands and wives do that sort of thing all the time, but you can't then come along later and say, "Well, really I didn't intend that effect," because the Court of Appeal said to be effective from a tax perspective there had to be an absolute transfer of the beneficial ownership and that took it outside the ambit of the legislation.

Now, if Mr Horsfall doesn't like that consequence down the track and says, "Well, actually, no, I did it for different – I never disposed of the beneficial interest. I retained the beneficial interest in 168 Group," then immediately what has been evaded is the filing of a GST return in relation to the acquisition, so there's a GST issue arises, and examination of whether it was in fact a going concern. There's the association of the GST Act between associated parties and their obligations. So the GST Act has slightly different definitions than the Tax Act.

McGRATH J:

I understand it was a not a transparent transaction, that's your submission, but how was it that he was avoiding tax by doing it this way. I mean if they ascertained, or if the Revenue formed the view that this was a purchase with –

MR BILLINGTON QC:

On two –

McGRATH J:

– a resale, he'd have been taxable anyway.

MR BILLINGTON QC:

On two bases. Not he, let's assume it's 168 Group, 168 Group is the associated party I think it's through YG1, with Riddiford, and arguably with Mr Horsfall as well. So it becomes a property dealer. So immediately College Street becomes revenue stock under the statute. So immediately – and it's sold within 12 months, which in itself raises inferences as opposed to a long-term hold.

ELIAS CJ:

But Inland Revenue has got direct remedies. I'm just feeling for where it all ends up here. Why it's necessary –

GLAZEBROOK J:

Well if you pretend it's for your home, and you pretend, you're pretending that its' not bought for the purpose of sale.

ELIAS CJ:

No, no, I understand that. but for pretence is something that Inland Revenue can tackle head on. I'm just wondering, it's a very crude, and I think you're acknowledging this, the *Potter v Potter* line is a pretty crude one, and I'm not sure why it's necessary to have –

WILLIAM YOUNG J:

Deterrent.

ELIAS CJ:

Pardon?

WILLIAM YOUNG J:

The best policy reason would be deterrence.

GLAZEBROOK J:

Except that here, one thing I did want to put to you, if it's right and it was all a pretence, your client was actually part of that pretence, so it's actually a *Patel* case rather –

MR BILLINGTON QC:

No. Sorry to interrupt you, I shouldn't interrupt. No she's not –

GLAZEBROOK J:

No but that's what I would quite like you to deal with.

MR BILLINGTON QC:

No, because her evidence was –

GLAZEBROOK J:

No I know her evidence is that she, that it was a genuine purpose on her part. But if, in fact, that isn't the case, say his evidence is overwhelming, and I'm not suggesting by any means that it is, but it's overwhelming that it was a pretence, then in fact she will be a party to that. I know that wasn't her evidence but assuming that her evidence is not accepted –

MR BILLINGTON QC:

It's not the finding of the Family Court.

GLAZEBROOK J:

I understand that too.

MR BILLINGTON QC:

Yes, I agree. If in fact she was a party, a knowing, if she was a party to it in the sense that she was complicit in the scheme, then yes she would be a party in the way that –

GLAZEBROOK J:
All I'm saying is you don't need this as a presumption. Then I suppose you're actually saying no you don't need this as a presumption because in fact the situation was as she says and not as he says.

MR BILLINGTON QC:
Correct.

GLAZEBROOK J:
So in fact you don't, he can put his evidence in, it just, you say, is not sufficient to create a resulting trust in the first place.

MR BILLINGTON QC:
Correct. that's where the case stopped as far as –

GLAZEBROOK J:
Yes.

MR BILLINGTON QC:
But if you have to go further than the Court has to ask itself, is there an evidential rule, or is it a rule of principle. If it's a rule of principle then he gives the evidence and what is the effect of that evidence. The Courts found Ms Potter had no role in this so she is not a Mirza and she's not a Tinsley. She is acting purely honestly. So it is he who then says, I defeat her interest as a property owner under the PRA because we never owned it, because 168 Group and I and Riddiford owned it, but we never paid any tax, and that's not tax avoidance in the conventional sense that you enter into a legitimate arrangement to minimise the incidence of taxation, BG1, it's a fact you're evading the obligation to pay tax because immediately, and had it been acknowledged at the time, and Mr Horsfall acknowledged this risk at the time, that there was a tainting through 168 himself and Riddiford, then they became associated parties under the Income Tax Act, they were associated parties under the GST Act, and they are avoiding their obligations under that statute, and then what is the practical effect of that. The property was sold within

12 months for a profit, and we don't know how this was accounted for, but either between 550,000 and 1.6 million, 1.1 million if you take that as the baseline, so that's taxable as income in the hands of a property trader, because it's revenue stock, or it's between 850,000 and 1.6 million, but the problem with that is there's a gap of 300,000 which also engages the Income Tax Act because it's been purchased at under value which creates tax problems at the outset. So the Income Tax Act is infringed in effectively three ways. One is to conceal then, if Mr Horsfall's evidence is right, is to conceal a transaction with the purpose of evading tax. The tax is evaded on the profit on the sale, and arguably the profit on the purchase because it was purchased for 300,000 under value, so it's purchased below market, so –

GLAZEBROOK J:

Well of course it may not be – the Revenue may come back presumably, or presumably will come back in fact.

MR BILLINGTON QC:

Well the worst possible outcome in this case is actually for my client to lose because the outcome is going to be economically far worse because it reaches back to false returns of significant income to 2004, and I shudder to think what that means in real terms. But yes, so these are clear breaches, in my submission. It's not a matter, with due respect to Your Honour Chief Justice, where the Inland Revenue simply deals with it. This is a tax fraud in my submission. Now I put the case in the Court of Appeal on the basis I didn't need to demonstrate that. It was justice Wild who actually thought that I, he quite liked the idea, but one doesn't need to because my case stops at the point where the resulting trust fails. But if you go further and have any reservations then you finish up with the *Potter v Potter* principle. Now if you apply the Illegal Contracts Act construct to this transaction, then Mr Horsfall doesn't get, would not get relief if it was an illegal contract because you come back to the three considerations that the, or the four considerations that 7(3) provide for. The conduct of the parties. The breach of the Income Tax Act and the GST Act possibly and the public interest. And the Solicitor-General will speak to the public interest and the Income Tax Act

but the authorities are very clear, that the payment of income tax depends on the voluntary disclosure by citizens of their income, it's not the reverse, so there's a very powerful public interest factor here which would ameliorate any relief that might be given, whatever rule of law this Court ultimately, whether it adopts the *Patel* position or otherwise, whatever position one adopts, whether it's *Patel*, *Tinker* or *Milligan* or the Australian position, the result in my submission would be the same. But the question is whether this Court ought to remain with the Lord Goff proposition of a narrow approach that unlawfulness simply disposes of it or as it was said in *Potter v Potter*, or whether there is some scope for relief of the nature Illegal Contracts Act discusses. Now that's really all I can say on that issue because with all due respect it's a matter for you but I thought I should develop those propositions because they are part of the fabric of this case.

