IN THE SUPREME COURT OF NEW ZEALAND SC 72/2007

IN THE MATTER	of a Civil Appeal	
BETWEEN	**REGAL CASTINGS LIMITED**	
	Appellant	
AND	**G M LIGHTBODY AND G N LIGHTBODY**	
	First Respondents	
AND	**A C HORROCKS, G M LIGHTBODY AND GN LIGHTBODY**	
	Second Respondent	

Hearing 10 April 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel J McCartney and G S Caro for Appellant
D K Wilson for Respondents

CIVIL APPEAL

10.04 am

McCartney May it please the Court Ms McCartney appearing for the appellant together with my learned friend Mr Caro.

Elias CJ Thank you Ms McCartney, Mr Caro.

Wilson As Your Honours please, I appear for the respondents.

Elias CJ Thank you Mr Wilson. Yes Ms McCartney.

McCartney Yes may it please the Court, the summary of the appellant's submissions are at paragraphs 1 to 16 of the written submissions and they can be addressed under six main headings. The first is that the rule or the presumption in *Freeman v Pope* continues to apply and that it's good law and that there is contemporary authority that supports the application of the rule, including in New Zealand and certainly in England and in Australia. There are sound policy reasons that I'll develop which continue to support that presumption.

The second is that Mr Lightbody was insolvent at the date of the alienation, the relevant date being November 1998, and that in the context of s 60 the alienation that took place was voluntary and in those circumstances Regal says it's entitled to the benefit of the presumption. So the competing interests, Regal says, are on the one part Regal, a creditor for value and on the part the Lightbodys and their third trustee who come to the Court as volunteers.

And the third point is if the Court finds that *Freeman v Pope* doesn't apply, then Regal says for the purpose of s 60 it's necessary to identify the relevant state of mind of the debtor and then to consider whether his state of mind was dishonest at the time of the alienation. And Regal submits that dishonesty is looked at from the point of view of the relationship between the parties which was that of debtor and creditor and that considerations are confined to the date of the alienation and that considerations are objective factors, not subjective factors.

Elias CJ The date of alienation being the date of transfer.

McCartney Yes, November 1998.

Elias CJ You'll come onto speak about why you say that date rather than the dates on which the debts were progressively forgiven.

McCartney Yes.

Elias CJ Yes.

McCartney And just to address that matter, and I'm going to develop it, but from the point of view of Regal, Regal says that as at November 1998 the Lightbodys entered into the agreement to sell their assets to Trust, they executed the transfer by which the house was transferred into the Trust, they simultaneously reduced the debt back by the first $54,000 and the evidence which I'll come to and which the Court of Appeal I submit has accepted, is that they did intend to see that whole debt forgiveness programme through until the end and did do so and the whole of the debt was extinguished by December 2002.

So dealing then with the three main errors, this is the fourth point, or the fourth ground of appeal, main ground, there are three main errors. And the first is that Regal wasn't given the benefit of the presumption in Freeman v Pope. The second is that the High Court and the majority in the Court of Appeal failed to identify the relevant state of mind that applied in relation to s 60. And by failing to identify that state of mind precisely, the High Court and the Court of Appeal I submit put a higher test on Regal than was necessary and looked to see whether Regal was motivated to harm, sorry, and looked to see whether Regal had proven that the Lightbodys were motivated by a wish to harm Regal and that I submit is putting too high a burden or too much of a burden on Regal.

And in adopting that test as to state of mind, I submit that the High Court and the Court of Appeal failed to give effect to the creditor protection, which is the purpose of s 60 and effectively undermined the value of the whole section.

Tipping J That point is really consequential on the other isn't it.

McCartney It is Your Honour.

Tipping J Yes.

McCartney It follows from the other, it follows on from the third point in relation to what was required for s 60.

And the next point deals with the good faith purchaser protection of s 60 subs (3) and in my submission the second respondents being the two Lightbodys themselves and their third trustee were not good faith purchasers. And they had notice. And in that regard Your Honours I have just this morning had brought to my attention, and I apologise for the late passing up of this, but it's a first instant decision of *Diemasters Pty Limited* which is before Your Honours. And it's a decision in which the issue of notice was dealt with slightly differently, or quite differently. And that's apparent from just the first page where held, paragraph 1, and it deals with the issue of where two people, one taking with notice of being a party to

fraud, take as purchasers as joint tenants under one instrument, the doctrine of unities requires unity of title and unity of interest so that one cannot take more than the other; and this principle does not operate so to determine the rights of the joint tenants between themselves. And I'll develop that as I continue with the submissions but in my submission that applies in relation to the protection given otherwise by s 60 subs (3) and also has application in relation to the issue of indefeasibility.

Regal says in relation to indefeasibility that the provisions in the Land Transfer Act do not apply to s 60 because s 60 derives from a separate statutory authority and in supplementary authorities that have been passed up to Your Honours, I have included the decision of Justice Macarthur in *Murtagh v Murtagh*.

Tipping J Is this effectively a submission that s 60 overrides the Land Transfer Act.

McCartney It does Your Honour.

Tipping J Mm.

McCartney It is effectively the submission.

Blanchard J What's the position if it doesn't.

McCartney If it doesn't Your Honour, Regal's position is that fraud is established nonetheless on the basis of the dishonesty which it says is the knowing exposure of risk. And in that regard Regal relies on the concept of dishonesty encompassing exposing someone to risk when there's no right to do so that comes out of the *Royal Brunei* decision. And it is Regal's position that all respondents had notice of it and in relation to Mr Horrocks, he either was wilfully blind or alternatively he did the bidding of the Lightbodys and cannot, or the three of them can't hid behind the fact that they introduced the third tame trustee and don't tell him what it is what it is that they are intending to do.

Elias CJ Does *Diemasters* affect that.

McCartney *Diemasters* is in addition to that. *Diemasters* would be in addition to that. Because it provides the doctrine of unity where if Mr Lightbody knew of the fraud, then Mrs Lightbody also knew.

Tipping J What if we were not satisfied that the respondents were guilty of land transfer fraud. Is there any other way you can attack them.

McCartney Well I mean I'd attack them first by saying s 60 overrides the provisions.

Tipping J Yes of course, but I'm just going down the chain so to speak.

McCartney Yes.

Tipping J And so neither of those.

McCartney Yes, if the Court were to hold that fraud requires moral turpitude, as required by the Land Transfer Act, then it would be a question of the Court taking, looking at what happened in terms of the actions and the knowledge of the Lightbodys as at 1998.

Tipping J But you see I don't think a fraud, if you like, under s 60 per se demonstrates a fraud for land transfer purposes. You may be able to elevate it into one. But I don't think it follows that satisfying s 60 per se satisfies land transfer fraud. But that's another point. I'm asking if all else fails, what else do you have. In other words, if there's no override and there's no land transfer fraud.

Blanchard J Well one reason why there mightn't be land transfer fraud is that maybe land transfer fraud has to be fraud against a person with an interest in the land.

McCartney Yes, in other words the section's fitting something else, directed at something else rather than directed at a situation where there's a fraud by the alienor against a creditor.

Blanchard J But assuming that, what Justice Tipping is asking is, is there another way home.

Tipping J Because I think there might be.

McCartney Oh, well I'm grateful to hear that.

Blanchard J So that Mr Wilson can think about it, assuming that we get this far, what about an *in personam* claim.

McCartney Can I come back to that because.

Blanchard J Yes, I don't want to take things out of sequence anyway. But you were telling us what you were going to argue and we were just adding a few supplementaries.

McCartney Well I'm grateful for that Your Honour. But I have passed up that recent High Court of Australia decision involving the *in personam* claim for the knowing receipt.

Tipping J Is that *Say-Dee*.

McCartney *Farrah Construction*. That is *Say-Dee*, yes it is.

Tipping J Yes. It came from the New South Wales Court of Appeal.

Elias CJ Was that handed up today or was it in the.

McCartney No. It's 31 in the bundle.

Elias CJ Yes.

Blanchard J This is perhaps not a knowing receipt case anyway.

Tipping J No.

McCartney I'm sorry Your Honour.

Blanchard J This is perhaps not a knowing receipt case anyway.

McCartney No. No, I'm not sure that it is a knowing receipt case.

Tipping J Well I agree with my brother Blanchard that Mr Wilson must be aware of the possibility that even if there is no land transfer fraud for whatever reason, there may be another route for relief for your clients through the *in persona* and what's loosely called the *in personam* approach.

McCartney Yes, yes, well I'm going to tag the *in personam* approach and I'm going to return to that but I'm not actually sure that this is a knowing receipt. It may be a knowing assistance which I notice in *Say-Dee* that the Court did leave open to be.

Elias CJ Well you wouldn't need that. You'd be able to rely simply on s 60 and obtain and in personam remedy.

