NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA484/2020
[2021] NZCA 645

BETWEEN	TODD WILLIAM FRANK SUTTON First Appellant	
	TODD WILLIAM FRANK SUTTON and HOFFMAN TRUSTEES LIMITED as trustees of the TODD SUTTON TRUST Second Appellant	
AND	JOANNA ELISIA BELL Respondent	

Hearing:	27 May 2021
Court:	French, Clifford and Courtney JJ
Counsel:	L J Kearns QC for First and Second Appellant B N Snedden for Respondent
Judgment:	2 December 2021 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

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

REASONS OF THE COURT

(Given by Clifford J)

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Introduction

[1] Todd Sutton and Joanna Bell met in July 2003. At the time Mr Sutton lived with two flatmates in a property he owned, his former matrimonial home, in Point Chevalier, Auckland (Pt Chevalier). Mr Sutton and Ms Bell began a sexual relationship shortly afterwards. Ms Bell moved in with Mr Sutton at Pt Chevalier in February or March 2004. The couple slept together in Mr Sutton's bedroom from then on. In late November 2004 Mr Sutton, with Ms Bell's knowledge, transferred Pt Chevalier to the Hunt Family Trust (the Trust). The couple entered into a de facto relationship sometime between December 2004 and January 2005. They continued to live together at Pt Chevalier until that relationship ended on 1 September 2012.

[2] Ms Bell subsequently claimed a half interest in Pt Chevalier. She did so on the basis Mr Sutton had transferred that property to the Trust in order to defeat her entitlements under the Property (Relationships) Act 1976 (the Act). The Family Court

granted that application.[1] It ordered that Pt Chevalier be transferred to Ms Bell and Mr Sutton as tenants in common in equal shares.[2] The High Court dismissed Mr Sutton's challenge to that decision.[3] With leave of the High Court, Mr Sutton now appeals that decision.[4]

[3] Mr Sutton's notice of appeal contained eight separate grounds, and the parties' list of issues included six. However, and as we explain below, the two principal issues raised by this appeal as argued before us are:

(a) Whether s 44 of the Act can apply to a disposition of property made before the relevant de facto relationship has commenced?

(b) If it can, was the High Court correct to find that Mr Sutton had transferred Pt Chevalier to the Trust in order to defeat rights the Act would have otherwise given Ms Bell?

Background

[4] After the couple's separation in 2012 Mr Sutton initially moved to a sleepout at Pt Chevalier. Ms Bell remained in the house with their two children. Ms Bell continued to live at Pt Chevalier until January 2018.

[5] For all of that period Mr Sutton continued to pay the outgoings on Pt Chevalier. [Redacted.]

[6] [Redacted.]

[7] Ms Bell commenced these relationship property proceedings in July 2017. She sought determination and division of all the couple's relationship property and, in particular, equal division orders under s 44 of the Act in respect of Pt Chevalier.

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1 *Bell v Sutton* [2019] NZFC 5363 [Second FC decision].
2 At [87].
3 *Sutton v Bell* [2020] NZHC 1557 [Judgment under appeal].
4 *Sutton v Bell* [2020] NZHC 2014 at [42].

[8] The couple's relationship property proceedings, [redacted], have a complex history.

[9] In a Family Court judgment of 27 July 2018 (the first FC decision), Judge Clarkson determined the parties' de facto relationship had begun by February 2004, when Ms Bell started living at Pt Chevalier with Mr Sutton.[5] It was then that she had recently listed the apartment she owned, and had previously lived in, on the rental market. As the Judge put it, Ms Bell's action in taking steps to rent out her apartment "was the final demonstration that they had adopted a more permanent life together".[6]

[10] Ms Bell's substantive s 44 application was granted by Judge Druce in a Family Court judgment released on 17 July 2019 (the second FC decision).[7] In doing so the Court proceeded on the basis of its earlier findings the parties were in a qualifying de facto relationship from February 2004 and Pt Chevalier was the family home from that time until its sale by Mr Sutton to the Trust in November 2004.[8] Having considered the evidence then before it, the Court was satisfied that s 44(1) applied to that sale.[9]

[11] Mr Sutton appealed the second FC decision to the High Court as of right and, at the same time, applied for leave to appeal the first FC decision out of time and to adduce new evidence for that purpose.

[12] That evidence comprised various emails between the couple. They had been discovered by Mr Sutton on old computer hard drives after the first FC decision but before the second FC decision. Those hard drives, it was said, were direct copies of the computer which Ms Bell had taken with her on leaving Pt Chevalier. Those emails ought, Mr Sutton said, to have been disclosed for the purposes of the first FC decision.

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5 *Bell v Sutton* [2018] NZFC 5556 [First FC decision]. The Judge also said March 2004 was "the latest date" which could be attributed to the commencement of the de facto relationship: at [39].

6 At [41].

7 Second FC decision, above n 1.

8 At [17].

9 At [57].

Had they been, they would have been directly supportive of his proposition the couple's de facto relationship had not started until late 2004.

[13] The High Court granted both of those applications in February 2020.[10]

[14] Mr Sutton's substantive appeals against the first and second FC decisions were heard by Walker J in the High Court in March 2020, with the decision under appeal being released on 3 July 2020.[11] Shortly before that hearing, and as anticipated in the High Court's February decision, more emails were revealed on further analysis of the hard drives. Those emails were admitted by consent shortly before the hearing. The parties also agreed that cross-examination on the new emails was not required.

The challenged High Court decision

[15] It is useful to start by noting the High Court placed considerable emphasis on an email sent by Ms Bell to Mr Sutton on 23 February 2004. That email, in Walker J's view, was significant in addressing the appeals against both the first and second FC decisions. That email said:

> I have also been thinking about living together and the specifics of the new Relationship Property Law … The basics are: If two people live together in a property deemed as "The Family Home" for at least three years, the property can be divided if the relationship breaks up - irrelevant of who owned it originally! … The point being though – that it is after three years!! Also the Law covers any "property" the couple purchase together (eg household items, etc etc). Spouses or partners can agree between themselves on how to share the property. These agreements can be made at any stage of the relationship. Those agreements must be in writing and each spouse or partner must have independent legal advice. So - how I think we should work it is: - I only stay in your house for a short period of time (time limit to be defined - eg 6 - 9 months) - I don't invest any major amounts of money in the upgrade of the property - thereby not having any 'rights' in the property's value (ie not buying fencing etc). Gifts, cleaning, or helping you do the gardening, or the 'table' project doesn't count! - Over the next few months, when you get some money, you go to a Lawyer and tie up the property as a "separate property" - ie putting the property in trust and having it separate for the rest of your life. Then no matter what happens - for the rest of your life, you have the Pt Chevalier property as your own and it can never be counted as "Relationship Property" and won't ever be at risk of being divided again. …

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10 *Sutton v Bell* [2020] NZHC 327.