Those are the first three headings that I wished to discuss with you. The fourth one is the effect of section 44 and it has been observed already in argument today, each of the Courts found that provided College Street was found to be relationship property, then the elements of section 44 were made out. This issue I covered in some detail in the written submissions filed in opposition to the appeal at paragraph 60. As Justice O'Regan observed this morning, the Court of Appeal's approach to this was an absolutely conventional approach to an issue of statutory interpretation, which is to break the section down to its component parts. The first issue to engage this Act, there has to be a right to the property and section 44 uses the word "property" not "relationship property" so it encompasses all forms of property, whether relationship or separate property.

The second point, has there been a disposition of property, and there was. Was it at the direction of Mr Horsfall? The answer is yes, it was. The other significant issue, was it in order to defeat the claims or rights of any other person? Each of the Courts below found that subject to the classification being relationship property, and yes, that's exactly what the position was, the judgments relied on this Court's judgment in *Regal Castings* which equated intent to defraud under the Property Law Act 2007 with a knowledge of the

consequences, so it need not be the sole objective but if it is a known consequence of the conduct, that is, that the creditors will be disadvantaged, then that was an attempt to defraud. That's the judgment of the majority as expressed by Justice Blanchard, and as the Chief Justice said in the same judgment, that is discernible from all the available facts, what were the consequences and what were those consequences known to the party whose conduct is being challenged?

Now, that test was adopted by Justice French in *Ryan v Unkovich*. While the wording of the statute is different, in order to defeat, Her Honour on that case applied the same reasoning, that if at the relevant time, and that's critical that the party making the disposition was aware of the consequences, in that case it was prior to the introduction of the PRA, as it now is, in 2002, then that would be sufficient to found an argument that the conduct was in order to defeat.

So if one distils those judgments and propositions down, they are in fact a wholly conventional application of the determination of what is an intent, whether you're looking at criminal law or commercial law or relationship property law, because the knowledge of the consequence is deemed, if one is deemed to have the requisite knowledge then one is deemed to have the requisite intent.

So if one is dealing with the creditor's situation and on all the available facts it is not necessarily the primary motive but the party making the disposition is aware that the creditors will be prejudiced in a significant way, then that is equated with the intent to defraud those creditors. That's *Regal Castings*. If a party is aware of the impending legislation to come into force of the Act that encompasses de facto rights, then the disposition of property is equated with the requisite knowledge and the requisite intent, and if one takes it to its most simple propositions, if one puts a knife into somebody, one knows the knife is going to hurt that person or injure them, then it's an intent to injure. So through the whole fabric of the law, if one is proven to have, to know the consequences of one's conduct, then that's intent.

Now, each of the Courts dealt with that element of this case in this way, in that Mr Horsfall gave evidence in his affidavits and evidence-in-chief that he was aware through his previous relationship experiences of the effect of the Property (Relationships) Act 1976. He'd attempted to have a section 29 agreement, a prenuptial agreement signed, which was not signed, and he acknowledged that he was aware of – in a significant way – the consequences of the way in which property was owned or held by parties to a relationship. He was examined on this and cross-examined on it at some length, and he was also questioned by the trial Judge. But each of the Judges then found – and it's interesting if one looks at the judgment just by way of example – of Justice France. There's an interesting paragraph, tab 8 of volume 1, it contains a mix of errors and truths. Paragraph 19, "By contrast, if the property was indeed purchased to be the matrimonial home, then the distribution of all the funds out of the relationship to a company in which Ms P has no interest provides a solid foundation for the application of s 44. In this regard, the Judge found, and there can be no doubt, that Mr H was well aware of the matrimonial property rules. He was both an experienced land agent and had been through a divorce." Now in terms of section 44 that's an impeccable summary of the Family Court judgment and the correct application of the relevant legal principles. Where His Honour misled himself was the classification and the interest around College Street being a matrimonial home, and if one substitutes the words, "By contrast, if the property was acquired was relationship property," then the rest follows. So if one accepts that College Street was relationship property in the way in which I have submitted to you under section 8, then the statement that is made by Justice France is actually correct. He focused on the issue of whether College Street was to be a matrimonial home. There is no such thing as a matrimonial home any longer. There's a family home, family residence, but there's no such thing, and he failed to appreciate the broader test of whether or not there was relationship property, but once one adopts that terminology then the reasoning is solid in my submission, and that's the same approach. He endorsed the Family Court Judge's approach, it was the same approach as was taken in the Court of Appeal. So there's no error of principle in my

submission in the way in which the Court below applied section 44. It was an orthodox interpretation, statutory interpretation exercise. The intent existed at the time. there was sufficient knowledge, and whilst my friend may argue ultimately he is bound, in my submission, by the findings and with due respect this Court should not interfere with the findings of the Family Court Judge on this issue, or for that matter the High Court or the Court of Appeal. There's no error of principle that one can identify from that. What possibly remains for this Court, with all due respect, is an exposition of what section 44 means in terms of in order to defeat is it equated with intent to defraud as was done in *Ryan v Unkovich* or is there some special meaning. But whatever meaning one gives to is, it has the same outcome in my submission, and on a factual basis the Courts below were entitled to make that finding, so one does not need to go into the evidence to answer that question. The Court of Appeal was not in error in my submission.

So you are left really in this position in my submission. You are faced with really two stark options. On the one hand the judgment upholds the finding it was relationship property and thus disposed of or alternatively if the contrary is found then it's a tax evasion that's being countenanced, and that really doesn't make sense with due respect at all because those really are the two stark alternatives when one reduces this to its bare facts and they are rather simple in my submission. The legal propositions are rightly here because there does need to be some discussion of how section 44 works, whether the Court of Appeal was correct. It's the only judgment at appellate level on section 44, and equally what you do with illegal transactions, or fraudulent transactions, as opposed to illegal contracts. However, that's as much as I'm able to advance usefully unless there's something I can assist you with Your Honours.