Blanchard J That would be where your cause of action would come from. The question would then be, is the behaviour unconscionable and would relief via *in personam* be inconsistent with the Land Transfer Act.

McCartney Yes.

Blanchard J Those are the three tests as I understand them.

McCartney Yes and I notice from Say-Dee that unconscionability was the element that the Court did elevate the conduct.

Blanchard J That's pretty much established in Australian cases.

McCartney And seemingly in the New Zealand situation too if I may suggest so Your Honour. Particularly having regard to Your Honour's paper on indefeasibility and the Torrens system.

Elias CJ I wouldn't want it thought that I necessarily think that unconscionability in those circumstances would be required. I'd like to consider whether s 60 adopts a different test.

Blanchard J Well it may be that s 60 and unconscionability fold into one another in this particular kind of claim. But generally speaking it seems to be pretty much bedded in, at least in Australia and certainly in the Court of Appeal here, that you do require to show unconscionability. But it may be once you've shown participation, knowing participation in something that breaches s 60, it's game, set and match on unconscionability.

McCartney Thank you Your Honour. And in this regard of course Regal would point to the exacerbating element which it can rely on which is that the Lightbodys made off with their property at a time of really I submit quite remarkable indulgence on the part of Regal.

Blanchard J All this of course presupposes success for you on prior arguments. And we're not prejudging those.

McCartney I'm going to, Your Honours, move to the prior arguments if I may. Coming back to the written submissions.

Elias CJ I just found that question though of indulgence, you may be going to develop that in sequence in which case leave it, but I'm not sure that that is necessarily an argument in your favour. It might be said the creditor didn't take steps to protect himself and the programme of forgiveness of debt occurred because he slept on his rights. I'm just not sure that indulgence is so much a factor in your favour.

Blanchard J It doesn't pay to be a nice guy.

McCartney Well, with respect Ma'am, I mean obviously Regal sees it as indulgence and the indulgence goes back to 1995 when the term loan agreement was entered into. And the massive amount of debt that Regal allowed to be put on term loan was more than $350,000 but also the waiver of interest of about $95,000. And during the term of repayment of that term loan, no interest attached to it at all. Now I mean I recognise that these days commercial people say you have to take steps to protect yourselves, but with respect, s 60 says otherwise.

Elias CJ Mm.

McCartney It says the creditor's entitled to look to assets of the debtor and entitled as a statutory provision to set aside a transfer if the debtor transfers those assets that the creditor is entitled to rely on.

Elias CJ I don't disagree with that. It's really your reliance on an exacerbating factor. It strikes me that that sort of exacerbation is probably irrelevant.

McGrath J There's complexity in the motives usually in this sort of situation anyway. I mean in the long term interests, the creditor might well have decided that continuing trading with the prospect of some reduction of the debt would be in his long term, would be a better course for him long term. I mean indulgence is a very black and white characterisation of it if you're saying that's all there was to it.

McCartney Yes but Your Honour what the focus is on in s 60 is the intent of the Lightbodys, not the intent of Regal. So perhaps I've put it too high but.

McGrath J Well that is a fair comment, yes.

McCartney But I do feel that the way in which the High Court and the Court of Appeal have addressed this is looking to see what Regal thought rather than taking it back to the focus in 1998 of what objectively it can be established that the Lightbodys knew. And when the focus comes back to those considerations I submit that it's pretty much overwhelming that the Lightbodys knew that they were facing the most hopeless financial situation in which they may have wanted and wished to trade on, soldier on in their business, make some profits, protect their house, but what they did know and this was the purpose or the intention when they transferred to trust, they did know that in protecting their house, what they were doing was exposing Regal to the risk.

McGrath J Yes.

McCartney And that in my submission is what's required for s 60.

McGrath J Yes.

McCartney I've moved past Summary of Reasons and I'll return to them later in the argument when on behalf of Regal I seek to show that the considerations taken into account by the High Court and the Court of Appeal majority were the wrong considerations and show that they were looking for something different than exposure to risk.

In relation to the key facts, there's only two matters that I highlight and that is at para 31 where I refer to the initial application for credit which incorporated the terms of trade by which Glen Lightbody accepted personal liability for payment of the accounts. And I'm highlighting that because I've noticed the respondents in their submissions refer to a guarantee which is different from personal liability, it was in fact personal liability. That's apparent from the credit application and it's also apparent from what.

Tipping J He was simply a concurrent debtor.

McCartney It was a concurrent debt.

Tipping J Yes.

McCartney He agreed that he would look after the repayments to Regal, together with Capro.

The second matter is at para 41. And that is the reference to the National Bank agreeing to increase lending to the Lightbodys as at November 1998 to $148,791. And this is in my submission a very important fact because the Court of Appeal completely overlooked this lending and to the extent the High Court referred to it and Justice Ellen France did make reference to it, the effect of that lending on Mr Lightbody's net financial position wasn't given much further consideration.

Tipping J This is relevant to the insolvency issue.

McCartney It is Your Honour.

Blanchard J What was the purpose of that increase in borrowing.

McCartney I think it's dealt with in the evidence Your Honour. I think some of it was for home improvements and some to repay creditors.

Blanchard J Well we probably don't need any detail on that.

McCartney Yes page 282, I'm sorry no, that related to further increases in 2001 and 2002 to catch up on creditor payments. The reference is 282 at line 27.

Tipping J The additional drawdown was the $80,000.

McCartney It is and it's dealt with in volume 3 page 282 line 32 dealing with borrowings of the bank and the reference to somewhere between 60 and 80 thousand and he said, yes it was borrowed for home improvements.

Blanchard J Thank you.

McCartney And he acknowledged the principal amounting to $148,000 at the bottom of page 282 volume 3.

So Your Honours if I may, that takes me to the first main ground which the presumption in *Freeman v Pope* which is on page 11 commencing paragraph 64. And Regal says the presumption does apply and that it is entitled to the benefit of the presumption. At paras 65 and 66 I refer to s 60 tracing it's origins back to the Statute of Elizabeth of 1571 and that the courts in New Zealand have held that authorities decided under this statute are relevant to the interpretation and application of s 60. And at para 66 to Kerr on *Fraud and Mistake* and references that he makes to the simplicity of the statutory enactment and it cannot receive too liberal a construction or be too much extended in suppression of fraud.

Tipping J Of course fraud in those days would not have carried anything like what tends to be viewed now as it's meaning of deceit. Fraud had a special meaning in this field didn't it.

McCartney Yes with respect Your Honour it did. And it was applied as set out in para 67. I mean according to the courts then you hold your property on the basis that if you get heavily in debt you have to make sure that you're making provision for your creditors.

Tipping J Would it be a fair summary to say that fraud was regarded in those days and still for present purposes as sort of running an unreasonable risk of prejudicing your creditors or something broadly along those lines.

McCartney With respect I agree, the way I've put it is I've adopted what the President, Justice Young, said, exposing your creditors to risk. Which is a lot less than trying to look for something like deceit.

At para 69 dealing with the policy and principles that the presumption proceeds on, the first taken straight from *Freeman v Pope* is that persons must be just before they are generous. And in my submission that principle and policy applies as much today as it did I 1870.

There are other policy considerations. And in this regard I refer to the decision of the majority of the Court of Appeal at para [45] where the Court referring to Justice Kirby's dissenting decision in *Cannane v Cannane Pty Limited (in liquidation)* made reference to that part of his judgment where the learned judge said proof of the intention of the person presents notorious difficulties in every area of law where it is encountered. And with respect I submit that that is a reason that underpins the use of presumption in this area of law. It's because of the notorious difficulty of

proving intent, particularly in these type of circumstances where a creditor or the Official Assignee is required to prove intent in circumstances where they were not there when the transaction was made. They are not parties to the transactions, they come to the fact situation a long time after often, a long time after the transaction was completed.

So in order to get around what Justice Kirby refers to as notorious difficulty of proof, in my submission it is quite appropriate, and the courts do in appropriate circumstances, create devices that assist in overcoming difficult areas of proof, having regard to the needs of the real world. And there is a tradition of the use of presumption in the area of insolvency and I refer to the Insolvency Act and to the Companies Act and to the use of presumption in circumstances of voidable conveyances, of gifts and of preferences.

Blanchard J Well there's certainly a presumption, the question is whether it's irrebuttable. In favour of it being irrebuttable is the authority of Professor Richard Sutton in his book on creditors' remedies. He describes it as irrebuttable.

Elias CJ He doesn't cite authority.

Blanchard J He doesn't cite authority. Nor does the Law Commission's Preliminary Paper in 1991, which treats it as irrebuttable, but I think that probably came from picking up what Prof Sutton had said.