11 Judgment under appeal, above n 3.

The email then quoted from a Courts of New Zealand website which defined relationship and separate property, and how separate property might become relationship property. At the end of the quote was the following statement:

> Usually, separate property is not shared. It remains the property of the spouse or partner who owns it. However, if you really want to protect such property, you should make an agreement with your spouse or partner.
>
> The family home (even if it is in the name of one spouse or partner) and family chattels are never separate property.

We discuss the significance of this email — both in terms of the commencement of Mr Sutton's and Ms Bell's de facto relationship, and Mr Sutton's intent to defeat Ms Bell's rights under the Act — later in our reasons.

[16] First, the Judge dealt with the appeal against the first FC decision as to the commencement date of the de facto relationship. She was satisfied the additional evidence supported Mr Sutton's assertion as to when the de facto relationship had commenced.[12] That is, the emails were consistent with his narrative that Ms Bell had initially moved in with him principally for economic reasons, and on a temporary basis. It was only in December 2004/early January 2005, when they had holidayed together and conceived their son, that they became committed to a permanent relationship. It was on return from that holiday they asked their flatmate to move out.[13] Thus, Mr Sutton had disposed of Pt Chevalier before his and Ms Bell's de facto relationship had commenced.

[17] The Judge then considered Mr Sutton's challenge to the second FC decision which granted Ms Bell relief under s 44.

[18] As relevant, s 44(1) of the Act provides:

> **44 Dispositions may be set aside**
>
> (1) Where the High Court or the District Court or the 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

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12 At [74]–[75].
13 At [65].

> (**party B**) under this Act, the court may make any order under subsection (2).
>
> (Emphasis added.)

[19] Mr Sutton argued that, in terms of s 44(1), he could not have acted in order to defeat, that is with an intention to defeat, interests in property which at the relevant time did not exist. They did not, and could not, exist because his de facto relationship with Ms Bell had not, by November 2004, commenced. Similarly, and from an evidential perspective, Mr Sutton argued the finding the couple's relationship had not commenced when he transferred Pt Chevalier to the Trust was of considerable significance. It went to whether Mr Sutton had intended to defeat Ms Bell's entitlements, even if it was sufficient as a matter of law for those entitlements to be ones to which she would become entitled in the future.

[20] Ms Bell argued the contrary: it was not legally necessary for a de facto relationship to have begun at the time of the challenged disposition. Rather, a disposition "in anticipation" of a de facto relationship did not avoid the application of s 44 unless it followed a valid agreement, contracting out of the Act's equal sharing regime under s 21.[14]

[21] Having considered all the evidence, the Judge was satisfied objectively that Mr Sutton was aware the transfer of Pt Chevalier to the Trust would avoid relationship property interests in that property arising in the future.[15] The Judge accepted Mr Sutton may, on the basis of a belief the couple were not in a de facto relationship, reasonably have thought Ms Bell had no relationship property interests or, in terms of her encouragement to him to form the Trust, was disavowing any interests.[16] But an assessment for s 44 purposes had to be made in the context of the proximity of approximately one month between the commencement of the couple's de facto relationship and the establishment of the Trust.[17] On that basis, and as regards whether Mr Sutton disposed of the property intending to defeat Ms Bell's interests, the Judge concluded:

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14 At [80].
15 At [94].
16 At [100(g)].
17 At [100(k)].

> [101] Weighing these various factors, and Mr Sutton's knowledge of the future effect on Ms Bell (rather than a generalised understanding of the effect), I concur with Judge Druce's conclusion. The couple were on the cusp of a de facto relationship within the meaning of the Act at the time of the disposition, having been in an intimate relationship for a considerable period. I am satisfied that the disposition was made in anticipation of the deepening of their commitment to one another. Ms Bell has therefore discharged the onus of establishing that the disposition to the Trust was intended to defeat her interest.

This appeal

[22] Mr Sutton challenges the High Court's conclusion as to s 44. The two issues we identify at [3] constitute the core of that challenge. For her part, Ms Bell does not challenge the Judge's finding as to the date of the commencement of the couple's de facto relationship (December 2004/January 2005), and — as is obvious — supports her ruling on the application of s 44.

[23] As relevant to the further issues raised by this appeal, Mr Sutton challenges the following further conclusions the High Court reached:

(a) Notwithstanding the Trust's acknowledgement of a debt back to Mr Sutton, the integrated nature and purpose of Mr Sutton's gifting programme meant the Trust did not receive Pt Chevalier for valuable consideration.[18]

(b) [Redacted.]

(c) Mr Sutton had not established Ms Bell had in the Family Court proceedings concealed evidence in the way she responded to a production notice.[19]

(d) The Family Court's order for division was appropriate.

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[18] At [109]. It should be noted that the Judge said she was "inclined" to that view, without deciding the issue, because the conjunctive requirements of s 44(2)(a) — that the recipient of the disposed property received the property in good faith *and* valuable consideration — were not satisfied because the Trust did not receive Pt Chevalier in good faith, based on Mr Sutton's knowledge of the disposition as trustee.

[19] At [119].

[24] We will consider and determine this appeal by reference in turn to the six issues identified by the parties. Before doing so, however, we summarise the scheme of the Act as relevant here.

The scheme of the Act

[25] Section 1C summarises the Act's well-known scheme for the equal division of relationship property between couples at the end of their relationship:

> **1C What this Act is about**
>
> (1) This Act is mainly about how the property of married couples and civil union couples and couples who have lived in a de facto relationship is to be divided up when they separate or one of them dies.
>
> (2) This Act applies differently depending on the length of the marriage, civil union, or de facto relationship:
>
> (a) in the case of marriages and civil unions, special rules apply to marriages and civil unions of less than 3 years:
>
> (b) in the case of de facto relationships, this Act usually applies only when the de facto partners have lived together for at least 3 years, but it may apply to shorter de facto relationships in certain circumstances.
>
> (3) In general, the couple's property is to be divided equally between the couple.

