IN THE COURT OF APPEAL OF NEW ZEALAND

CA720/2014
[2016] NZCA 514

BETWEEN	DIANA JANE POTTER Appellant
AND	MARK ALBERT HORSFALL First Respondent
AND	168 GROUP LIMITED Second Respondent

Hearing:	2 August 2016
Court:	Wild, Mallon and Williams JJ
Counsel:	J R Billington QC and R A Newberry for Appellant T G Stapleton QC for First Respondent RJB Fowler QC for Second Respondent
Judgment:	25 October 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the High Court is set aside.

C The proceeding is referred back to the Family Court for the remaining issues affecting the second respondent under s 44 of the Property (Relationships) Act 1976 to be determined.

D The first respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] In the course of the appellant and first respondent's relationship, a commercial property in College St, Wellington, was registered in their joint names. It was sold profitably about a year later for $1.575 million (GST inclusive). 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 Ltd (168 Group), a company he controlled.

[2] The parties subsequently separated and sought orders for the division of the relationship property. Ms Potter was successful in her claim in the Family Court for a half share of the net sale proceeds. Judge A P Walsh ordered 168 Group to transfer half the net proceeds to Ms Potter, with interest.[1] The Judge made that order under s 44(2)(c) of the Property (Relationships) Act 1976 (the PRA).

[3] Mr Horsfall appealed successfully to the High Court. Simon France J held:[2]

> … Mr Horsfall disposed of the proceeds of the sale [of the College St property] not to defeat Ms Potter's interest but because Ms Potter did not have a beneficial interest in the property. … The key point is that Ms Potter was not entitled to [the proceeds], and in my view knew that to be so.

Accordingly, Simon France J held Ms Potter had not established that the Family Court had jurisdiction to make the order it had under s 44(2) of the PRA, and set that order aside.[3]

[4] In a judgment delivered on 10 June 2015 this Court granted Ms Potter leave, under s 67(1)(a) of the Judicature Act 1908, for a second appeal on the following question of law:[4]

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1 *DJP v MAH* [2013] NZFC 4577 [Family Court judgment] at [223].
2 *MAH v DJP* [2014] NZHC 1520 [High Court judgment] at [41]. We have substituted names for initials in the passage cited.
3 At [42].
4 *DJP v MAH* [2015] NZCA 230.

> Was the High Court correct to find that the disposition of the proceeds of sale of the College St property was not made by the first respondent in order to defeat the claim or rights of the applicant for the purposes of s 44 of the Property (Relationships) Act 1976?

Elements of s 44 of the PRA

[5] Section 44(1) of the PRA provides:

> Where the High Court or a District Court or a Family Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person (**party B**) under this Act, the court may make any order under subsection (2).

[6] On this appeal it is not in issue that there was, in terms of s 44(1), a "disposition of property". It was by Mr Horsfall to 168 Group. The contested elements of s 44(1) are, firstly, whether Ms Potter had any "claim or rights" in respect of the College St property, and, secondly, if she did have a claim or right, whether the disposition was done "in order to" defeat that claim or right.

Did Ms Potter have a claim or right to the College St property?

[7] With the benefit of counsel's submissions, particularly the way the parties' respective cases were condensed in oral argument, we consider answering this first issue requires us to address these prior questions:

(a) To the extent, if any, that the source of the purchase monies for the College St property is relevant, what was the source of those monies? Specifically, were they in whole or in part relationship property?

(b) Why was the College St property registered in the parties' joint names? In particular, was it because the parties intended it to be part of their relationship property?

(c) If "no" to question (b), was the College St property registered in the parties' joint names to conceal the fact that it was beneficially owned by 168 Group and/or 88 Riddiford Holdings Ltd (Riddiford Holdings), both property companies? In particular, was it done to

avoid the prospect of either or both those companies being assessed for income tax on any profits from the sale of the College St property?

(d) If "yes" to question (c), is that reason one Mr Horsfall may advance in a court of law? Specifically, will the Court permit Mr Horsfall to advance that reason in answer to Ms Potter's claim under the Act to a half share of the proceeds of sale of the College St property?