Tipping J I would have thought with respect that the concept of irrebuttability was inherent in the way they approached it in *Freeman v Pope*. Because you mustn't speculate about what the real motives were, it's the effect if you like.

McCartney Yes.

Tipping J If something is inevitably going to withdraw funds from creditors, the law deems you to have had that intent.

McCartney With respect Your Honour Justice Tipping, I agree. From both judgments of Lord Hatherley at page 541 it's reproduced in the judgment of the majority I believe. But it's halfway down page 541, it's tab 5. Halfway down that page, "But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, since it is the necessary consequent of the settlement that some creditors much remain unpaid, it would be the duty of the Judge to direct the jury that they must infer."

Tipping J They must infer.

McCartney Yes. The intent of the.

Tipping J So that suggests an irrebuttable.

McCartney It does and it's put even higher or more strongly I submit by Lord Justice Gifford on page 545 commencing with the words, "For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the court infers intent, and it would be the duty of the Judge, in leaving the case to the jury, to tell the jury they must presume that that was the intent."

Tipping J Supporting that on the facts of Freeman v Pope, Lord Hatterley says at the top of page 544 that the gentleman almost certainly had no active animous towards his creditors, he was just sort of bumbling around. And so it's quite clear that that really shuts off any avenue if you like of rebutting it.

McCartney Yes. With respect yes. And *Kerr on Fraud and Mistake* in dealing with this presumption, which is at p 309, it deals with it I submit on the basis that, sorry it's 310, on the basis that it is an irrebuttable presumption. I think the reference is the last sentence at the top of that paragraph. "it appears", this is 310, "from all the facts of the case that the effect might be expected to be and has in fact been to do so, the Court will attribute the fraudulent intention to the settlor. Where the settlor is shown to have been indebted, he must be taken to have known the state of his circumstances whether he really did so or not. Evidence that he did not will not rebut the presumption of fraud." So in my submission it's dealt with there as if it were an irrebuttable presumption.

McGrath J Ms McCartney if we go back to page 541 of Freeman v Pope, the qualifications in relation to proper funds for the payment of the debts without which the debts cannot be paid.

McCartney Yes.

McGrath J Does that allow any scope for considering payment from a continuing operation of the business at all or is that just simply anything futuristic, if you put it, any future prospects just have to be put out of mind.

McCartney The latter in my submission. Because the section talks about alienation with intent to defraud, the relevant time is the date of the alienation.

McGrath J Yes.

McCartney And for that reason future events have no relevance, other, of course, than if the debtor suddenly had a windfall and was able to pay all his creditors he wouldn't find himself before the court facing an application under s 60.

McGrath J But he still would have been in breach of s 60.

McCartney Yes, he still would have breached it at the time.

McGrath J Thank you.

Tipping J In support of that Ms McCartney is the less cited passage from Lord Hatherley's first sentence. "The principle on which the statute proceeds is persons must be just before they are generous."

McCartney Yes.

Tipping J And that debts must be paid before gifts can be made.

McCartney Yes.

Tipping J I mean that's very very blunt. Whether it goes quite far, I mean it doesn't go quite that far obviously because it's subject to insolvency and all that sort of stuff. But you can see quite clearly from that, and that I think is a fair articulation of the earlier cases which he was purporting to summarise.

McCartney I agree with respect.

Elias CJ He does introduce it though and this is after all talking about a direction to the jury where there is absence of any such direct proof of intention. So this is one of those cases where the function of the judge is to direct the jury that if there isn't evidence of direct proof of intention they must infer. I'm not so sure that if there is some evidence, and my understanding is there are some old cases where there are discussions about settling property in anticipation of marriage and things like that which are held not to be with intent to defraud creditors. It's only a vague recollection. I did the Halsbury commentary years ago in 1979 on this topic and I think in the Halsbury text there are some references to things like that. So I do think that maybe Freeman v Pope is predicated on what the judge must tell the jury is there is no evidence of proof of intention. Which wouldn't make the presumption irrebuttable if there was such proof. You know then there'd have to be a determination of what the intention was.

Tipping J But with respect that sentence is immediately ceded by the fact that in *Spirett v Willows* in that case there was clear and plain evidence of an actual intention to defeat but it was established by authorities that in the

absence of any such direct proof of an actual intention. I think it's in commercial cases that this presumption applies.

McCartney Yes.

Tipping J I think I agree that in marriage, there are marriage settlement cases which perhaps are not quite within this rigour.

McCartney And which would involve or could involve consideration, in consideration of marriage so they don't fall within the fact situation of insolvency and a voluntary disposition of property. So maybe. I haven't read them before.

Tipping J You've just go rid of your daughter at last sort of.

McCartney Yes, here take this money.

Tipping J It's 18th century concepts. So there's bags of consideration.

McCartney But can I say in relation to Freeman v Pope I do submit that what the Court there held was an irrebuttable presumption.

Tipping J If it was to be rebuttable.

McCartney If it were to be rebuttable.

Tipping J But what I would like to know is on what premise is it rebuttable. How can you rebut it. Can you rebut it simply by saying, oh I didn't have a thought to my creditors.

Elias CJ No.

Tipping J No.

Elias CJ Because you take it back, it's not motive, it's the intent. And that's why I think you take it back to the statute, statutory language and how it's been interpreted and you don't need to look at unconscionability. That's the way I would instinctively look at it.

Tipping J I don't think with respect the unconscionability comes in here.

Elias CJ No.

Tipping J It comes in for the purpose of the *in personam* remedy.

McCartney I submit Your Honour in answer to the question, although my learned friend Mr Wilson will be able to deal with this and will deal with it, but it

seems to me that you could perhaps say, I anticipated a settlement from my aunt for example, if it were rebuttable. But even if it's rebuttable and that's not Regal's position, in this case Regal was still entitled to the benefit of the rebuttable presumption and didn't get that.

Tipping J Quite, it wasn't rebutted in this case if it's rebuttable.

McCartney It wasn't rebutted.

Tipping J Yes. But we've got to make a call on whether it's rebuttable as a first step. Now would it in policy be wise to make it rebuttable to accommodate the optimists. People who say.

Blanchard J It's too late, the Property Law Act makes it irrebuttable.

Tipping J Yes.

Blanchard J The new Property Law Act.

McCartney Thank you Your Honour but I take the position that there is nothing wrong with, in justice or in policy, in applying a presumption in circumstances where a debtor is insolvent and gives away all the property that his creditor can look to to get paid.

Tipping J You're in the happy position of being able to say, well you prefer it to be irrebuttable but it doesn't really matter because it's not rebutted here.

McCartney It wasn't rebutted here. Yes.

Blanchard J What the new Property Law Act says, and it doesn't apply to this transaction because it only applies to dispositions of property made after 31 December last year. It deals with applying only to a debtor who's insolvent or, there's some other little wrinkles on insolvency, but then it goes on, with intent to prejudice a creditor, or by way of gift, or without receiving reasonably equivalent value in exchange.

McCartney And I would submit in relation to that, and this is the next policy argument that I put forward to support *Freeman v Pope* is that in the way that the cases have said that the authorities under the State of Elizabeth are applied in interpretation of s 60, what can be seen in s 60 is that it is in fact that original statute, the State of Elizabeth. It's been taken by the legislature and put in at s 60 without effective limitation and in doing that I submit that Parliament can be seen to have impliedly accepted not just the statute but the authorities decided under the Statute of Elizabeth and that those authorities include *Freeman v Pope* and of course bring over the presumption in *Freeman v Pope*.

Now just dealing with the way in which the majority of the Court of Appeal dealt with the presumption, in my submission the majority looked at the wrong cases. They looked at cases in *Cannane* and *Swann* that didn't involve insolvency and didn't involve voluntary dispositions and used those cases to show, or say, you know, a different test applied. But in fact there are cases of recent authority, of recent decisions in which Freeman v Pope has been applied. And in New Zealand, although.

Tipping J As a rebuttable or as an irrebuttable presumption in these recent cases. Or do they not distinguish.

McCartney Well it's really not distinguished. The best examples are the Australian cases of *Noakes v Harvy Holmes.*

Blanchard J Do I have to disclose Mr Noakes was a client of mine. Although not in this case.

McCartney No. *Noakes v Harvy,* it's tab 16 and it's page 303 commencing, "Consequently". And perhaps better to start, "We were pressed with some observations in *Williams v Lloyd* where the Court affirmed that the burden of proof that the transfer was made with the real intent to defeat or delay is upon the party who so alleges. But that was a case where, at the time of the challenged disposition of property by a husband to his wife, he was in a sound financial position. It was held that subsequent conduct and events were insufficient to show that the husband had at that time an intent to defraud creditors. And in the present case, the inevitable result of the transfer of shares was to defeat or delay any attempt to execute the judgment. The case falls squarely within the line of authorities in *Freeman v Pope*." And reference there made to the judgment of Lord Hatherley so in my submission that is a direct application of the presumption, although nothing's said about whether it's rebuttable or irrebuttable.