ELIAS CJ:

No thank you Mr Billington.

MR BILLINGTON QC:

Thank you.

ELIAS CJ:

Ms Deligiannis, we have read your submissions, we think that you probably don't need to elaborate on them at all, but you've heard the argument as it's developed and there maybe some matters that the Court has raised that you'd like to have to have an opportunity to comment on, and we'd be interested in particular in your comments on the GST analysis.

MS DELIGIANNIS:

Your Honours, the tax situation here is complicated, both the income tax and the GST side of things. Perhaps if I could talk about the GST consequences as matters have arisen today and look at the possible GST consequences for the company. So if, for example, the companies actually owned the College Street property. So 168 Group was the purchaser of the property instead of Mr Horsfall and Ms Potter. So if one of the companies had bought the commercial building, and both the purchaser and the vendor were both GST registered, then they were renting out commercial premises and therefore there would be taxable activity, they were making taxable supplies. My understanding is that the rent was $60,000 per year and that figure is set out in the insurance document that my learned friend Mr Billington took Your Honours to earlier today. So 60,000 rent therefore they would have been over the threshold which at the time I believe was 40,000, and therefore they would have had to have been GST registered and would have had to have returned the rental as GST-able. So they would either have claimed a GST input credit on the purchase, if the purchaser wasn't GST registered, and selling – sorry, was not GST registered and selling the building as a second hand good, or if the purchaser, sorry, if the vendor was GST registered and selling the commercial building as a going concern, and there was no GST payable or chargeable, so it would have been zero-rated as per section 11(1)(m) of the GST Act.

WILLIAM YOUNG J:

Do we know how the sale to Mr Horsfall and Ms Potter was treated by Ascot?

MS DELIGIANNIS:

No we don't. Not Ascot, no.

WILLIAM YOUNG J:

Presumably they would have had to return GST on the sale.

MS DELIGIANNIS:

So Mr and Mrs Shaw –

WILLIAM YOUNG J:

I'm just looking at Ascot Resources. They've got a development, they're traders basically, one would think.

MS DELIGIANNIS:

Yes. So they sold, they would have sold it as a tenanted property, therefore it would have been a zero-rated –

WILLIAM YOUNG J:

But that requires –

GLAZEBROOK J:

At one stage you had to put that in the agreement, for it to be zero-rated, and if it wasn't you paid, claimed an input tax, so I'm not entirely sure where we would have been on that, and I'm not sure that the agreement, is it inclusive of…

WILLIAM YOUNG J:

But doesn't the purchaser have to be –

GLAZEBROOK J:

They both have to be registered.

WILLIAM YOUNG J:

They both have to be registered.

MS DELIGIANNIS:

They both, yes, in order for it to be zero-rated they both have to be registered, that's right, and they have to sell it as a going concern, so they would have had to have bought the tenancy –

GLAZEBROOK J:

We're still on the company having purchased, I think, aren't we at the moment.

MS DELIGIANNIS:

Yes, so this is if the company had been the purchaser instead of the appellant and the respondent. So I'm just covering the possible GST situation. On the sale of the building, so assuming again that the company was the owner, if both the purchaser and the vendor was GST registered, and the commercial premises was sold as a going concern, then there would be no GST payable or chargeable. Again zero-rated. If, however, it wasn't sold as a going concern, then GST is payable on the sale by the 168 company. So they would add that to the purchase price and pay it to the Inland Revenue, or they would increase the purchase price by what they would have thought the GST would be, so that they didn't end up out of pocket, and the purchaser would claim the GST input credit. So what happened here, as I understand it, is that Mr Horsfall and Ms Potter weren't GST registered for the transaction, but they probably should have been –

WILLIAM YOUNG J:

They should have been, because the rent level was over the threshold.

MS DELIGIANNIS:

Because of the rent level. They were actually conducting a taxable activity so they should have been registered. They were over the threshold at the relevant time. so they should have been returning the rental income –

WILLIAM YOUNG J:

Was the threshold then about 24,000?

MS DELIGIANNIS:

40.

WILLIAM YOUNG J:

40.

MS DELIGIANNIS:

So they should have returned the rental income and there is some doubt about whether the sale was actually the sale of a going concern. Now if I can actually take Your Honours to the sale and purchase agreement of the site.

WILLIAM YOUNG J:

Well it wasn't treated as a going concern was it? Isn't the purchase treated as the acquisition of second-hand goods?

MS DELIGIANNIS:

Yes they have because they didn't buy, buy it. They bought it as vacant possession. There's some evidence that they intended to develop it, apartments as I understand it.

GLAZEBROOK J:

At some stage are you going to deal with that payments and invoice basis, because I understand that's just a timing issue rather than an absolute issue, so I didn't understand Mr Jordan's concession or the evidence on that. Are you able to throw any light on…

MS DELIGIANNIS:

Can Your Honour just assist me a little bit about the payments and…

GLAZEBROOK J:

Well, there was a – well maybe finish what you're doing, but we were taken to evidence of Mr Jordan conceding that the payments or invoice basis may have meant that Mr Horsfall's treatment was right, whereas payments and invoice basis I thought was merely timing rather than an absolute mismatch.

MS DELIGIANNIS:

Yes, that's right, unless Your Honour was, it is just a mismatch and, in timing.

GLAZEBROOK J:

In timing but not in terms of making, not paying GST at all…

MS DELIGIANNIS:

No, no. Unless there was a tax avoidance arrangement –

GLAZEBROOK J:

Mr Jordan seemed to think that it was a legitimate, possibly a legitimate –

WILLIAM YOUNG J:

Yes, I couldn't understand what he said actually.

GLAZEBROOK J:

No, no –

MS DELIGIANNIS:

Yes, yes, I think it's a third, it's a totally unassociated –

GLAZEBROOK J:

Just a timing issue.