First question: source of purchase monies

[8] Mr Billington QC's primary submission for Ms Potter was that it mattered not where the purchase monies came from because, once the College St property was registered in the parties' joint names, it became relationship property: s 8(1)(c) of the PRA.

[9] Without derogating from that primary submission, Mr Billington accepted Ms Potter had not contributed any cash towards the purchase. But he submitted the sources of funding were predominantly relationship property because of a series of transactions between various entities entered into during the relationship that resulted in intermingling of funds. Further, he submitted Ms Potter had contributed through effort in other properties and was the beneficiary of profitable transactions by Mr Horsfall during the relationship. Mr Billington did not detail the relevant transactions.

[10] Mr Stapleton QC, for Mr Horsfall, submitted the purchase monies came predominantly from Mr Horsfall's separate property. In particular, Mr Horsfall sold shares that were his separate property in order to contribute to the purchase price. The balance of the purchase price came from Riddiford Holdings, a company formed on 30 September 1999 with one director, Mr Horsfall's sister, and with 88 Riddiford Holdings Family Trust as its sole shareholder.[5] That Trust had been settled on 28 September 1999, two days before Riddiford Holdings was formed. The beneficiaries of the Trust were Mr Horsfall, any trust or superannuation plan of

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5 In the High Court judgment, above n 2, at [6] and in Mr Horsfall's evidence, the Trust is said to be the sole shareholder. But the Companies Register records Mr Horsfall's sister as the sole director and shareholder.

which he was a member, any children of his, and any charitable purpose trust or institution. The trustees were his sister and "WRM" (the material we have does not indicate who or what WRM is).

[11] The evidence establishes that the purchase price of $560,000 was funded by Mr Horsfall (from the proceeds of the sale of shares that were his separate property) and by Riddiford Holdings. That purchase price was only for the 50 per cent share in the property that 168 Group did not already own. Once the purchase was completed, the entire property was registered in the parties' joint names. Thus 168 Group effectively contributed its existing half share of the property.

[12] The source of purchase money can be relevant in relationship property proceedings. Property acquired after the commencement of the relationship is relationship property (s 8(1)(e)) unless it was acquired out of one party's separate property after the commencement of the relationship in which event it remains separate property (s 9(2)).[6] However, Mr Horsfall has not maintained the College St property as his own separate property but registered it in the parties' joint names. In any case, he does not rely on s 9(2) because his position is not that the College St property was his separate property, but rather that it was neither his nor Ms Potter's.

[13] As noted in [8] above, Mr Billington submits the College St property was relationship property because s 8(1)(c) provides property that is "owned jointly" is relationship property. But the definition of "owner" in s 2 of the PRA is a person who is the beneficial owner of the property.[7] Mr Horsfall's position is that he and Ms Potter always held the College St property on a resulting trust for 168 Group and Riddiford Holdings.

[14] We accept that a resulting trust as between the two companies on the one hand, and the parties on the other, would not be excluded by s 4 of the PRA. However, we are not able to accept Mr Horsfall's argument that he and Ms Potter

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6 It is for the party seeking to rebut the s 8(1)(e) presumption to establish that the property was acquired by his or her separate property: *Allan v Allan* (1990) 7 FRNZ 102 (HC) at 105; and *Watson v Watson* (1996) 14 FRNZ 571 (CA) at 573.

7 The full definition is: "**owner**, in respect of any property, means the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity".

held the College St property on a resulting trust for the two companies. There are three reasons for this.

[15] First, as we explain in [24] below, Mr Stapleton conceded joint registration in the parties' names was effected to avoid a potential liability on the part of the two companies to income tax. That could only be achieved legitimately if the parties became the beneficial owners of the College St property. So the very purpose of joint registration in the parties' names was antithetical to a resulting trust.