And the other decision, also out of Australia is *P T Garuda Indonesia v Grellman* which is at tab 15. And the reference is made on p 524 commencing, "We refer to *Freeman v Pope*." And then reference to *Noakes v Harvy Holmes* and the judgment in that part of it that I've just referred to. And the next passage beginning, "This passage was applied by Fisher J as indicative of the correct interpretation of s 121 of the 1966 bankruptcy statute."

Blanchard J I see there's a reference to an article by a man or a woman called Langstaff. Have we got that.

McCartney No. I'm sorry I can't see where that reference is.

Blanchard J Top of page 525.

McCartney Oh, "The Cheat's Charter".

Blanchard J Mm.

McCartney Yes I do have a copy of it. I think it's a gentleman, Langstaff. And I can certainly provide that.

Blanchard J Does it say anything about whether the presumption's rebuttable or irrebuttable.

McCartney My memory is no. My learned friend will have a look at it Your Honour and see whether it does. It's directed more to I think other considerations in relation to the application of the rule.

So Your Honours I come to, in relation to that part of the argument, that in my submission it remains good law.

Oh, I didn't go on and say other contemporary authority in England, *Lloyds Bank v Marcan* itself which makes reference, *although Freeman v Pope* wasn't relied on. And the recent judgment of the English Court of Appeal of *Giles v Rhind*, which is in the authorities, referred to the Australian cases and referred or do refer to Your Honour Justice Blanchard's mention of *McKay v Douglas* in *Johnson v Felton* although I acknowledge that *Freeman v Pope*.

Blanchard J We weren't thinking about this situation.

McCartney No. So in my submission retaining the presumption gives consistency with the English and Australian jurisdictions in circumstances of insolvency and voluntary transactions. And as I have said, the Court of Appeal I submit in error relied on cases that didn't involve those limited circumstances and failed to refer to those cases that did.

Now before I leave this aspect, the respondents rely on the passage in *Swann* in which Justice Gault, referring to *Smith and Hogan* said, constructive intentions are to be abhorred and *Swann* is at tab 21 of the first bundle of authorities. And the passage is at p 153 line 20 where His Honour, referring to *R v Cooke*, refers to *Smith and Hogan on Criminal Law* and the passage commences: "Constructive intentions are to be abhorred; but presumably the House in *Cooke* thought that a jury would properly find that the defendants must have known that their conduct would, inevitably, cause loss to British Rail. If so, it was right to hold that they *intended* to defraud BR and it should be immaterial that this was not

their purpose. The true purpose of conspirators is almost always to make a gain for themselves, not to cause loss to another. Conspirators act out of greed, not spite. Since they know they can make a gain only by causing a loss, they intend to cause that loss. Of course, the intention must be proved."

Now the respondents rely on that as showing that the New Zealand courts require an intention to be proven and cannot be established by presumption. But in my submission that passage from the judgment of Justice Cooke has been taken out of context because *Swann v Secureland* involve fraud in a number of ways. Section 60 was one but also in common law and in equity. And the real issue of that case was the distinguishing of motive on the one part and intent on the other. And that.

Tipping J Not at all clear what Justice Gault was referring to in this passage I didn't think.

McCartney No.

Tipping J The most immediately recent reference was to s 60 but with great respect I don't think what is said here can really be reconciled at all with the authorities on s 60.

McCartney Well with respect Your Honour I agree. And in this regard, as I say, it's a judgment that covers a whole raft of fraudulent, fraud in a whole raft of different situations and the learned Judge didn't show that in this regard he was referring to s 60 and if he was, with respect, he may have meant normally it should be proved but the word normally is not there.

Tipping J To analogise from the criminal law to the authorities on s 60 is with great respect a very difficult step.

McCartney It is because *Smith and Hogan* is of course a criminal text and you wouldn't expect intent to defraud to be the subject of presumption in the criminal law. But in the civil context I submit it's quite different. You've got equal private citizens.

Tipping J The purpose of the Statute of Elizabeth and the criminal law are entirely different.

McCartney I agree with respect.

Blanchard J I think probably we're being a little unfair on Justice Gault. In the context in which this case he was deciding fell, it's perhaps not out of place. I think that that passage is helpful in a way because it demonstrates the difference between purpose and intention.

McCartney With respect it does and I submit that's the purpose of that particular.

Tipping J But there is a very, with respect, I think potentially tricky sentence at the previous page, 152.

Blanchard J I'm sorry, I'm only focusing on that particular part.

Tipping J Oh right, I was looking wider. At line 45, 152 His Honour says: "In cases under s 60 intent to defraud must be actual intent." Now that's true in a sense but the proof of actual intent does not exclude proof by presumption. You're deemed to have this actual intent if you like. The word actual in that context is I think, I'll see what Mr Wilson says about this, but frankly potentially misunderstood.

McCartney I, with respect, agree and I'm not at all comfortable with qualifying intent by words such as "actual" or qualifying dishonesty with words such as "real dishonesty" or "actual dishonesty". Dishonesty is dishonesty and intent is intent. And it needs to be interpreted in the context of the section. There's a second sentence on p 152 line 45 which follows. "It's not sufficient that the consequence of defeating creditors should have been recognised as likely to flow from the particular alienation." And I'd just submit in relation to that, well when the consequence is inevitable it puts it in a different ballpark or category. And that's from *Freeman v Pope*.

Tipping J When the risk is inevitable.

McCartney When the risk is inevitable. Because that is the consequence that in s 60 I submit that we're looking at. And in those circumstances the presumption I submit is available and Regal was entitled to the benefit of it.

Now there are just two more points on this part of the argument and that is that the President, Justice Young, referred to awkwardness, possible awkwardness in relation to s 60 subs (3) the protection of the innocent purchaser. And he also referred to awkwardness with indefeasibility provisions. With respect I submit there's no awkwardness with s 60 subs (3) because the intent's established under s 61 and the innocent purchaser still has the benefit of s 60 subs (3) if it applies.

In relation to the indefeasibility provisions we've already discussed them and they will be developed but in my submission s 60 is a separate statutory authority and the awkwardness that Justice Young refers to just doesn't in my submission come up.

Now may I turn to the issue of insolvency because it's convenient I submit to deal with it while we're dealing with the presumption in *Freeman v Pope.* And my written submissions in this regard are at paragraphs 117.

Elias CJ Justice Tipping indicates to me, although I haven't discussed it with those on the wing that it may not be necessary for you to enlarge upon this section of your submissions at any great length. Is that.

Tipping J I would leave it to Ms McCartney's reply and see how Mr Wilson gets on on this topic frankly.

McCartney Alright, thank you Your Honour. I'll then come onto, in the written submissions paragraph 126, the alienation was voluntary. Now I start at paragraph 126 with reference to *Re Hale*. And the observation or position of Justice Richmond where he says: "My present view is that in the context of s 60 subs (1) the word alienation should be given a wide enough meaning to cover a transaction by a debtor such as a mortgage or charge, whereby he effectively parts with a degree of control over an assets and to that extent puts the asset out of the reach of the general body of creditors."

And in this regard Regal says that looking at the alienation, the arrangement which was adopted by the Lightbodys involved the combination of four separate agreements or transactions, the first of which was the agreement to put the home and the shares in Capro into trust. The second was the transfer which was registered on the title. The third was the debt back and the debt back is in the bundle of documents and it's relevant I submit on the issue of whether.

Tipping J Could I just interpose here before you develop the detail of this.

McCartney Yes.

Tipping J You seem to have equated in your para 130 the concepts of alienation and transaction. I would have some difficulty in seeing the alienation as going beyond the disposing of the land. Because if the word had been transaction then you've got the capacity to bring in allied. But how can a gift back be an alienation.

Wilson J Just on that point, looking at your notice of application at page 13 of the case, it seems to attack only the agreement for sale and purchase, really reflecting the point that Justice Tipping puts to you.

McCartney The application is at page 12. Oh page 13 thank you. Is Your Honour looking at item 1, the order that's sought. In order that the agreement for sale and purchase and, right at the bottom, together with the associated transfer be set aside.

Tipping J Wouldn't you be better to argue, with great respect, that the consideration was nominal in the circumstances and always intended to be nominal.

McCartney Yes.

Tipping J So that it was a voluntary alienation if you like rather than, I would feel more comfortable with the proposition that it was an alienation but a voluntary one rather than not an alienation at all.

McCartney Oh well, if I've given that impression in the submissions I didn't mean to. It is an alienation but a voluntary alienation. I apologise Your Honour.