[26] The Act's presumptive equal division regime for relationship property was applied first to marriage relationships when the Act came into force on 1 February 1977 as the Matrimonial Property Act 1976. Major reforms in 2001 saw that approach extended to de facto relationships, both same and opposite sex.[20] At that time the Act was given its current title. Civil unions were brought within the scope of the Act in 2005.[21]

[27] From the start, the Act has provided both:

(a) the freedom for couples to contract out of the Act's presumptive equal division regime;[22] and

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20 Property (Relationships) Amendment Act 2001.
21 Property (Relationships) Amendment Act 2005.
22 Property (Relationships) Act 1976, s 21.

(b) powers for the courts to restrain, set aside and compensate for dispositions which, in general terms, defeat claims that might in their absence have arisen under the Act.[23]

The contracting out regime

[28] The Act's contracting out regime promotes couples', rather than an individual's, autonomy. Section 21 provides that "[s]pouses, civil union partners, or de facto partners, or any two persons in contemplation of entering into a marriage, civil union, or de facto relationship" may contract out of the provisions of the Act. Section 21F stipulates formal requirements to ensure that each party to such an agreement makes a free and informed decision:

> **21F Agreement void unless complies with certain requirements**
>
> …
>
> (2) The agreement must be in writing and signed by both parties.
>
> (3) Each party to the agreement must have independent legal advice before signing the agreement.
>
> (4) The signature of each party to the agreement must be witnessed by a lawyer.
>
> (5) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

[29] Thus parties may contract out of rights and entitlements *before*, but whilst in contemplation of, and *after* the commencement of a qualifying relationship, including a de facto relationship. Contracting out may be achieved by any agreement the parties "think fit with respect to the status, ownership, and division of their property (including future property)".[24]

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23 The courts' power here has a long pedigree. Section 81 of the Matrimonial Proceedings Act 1963 was the first iteration of the court's power in its modern form. However, under s 34 of the Divorce and Matrimonial Causes Act 1928, courts could set aside a "deed, conveyance, agreement or instrument" made "in order to defeat the claim or rights of a petitioner [under the Act] in respect of damages, alimony, agreement or instrument".

24 Section 21(1).

[30] Subject to the fulfilment of the formal requirements, the courts will enforce the couple's bargain except only for avoidance on the "serious injustice" ground found in s 21J:

> **21J Court may set agreement aside if would cause serious injustice**
>
> (1) Even though an agreement satisfies the requirements of section 21F, the court may set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.
>
> (2) The court may exercise the power in subsection (1) in the course of any proceedings under this Act, or on application made for the purpose.
>
> …

[31] Mandatory considerations when making the "serious injustice" assessment are provided in s 21J(4). They include:

> (a) the provisions of the agreement:
>
> (b) the length of time since the agreement was made:
>
> (c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made:
>
> (d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):
>
> (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:
>
> (f) any other matters that the court considers relevant.

[32] As to "serious injustice", *Fisher on Matrimonial and Relationship Property* observes:[25]

> The effect of s 21 is that contracting out is realistically possible only to the extent that the agreement is not so "unreasonable" as to give rise to "serious injustice". … Consciously or otherwise, a comparison is made between the effect of the agreement and the effect of the Act.

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25 *Fisher on Matrimonial and Relationship Property* (online ed, LexisNexis) at [5.29].

[33] The particular significance of s 21 in this context is, therefore, Parliament's clear intention that couples were to be able to contractually avoid rights which under the Act would only come into existence in the future.

Restraining and setting aside dispositions

[34] The enabling of contracting out in s 21 is complemented by the restraints found in ss 43 to 47 on dispositions which would take property beyond the reach of the Act.

[35] In summary:

(a) Section 43 empowers the court to restrain dispositions of property about to be made "in order to defeat the claims or rights" under the Act.

(b) Section 44, as set out above, gives the court the power to set aside such dispositions after they have been made. In doing so the court may order that the person to whom the disposition was made, or a person who has received the disposed property from that person, transfer the property or pay money into court, as the court directs. Such relief may not be ordered, however, to the extent that the person from whom it is sought received the property in good faith and for valuable consideration. Orders under s 44 can be made irrespective of whether the property in question was, at the time of its disposition, relationship property.

(c) Section 44C allows the court to order compensation where, since the beginning of a marriage, civil union or de facto relationship, relationship property has been disposed to a trust and that disposition has had the effect of defeating claims or rights under the Act in a situation where s 44 does not apply. Such compensation may involve the payment of a sum of money, the transfer of property (whether relationship property or otherwise) or payment of income of the trust.

(d) Sections 44F and 45 provide further protection where property has been disposed to "qualifying" companies, and where family chattels have been disposed of.

(e) Sections 46 and 47 protect the interests of mortgagees and creditors generally.

[36] The establishment of the Act's presumptive equal sharing scheme was the product of a concerted programme of legal reform over a lengthy period of time, both as regards the range of relationships and the extent of a couple's property to which it applies. Although now well understood, and no longer controversial, that was not always the case. That regime forms an important part of New Zealand's social and legal fabric. It goes without saying that when interpreting provisions of the Act, its underlying philosophies and principles are of fundamental importance.

[37] More particularly, as we now explain, the relationship between the s 21 contracting out provisions and the s 44 avoidance provisions provides the basis for resolving the first of the issues we are to address: that is the significance or otherwise of the existence of a qualifying relationship, here a de facto one, for the availability of relief under s 44.

The jurisdiction issue: can a s 44 claim be made for property disposed of before the relationship commences?

Overview

[38] The question here is whether s 44 can be used to set aside a disposition of property made before the commencement of a qualifying relationship. As we have said, the High Court's finding Mr Sutton and Ms Bell's de facto relationship commenced in December 2004/January 2005 is not challenged on appeal.

[39] Mr Sutton argues that because his de facto relationship with Ms Bell had not commenced by November 2004 (when Pt Chevalier was transferred into the Trust), her rights under the Act had not come into existence. He could not, therefore, have intended to avoid them.

[40] We do not agree. As we now explain, whether a qualifying relationship has commenced is not determinative of the availability of a s 44 claim. Rather, what is

determinative is the status of the relationship at the time of the challenged disposition, accepting it is yet to become a qualifying relationship.