MS DELIGIANNIS:

Yes, just a timing issue. But the relevance of this being not a going concern sale for Mr Horsfall and Ms Potter is that they would have had to have paid the GST on the sale to Inland Revenue. So the purchaser has claimed it – sorry, the vendor – the purchaser has claimed it but the vendors have pocketed the GST. So that's, bearing in mind that this matter hasn't been investigated by –

WILLIAM YOUNG J:

And then looking at the other component of it, if it is the case that the true owner of the Horsfall interest in College Street, and the true purchaser was

168 Limited, and it had acquired the property for $560,000, at number value, how would that have been treated, when it was worth 850 to one million at the time? Would that have been treated, as it were, as a profit accrued on the development?

MS DELIGIANNIS:
For income tax purposes?

WILLIAM YOUNG J:
Yes.

MS DELIGIANNIS:
It could very well have been Sir, yes, that's right, and there are a number of income tax considerations and consequences that could come into play in terms of the role of, if 168 did own the property.

WILLIAM YOUNG J:
And then the likelihood if it being subjected to any further tax on profits made on a quick flip.

MS DELIGIANNIS:
It's a lot harder for a company to argue that it didn't have the intention to dispose of a commercial building, commercial property if it flicks it off within I think it was eight months here, as opposed to an individual saying, well we bought his property, we didn't intend to flick it off, we intended to have it as our residential home. However, these circumstances have come up and we had to flick it off, so it's a lot harder to prove that the intention was to dispose of it when they bought it, whereas a company buying a commercial building and flicking it off quickly it's –

WILLIAM YOUNG J:
I suppose what happened there's actually an accrued profit there anyway, there's an accrued profit of $300,000-$500,000 is just disappearing.

That's the difference between the market value of the building that's being acquired and what they're paying for it.

MS DELIGIANNIS:
Yes, we don't appear to have a valuation of the property.

WILLIAM YOUNG J:
We only have their own figures.

MS DELIGIANNIS:
Yes, their own figures, so it would depend on what the Government valuation was, or what the market valuation –

WILLIAM YOUNG J:
I think they valued it at least 880 or something.

MS DELIGIANNIS:
Yes, it appears that perhaps Mr Horsfall saw an opportunity here to purchase the building and flick it off quickly.

GLAZEBROOK J:
Well he says so at one stage. Apparently he contradicts later, which we haven't been taken to yet.

MS DELIGIANNIS:
Yes, the piece of evidence that Your Honours were taken to about the residential, the possibility with engineering aspects of the apartment building, I do note that it was about developing three floors.

WILLIAM YOUNG J:
No, it was developing one, the third floor and possibly above, and then the second one was developing, building three levels of residential above and the third one was a new building on the carpark, so there are three possible options.

MS DELIGIANNIS:

So it wasn't just the top floor being a residential apartment.

WILLIAM YOUNG J:

No, that's right.

MS DELIGIANNIS:

Yes, so it looks like perhaps the intention was to buy it, develop it, turn it into a residential apartment block and flicking it off at a profit and therefore you might get your business in dealing in land provisions and operation under – parts of section, part CD of the Income Tax Act, and again it's easier to attribute that to a company conducting that type of activity than to individuals. So there's various situations or consequences that could arise from these factual situations and that probably need more investigating. But in terms of the GST situation which Your Honour asked me to elaborate on, it does appear that there could be a GST liability here.

GLAZEBROOK J:

And actually in fact whoever owns it, so win or lose, it's lose.

MS DELIGIANNIS:

That's right.

WILLIAM YOUNG J:

Okay.

MS DELIGIANNIS:

Was there anything else you, because I'm in your hands Your Honour.

ELIAS CJ:

No, thank you very much for your helpful submissions. Yes Mr Stapleton?

MR STAPLETON QC:

Your Honours, if I can start with the references first of all to the intention at the time of purchase to sell, and the first reference, and these are all in 2D. The first reference is at page 1028 at line 21.

WILLIAM YOUNG J:

Sorry, what page sorry?

MR STAPLETON QC:

Page 1028, line 21, Mr Horsfall says, "168 Group had the same view of the property as I did. It wasn't being purchased to sell on. It would be better to hold it and/or redevelop it." The next reference is at page 1042, the last line on 1042.

GLAZEBROOK J:

Did he say what the redevelopment was going to be?

MR STAPLETON QC:

No, the evidence of redevelopment is in the form of the engineering reports that Justice Young has already referred to.

GLAZEBROOK J:

So redeveloped for residential, when Justice Simon France found that it wasn't feasible to do so.

MR STAPLETON QC:

No, there were three options, Your Honour, in the letter of the 31st of October that were being canvassed, one of which was an apartment on the top floor with the possibility of work on a further floor above. The other two appeared, at least from my reading of them, to be wholly commercial in nature, and he was seeking –

WILLIAM YOUNG J:

Well I think they're more elaborate residential aren't they? Not for them to live in but it does give a certain amount of support to Ms Potter's account that they were talking about putting an apartment on the top.

MR STAPLETON QC:

If that had been the only option canvassed in the 31st October-

WILLIAM YOUNG J:

No, no, what I'm, I'm not sort of drawing so much as to what Mr Horsfall may have intended, it's just that he is talking about an apartment at a time when they're owning the building. He's talking about other stuff as well, I agree. So it does suggest that it's not something she's just plucked out of the air, which is rather what he seemed to attribute, claimed she was.

MR STAPLETON QC:

Well it's an issue of timing, 31st of October, after the settlement in May.

WILLIAM YOUNG J:

Which is while they still own it.

MR STAPLETON QC:

Yes, and in the context that it's not simply the sole proposal for which advice is sought, there's a combination set out in the letter Sir. Now in terms of timing that advice is sought 31st October. The contract for the sale is signed on the 18th of December, and you saw that from the contract document referred to earlier.

Now continuing with the references to the intention for the property at the time of purchase, the third reference is at page 1043, at line 16, where Mr Horsfall repeats what he said previously and then at line 18 through to 26 Mr Newberry puts to him the paragraph that's already been referred to, "The property was likely to be on sold in short order for a profit," and the response

then follows. There are those references in the evidence to the statement of intention at the time of settlement of the purchase, 8 May 2003.