Tipping J I thought you were attacking it as not being an alienation.

McCartney No, it's an alienation. It's a disposal, it's a taking of property and putting it out of the reach of the creditor.

Tipping J Right.

McCartney And the way in which that happened was by the combination of the selling, the transfer, the debt back, the reduction of debt as at November 1998 and the taking on of that debt forgiveness programme which the evidence says was intended to be adhered to and seen through and in fact was within four and a bit years. So I agree there is an alienation. And I submit it's voluntary. And the reason why I submit it's voluntary is two reasons. The first is that we look at whether an alienation is voluntary from the point of view here of s 60. And what is relevant is what is given in substitution. Because that's how you protect a creditor, by giving an asset in substitution against which he or she can look for payment of the debt or for execution of the judgment. And in this regard what was given in substitution was a debt back immediately reduced by $54,000 which is 23% of the overall value, and forgiveness of debt programme which, as I say, was intended and expected to be adhered to, with the result that there was nothing left at all within four years.

So if we look to see what was given in substitution the answer is, after four years, nothing; immediately a reduced amount. And the evidence.

Elias CJ But looking at it from the time of the transaction, apart from the 54,000 which happened immediately, the gift programme may not have eventuated so can you show us any authority where there has been at least a nominal exchange of value as here, and it's been held that the initial transfer or alienation was voidable because eventually no consideration was given.

McCartney Well *Kerr* deals with but under the heading of the bona fides of the purchaser. But I submit that it could as relevantly be dealt with here in relation to the lack of consideration for the conveyance. The reference in *Kerr* is at page 348, the tab number is 7. As I say it's dealt with in terms of protection of purchasers for value but in fact the issue is whether the consideration given qualifies. And on page 348 reference is made to the judgment of *French v French*, a case in which a man made over his business stock in trade and fixtures in consideration of a sum of money and an annuity to be paid to himself during the joint lives of himself and the purchaser and afterwards a small annuity to his wife in case she survived him during the joint lives of herself and the purchaser with power to dispose of the wife's annuity. "On the vendor's debt", this is at the bottom, "the wife's annuity was impeached by the creditors. Lord Cranworth said that the annuity to the widow clearly formed a portion of the consideration which the vendor instead of keeping himself for the benefit of the creditors chose to keep for the benefit of the wife. And the sale was valid." This is at the top of page 349. "But the consideration which was paid must be taken to have been voluntarily settled by the debtor on his wife".

Elias CJ But this seems to be an authority for saying that it's the various forgivenesses of debt that you should have been attacking. Because it wasn't the settlement that was set aside, it was the, I might be misreading this as I skim through it, but.

McCartney In order to achieve the outcome or the relief that Regal required, Regal had to get rid of or have set aside the sale and purchaser agreement and the transfer. That's why the application seeks that order.

Elias CJ Why couldn't you have attacked the various forgivenesses of debt.

McCartney Regal could have but it didn't need to. If the property comes back into the names of Mr and Mrs Lightbody, then Regal or the Official Assignee has access to the property. It didn't need to attack the forgivenesses of debt.

Elias CJ Well they're the operative harm and after all different intents may need to be considered at each stage. And they might not have eventuated, if you're looking at it prospectively.

McCartney Well the.

Blanchard J In other words, if you don't succeed on this you may have to bring another application.

McCartney Or the Official Assignee may have to bring the next application. But in my submission Your Honours it wasn't necessary to go to each

forgiveness of debt given that the relief that was sought, which is what's been sought at p 13, was simply to get the house back into the name of the Lightbodys so that the creditor could have access to the asset that he was relying upon.

But that's different. The relief sought and applied for is quite different from the allegation as to what the alienation is. And the alienation by which the property was taken away from the creditor involved that combination of elements.

Elias CJ But if it had, if it had been, because we have to look at the matter in terms of principles of general application, if it had been an alienation with an intention that the debt be forgiven, normally it would be accepted that there is an exchange of values there and that the transaction is not a voluntary one, and if at the time of that alienation of property the transferor had been solvent but because insolvent before some forgivenesses of the debt, you'd have to attack the forgivenesses of debt. I mean don't you have to say that this alienation of land was a sham.

McCartney Well with respect no. No, because as Lord Justice Russell I think it is says in *Lloyds v Marcan*, what the debtor has done he's entitled to do. Otherwise you wouldn't bringing your application under s 60. He's entitled to transfer his property in the way in which he did. He's entitled to adopt a debt forgiveness programme but what he's not entitled to do is to do it in circumstances where he puts Regal at risk and where he's acting dishonestly. So the documentation or the transactions themselves are not sham transactions, but they involve an arrangement in combination which under s 60 he wasn't entitled to undertake. So I don't agree that it needs to be shown to be a sham and I don't agree with the application of *Mills v Dowdall* which my learned friend will be relying upon.

Tipping J I suppose it may be of some comfort to you that even if this point is valid, and this wasn't strictly a voluntary alienation, all that does is remove from you your ability to rely on Freeman v Pope.

Elias CJ Mm.

Tipping J You're still afloat if you like.

Elias CJ That's right, yes.

McCartney That is correct. Because it is an undervalue which is a consideration to be taken into account.

Tipping J Well it will be the question of the intent, the intent.

McCartney Yes.

Tipping J And you could readily infer in the light of what they intended to do in the future the present intent was to defeat creditors.

Elias CJ But when do you ascertain and in respect of what alienation. Because I'm still not persuaded that the operative alienations weren't the various forgivenesses of debt.

Wilson J Just on that point Ms McCartney, in fairness I should point out there is an amended application that appears from page 20 and I assume that's the application that you went to a hearing on.

McCartney Yes, I'm sorry, thank you Your Honour.

Wilson J Can I ask you where in that amended application if anywhere do we see an allegation of the combination of elements as you put it.

McCartney Well Your Honour doesn't see it expressly.

Wilson J Yet we see it implicitly.

McCartney But implicitly by virtue of the fact that the allegation is made that by the transfer into the names of the trustees and removal of the property to trust there was nothing left for Regal and that's at pages 23 paragraphs 13, 14 and 15. And down 16, 17, 18 and 19 and 21, "The simple consequence of the transfer would be that the debt to Regal may be able to be avoided. The effect of the agreement would be to preclude successful execution of the debt and subsequent judgment." And then reference to not at arms length, not bona fide and that Mr Lightbody retains control over the property. But it's the first two 21.1 and 21.2.

Blanchard J Well it's not the consequence of the transfer that the debt may be able to be avoided, it's the consequence of the transfer plus the gifts.

McCartney Well.

Blanchard J Because otherwise Mr and Mrs Lightbody are still owed a substantial sum of money by the trustees.

McCartney Well it could have been expressed more concisely Your Honour, but in my submission that was what Regal was directing it's attention to.

Blanchard J Can I ask you about a paragraph in your submissions which has puzzled me. Paragraph 132. Could you explain that.

McCartney Well, in that regard yes. In the unlikely event that one of the trustees had died before completing the gifting programme the other trustees, it was a power under the trust deed Your Honour to appoint other trustees and that power was in Mr and Mrs Lightbody.

Blanchard J But what power did the trustees have to ensure that the debt forgiveness programme was seen through.

Tipping J They were the donees.

McCartney Oh okay. Yes thank you Your Honour, of course.

Blanchard J Because if that was right that's a complete answer.

McCartney Yes, no, you're correct of course. You're correct, yes. But so it was Mr and Mrs Lightbody. But can I just refer on the question in my submission.

Blanchard J Well, this is the Chief Justice's point. If Mr and Mrs Lightbody had died in a car accident shall we say, the trustees of their estates might well have said, well we can't complete the gifting programme.

McCartney Well they might have but they didn't.

Blanchard J Well they'd be a bit unlikely to I thought, I imagined you'd say, because they might then be making voidable alienations.

Tipping J But if at the time.

McCartney Well possibly but, I'm sorry.

Tipping J No you carry on, unless I've distracted you, I'm sorry.

McCartney Can I just say in relation to this gifting programme, Mr Horrocks gave very clear evidence as to what it was that was intended and this is in volume 3 on the cross-examination at page 312, commencing at line about 11. "Now the effect of those forgivenesses was to reduce the sale price by 54,000 wasn't it." And he says, "It doesn't reduce the sale price, it reduces the level of the debt back". And the question, "Reduces the assets received as consideration for the sale." "Yes if you mean the debt back, exactly, which I might add is quite normal procedure when husbands and wives set up a trust." "The effect of it was the debt back was reduced from $231,000 to $177,000", this is initially, "and on my calculation that's a reduction of 23.47% of the asset in substitution?" He said, "So it's a reduction of $54,000 which is a normal combined gifting amount annually duty free for husband and wife."