[41] In our view, for a claim to be available the couple, at the time of the disposition, must have reached a stage where there was mutual contemplation of beginning a qualifying relationship. That approach is consistent with the Act's contracting out regime. That established, the question will then be whether the disposition was made in order to defeat rights which would have otherwise arisen under the Act.

Case law

[42] The significance, for s 44 claims, of the existence or not of entitlements under the Act at the time of the disposition has been considered in a number of cases.

[43] One group of those cases involves dispositions of property made *after* the commencement of a de facto relationship but *before* the Act's equal sharing regime for de facto relationships came into force on 1 February 2002.

[44] The first of those, *Ryan v Unkovich*, involved a strike-out application on the basis it was impossible to have an intention to defeat rights not then in existence.[26] Emphasising the strike-out context, French J concluded "the mere fact the dispositions pre-dated 1 February 2002 is not in itself sufficient to dispose of the claim".[27] In doing so, the Judge reasoned:

(a) At the time of both transactions, and as the Judge put it referring to the subsequent enactment of the Act, "it was widely known that major legislative change was on its way".[28]

(b) As a matter of general principle, an intention to defeat future claims was capable of constituting an operative intention to defeat.[29]

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26 *Ryan v Unkovich* [2010] 1 NZLR 434 (HC).
27 At [40].
28 At [27].
29 At [42](i).

(c) There was nothing in s 44 which expressly required the rights and interests to exist at the time of the disposition.[30]

[45] The Judge also emphasised the significance of the fact that, at the relevant time, a de facto relationship existed. In doing so, the Judge noted the decision of *Genc v Genc* which held that the existence of a qualifying relationship was a necessary pre-condition for a claim under s 44.[31] Thus in Mr Unkovich's case the factual basis for his subsequent legal entitlement — his de facto relationship with Ms Ryan — already existed. Accordingly, to exclude automatically all dispositions prior to 1 February 2002 from the ambit of s 44 was not, the Judge concluded, consistent with Parliament's purpose.[32]

[46] In *Gray v Gray*, Heath J resolved similar issues adopting French J's analysis.[33]

[47] Finally, in *SMW v MC* the High Court endorsed French J's reasoning in *Ryan*, observing:[34]

> [64] It is immaterial that at the time of the disposition, C had no rights in the property. There is nothing in s 44 which expressly requires that the rights and interests must exist at the time of disposition. Such an interpretation is consistent with the finding that an intention to defeat another party's rights or claims includes an intention to defeat a future claim, as discussed below.

[48] Whilst those cases concluded s 44 may apply to a disposition entered into in order to defeat future rights, they did not consider whether the same could be said of a disposition made before the commencement of the relevant relationship. Moreover, and relying on *Genc*, the Courts in *Ryan* and *Gray* proceeded on the *assumption* a qualifying relationship must exist at the time of the disposition for there to be a challenge under s 44.

[49] But *Genc* did not go that far. Reflecting the previous law, Mrs Genc claimed an interest in the family home, transferred by Mr Genc to his family trust before the couple married, on the basis the trust was a sham or Mr Genc's alter ego. In doing

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30 At [42](ii).
31 *Genc v Genc* [2006] NZFLR 1119 (HC) at [96].
32 *Ryan v Unkovich*, above n 26, at [42(vi)].
33 *Gray v Gray* [2013] NZHC 2890 at [33]–[40].
34 *SMW v MC* [2013] NZHC 396, [2014] NZFLR 71 (footnote omitted).

so, she asserted the couple were in a de facto relationship from 1994 until they married in 1999. The Family Court found the couple had only begun a de facto relationship around the time they married, and went on to dismiss Mrs Genc's argument the trust was a sham or Mr Genc's alter ego.

[50] On appeal, in upholding the Family Court's findings, the High Court reasoned:[35]

> [71] The Judge in this case found that the parties were not in a de facto relationship within the meaning of the Act at any time prior to the announcement of their intention to marry towards the end of 1998. I have upheld that finding. It follows that the property which Mr Genc transferred to the trust … was his separate property, …
>
> [72] … Consequently, although the … property became the home of the parties after the date upon which the de facto relationship commenced, towards the end of 1998, it was not property to which Mrs Genc could lay any claim by virtue of the relationship at the time the trust purchased it, or subsequently. It has never been relationship property.

[51] But claims under s 44 are not limited to relationship property. And given that approach, the fact the disposition was made before the couple's de facto relationship commenced was not relevant jurisdictionally or evidentially to the availability of a s 44 claim. Accordingly, it is not clear what — if anything — we should take from *Genc*.

[52] That issue has featured to a relatively minor extent in two subsequent decisions of the High Court. Those decisions are not, however, of great assistance.[36]

First principles

[53] Given the state of authority on the jurisdiction issue, or more accurately the lack thereof, it is appropriate we consider the matter on the basis of first principles.

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35 *Genc v Genc*, above n 31.

36 See further *JEF v GJO* [2012] NZHC 1021, (2012) 3 NZTR 22-010 and *K v V* [2012] NZHC 1129. In *JEF v GJO*, the High Court proceeded on the assumption that it was necessary for a de facto relationship to exist at the time of the challenged transaction, and it was accepted the disposition could only be challenged by arguing the trust was invalidly constituted. In *K v V*, the High Court did not accept the appellant's arguments that a transfer could not be caught by s 44 because it pre-dated the inclusion of de facto relationships in the Act, citing *Ryan v Unkovich*, above n 26. The Judge found, on an evidential basis, that the disposer did not have an intention to defeat an interest he did not think existed at the time.

[54] The first of those principles is the scheme and purpose of the Act. We need say no more on that than we have already. We also recognise the general proposition that where Parliament protects third party interests from transactions that would adversely affect those interests, it can choose to protect not only interests which exist at the relevant time, but also interests which may come into existence subsequently.

[55] Having said that, we acknowledge the apparent appeal in this context of the binary proposition that, until a qualifying relationship is in existence, it is difficult to see how a disposition can be made in order to defeat property entitlements that would otherwise arise under that relationship. After all, how can such a prediction be made if the qualifying relationship has not commenced?