Turning to reply to my learned friend Mr Billington's submissions, and first of all his acceptance that the proceeds of sale of Mr Horsfall's separate property shares, were his separate property. What then followed in this case, as Mr Horsfall was entitled to do with his separate property, was that they were advanced those proceeds of sale to 168 Group as recorded in the financial statements, and those monies, along with the monies from 88 Riddiford Holdings, then applied for the purchase of College Street property, with title being taken in the names of Mr Horsfall and Ms Potter, but with the beneficial owners being the companies who provided the purchase funds. Now Your Honours, there has been a lot of talk in the course of this case, particularly in my learned friend's submissions about fraud and the like. I want to refer Your Honours to the submission that I made in the Family Court, it's at volume 1, it's recorded in Judge Walsh's judgment when he records my submissions at paragraph 195 on page 152, and Your Honours will see that paragraph (d) records –

GLAZEBROOK J:
Sorry, I think I'm in the wrong…

MR STAPLETON QC:
It's in volume 1 at page 152, paragraph 195. And at paragraph (d) His Honour records my submission that, "If there had been any basis for concern about the transactions," and you'll remember there's no concern expressed until the commencement of these proceedings in March 2009, "then Ms Potter had nine years after the settlement of the sale to refer matters to the Inland Revenue Department, to obtain affidavit evidence of those concerns if they existed, to enable them to be the subject of expert evidence from Mr Underwood and be tested in cross-examination." But that's not what was done here by her in a case in which she is clearly a party to an illegal or fraudulent agreement, if that is this Court's finding. It's my submission –

WILLIAM YOUNG J:

Not necessarily. I mean it's possible that she thought that there was going to be a house put on the top of the building and it's possible that she didn't allow her mind to wander over the tax and GST implications.

MR STAPLETON QC:

But possibility doesn't get to the required level –

WILLIAM YOUNG J:

No, but I'm just saying, you're the one that's saying she's in on the joke. I'm not so sure that she is.

MR STAPLETON QC:

Well that was the finding in the High Court and the Court of Appeal proceeded on the basis of the –

WILLIAM YOUNG J:

Well there are three things that trouble me about Justice Simon France's judgment. First, the timing issue that I referred to. She first goes on oath with her, it's for an apartment explanation in November 2009. As far as I can see she doesn't get the Langford file until the following month.

MR STAPLETON QC:

Correct.

WILLIAM YOUNG J:

So she hasn't tailored her evidence to documents that she knows are out there. Instead she gives her account, the next month out comes the document that says, yes, it is actually for a house. That's the first thing, Judge doesn't refer to it. The second thing is the, letter of the engineers that refers amongst other things to the possibility of an apartment, that's not referred to by the Judge. Then the third, which is possibly something of a more teasing nature, when you cross-examine she says, "Well what about all the wood that

we acquired for timber and the appliances we got from Radford." She's never challenged on that.

MR STAPLETON QC:
Mr Horsfall is not cross-examined on it either.

WILLIAM YOUNG J:
No, but you didn't cross-examine her on that issue.

MR STAPLETON QC:
But this, that sequence in the evidence, Your Honour, relates not to College Street.

WILLIAM YOUNG J:
I think it does, doesn't it?

MR STAPLETON QC:
No, it relates to Kent Terrace.

WILLIAM YOUNG J:
Let's have a look. You may be right. I'll have a look, don't worry about it, I'll have a look.

GLAZEBROOK J:
But the engineer issue troubles me because Justice Simon France says well it was quite clear that it wasn't a possibility to have apartments there residential but in fact the engineer, the commission to the engineers suggests that that's the very thing they were wanting to do, was create apartments.

MR STAPLETON QC:
These documents, Your Honour, need to be read in their entirety, the engineering reports. Justice Simon France did refer to them in his judgment, and if one looks at the reports, it's in volume 3A at page 1511, and this is 4 July 2003, and it's addressing the issue of the existing seismic strength of the building. It sets out the engineering findings and if Your Honours then turn

to the following page, 1512, the fourth paragraph, you'll see that there is no legal requirement to strengthen the building, providing the current type of occupancy does not change. "If a change of use occurred (deemed to have occurred by the Wellington City Council) then section 46… requires the building to be strengthened to as near as reasonably practical to the current code as if it were a new building." So that as at July 2003 the advice is if there's to be any change from commercial use, for this building, then you're going to have to strengthen it to the standard required of a new building, and it then goes on to the gravity frame at the foot of the page, talks about the loadings existing, and then says, "Therefore there is scope to add up to three floors of lightweight construction on top of the existing building based on the existing floors remaining office/commercial use." Now that's where matters sit during July, August –

WILLIAM YOUNG J:
But when did they settle for it?

MR STAPLETON QC:
The purchase was settled 8 May 2003.

WILLIAM YOUNG J:
Okay so this is two or three months after settlement.

MR STAPLETON QC:
Two months after settlement. Nothing further is then done in terms of –

GLAZEBROOK J:
But aren't we looking at what happened at settlement. So the fact that they're actually still investigating this later doesn't tell against her version of events, does it, as Justice France said it did. How can what happened later –

WILLIAM YOUNG J:
Well I think it helps her.

GLAZEBROOK J:

Exactly.

WILLIAM YOUNG J:

If you look at para 24 of Justice France's judgment –

ELIAS CJ:

Can we just pause just a moment, I just want to check, are you happy to keep sitting, would you prefer to take a short break? Yes thank you.

MR STAPLETON QC:

Paragraph 24 of Justice France's judgment.

WILLIAM YOUNG J:

There's no suggestion there of an awareness that two months after settlement, or three months after settlement, Mr Horsfall is investigating the possibility of putting an apartment on the top floor.

MR STAPLETON QC:

Not in that paragraph Sir but there is a reference to the engineering reports in the judgment.

GLAZEBROOK J:

But the difficulty is he said what tells against her version is that it was not possible, and she knew it, to put an apartment there, but that has to be at the time of the settlement of the original transaction, and if you don't get – and in fact I don't think this July letters says anything of the sort anyway.

MR STAPLETON QC:

Well if one is going to build an apartment that's necessarily for residential use, that's necessarily change of existing commercial use, it requires 100% strengthening.

GLAZEBROOK J:

Well no but didn't you just read something to say if you still keep the first floors you can actually add floors without triggering this. But in any event it's irrelevant because that wasn't absolutely clear to her or, in fact, to Mr Horsfall at the time of settlement.

MR STAPLETON QC:

Well, this is –

GLAZEBROOK J:

Which is what Justice France said in paragraph 24, wasn't it?

WILLIAM YOUNG J:

Six months after settlement he, Mr Horsfall obviously doesn't think it's impracticable, because he's asking for an engineering, a quote for an engineering report as to an apartment as an option.