[16] A similar situation arose in *Potter v Potter*, and was fatal to Mr John Potter's argument that Ms Louisa Potter held her half interest in the family home on a resulting trust in his favour. This Court explained:[8]

> [19] Central to a resulting trust is the absence of any expression of intention on the part of the settlor that the beneficial interest pass to the legal transferee: *Gillies v Keogh* [1989] 2 NZLR 327 (CA). With Chambers J, we do not see how that requirement could have been satisfied in the present case. But on appeal there was a further difficulty. It was said that the half interest in the property was conveyed to Ms Potter solely for revenue purposes without prejudice to Mr Potter's retention of the entire beneficial interest. The difficulty is that gift duty could have been legitimately reduced only if Ms Potter's half interest had been a beneficial one. A bare legal interest as trustee would have provided no basis for personal participation in a gifting programme for the purpose of the Estate and Gift Duties Act 1968.

[17] Secondly, Mr Horsfall contributed a portion of the purchase monies from his own personal, separate property. The two companies thus did not provide all the purchase monies. Mr Horsfall also effectively controlled the two companies that provided the balance of the purchase monies. Yet he chose, deliberately, to use all those monies to purchase a property that was registered in the parties' joint names. These facts do not support a resulting trust in favour only of the two companies, but rather point away from one.

[18] Thirdly, there is none of the sort of evidence a court might expect if there was the resulting trust contended for by Mr Horsfall. However, we acknowledge that might be explained by Mr Horsfall's desire to avoid any record of the two companies' beneficial ownership.

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8 *Potter v Potter* [2003] 3 NZLR 145 (CA).

[19] We accept Ms Potter did not contribute in any direct way toward the purchase monies for the College St property. However, the sources of the funds provided by the two companies are not clear. We therefore cannot discount some intermingling of Ms Potter's funds with those of the two companies.

[20] Accordingly, we answer this first question in this way:

(a) A contribution by Ms Potter to the purchase monies for the College St property was not necessary to give Ms Potter an interest in that property, given that Mr Horsfall deliberately registered it in the parties' joint names.

(b) To the extent, if any, that the sources of the purchase monies is relevant, they came from the proceeds of the sale of Mr Horsfall's separate property and from the two companies. The precise source(s) of the monies provided by the two companies is not clear.

Second and third questions: reason for joint registration

[21] Judge Walsh found that the decision to purchase in the parties' joint names was made by Mr Horsfall:[9]

> (i) to take advantage of a loophole in GST legislation which enabled the parties to retain the GST component, $175,000, without being required to pay this amount to IRD; and
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> (ii) to provide a layer against "*tainting*" the property transactions of 168 Group Limited. This was confirmed by [Mr Horsfall's] evidence as to why he had written the letter on 11 March 2004 to his solicitor indicating the College St property had been purchased with the intention of it becoming a home for the parties.[10]

The Judge recorded Ms Potter's evidence that she thought the property was being placed in their joint names with a view to it becoming their home but did not come to a clear conclusion as to whether he accepted this.

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9 Family Court judgment, above n 1, at [200(b)].

10 We refer to this letter at [22](d) below.

[22] In the High Court, Simon France J found that Ms Potter knew she had no beneficial rights in the College St property because:

(a) she did not contribute any funds, despite the parties' family home having just been sold. If the College St property was to become the parties' new family home, it could be expected the proceeds of the sale of the previous family home would be applied to the purchase;

(b) the parties kept no accounting record of the purchase or as to how they would finance the development of the College St property as their family home. In telling contrast, the parties carefully recorded other matters, for example the loan they made from the proceeds of the sale of their previous family home;

(c) it was significant that Mr Horsfall paid Ms Potter $50,000 when the College St property was sold. Ms Potter's explanation that this payment was to placate her because she was unhappy that the College St property would not become their family home was unpersuasive. Mr Horsfall's explanation that the payment was for the use of her name (as a joint owner) was the likely one, particularly because the property was a commercial one unlikely ever to have been suitable for conversion to a family home; and

(d) at the time the College St property was sold Mr Horsfall wrote to the lawyer who was acting on that transaction (he was not Mr Horsfall's usual lawyer) explaining:

> As the property was intended to be our house, we had not claimed GST on the purchase. We are selling it on the basis of "including GST if any" so therefore we will not be required to pay GST.

Although this letter presented a difficulty for Mr Horsfall, given the overall circumstances, his explanation that it was just a quick account given to a new lawyer in circumstances where its accuracy did not matter was plausible.