[56] We also acknowledge it can be argued that to require the existence of a qualifying relationship for jurisdiction under s 44 to exist would recognise individual autonomy. But that is not consistent with the s 21 contracting out regime founded on the principle of *couples'* autonomy. And, as *Fisher on Matrimonial and Relationship Property* notes, the scheme of the Act gives only limited protection to pre-qualifying relationship assets:[37]

> Unlike the traditional community of acquests[38] and the more modern deferred community of surplus[39] matrimonial property regimes overseas, the Property (Relationships) Act 1976 gives limited protection to pre-marriage or relationship assets. Nowhere in the Act are they expressly and positively protected as separate property. Only to the limited extent that they escape the numerous relationship property categories (s 8(1)(a)-(l), s 9A(1) and (2), and s 10(4)) do such assets fall into the residue of separate property (s 9(1) and (2) and s 10(1) and (2)).

[57] The limited nature of that protection indicates s 44 should not be applied in a manner inconsistent with s 21, which expressly contemplates the making of agreements prior to the commencement of a qualifying relationship. If s 44 did not apply at all to dispositions made before a qualifying relationship began there would be considerable potential to 'hollow out' s 21. A soon-to-be-spouse or partner could unilaterally dispose of property and thereby shield it from the Act's property-sharing

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37 *Fisher on Matrimonial and Relationship Property*, above n 25, at [5.21] (footnotes in original omitted).

38 Where pre-marriage realty (but not the personalty) is treated as separate property.

39 Where pre-marriage assets remain separate property while both share in after-acquired assets.

regime, and the courts' s 44 oversight. Moreover, it would seem strange if attempts made before the commencement of a qualifying relationship, to lawfully contract out of equal sharing, could be set aside under s 21J; but that unilateral, and hence non-consensual, attempts made at the same time would fall outside the courts' jurisdiction under s 44. In our view, therefore, Parliament cannot have intended the existence of a qualifying relationship at the time of a disposition of property to be a necessary pre-condition for the availability of s 44 relief.

[58] That conclusion is strengthened when it is remembered ss 44C and 44F (relating to dispositions to trusts or to qualifying companies respectively) — which do not require an element of purpose — only apply to dispositions made since the relationship began.

[59] A further aspect of the Act also supports that conclusion, particularly as regards de facto relationships. Sections 14, 14AA and 14A deal respectively with marriages, civil unions and de facto relationships of short duration: that is, and in general, ones that have lasted for less than three years.[40] Those provisions affect the expectation of equal sharing, notwithstanding that the relationship has *commenced* at the time of the impugned disposition.[41] If a de facto relationship remains one of short duration, an order for the division of relationship property cannot be made under the Act except in certain circumstances.[42] But there is no suggestion a challenge under s 44, to a disposition made during that initial period of a de facto relationship which subsequently ceased to be of short duration, would face a jurisdictional or evidential challenge on the basis that entitlement was at that time yet to come into existence.

Conclusion on the jurisdiction issue

[60] For all those reasons we are satisfied a claim under s 44 can be made where property is disposed of before the start of the relevant qualifying relationship.

[61] The question therefore becomes, in a jurisdictional sense, when in the course of a "relationship" does that possibility arise? Walker J did not separately consider

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40 Property (Relationships) Act, s 2E.
41 Sections 14(2) and 14AA(2).
42 Section 14A(2).

that question but went to the eventual one of Mr Sutton's intent — was the disposition made "in order to defeat" pursuant to s 44(1)? There is, we acknowledge, considerable overlap between those two questions in the case of a pre-qualifying relationship disposition. But, guided by the approach taken under s 21 as to what constitutes "in contemplation" as the pre-condition for valid contracting out agreements, we think the better approach is to separately consider the "when" question we have just posed — albeit the answer in a particular case is evidentially dependant — separately from that of the disposer's intention.

"In contemplation"

[62] We have noted the Act's recognition in s 21 that parties can contract out of the equal sharing regime in contemplation of entering into a de facto relationship. That helped us to conclude s 44 can apply to dispositions made prior to the commencement of a de facto relationship. But just what constitutes such contemplation remains a difficult question. That is because of the essential characteristics of a de facto relationship. As the statutory definition of that term recognises, parties will be in such a relationship when, objectively assessed, they are seen to "live together as a couple".[43] A de facto relationship can, therefore, commence without there having been any "contemplation" of that occurring as will not be the case for marriages and civil unions. The formalities of entering those latter qualifying relationships require contemplation. At the same time, it can also be said that once a couple mutually contemplate a de facto relationship, that is mutually accept its desirability, that relationship may well have already come into existence. Such is the nature of things.

[63] Taking what guidance we can from that acknowledgement, we think what is meant by the phrase "in contemplation" in the context of contracting out is the most useful starting point for identifying the existence of the characteristics of a relationship which can provide the context necessary for there to be an intention to defeat entitlements for s 44 purposes.

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[43] Section 2D(1)(b).

[64] As the High Court recognised, a disposition made with such a purpose, but one not focused on the future entitlements of a specific person, is not enough.[44] Rather, the disposer must already be in a relationship with a specific person which is of sufficient significance, in terms of possible future rights under the Act, to enable the conclusion to be drawn that the disposer could have acted in order to defeat that person's possible future rights.

[65] As noted, the Judge was satisfied the disposition was made "in anticipation of the deepening of their commitment to one another".[45] It is not clear what the Judge meant by her phrase "in anticipation". She may have used it as a synonym for the Act's phrase "in contemplation". If she did, she did not analyse the evidence in terms of established meaning of that phrase. The phrase "in contemplation" is used elsewhere in the Act:

(a) The definition of relationship property in s 8 includes property owned by either spouse or partner immediately before their qualifying relationship began, if acquired in contemplation of that relationship and intended for their common use or benefit.[46]

(b) Section 16 provides for the court to adjust the shares of the spouses or partners when dividing the relationship property including where, before a qualifying relationship began, each spouse or partner owned a home capable of being a family home, and one sold such a home "in contemplation" of that relationship.

[66] As can be seen, the circumstance of a couple acting in contemplation of beginning a qualifying relationship is used to define the point in their relationship at which the law recognises that, although that qualifying relationship is yet to come into existence, the effect of some formal legal step should be assessed in terms of the consequences it will have if such a relationship does commence. Accordingly, consideration of what is meant by "in contemplation" provides guidance as to when

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44 Judgment under appeal, above n 3, at [96].
45 At [101].
46 Property (Relationships) Act, s 8(1)(d).

a disposition can properly be characterised as having been made to defeat future entitlements of the person s 44(1) refers to as "Party B".

[67] What is meant by "in contemplation" as regards de facto relationships has received little attention. The phrase "in contemplation of marriage" has a longer pedigree, and has been considered in a number of cases, not only in the context of s 44 but also for wills made in contemplation of marriage and for property acquired in contemplation of marriage.