MR STAPLETON QC:

Well one needs to look at the exact wording Your Honour.

WILLIAM YOUNG J:

Yes.

MR STAPLETON QC:

It doesn't say that precisely. It's in rather broader terms than that.

GLAZEBROOK J:

Well it might be but whatever it does say, or doesn't say, there is no evidence that at the time the purchase was settled, it was absolutely clear you couldn't put an apartment there, which is what paragraph 24 of Justice Simon France's decision says, isn't it?

MR STAPLETON QC:

But that's not the relevant issue in terms of assessing what was the nature of the agreement between these parties at the time or purchase. They each

gave their respective accounts. Justice Simon France preferred Mr Horsfall's version of events for the reasons set out in his judgment –

GLAZEBROOK J:
And one of it was because he knew, and she knew at the time of settlement that a residential possibility was not there.

MR STAPLETON QC:
Well the reasons are all set out Your Honour –

GLAZEBROOK J:
Well if that reason's wrong what's left of the reasons there?

MR STAPLETON QC:
Well one goes to the judgment and refers to the reasons. His Honour set out cogently in my submission why he preferred Mr Horsfall's reasons. The Court of Appeal then proceeded on the same basis. it didn't go back and revisit the competing versions.

WILLIAM YOUNG J:
I'm just going to ask you one more question then I'm going to leave you. If you look at 769 to 770, this is Mr Horsfall's affidavit, you'll see that he puts his account pretty high.

ELIAS CJ:
What volume?

GLAZEBROOK J:
Volume 2C.

WILLIAM YOUNG J:
"The only discussion Diana and I ever had about College Street pertaining to her was my asking to put it into her name as well as mine given the property was likely to be on sold in short order for a profit." And then, over the page, "The rest of Diana's commentary is pure fantasy which I suspect is made in

the hope of having the property treated as relationship property for the purposes of a section 44 claim… Specifically, if Diana had really had a discussion with me about putting a dwelling on the roof, she would have been told by me that for a commercial building to be used as a residential dwelling it needed to meet strict fire and earthquake regulations. Fire requirements et cetera… A dwelling on the roof that Diana falsely asserts we were contemplating would have required a whole new set of stairs," et cetera, and so on. Now there's no suggestion there that in fact six months later he was asking for a quote for an engineering report as to the practicality of doing exactly what she was talking about.

MR STAPLETON QC:
Keep reading Sir, turn the next page.

GLAZEBROOK J:
At page 771 he does say that, but it just doesn't make any sense.

MR STAPLETON QC:
Well Mr Horsfall is dealing in this reply, 15 March 2010 –

GLAZEBROOK J:
Well he says at 771, "We couldn't have had the discussion Diana claims as it was never going to be a feasible proposition," and yet he's just said he commissioned an engineer's report to see whether it would be.

MR STAPLETON QC:
And in terms of Your Honour's questions of me earlier, after the settlement had taken place when Your Honour has indicated to me that the relevant time was at the date of settlement of the purchase.

GLAZEBROOK J:
But why, if you say it would be impossible, would you actually spend money getting an engineer's report to tell you it was impossible. If you knew it was

impossible at the time of purchase, why on earth would you spend money getting an engineer's report to tell you it was impossible?

MR STAPLETON QC:

Because prudently, I suspect, one is taking advice from professionals as to what may be done and what may not be done and the engineers' reports that I've referred to, 4 July 2003, state what they state, and then Mr Horsfall asks on 31 October for advice on the three options set out in his letter. Now one does need, in my submission, to look at the whole of the evidence, to look at the whole of the account given by Mr Horsfall in this paragraph in response to Ms Potter's earlier affidavit, because that's how cases are decided, in my submission, on the whole of the evidence, not simply looking at aspects of them which support one party or the other, but on the whole of the evidence, and that, in my submission, is how Justice Simon France approached the task before him in terms of assessing which of the parties' versions of events was the correct one, and he set out that in his determination it was that given by Mr Horsfall for the reasons set out in his judgment.

Now what Ms Potter does here is not go to the Inland Revenue Department with any concerns about the way in which these arrangements were structured at the time of purchase in 2003, but makes a claim on the 6th of March 2009 after the parties' separation, in which she advances the claim on the bases that have already been canvassed today. Now in those circumstances where you have a performed contract, this is not an agreement where it's yet to be performed, but on Mr Horsfall's version of events, accepted in both the immediate Courts below, the agreement is actually performed and executed on the date of settlement, 1 April 2004 –

GLAZEBROOK J:

I'm sorry I'm not quite sure what you say in both the Courts below. What agreement are you talking about?

MR STAPLETON QC:

Justice Simon France's upholding of Mr Horsfall's version of events and the Court of Appeal proceeding on the same basis without revisiting the competing versions.

GLAZEBROOK J:

Where do you say they accepted the version of events?

MR STAPLETON QC:

There is no revisiting in the Court of Appeal judgment of the competing version of events in the Family Court, determined by Justice Simon France in the High Court that he accepted Mr Horsfall's version. The Court of Appeal judgment doesn't go over any re-examination or re-analysis of those issues. It proceeds on the basis of Mr Horsfall's version –

GLAZEBROOK J:

Well that might – I'm not saying whether it's right or not, but if they did so wrongly, because they were relying on a *Potter v Potter*, or they didn't need to rely on the *Potter v Potter*, why does that mean that we can't look at the facts anew. Is that the submission?

MR STAPLETON QC:

No, the submission is that if Your Honours wished to look at the facts anew, as a final appellate Court, then of course you can. But it needs to be on the whole of the evidence. It needs to be against the backgrounds of the findings that have already been made in the Courts below, particularly in terms of this essential element, which version of events is to be preferred in respect of the arrangements at the time of purchase.

WILLIAM YOUNG J:

Have you got an explanation why – sorry, I'll start again. On Mr Horsfall's case, Ms Potter came along and committed perjury by saying that the prospect of an apartment being built had been mentioned and was part of the reasons for the acquisition of the building, and then he himself has to

acknowledge that he told a very similar lie to his solicitors when he said that it had been bought for those purchasers. Now that they should both tell the same lie entirely independently seems a bit odd. So it does rather suggest that between them there must have been discussions about an apartment being built on the building. How else, why else would that coincidence arise?

MR STAPLETON QC:
The reference in the letter to the solicitor was to a house, not a home. It was our house because the Hall Street property had just been sold.