Tipping J It's been the same amount for donkeys' years hasn't it.

McCartney It has, it has. "And the debt back continued to be reduced on annual basis at the level of 54,000 until it was repaid?" "I think that's correct." And I said, "If you turn to page 364 what happened by 18 December 2002?" He said, "Yes." "So from the point of view of any creditors the consideration available as at that date of the transfer of $231,0000 was rapidly dissipated, disappeared altogether within 4 years?" And he said, "Well, that's exactly what you would expect with normal gifting programme on it's anniversary, that's exactly what is supposed to happen."

McGrath J Ms McCartney, if you go back to *Kerr* at p 349, perhaps the second paragraph, the paragraph following the one you were reading.

McCartney Yes.

McGrath J There is some indication that *Kerr* suggesting you look at this question of consideration in the round doesn't he, and looking at it in a reasonably broad way. Because consideration can be given in a form that will defeat creditors.

McCartney Yes with respect thank you Your Honour. And having regard, as is set out in that paragraph, to the value and tangibility.

McGrath J Yes.

McCartney Of that substituted in it's place. And in this regard may I point out that the debt back which is in volume 4 at page 193, termed a term loan contract, on the issue of defeating the creditor, the principal sum shall be repaid on the 12th day of November 2005. In other words, I think that's 7 years, 7 years from the date.

Elias CJ Ms McCartney, just because I regard this as probably the key issue in the case, and I'm bothered about different results according to the view that might be taken. I might be quite astray on this so correct me, but is it the case that if a transaction is voidable as against creditors, it's avoided to the benefit of the creditors at the time of the transaction.

McCartney To the body of creditors is my understanding. Yes, the future creditors who come in can benefit. In this case, because Mr Lightbody is insolvent the situation is one in which the property vests in the Official Assignee for the benefit of all creditors.

Elias CJ I see so there wouldn't be a dissonance according to whether a view was taken that it's the alienation of the land that is the operative voidable transaction or the forgivenesses of debt.

McCartney Well I may have missed with respect the.

Blanchard J It would still vest in the Official Assignee.

Elias CJ Yes.

McCartney The whole of it's vests in the Official Assignee. If the order is made in accordance with the relief that's been sought the land goes back to Mr and Mrs Lightbody's beneficial owners.

Elias CJ But he doesn't hold it simply for creditors at the time of the avoided transaction.

McCartney No, no.

Tipping J No.

Elias CJ Okay.

Tipping J It's past, present and future creditors can take advantage of the section.

McCartney Whoever's put their hand up in the insolvency can take advantage of Regal having brought these proceedings if the order's made, yes thank you. Yes and my learned friend Mr Caro has just pointed out *Kerr* deals with this at p 317 under the heading "When set aside all creditors let in".

Elias CJ Thank you.

McCartney Which succinctly summarises it.

Elias CJ That's helpful.

Tipping J Just before we move on from this point Ms McCartney, I wonder how the concept of intent fits into this. Even though the alienation of the property might strictly be regarded as taking place pursuant to the gifts, at the time when the land was alienated the intent of the alienors was, as a matter of demonstrable inference, that that should ultimately take place for no consideration so that I would have thought strongly supports the view that at that time and in that transaction it can be said that they had the intent to defraud creditors.

McCartney Yes with respect I agree. Section 60 talks of alienating with intent to defraud so the relevant date is the date of transaction and the evidence in this case I submit shows beyond any argument that that was the intent of Mr and Mrs Lightbody at the date.

Tipping J Their intent at the time was effectively to withdraw that asset or its equivalent from the body of creditors.

McCartney Entirely. Yes.

Tipping J They can't, subject to what Mr Wilson's going to say, I would have thought that was a very strong inference.

McCartney Yes.

Tipping J Even without *Freeman v Pope*.

McCartney Yes, with respect I agree.

So Your Honours that brings me to paragraphs 81 to 113 of the submissions, namely if *Freeman v Pope* doesn't apply, what did Regal have to prove to establish intent to defraud. And in all the research and reading I've done for the purposes of this appeal, the only case that I have found in which a judge identifies with precision the state of mind required is the judgment of the President Justice Young where he says what is required is knowledge that in acting in the way in which the debtor is it's putting the creditor at risk. And in my submission that is the answer. But I start at para [81]. Oh, before I just move there, because until you identify the state of mind, the intent, in my submission it's impossible to move on to the next question of whether the intent was dishonest. You have to know first what it is that you're looking for.

And at para [81] I commence with reference to s 60 to submitting that the meaning depends on the language of the section. The overall statutory scheme and the principles and policies which have been shown by the authorities to apply in this area of the law.

And at para [82] the purpose of the section which is protection of creditors.

And then I move to the words used in s 60, this is para [84], and the final word of subs 61 which is prejudiced. And that word follows from the original wording of the Elizabethan Statute which referred to transfers of property including to delay, to hinder or to defraud creditors. And in my submission that word prejudiced, together with the original wording of the Elizabethan Statute, shows that what is indicated here is a wide meaning of defraud. And it is not limited to cheated or swindled or exposed to inevitable risk but extends to and is intended to include exposure to risk.

So coming back to the statutory provision itself, which is in the bundle under the first tab, in subs (1). Every alienation of property with intent to

defraud creditors. So in my submission to establish and prove that Regal is entitled to the benefit of s 60, what's required first is addressing the issue of the intent or the state of mind, and second, characterisation of that state of mind as fraudulent. And that characterisation takes place at the time of the alienation.

Tipping J As fraudulent for present purposes.

McCartney For present purposes in the relationship.

Tipping J I think we've got to disjoin the word fraud here or the concepts of defraud from anything approaching common law deceit.

McCartney I agree with respect Your Honour.

Elias CJ It's with intent to defeat creditors.

Tipping J Mm.

McCartney Or even, going back to the Statute of Elizabeth, to hinder or to delay. But it is, I'm happy with the words intent to defeat creditors Your Honour.

Tipping J Well one could perhaps prefer it with the idea of with intent to prejudice creditors.

McCartney Yes, well.

Tipping J Because that's really a comprehensive word which is conveniently, as you say, picked up by the verb I prejudiced.

McCartney And that is the way in which it was dealt with in *Re Hale* by the Court of Appeal which is tab 8, where Justice Richmond on page 508.

Tipping J Which tab is this.

McCartney Tab 8.

Tipping J I think it was I who provoked this report to be reported wasn't it.

McCartney I think so, yes.

Tipping J I said that it was curious that it hadn't because I thought it was a very valuable discussion.

McCartney Yes. And at page 508 line just above 40 beginning with the paragraph numbered [2], Justice Richmond said, "It's not necessary for the purposes

of the present case to attempt any precise definition of intent to defraud. If there is an intention to prejudice creditors by putting an asset wholly or partly beyond their reach then that will be an intent to defraud creditors provided that in the circumstances the debtor is acting in a fashion which is not honest in the context of the relationship of debtor and creditor." And that, as Justice Richmond said, is taken from the judgment of Lord Justice Russell in *Lloyds Bank v Marcan*.

And in my submission and just before we break Your Honours, may I say that what I submit can be taken from Justice Richmond's judgment is first, the requisite state of mind is the intention to prejudice creditors by putting an asset wholly or partly beyond their reach. And second, the state of mind will be characterised as dishonest or fraudulent if the surrounding circumstances are such to show that the debtor is acting in a fashion which is not honest in the context of the relationship of debtor and creditor.

Now Your Honour is that a convenient time.

Elias CJ We'll take the adjournment thank you Ms McCartney.

Court adjourns 11.30 am
Court resumes 11.48 am

Elias CJ Yes thank you.

McCartney May it please Your Honours, we found *The Cheat's Charter?* and a copy of it has been passed up to Your Honours.

Elias CJ Thank you.

McCartney In our consideration of it we don't see anything that directly responds to the query by His Honour Justice Blanchard.

Tipping J Just before you move on Ms McCartney. Could you just help me by giving me the reference to that passage from Justice Richmond in *Hale* about prejudicing creditors.

McCartney Yes.

Tipping J Because I haven't sadly managed to note it.

McCartney The tab number is 8.

Tipping J And it's at 508 my brother says.

McCartney And it's 508, yes thank you.

Tipping J Thank you.

McCartney So moving from that passage, and to the judgment of the President Justice Young in the Court of Appeal at para [99], sorry [98] and [99]. At para [98] Justice Young says, "I would treat this with reference to *Lloyds Bank v Marcan*", which, as I've said, is the way in which Justice Richmond dealt with the matter in *Re Hale.* "I would treat this as encompassing actions by which a debtor, to recast Lord Justice Russell's words, disposes of an asset which would be available to his creditors with knowledge that this will prejudice them by putting it or its worth beyond their reach."