[68] What constitutes "in contemplation" of entering into a marriage was considered by this Court in *M v H*.[47] This Court accepted Brewer J's analysis in the High Court that the Act's contracting out provision should, as relevant here, be interpreted as having been intended to apply to couples having a "clear and present intention" to become married.[48] In doing so, this Court rejected the submission that to "contemplate" simply means to "entertain the possibility of such an occurrence".[49] As this Court said:[50]

> The implications of the [contracting out] agreement cannot be explained in a tangible and useful way [under the formalities provisions, for example, the independent advice requirement] if the marriage that might bring the parties within the sharing regime of the [Matrimonial Property Act 1976] is no more than a distant prospect. This indicates that the words "in contemplation of their marriage to each other" means a marriage actually intended at the time the agreement is entered into, as Brewer J found.
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> …
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> At the time they entered into the agreement, June 2000, the parties had no plan to marry. The [Matrimonial Property Act] did not apply to them and there was no expectation that it would do so. The appellant was not able to make an informed decision about whether to contract out of her rights under the Act because she had no such rights and did not expect to acquire them in the foreseeable future.

[69] This Court also noted support for that strict approach could be found in cases concerning whether a will survives a subsequent marriage:

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47 *M v H* [2018] NZCA 525, [2018] NZFLR 918.
48 At [47] and [55]; referring to *M v H* [2017] NZHC 2385, [2017] NZFLR 751 at [47].
49 At [48].
50 *M v H*, above n 47, at [51] and [55].

> [52] … The expression "in contemplation of a marriage" has long been used in legislation governing wills. Section 13 of the former Wills Amendment Act 1955 read:
>
> > Notwithstanding anything in s 18 of the principal Act or any other enactment or rule of law, a will expressed to be made in contemplation of a marriage shall not be revoked by the solemnisation of the marriage contemplated.
>
> [53] In *Re Natusch*, McGregor J considered that the expression required that at the time of making the will, the testator intended marriage as a likely future event.
>
> [54] The current Wills Act 2007 uses a similar formulation. It provides that a will is revoked if the will-maker marries or enters into a civil union but not in certain circumstances including where the will was made in contemplation of a particular marriage or civil union. In *Re Stirling (deceased)*, Heath J was not satisfied that a will had been made in contemplation of marriage even though the testator was engaged and intended to marry at the time the will was made. This was because there was no evidence that he was advised of the legal implications of making a will in contemplation of marriage.
>
> (Footnotes omitted.)

[70] We consider that the approach requires adaptation in the context of de facto relationships. As noted, the transition from a "dating" relationship to a de facto one, as defined by the Act, generally involves an evolution rather than a formal legal step. Therefore it would not, in our view, be appropriate to apply the strict tests that apply to determining "in contemplation of marriage" to "in contemplation" of a de facto relationship.

[71] The issue here is not whether *the qualifying relationship* has begun, but whether, between the couple, *a* relationship in fact exists of such a character as to bring the s 44 protection into play. In our view, an intention to defeat cannot be entirely abstract. That is, the entitlements in question at the time — whether actual or future — must be those of a person who is a party to a relationship in which a qualifying relationship is "in contemplation" and which subsequently becomes such a relationship, and which then ends. That is consistent with the approach under s 21. There the temporal requirement for an effective contracting out is that the couple are "contemplating" a qualifying relationship.

[72] We recognise the need to provide, insofar as possible, certainty to persons in the situation of a developing relationship. We consider that certainty requires a milestone as to when the exercise of one's (separate) property rights will become fettered by the need to consider — and agree on — the implications for their partner.

[73] To that end, we prefer to be guided by the words of the Act itself. At the heart of the definition in s 2D of a "de facto relationship" is the requirement for two persons to "live together as a couple". "In contemplation of entering into… a de facto relationship" in s 21 therefore means, at its simplest, contemplating living together as a couple.

[74] Generally, the decision to live together represents a couple preparing to make their relationship more serious. We are satisfied that, in most cases, a decision to live together creates a strong but rebuttable presumption that there exists between the parties mutual contemplation of entering a de facto relationship. Rebuttable, because an analysis of the contextual factors in s 2D(2) may indicate that, even where two people agree to live together, they are not doing so "as a couple". That analysis distinguishes true couples from those in relationships of less significance, such as the 'friends with benefits' situation. Ultimately, an inquiry into the substantive characteristics of the relationship may be necessary.

Were Mr Sutton and Ms Bell "in contemplation" of a de facto relationship when Mr Sutton made the disposition?

[75] In the present case, we are satisfied that when Mr Sutton disposed of Pt Chevalier to the Trust in November 2004, he and Ms Bell were in contemplation of entering a de facto relationship. They had been, by that time, in an exclusive relationship for approximately 16 months and had been living together for eight of those months. They presented to their families and friends as a couple, and were by that time a serious and committed couple.

[76] We acknowledge that one of the motivations for Ms Bell moving in with Mr Sutton was to establish her new business from his home office. But we are not convinced that was the sole motivation. Rather, that motivation would appear to have

coincided with the decision to take the next step in the development of their relationship.

[77] By the time she had moved in, Ms Bell had also visited Mr Sutton's sister in Australia with him and had spent Christmas with Mr Sutton's family. While Mr Sutton downplayed the significance of those events as demonstrating his commitment to her, we agree with Ms Bell that they show she was more than a "tag on girlfriend". We do not think that, in the context where Mr Sutton had ended his marriage only months prior, he would have involved Ms Bell in his family life in that way without foreseeing that his relationship with her could well become an enduring one.

[78] Ms Bell had claimed that it was Mr Sutton who had persuaded her to move in by "pointing out that there was a home office… from which I could begin my new business". But she also said that before moving in, she had been staying with Mr Sutton most nights of the week. Mr Sutton rejected the latter claim. He had maintained right up until the first Family Court hearing that Ms Bell had moved in "as a flatmate". As the context shows, that was clearly an understatement. Under cross-examination, Mr Sutton conceded:

> … When she moved in, we did sleep in the same bedroom, however she had her own bedroom as well which she had all her stuff in and she had her own wardrobe in that room, so she had her own bedroom, with her own wardrobe, the office that she was operating her business from and then she would sleep in my bed.

[79] As Judge Clarkson noted in evidence once Mr Sutton gave that answer, the fact he and Ms Bell shared a bed had been "left out" of his affidavits.