[23] Before us Mr Billington accepted the property was put in the parties' joint names to avoid a GST liability (had the property been registered in the names of the two companies, they would have had a net GST liability because the price at which they sold the property well exceeded the total of the purchase prices) and to avoid "tainting" it for income tax purposes. But he went on to submit that, having made a conscious choice to bring the property under the PRA for tax reasons, Mr Horsfall should not be permitted to argue it should be placed outside the PRA for relationship property purposes. While the parties may not have intended the property to become their family home, they clearly intended to bring it under the relationship property regime.

[24] Mr Stapleton conceded the College St property had been registered in the parties' joint names to avoid "tainting" for income tax purposes, but disputed that it had also been done to avoid paying GST. That is a concession that the two companies (both property companies) would have been liable to pay income tax on the profit they made when they sold the College St property. As to GST, had the College St property been registered in the names of the two companies, Mr Stapleton submitted it would have been zero rated for GST because it would have been sold as a going concern — it was sold subject to two tenancies. Mr Stapleton accepted there was no evidence and no finding on the GST issue in the Courts below, but assured us he had made a submission to that effect to the Family Court.

[25] We accept that tenanted commercial buildings are routinely bought and sold as going concerns for GST purposes. However, if zero rating for GST purposes is to be achieved, certain requirements must be met. Section 11(1)(m) of the Goods and Services Tax Act 1985[11] provided, at the relevant time, that the supply of goods to a registered person of a taxable activity, or part of a taxable activity, that is a going concern at the time of the supply, will attract zero per cent GST if:

> (i) the supply is agreed by the supplier and the recipient, in writing, to be the supply of a going concern; and

[11] Since 1 April 2011 all transactions involving the supply of land are zero-rated, pursuant to s 11(1)(mb) (inserted by s 10(1) of the Taxation (GST and Remedial Matters) Act 2010), and a significant number of sales of commercial property with current leases that formerly relied on the "going concern" provision are now zero-rated under s 11(1)(mb); but the parties in the present case bought the College St property in May 2003 and sold it in April 2004, before the amendment.

(ii) the supplier and the recipient intend that the supply is of a taxable activity, or part of a taxable activity, that is capable of being carried on as a going concern by the recipient;

[26] These requirements were not met by the parties, no doubt because they were not at any material time registered for GST.[12] Section 11(1)(m) requires that the supply be "to a registered person".

[27] However, we accept it is probable the requirements would have been met had the College St property been registered in the names of one or both of the two companies, because both are property companies. Given Mr Stapleton's concession as to income tax (recorded in [24] above), we need say no more about GST.

Fourth question: if the reason for joint registration was to avoid paying tax, can Mr Horsfall advance that in answer to the appellant's claim for a half-share?

[28] In submitting the answer to this fourth question is "No", Mr Billington relied on what might be termed the *Potter v Potter* line of authority.[13] The principle established by the *Potter* line of cases was summarised by this Court in *Potter v Potter* in the following way:[14]

> [20] 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. For example it would be fraudulent to hold out that a wife was the beneficial owner if in reality the husband had retained the relevant beneficial interest. Accordingly, in cases where property had been transferred by a husband to a wife to gain revenue advantages premised upon her new beneficial interest, the husband has been precluded from averring in later proceedings that his real intention was to retain the beneficial interest e.g. *In Re Emery's Investment Trusts* [1959] Ch 410. The same principle applies where a husband has put property into his wife's name as a protection against creditors: *Gascoigne v Gascoigne* [1918] 1 KB 223; *Tinker v Tinker* [1970] P 136 and see further *Preston v Preston* [1960] NZLR 385 (CA) (evidence disclosing breach of statute rejected) and *Stadniczenko v Stadniczenko* [1995] NZFLR 993. In this situation the settlor is the unwilling beneficiary of a compliment to his honesty. It is assumed

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[12] The evidence establishes the parties were not GST-registered at the time they sold the property. It is not clear on the evidence whether they were GST-registered at the time they purchased it, but the Court assumes they were not registered at either time. If the parties were conducting a taxable activity of dealing in property, there would have been no point in registering the College St property in their names.