And at para [99], "On my approach, knowledge of a consequence is equated with an intention to bring it about. I do not see this as controversial or novel," and with respect I submit it is not and although I probably shouldn't be referring back to the criminal text of *Smith v Hogan* I do note that in the judgment in *Swann* both Justices Hardie Boys and Gault in the course of that judgment said, "Conspirators act out of greed, not spite. Since they know they can make a gain only by causing a loss, they intend to cause that loss." And authority if it's needed for the proposition at para [99] of the Court of Appeal's judgment is I submit found there in *Swann* and from *Smith v Hogan.*

So in the context of s 60, I submit the requisite state of mind is knowledge on the part of the debtor who disposes of an asset otherwise available to his creditors that his actions will prejudice the creditor. The prejudice is the exposure to risk and with reference to the judgment of the High Court, Justice Ellen France, there are findings made there that the Lightbodys were aware that one of the effects of their trust arrangement was to protect assets and the references are paras [57] and [75] of the judgment. Those findings were supported I submit by ample evidence and just by way of one example, Mr Lightbody recognising the asset protection benefit of the trust at volume 3 page 277 lines 10 to 15.

Elias CJ I'm sorry what are you referring to.

McCartney Just the evidence of the Lightbodys themselves in which they recognise the protection that the trust was going to give them, the asset protection, protection from their creditors.

Blanchard J What was their explanation for setting up the trust.

McCartney Their explanation was that they wanted to protect it for their children.

Blanchard J Against whom.

McCartney That was the question I asked Mrs Lightbody and she wasn't able to respond. My question Your Honour is at page 328 volume 3 line 34. Well it starts at line 24. And although the reference is in August 2000, the question is, you would lose the house if Regal called up the debt. She said Regal didn't call up the debt. But if it had you would have lost the house. She said, "I can't answer that question, I wouldn't know." I asked her about other assets of significance and she refers to a boat and the Nissan Safari and to four children.

Blanchard J How old were the children.

McCartney They ranged in age, there was a little who was sort of 14 months but then it went up to I think about 20-ish. The three first children were, Mr Wilson will be able to help I'm sure, but about 15 to 17 old I think and then there was a little one.

Blanchard J Protection for the children.

McCartney "And your intent was to protect the house?" "It was protection for the children." I said, "I'm not saying for whom, I'm asking the intent was to protect the house?" She said, "For the children" and I said, "Also for you and Glen Lightbody wasn't it?" "We were trustees."

Tipping J Well you wouldn't need much imagination in the context to extrapolate from what they were trying to protect their children, if indeed that was their principal motive.

Blanchard J Ah, it's at page 330, line 30. "The home was put into trust so it would not be sold underneath the children if they lost both parents at once. It was for stability."

McCartney Yes and further down at line 20, or line 24. "What else was the home being protected from?" I'm sorry, that's not right either. But yes, the answer was protection for the children. And Your Honours I submit that protection of the home for the children is not inconsistent at all with protection of the home from Regal. Because Regal was the only party who could come in and take the home away. So in putting it to trust and protecting it for the children what they were doing was protecting it against Regal in my submission.

So coming back to the requisite state of mind as I have submitted, it involves knowledge of exposing the creditor to risk and the prejudice is the exposure to risk, and as I've said, Justice Ellen France made those findings. As submitted above, s 60 is not confined to actions on the part of the debtor which have the inevitable consequence of risk. It is sufficient to show that the debtor assumed the risk to the creditor. And for the purposes

of establishing state of mind it's enough for Regal to show that Glen Lightbody knowingly put the risk on Regal that Capro would not be able to trade out of difficulty. And he made away with the assets knowing that his actions put Regal in a position where it's certain liabilities could only be met from Capro's uncertain future earnings.

The point made in *Swann* and which applies here is that Regal does not have to prove a motive of harm. That is Regal does not have to show that when the Lightbodys made off with their assets they wanted to cause harm to Regal. Regal has to show only that they knew when they transferred the property to trust that they were putting the risk on Regal. And this is the difference between motive and intent. On the one hand motive involves what you want to happen and intent is what you know will follow. And in this case, as I say, Regal had to show Glen Lightbody knew he put the risk on Regal.

Probably what the Lightbodys wanted to happen as I've said they were going to soldier on in their business. They would reduce their indebtedness to Regal and their home would be protected. But they knew that if that didn't work out, and against their hopes all did not go well, then by adopting the contingency creditor protection they intended and knew Regal was exposed to the risk of business failure.

And Your Honours as I have submitted, the main criticism or a main criticism Regal makes of the judgments in the High Court and the Court of Appeal is the failure to identify that requisite state of mind and identify it as knowledge of exposure to risk. And I submit that reference to the authorities that are considered and discussed by the majority when they're dealing with the test at it seems to me and I submit it is apparent that the majority were influenced by discussions in *Swann* and by discussions in *Cannane* in which the High Court of Australia or the majority came back to make reference to another case of the High Court of Australia, *Hardie v Hanson* which is the case that says intent to defeat creditors involves a consciously pursued plan of swindling or cheating creditors. I should mention *Hardie v Hanson* is in a company context and not in the s 60 or the Australian equivalent context.

And in this regard in relation to the majority's judgment, and in my submission the majority was putting the test or the bar too high, I come back to paragraphs [56] and [57] of that judgment in which, rather than identifying the state of mind required, the Court in the previous paragraph [55] say it's a matter of determining intent from circumstances of the particular case. And at [56] this is the only example that the majority give of where s 60 would apply. And they give the example that's at para [56] at the top of page 43 in the first volume. They say, "For example in a case where a creditor claims against a person who immediately transfers all of

his or her assets to a family member for no consideration, the Court is unlikely to have any difficulty in drawing the necessary inference because the inevitable consequent of the transfer is that the creditor's claim would be defeated." And reference is made to the *Freeman v Pope* line of authorities.

And then at para [57] the last sentence, with reference to the example above, "Intention is to be assessed at the time of the transfer so that in terms of the example given in para [56] above the inevitability of loss to the creditor must be apparent at that time."

And at [58] the majority say, "In cases where it cannot be said that the loss to creditors was an inevitable consequent of the alienation, courts will draw inferences of intention to defraud if all the circumstances justify doing so."

But in my submission when one looks at those three paragraphs, what the majority were looking for was something much higher than simple exposure to risk. And pretty much looking for inevitability of loss although I have to concede para [58] is a little bit of watering down. "Although we don't know what will suffice other than inevitability of loss."

But then in terms of the considerations that the majority then look at from paras [63] of the judgment onwards, in my submission it's apparent from those considerations that the test was put too high. The majority start at para [62] where they say, "We will consider Ms McCartney's principal argument, namely that the transfer to the trust was voluntary and that Glen Lightbody was insolvent when it was made because he was not in a position to repay Capro's debts to the appellant had he been called upon to do so." The majority say, "If true this would be a powerful objective indicator of an intention to defraud."

But then with respect under the heading "Voluntary alienation by an insolvent debtor?" the majority deal with the voluntary alienation at paras [67] and [68] finding that because it was not certain that all the gifting programme would be completed, the transfer couldn't be said to be voluntary.

Tipping J I found the word necessarily very tricky in that context. Surely it either is or it isn't.

McCartney Well the first part of para [67] I submit shows that the Court of Appeal, the majority, were in fact open to the idea that the transfer was voluntary. And the only thing that stopped them saying it was seems to be that they accepted someone might have died. Now if I come back to Your Honour

Justice Tipping's point, and with respect adopt it, if the intention at the time of the transaction is the gifting programme will be seen through and will be completed, then that means the intention is that the alienation is voluntary. And that of course is the submission of Regal.

What the majority did hold was that the transaction was at an undervalue and there's no cross-appeal in relation to that finding.

On the issue of Glen Lightbody's financial position, at para [70] of the judgment, the majority refer to his financial position and say the relevant debt to Regal is the overdue portion of the current account of approximately 64,900 as well as any indebtedness that Glen Lightbody may have. And as the Court would have heard me submit, the majority then failed to take into account the other indebtedness which was the significant indebtedness to the bank of $148,000. By taking that into account of course Glen Lightbody was in my submission very clearly insolvent and it's a major error in my submission that his net position was not looked at by either the High Court or by the Court of Appeal.

Blanchard J The bank had a charge over the property.

McCartney First mortgage. So in that regard Your Honour the value of the home less the mortgage, I can't remember what it comes to but it's 230 less 148 and then a half share of that belonged to Mr Lightbody. And from that he owed the 65,000.

Tipping J What relevance has the sentence, "Lenders are often more interested in a debtor's future earning potential than in a debtor's underlying assets" to the question of what the intention was of the borrower?