[80] While Mr Sutton and Ms Bell lived at Pt Chevalier with a flatmate until January 2005, it is not uncommon for couples to do so. And although Mr Sutton and Ms Bell kept separate accounts throughout 2004, we do not think having joint accounts is necessary for a couple to be *contemplating* a de facto relationship; rather, having joint accounts is more likely evidence of a de facto relationship already in existence.

[81] After moving in together, Mr Sutton and Ms Bell became more involved in each other's lives. That is the gist of the emails from March 2004 onwards. Those emails refer to mundane everyday events and to more significant

events together. For example, in one email Ms Bell said they needed to go grocery shopping together and that it was "[her] turn to pay". Other emails show her arranging purchases of firewood and refer to her cleaning the yard for Mr Sutton. They also show that they both holidayed together to Rotorua on Queens Birthday weekend in 2004, and while planning that trip Mr Sutton signalled his desire to holiday again with Ms Bell in July/August of that year. Indeed, at the end of September/October, they both went to Malaysia for a 10-day holiday, returning via Australia to again visit Mr Sutton's sister.

[82] We are satisfied that by the time Mr Sutton made the disposition, his relationship with Ms Bell — particularly because of the duration of the relationship and the apparent signs of permanence — was sufficiently serious to demonstrate the parties were in contemplation of a de facto relationship.

The evidential issue: was the High Court correct to find Mr Sutton had transferred Pt Chevalier to the Trust in order to defeat rights the Act would have otherwise given Ms Bell?

[83] The Judge prefaced her discussion of this issue by summarising what she saw as the correct approach to determining the presence or otherwise of the necessary intent. Referring to the approach in *Ryan*,[51] as approved by this Court in *Potter v Horsfall*,[52] she summarised that approach in the following way:[53]

> Thus, the inquiry for establishing intention is directed to the disposing party's knowledge of the effect of the disposal on the other party's rights. From this, intention may be inferred, and it is not necessary to show that the disposing party was motivated by a desire to bring about that consequence.

[84] It is useful to note here that this statement summarises the position reached as regards the decision of this Court in *Coles v Coles*,[54] and the Supreme Court's subsequent decision in *Regal Castings Ltd v Lightbody*.[55] In *Coles*, this Court had said that "in order to defeat" required the disposer to have had a "conscious desire" to remove property from beyond the reach of the courts.[56] The Supreme Court in

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51 *Ryan v Unkovich*, above n 26, at [33].
52 *Potter v Horsfall* [2016] NZCA 514, [2016] NZFLR 974 at [40]–[41].
53 Judgment under appeal, above n 3, at [91].
54 *Coles v Coles* (1987) 4 NZFLR 621 (CA).
55 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.
56 *Coles v Coles*, above n 54, at 624.

Regal Castings, decided in the context of the meaning of "intent to defraud" under s 60 of the old Property Law Act 1952, put the test differently. It said that if the disposer had *knowledge* that their disposition would defeat creditors' recourse to that property, the disposer must be taken to have intended that consequence.[57] That wider principle from *Regal Castings* was adopted by French J in *Ryan* for the purposes of s 44:[58]

> … I accept the principles enunciated in *Regal Castings* are sufficiently general to apply to s 44. In particular, I accept that in so far as the *Coles* formula fails to distinguish between intention and motive, it is contrary to the reasoning of the Supreme Court and should not be followed. Knowledge of a consequence can be equated with an intention to bring it about.

[85] Taking that approach, Walker J agreed with the Family Court Mr Sutton had been aware of the effect of transferring Pt Chevalier to the Trust: that it would not become a family home if he entered into a de facto relationship.[59] Mr Sutton's evidence in the Family Court confirmed that understanding. Moreover it was likely he had received legal advice to that effect.[60] Those factors alone, the Judge noted, supported the conclusion Mr Sutton was aware of the impact of the Trust on any of Ms Bell's potential rights.[61]

[86] Powerful confirmation that was the case was to be found in the February 2004 email Ms Bell had sent to Mr Sutton pointing out to him the property consequences of de facto and other qualifying relationships for his ownership of Pt Chevalier.[62] In light of that possibility, and what Ms Bell knew would be Mr Sutton's father's concern if they were to live together, she recommended that over the next few months, when he got some money, he went to a lawyer to tie up the property as a "separate property" — putting the property in trust and having it separate for the rest of his life. That email was, as is apparent, of particular significance as to the dispute over the date of the commencement of the de facto relationship. As the Judge put it, it spoke of

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57 *Regal Castings Ltd v Lightbody*, above n 55, at [54] per Blanchard and Wilson JJ.

58 *Ryan v Unkovich*, above n 26, at [33]. See further the discussion in *Fisher on Matrimonial and Relationship Property*, above n 25, at [9.42], which notes that the Supreme Court's decision on appeal in *Horsfall v Potter* [2017] NZSC 196, [2018] 1 NZLR 638 adopted language "redolent of that in *Regal Castings*" without actually citing it, and so may "implicitly be taken to have endorsed [this Court's] application of the *Regal Castings* test".

59 Judgment under appeal, above n 3, at [92].

60 At [93].

61 At [94].

62 Set out at [15] above.

"the impermanent and unsettled nature of their living arrangement" at the time.[63] But it also went to the question of Mr Sutton's knowledge prior to disposition of possible future relationship property interests arising in Pt Chevalier.[64]

[87] Some months later, in September that year, Ms Bell and Mr Sutton attended an Auckland home show. They won a prize of a free consultation at a firm of solicitors. On 24 September 2004 Mr Sutton spoke to those lawyers and, as already noted, based on the legal advice he received the Trust was settled on 9 November and Pt Chevalier transferred to the Trust on 29 November.

[88] At the end of the day the Judge based her conclusion that Mr Sutton had the necessary intention to defeat Ms Bell's future interests on his knowledge of the effect of the trust arrangements and for their proximity of effecting those arrangements to the subsequent commencement of the de facto relationship.

[89] As we see it, the two main areas of analysis here concern the extent of Mr Sutton's knowledge as to the effect a trust would have on Ms Bell's rights; and the significance of Ms Bell's encouragement of the establishment of the Trust.

[90] First, we start by observing, as did the High Court, that whether Mr Sutton consciously desired to defeat Ms Bell's rights is not the issue.[65] As we have explained, what is relevant is what Mr Sutton intended, including as demonstrated by what he actually knew of the disposition's effect.