[13] In particular, counsel referred us to *Potter v Potter*, above n 8; *Gascoigne v Gascoigne* [1918] 1 KB 223; *Re Emery's Investments Trusts* [1959] Ch 410; and *Tinker v Tinker (No 1)* [1970] 2 WLR 331 (CA(Civ)).

[14] *Potter v Potter*, above n 8.

> that he would not have intended to defraud others by pretending that his wife had a beneficial interest when in reality he had intended to retain the beneficial interest all along.

[29] In the High Court, Simon France J distinguished *Potter v Potter* itself (but not, we think, the *Potter* line of authority) on two bases. First, he pointed out that the Privy Council in *Potter* had found it had always been intended that Ms Louisa Potter in that case would take a beneficial interest in the Kerikeri house and orchard property in issue, whereas here the College St property was never intended to be beneficially owned by Ms Diana Potter. Secondly, he considered registration of the College St property in the parties' joint names had not avoided payment of GST that would otherwise have been due. That was because GST treatment turns on the status of the legal, as opposed to the beneficial, owners. The parties, who were not GST-registered, had not claimed a GST refund when they purchased the property and had not accounted for GST when they sold it.

[30] Before us, Mr Stapleton sought to distinguish the *Potter* line of authority on the additional basis that all the cases in the *Potter* line involved a transaction between a husband and wife, whereas the present case involves a transaction between husband and wife on the one hand, and third parties (the two companies) on the other. Although Mr Stapleton did not refer to it, there is perhaps some faint support for his argument in *Potter v Potter*, in this reference to the nature of the proceeding as a family issue:[15]

> … As to its relevance, Mr Carruthers submitted that it demonstrated that Mr Potter was dominant in the transaction and that the reference to "or nominee" signalled the prospect, even at that early stage, that the transferee of legal title might be a family trust rather than Mr and Ms Potter.

[31] As we pointed out, Simon France J appears only to have distinguished *Potter v Potter* on its facts, whereas it is the principle established by the *Potter* line of authority that Mr Billington invokes.

[32] In our view, the *Potter* line of authority applies here. Having deliberately registered the College St property in the parties' joint names, the Court will not permit Mr Horsfall to avoid the consequences of that by adducing evidence that joint

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15 *Potter v Potter*, above n 8, at [40]

registration was effected to avoid the two companies being assessed for income tax on their profits when they sold the College St property. In short, a court of law will not permit a party to avoid the consequences of a course of action deliberately taken, by adducing evidence that the course of action was taken for an unlawful purpose such as avoiding tax or defeating creditors.

[33] We do not accept Mr Stapleton's endeavour to distinguish the *Potter* line of authority on the basis that all the cases concerned transactions between spouses. First, the principle that emerges from the cases is not in any way dependent on a spousal relationship. Secondly, the principle has its origins in cases that did not involve spousal relationships. We instance *Davies v Otty*,[16] *Muckleston v Brown*[17] and *Cottington v Fletcher*,[18] all referred to in the judgment of the English High Court in *Gascoigne v Gascoigne*.[19]

Conclusion on first appeal issue

[34] For the reasons we have given, we answer the first issue "Yes, Ms Potter does have a claim or right to the College St property".

Was the disposition effected in order to defeat the appellant's rights?

[35] The parties' arguments were mainly directed to the first issue, as the answer to it is largely determinative of the appeal. However, particularly during Mr Billington's submissions, we were alerted to a potential issue as to the interpretation and application to relationship property claims of the Supreme Court's decision in *Regal Castings Ltd v Lightbody*.[20]

[36] In that case the respondent husband and wife had transferred their home to a family trust in 1998. The husband owned a jewellery business, for whose debts he was personally liable. He owed a debt of some $350,000 to the appellant. The jewellery business was placed in liquidation in 2003 and the appellant was unable to recover the amount it was owed. It sought an order setting aside the transfer of the

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16 *Davies v Otty (No 2)* (1866) 35 Beav 208, 55 ER 875 (Ch).
17 *Muckleston v Brown* (1801) 6 Ves Jr 52, 31 ER 934 (Ch).
18 *Cottington v Fletcher* (1740) 2 Atk 155, 26 ER 498 (Ch).
19 *Gascoigne v Gascoigne*, above n 13.
20 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

house property as one made with intent to defraud under s 60 of the Property Law Act 1952.