WILLIAM YOUNG J:
Yes, I know that. But the connotation is that they're going to live in it.

MR STAPLETON QC:
Not in my submission Sir because they continue living in one of the apartments at Riddiford Street throughout.

WILLIAM YOUNG J:
No, no, but the connotation of what is said to the solicitor is they're going to live in it.

MR STAPLETON QC:
No. The connotation said on 11 March 2004, three weeks before the sale is settled, that the property was purchased as our house.

WILLIAM YOUNG J:
Yes, well isn't a house something you tend to live in?

MR STAPLETON QC:
Well a home is something you tend to live in, and these parties had a home, and had throughout, at one of the apartments at Riddiford Street.

GLAZEBROOK J:
Where did they have a home?

MR STAPLETON QC:

They had a home in one of the apartments at 88 Riddiford Street, and that's where they lived, Your Honour, for the whole of this period from the sale of Hall Street until they –

GLAZEBROOK J:

Well they're hardly going to live in something before it's developed as an apartment, aren't they? Because wasn't the evidence they were going to develop it as an apartment. They're not going to live in it before it's developed.

MR STAPLETON QC:

Well the evidence does have to be weighed against what actually happened. The assertions have to be weighed against what actually happened and what happened here, College Street was sold, not developed at all. Kent Terrace was purchased, and Your Honour's reference when you check it, you will see –

WILLIAM YOUNG J:

No, you're right, yes.

MR STAPLETON QC:

It is, it was the Kent Terrace.

GLAZEBROOK J:

Were they going to live in Kent Terrace?

MR STAPLETON QC:

No. That's what she says in terms of the passage that Justice Young referred to, but again that building still held by 168 Group has only ever been used for commercial purposes and that's why Mr Horsfall says forcefully in the affidavit under consideration that her allegations about apartments at College Street are false.

WILLIAM YOUNG J:

Never mentioned, that's what he says, isn't it. If she hadn't –

GLAZEBROOK J:

Fantasy.

WILLIAM YOUNG J:

– I would have said don't be barmy.

MR STAPLETON QC:

Well, I can't improve on what he says himself Your Honour in his own words.

WILLIAM YOUNG J:

No, no. but it's just, all right, it just did seem to be a bit odd that that you have these two – I mean whether it's a house or a home his letter to the lawyer was still a lie, and it's a very similar lie to the one that he claims his former wife was telling, and yet it's just a coincidence. I suppose that's the only answer–

MR STAPLETON QC:

Well I can't, I can't –

WILLIAM YOUNG J:

That's the only answer you've got isn't it?

MR STAPLETON QC:

Well I don't have an answer for the question in the sense that it's a postulation Sir that I don't need to answer because what we come back to in this case is this, and it goes back to Justice Glazebrook's comment to my learned friend shortly before lunch, when he referred to Mr Horsfall's statement about he being a beneficial owner because of the provision of the proceeds of sale of the separate property shares. Now that affidavit was sworn on the 15th of March 2010. We all know that cases develop. We all know that matters have to be refined, and approaches refined, in the light of all the available evidence. And when Mr Underwood's expert evidence in August 2012 is that matters

were properly accounted for in the 2005 financial statements, and they show the movement in advances of the scale I've already referred to, the clear inference and conclusion to be drawn from that evidence is that there is no beneficial ownership on the part of Mr Horsfall because he doesn't advance the proceeds of sale of the shares to the purchase. They go through the advance account to 168 Group and 168 Group then advances them. That's how the transaction is recorded in the financial statements. Mr Underwood's evidence on it was unchallenged.

GLAZEBROOK J:
So, well that might have been how they're recorded, but does that say anything about how they were done, and one would have thought if anybody knew about it, it would've been Mr Horsfall when he was swearing that affidavit. Did it slip his mind that he'd lent it to the company at that stage?

MR STAPLETON QC:
No, because you see –

GLAZEBROOK J:
Twice or three times including in cross-examination.

MR STAPLETON QC:
That's right, because I was about to come to that Your Honour. He does say in cross-examination, he makes a number of statements about his beneficial ownership as a result of the share proceeds, and I can give Your Honours reference to those passages now in volume 2D. He talks about beneficial ownership at 1050.

GLAZEBROOK J:
Can you just say what you take from that before you… what do you take from what you're saying about that.

MR STAPLETON QC:

What I take from that is that Mr Horsfall at the time he swore the affidavit believed that he was a beneficial owner. But an objective analysis of the evidence, in light of the accountant's expert evidence, demonstrates that he was not because the advances did not go, the proceeds of sale did not go directly from him to the purchase. They were –

GLAZEBROOK J:

Well, but the accounts don't show that. The accounts just show that that was the way it was recorded.

MR STAPLETON QC:

And if that's the way it was recorded, that in my submission is evidence of the way in which it happened.

GLAZEBROOK J:

Well not if he says something totally different, that he owned it beneficially, and doesn't mention that he lent the money to the company. Including in cross-examination.

MR STAPLETON QC:

Including in cross-examination, Your Honour, of the two passages are first of all 1050 at lines 10 to 15 in volume 2D, and you'll see at line 11 his answer, "Well only the fact that the communications and general correspondence was to me. But there's nothing in the file that I've seen that says, 'Mr Horsfall is the beneficial owner.' But the beneficial owner is established presumably by law and what actually happened, and where the money came from." And then at pages 1052, 1053 and 1054 there are further statements relating to beneficial ownership. You'll see he talks at 1052, between lines 15 and 20, that the proceeds of sale of the shares were his separate property. He then talks in line 25 about the two advances in the advance account that had been referred to, and he then, at page 1053, at line 9, Mr Newberry puts to him, "If, as I understood you to say, part of this money was beneficially yours," et cetera. He then says, "What is it?" Mr Horsfall's answer, "It's, as it says in

the accounts, an advance in the 2000, I think it's 2005 – ". Mr Newberry gets it wrong and says, "Eight." Mr Horsfall corrects him and says, "2005… it was covered off as separate advances and it even refers to College Street. So it's clearly documented as to what it is, and where it went, as evidence for the back sales."

ELIAS CJ:
Is your point really that, I'm just thinking about the development of the evidence point, that he was responding to a section 44 claim.

MR STAPLETON QC:
Yes.