[91] We accept that the intent to protect Pt Chevalier from a division of relationship property may not have been Mr Sutton's sole intent. He was likely to have been motivated in part by his grandparents' experience,[66] and perhaps more broadly, to protect his home for the benefit of any children he was, at that time, yet to have. Under cross-examination at the hearing before Judge Druce, Mr Sutton gave the following evidence:

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63 Judgment under appeal, above n 3, at [67].
64 At [94].
65 At [90].
66 That is, the taking of 50 per cent of the value of Mr Sutton's grandparents' house to pay for Mr Sutton's grandmother's rest home fees.

> Q. You understood that the benefit, or a benefit of a family trust would protect a home from a division of relationship property, is that right?
>
> A. I understood that the family trust protected a home from all sorts of incidences and the one that was at the top of mind at that stage was my grandmother's estate that had just been completely cleaned out by rest home subsidies that had been taken off her, so it was top of [mind]…
>
> Q. Okay so can you just answer the question, you understood that amongst other things, a family trust could protect a home from division of relationship property?
>
> A. I did understand that, yes. But I understood that a trust protects a home from a number of things, a number of features and that was actually part of the, that was when I went to see, to see Mr Shearer, he stepped through all the types of things that trusts do, he said, "This is," and at that, was, we talked a lot about future kids, you know, when you have kids and you have future generations, this looks after this asset for future generations.

[92] Mr Sutton's knowledge was based, in part at least, on the advice of his lawyer, Mr Sherer. Mr Sherer gave evidence at the second Family Court hearing he had talked Mr Sutton through the general workings of a trust and its benefits for asset protection, including as regards the division of relationship property. Mr Sherer also said that the topic of rest homes was discussed.

[93] For the purposes of s 44(1) it is sufficient if the intent to defeat a partner's interests is merely one of the disposer's various purposes. In *Dyer v Gardiner*, this Court held that even though Ms Gardiner had transferred shares to a trust to ensure a portfolio of assets could grow to provide ongoing financial support to her disabled son, her knowledge the arrangements would also ensure Mr Dyer had no recourse to the shares meant her disposition was made in order to defeat Mr Dyer's rights.[67] As Collins J put it in *K v V*, the requirement for a disposer to have the intent to defeat "need not be the sole aim of the transaction, or the dominant aim, it will suffice that it was one of their aims".[68]

[94] Mr Sutton accepted before Judge Druce that he understood the possibility that if he was to enter a permanent relationship with Ms Bell there was a possibility

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67 *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293 at [103].
68 *K v V*, above n 36, at [110].

Pt Chevalier would become the family home (and therefore liable to division under the Act). Indeed, Ms Bell had told him as much in the February 2004 email.

[95] We are satisfied Mr Sutton knew the consequences the disposition would cause: that can be sufficient to establish an intent to bring it about.

[96] What, then, is the significance of Ms Bell's encouragement, as evidenced by the February 2004 email, of Mr Sutton to take that course of action?

[97] We recognise that Ms Bell appears to have supported and encouraged the creation of the Trust and the transfer to it of Pt Chevalier. But ultimately the decision to undertake those actions was Mr Sutton's, on the advice of his counsel. Ms Bell's email of February 2004 helps to inform the motivation for the establishment of the Trust. Ms Bell was not saying that she did not or would not have any rights in Pt Chevalier under the Act. She was, in effect, acknowledging that those rights could arise and that Mr Sutton should put Pt Chevalier into trust to prevent such an outcome. That is, she was acknowledging the purpose of the transaction. She was, in effect, agreeing to contract out.

[98] But the Act mandates that a person cannot consent to a waiver of their rights or entitlements except where a contracting out agreement has been made and the formalities in s 21F are complied with. There clearly was no such agreement in this case. If agreements that do not comply with the formalities are void (except in the limited circumstances set out in s 21H), then it is not clear to us why Ms Bell's apparent position in the February email (that Pt Chevalier should be Mr Sutton's separate property) should influence our objective assessment of Mr Sutton's intent in making the disposition under s 44. The most that can be said for Mr Sutton is that, with Ms Bell's apparent blessing, he did not make the disposition maliciously. But that is not a requirement of s 44(1). An intent, or knowledge of the effect of the disposition, suffices. The "conscious desire" approach no longer reflects the test.[69] That means that a disposition made in good faith, but nevertheless in order to defeat, meets the threshold for s 44(1).

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[69] As discussed at [83] and [84] above.

[99] It follows that the High Court was correct to find Mr Sutton transferred Pt Chevalier to the Trust in order to defeat Ms Bell's rights.

Other issues

[100] There are four, supplementary, issues which we can deal with relatively succinctly.

Valuable consideration

[101] The first is whether a debt-back gifting programme constitutes valuable consideration. We do not consider it necessary to deal with this question because, as the High Court found,[70] the good faith and valuable consideration requirements of s 44(2) are conjunctive, and we do not think that the Trust received Pt Chevalier in good faith because Mr Sutton's intent to defeat can be attributed to it.

[102] [The following five paragraphs have been redacted.]

The remedial discretion

[103] Mr Sutton says the Court should exercise its remedial discretion to ringfence his initial contribution to the purchase of Pt Chevalier and to postpone the vesting date. He does so on the basis of [redacted], and Ms Bell's knowledge of the effect of transferring Pt Chevalier to the Trust. For the same reasons as we have already given, we put no weight on those factors.

[104] Finally, Mr Sutton says that Ms Bell failed to discover documents, in particular, bank statements from 2004, and concealed the emails produced by consent in the hearing before Walker J. The Judge held that, without seeing and hearing from the witnesses, she was not prepared to make a finding that Ms Bell had actively concealed relevant documents. Theoretically, there were alternative explanations.[71]

[105] We are in the same position and for the same reasons do not consider it appropriate to make such a finding.

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70 Judgment under appeal, above n 3, at [103].
71 Judgment under appeal, above n 3, at [119].

[106] Accordingly, we decline to exercise our remedial discretion.

[107] For all those reasons, the appeal is dismissed.

Result

[108] The appeal is dismissed.

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

Addendum

[110] For the purposes of publication, we have omitted parts of or all the original paragraphs [5]–[7], [23(b)] and [102]–[107] of this judgment to comply with ss 11B to 11D of the Family Courts Act 1980.

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