[37] Blanchard and Wilson JJ held that it was not necessary to show the debtor had the purpose or motive of making his creditor suffer a loss; the debtor need only have had the intention of hindering or delaying the creditor's recovery:

> [54] Whenever the circumstances are such that the debtor must have known that in alienating property, and thereby hindering, delaying or defeating creditors' recourse to that property, he or she was exposing them to a significantly enhanced risk of not recovering the amounts owing to them, then the debtor must be taken to have intended this consequence, even if it was not actually the debtor's wish to cause them loss. …

[38] McGrath J agreed with this reasoning.[21]

[39] Tipping J noted that "intent to defraud" under s 60 does not require proof of actual dishonesty,[22] and found that a voluntary alienation by an insolvent debtor (including one who will become insolvent as a result of the alienation) is caught by s 60(1), the necessary intent being deemed to be present as a matter of law.[23] However, his Honour went on to consider whether an intent to defraud could be inferred from the relevant circumstances. Elias CJ, similarly, preferred to consider whether the facts disclosed sufficient evidence that an intention to defraud could be inferred rather than relying on any rule that imputed an intent to defraud.[24]

[40] In *Ryan v Unkovich* French J accepted the principles enunciated in *Regal Castings Ltd* were sufficiently general to apply to s 44 of the PRA: "Knowledge of a consequence can be equated with an intention to bring it about".[25] Her Honour went on to point out that the inquiry must still be as to the actual knowledge and intentions of the party disposing of the property.[26]

[41] These authorities demonstrate that the inquiry is directed to the disposing party's knowledge of the effect the disposal will have on the other party's rights,

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21 At [167].
22 At [86].
23 At [105].
24 At [9]–[13].
25 *Ryan v Unkovich* [2010] 1 NZLR 434 (HC) at [33].
26 At [41].

from which intention may be inferred, rather than to whether that party was motivated by a desire to bring about that consequence.

[42] Before us Mr Billington accepted (appropriately, in the light of the law summarised above) that the disposition must have had the effect of defeating Ms Potter's rights *and* that Mr Horsfall must have known that would be its effect — the relevant purpose cannot be inferred unless the party disposing of the property had the relevant knowledge at the time of the disposition.[27]

[43] In the Family Court Judge Walsh found that Mr Horsfall had in mind the potential claim and rights of Ms Potter when he transferred the proceeds of sale of the College St property to 168 Group, and would have known that he was exposing her to a significant risk of not being able to assert her rights in respect of those proceeds.[28] In the High Court Simon France J, had he agreed the property was relationship property, considered there would be a "solid foundation" for the application of s 44 of the PRA as there could be no doubt Mr Horsfall was aware of the relationship property rules.[29] This point was not seriously challenged on appeal before us. We agree that Mr Horsfall, as a property developer who also had some experience with relationship property proceedings, would have known at the time he transferred the proceeds of sale that he was defeating Ms Potter's rights to a share of the proceeds.

[44] For the reasons we have given, we answer the second issue "Yes, the disposition was effected in order to defeat Ms Potter's rights".

Result

[45] The appeal is allowed. The judgment of the High Court is set aside.

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27 In addition to *Regal Castings Ltd v Lightbody*, above n 20, and *Ryan v Unkovich*, above n 25, Mr Billington referred us to the decision of Associate Judge Doogue in *Holm-Hansen v Johnson* [2012] NZHC 3445.

28 Family Court judgment, above n 1, at [217(h)].

29 High Court judgment, above n 2, at [19]. The Judge referred to "the matrimonial home" rather than to "relationship property" but the difference between those concepts is not material to this question whether the disposal was effected with the intent of defeating Ms Potter's rights.

[46] By consent, we direct that the proceeding be referred back to the Family Court for the remaining issues affecting the second respondent under s 44 of the PRA to be determined.

[47] The first respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

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