ELIAS CJ:
And he said, and he had initially taken the view that it was his separate property, but accepted that it was an advance to the company and that the company is the beneficial owner, is that what you're submitting?

MR STAPLETON QC:
Yes Your Honour. Because when one looks at the whole of the evidence, that is what emerges from it.

Now the two concluding comments, because I'm conscious of the time, but I need to make two concluding comments. The first is in relation to the various references in *Tinsley v Milligan* and *Patel v Mirza* to the Illegal Contracts Act in this country, and how that might operate in this setting. Now if this Court holds, contrary to my submission, that the agreement between Mr Horsfall and Ms Potter was a fraudulent agreement, or was an illegal agreement, they are both parties to that agreement for which Ms Potter received consideration of $50,000 on the 1st of April 2004 and neither, in my respectful submission, can benefit from that illegal agreement. Mr Horsfall doesn't seek to do so but he says, nor can Ms Potter in all the circumstances. And if there is any issue around illegal contracts, around proportionality and the like, then those issues fall to be determined, not in this Court between those two parties, but in the

Family Court if matters revert there, between 168 Group, 88 Riddiford Holdings if need be, and Ms Potter, because to do otherwise is to deprive 168 Group of $390,000 and 88 Riddiford Holdings of the $170,000 which clearly provided the purchase funds for the purchase. That's where those issues are properly determined, particularly when one has regard to the opening words of section 44(4) of the Property (Relationships) Act.

The second point is this.

ELIAS CJ:
Well they'd have to be determined – they wouldn't be determined under the, what did we call it –

O'REGAN J:
Why would they be determined in the Family Court?

ELIAS CJ:
Yes, they wouldn't be determined in the Family Court. They'd be determined as matters of property in the High Court.

MR STAPLETON QC:
No, no, no.

O'REGAN J:
But also weren't the loans repaid?

MR STAPLETON QC:
It Your Honours look at section –

O'REGAN J:
Why are they being deprived of anything. The loans were repaid years ago.

ELIAS CJ:
Yes.

MR STAPLETON QC:

No, they are being deprived of it because if an order is made in the form that it was in the Family Court at the commencement of these proceedings, then effectively having provided the purchase funds, they are then being ordered, in addition to the $50,000 Ms Potter received from the proceeds of sales at Hall Street, to pay her half the proceeds of sale of College Street.

O'REGAN J:

No they're not. Mr Horsfall's been ordered to make that payment.

MR STAPLETON QC:

No, 168 Group Sir. If you look at the Family Court judgment the order was made against 168 Group because the order couldn't be made against Mr Horsfall because he didn't receive them. He simply paid the monies to 168 Group –

O'REGAN J:

But he just pays that out of his relationship property doesn't he?

MR STAPLETON QC:

No, no, no Sir. The order was made under section 44. There was no other basis –

GLAZEBROOK J:

Well presumably on the basis that the company and Mr Horsfall knew when that was done that it wasn't actually the company's money.

MR STAPLETON QC:

Well –

WILLIAM YOUNG J:

You could be in trouble because probably any knowledge attributed, that Mr Horsfall had, would be attributed to the company.

MR STAPLETON QC:

Well that can't be determined here Sir.

WILLIAM YOUNG J:

No, I understand, I was talking prospectively.

MR STAPLETON QC:

Understood.

WILLIAM YOUNG J:

And I mean I just, my mind, it's been a long day, would it be the case that he wouldn't have to be liable personally if the companies for some reason or other wouldn't or couldn't pay? Wouldn't he –

MR STAPLETON QC:

Don't know Sir, and I don't need to answer that question at this stage because all I'm seeking to demonstrate in a section 44(1) context is that, as I said this morning, you don't get to a concluded view on these issues because the conclusions are still to be arrived at under sections 44(4) and 44(2) if the appeal is not allowed and this matter goes back to the Family Court, and I wanted to draw Your Honours attentions to the opening words of section 44(4), which makes it plain that issues relating to illegal contracts and such considerations fall to be considered there because it says, opening words, "Relief," for someone in 168 Group's position, "(whether under this section, or in equity, or otherwise) in any case," so that if there are concerns or issues around the Illegal Contracts Act, around proportionality, around principles in *Tinsley v Milligan* and *Patel v Mirza* and the like, that's where those issues get determined if these matters, these proceedings end back up in the Family Court.

O'REGAN J:

Well if we are against you we would just dismiss the appeal, wouldn't we? That's all this Court would have to do. We wouldn't have to make any orders, would we, the Court of Appeal's appeal then just stands.

MR STAPLETON QC:

Yes, and matters go back to the Family Court in terms of –

O'REGAN J:

But there's nothing we need to do to make that happen, is there?

MR STAPLETON QC:

Pardon Sir?

O'REGAN J:

There's nothing we need to do to make that happen?

MR STAPLETON QC:

Other than dismiss the appeal.

O'REGAN J:

Yes, that's what I mean. That's all we are being asked to do, I think, is just dismiss the appeal.

MR STAPLETON QC:

Yes, and –

O'REGAN J:

Or in your case, obviously, allow the appeal.

MR STAPLETON QC:

It did seem to me that my learned friend Mr Billington's submissions were going further than that.

O'REGAN J:

I see.

MR STAPLETON QC:

And that's why I'm responding –

O'REGAN J:

Sorry, I misunderstood you.

MR STAPLETON QC:

Particularly to the discussion around the Illegal Contracts Act and so on.

ELIAS CJ:

Yes, I understand that.

MR STAPLETON QC:

The second point is this. One has to be very careful in the difference in wording in section 44 provisions of this Act, because section 44(1) requires intention. Section 44C and 44F require effect only. Don't require intention. It's very easy to slip from one to the other without really recognising it, and my learned friend Mr Billington's submissions do that in paragraph 68, because having started at paragraph 60 on an analysis of section 44(1), Your Honours will see when you read the relevant paragraphs of his submissions, that by the time one reaches paragraph 68, last line on page 13, we've moved from intention to the effect of the disposition, which is not the required section 44(1) concept.

If the Court pleases, unless there are any further matters I can assist with, those are my submissions in reply. I rely, of course, on my written submissions filed in response to the Crown's submissions.

ELIAS CJ:

Yes, understood. Thank you Mr Stapleton. Thank you counsel for your submissions. We will take time to consider our decision in this matter.

COURT ADJOURNS: 4.31 PM