McCartney Well with respect I agree Your Honour. Because what the High Court and Court of Appeal both in my submission did, they went on, rather than looking at the intent of the debtor at the date of alienation, they went to see what Mr Astley might have thought of Capro's ability to perform and what Mr Horrocks might have been told at the time he was asked to form the trust. And in my submission that last sentence has nothing whatever to do with the, I mean the debtor's intent could not possibly be judged by what Regal thought. That doesn't need to be developed.

The Court then looked at Capro's performance in 1998 and the point that I make is at para [73] where the Court said that Mr Astley of Regal considered Capro to be a viable business in the long term. Now in my submission there is absolutely no evidence at all to support that observation. The fact that Regal foolishly or whatever continued to support Capro doesn't mean that Mr Astley of Regal thought it was a viable business. And in fact his evidence as to what happened when he

stopped looking after Capro is highly relevant because as soon as he stopped supplying Capro and Capro went to one of the international suppliers, within months it fell over. And the evidence in that regard is the cross-examination of Mr Astley which is at page 258 to 259.

Tipping J This seemed to me, with great respect, to be something of an optimist's charter, this sort of approach that you know, if you can't pay your debts, it's alright to be optimistic that you may be able to pay them in the future. I'll just put Mr Wilson on notice if he's going to try and support that, I know of no authority for the idea that you can assess it. Either you're able to pay your debts at the time or you're not. The fact you may be able to optimistically get to pay them in the future I don't quite understand where that fits into the whole equation.

McCartney And Your Honours I've attached to the submissions the financial performance of Capro over the relevant time which is extrapolated from the documents that were before the High Court or the financial accounts. And it's apparent with reference to those attachments that Capro was either running at a loss or just managing to skim past a loss situation.

Now at para [77] onwards, this is really the crunch part of the majority's reasoning. And it's the gap between the alienation and Capro's liquidation which at para [79] the majority agree with Justice Ellen France that the length of time that passed before Capro went into liquidation tells against an intention to defraud and supports the view that the Lightbodys envisaged at the time of the transfer that Capro would continue in business in the long term.

The majority goes on to say, "If Mr Lightbody had been called upon to meet all of Capro's liabilities to the appellant at the time, he could not have done so." But the majority say, "It's also clear that all those involved envisaged that Capro would continue to meet its under the term loan in the current account to the appellant's satisfaction and so would continue in business as in fact it did."

Now in terms of an alienation with intent to defraud, as I have submitted a number of times, whether the Lightbodys had that intent is judged in November 1998.

Tipping J This is more like an inquiry into whether or not it was reasonable for them to continue trading.

McCartney Yes.

Tipping J Those sort of considerations are under the Companies Act and so on.

McCartney Yes. And then, and this is the way in which Justice Ellen France dealt with and the majority support her, in the last two lines, "As the Judge said at para [75], to hold that there was an intention to defraud despite the passage of four and a half years requires a degree of calculation and sophistication on the part of the Lightbodys that is difficult to believe they possessed."

Now with respect that is where it all is shown to have been an incorrect inquiry. It is not Regal's task to show that the Lightbodys in November 1998 moved their assets to trust with a view to then letting matters run on for four years and then reneging on their commitments to Regal. And that passage shows that Justice Ellen France and the majority in the Court of Appeal both thought that what Regal needed to show was a motive involving ultimate harm to Regal that was implemented over a period of four years and that is not what Regal had to prove at all.

There are some other short considerations, secrecy and reliance. And secrecy, the majority basically say that Mr Astley should have made better inquiry and did not find it dishonest in the relationship of debtor and creditor that at the time the asset was transferred it wasn't revealed to Mr Astley of Regal. In relation to Mr Horrocks' evidence, the majority say that Justice Ellen France was entitled to accept Mr Horrocks' evidence that he had to sell the Lightbodys the idea of the trust and that there was nothing wrong with accepting that evidence and that the judge was.

Blanchard J Why were they there seeing him.

McCartney They went to see him Your Honour and this is in the evidence in chief of all the witnesses. Glen Lightbody says it at Volume 2 page 108 paragraph 2. He says, I'm sorry, it's not there. Paragraph 12. It's page 110 of Volume 2 where it can be seen, got the suggestion from new accountants. Were referred by those accountants to Mr Horrocks, thereafter had several attendances resulting interest he execution of the documents. And at para 14, he gives evidence as to his primary reason for setting up the trust.

Mrs Lightbody's evidence is at volume 2 page 130, paragraph 2. It says the same thing, we became interested in forming a family trust which would own our home after we had a consultation with an accountant. We were put in touch with Mr Horrocks. And Mr Horrocks, at volume 2 page 133 paragraph 4, says, "I had met nor acted for the Lightbodys until I received instructions from them to form and act for the family trust. I recall the Lightbodys were referred to me by an accountant."

So they all say the same thing, they saw an accountant, the Lightbodys did, they were referred to Mr Horrocks who they didn't know, and he formed the trust for them.

But what happened, and this is a matter that Regal disagrees with very strongly, is that in the course of cross-examination of Mr Horrocks very early on, volume 3 page 297, line 35, I asked Mr Horrocks, "And at the time you saw them they had already decided to go ahead with a trust?" And right out of left field Mr Horrocks said, "No, as I recall it I very much had to sell them idea of trust." So on that basis, volume 3 page 297, on that basis the cross-examination continued on the basis, well if you are trying to sell them the trust you'd be telling them about protection from creditors wouldn't you. And Mr Horrocks moved quite significantly back from the idea of selling the trust on the basis of that cross-examination and on page 300 line 6 he was asked, "Was it you who had to sell the idea of transferring those assets or was that their instruction?" He said, "I had to sell them the idea of a trust in the general sense." And he gave some evidence of how decent Mr and Mrs Lightbody are. And then he went on, "I recall in particular that Mrs Lightbody" and the word he now uses is, "very hesitant about the idea and in my long experience of trusts that's not uncommon with the wife."

So the cross-examination continued through to 301 where at line 24 my question was, "You didn't answer my question. I asked you, given the Lightbodys were in trade, you were there for two hours discussing pros and cons of trust, Mrs Lightbody is reluctant, you would point to her a transfer to trust would protect Mr and Mrs Lightbody from creditors?" And Mr Horrocks said, "Correct again general sense. Creditors in general sense would have been addressed."

And at page 302 line 3 he was asked, "You say she was reluctant so you would ask her about her liability position?" And Mr Horrocks said, "No the word reluctant was yours, my word was hesitant." "So here she is hesitant and you're selling idea of trust to her. You know that she and her husband are in business so you let them know the transfer will give them protection from creditors don't you?" And the answer is, "Mrs Lightbodys hesitancy was more about not understanding what a trust is and what it all costs to get it going."

So Your Honours what I'm saying there is that Mr Horrocks having asserted he went along to sell them the trust, they weren't committed, ends up in my submission acknowledging that in fact all that happened was a little bit of hesitancy about what a trust is and what it costs to get going. But most unfortunately for Regal, Justice Ellen took Mr Horrocks's evidence of selling the trust as indicating that the Lightbodys had no commitment to the trust and he had to go and talk them into it and that his evidence, according to Justice Ellen France, went a very long way to resolving what the Lightbody's intent was. And in my submission on the

cross-examination that I've referred the Court to, that finding wasn't available to the High Court.

Tipping J Well it's only available if one mistakes intention from motive in this field.

McCartney And that also. Yes and I agree Your Honour. Were they there with the motive of setting up this trust in order to harm Regal by reneging on payments. But if they were there to set up the family trust, whether it's sold to them or not, with a view to removing their assets to it and knowing they were putting Regal at risk, that was sufficient. But as I say unfortunately it was taken from the point of view of Justice Ellen France largely conclusive of the fact that the Lightbodys didn't have, as Your Honour Justice Tipping says, a motive to harm.

Blanchard J Do I take it from this that in the interview with Mr Horrocks when the decision was made to go ahead, that there wasn't a discussion about the state of Capro and a mention of the debt which Mr Lightbody had.

McCartney That's the evidence of Mr Horrocks. A little more muted from the point of view of Mr and Mrs Lightbody but in terms of notice Your Honour, if I may deal with it then, I will take the Court to what Mr Horrocks said about what he asked. The finding in the High Court that the debt wasn't discussed precludes Regal from saying that the evidence of the witnesses wasn't correct in that regard.

Blanchard J Well if there's a finding in the High Court it wasn't discussed, presumably it wasn't mentioned to Mr Horrocks.

McCartney Yes. That was the evidence.

Blanchard J So Mr Lightbody's getting advice that a trust will protect against creditors and doesn't mention that he has creditors, in particular a creditor.

McCartney At the level of $430,000.00. No, that's what the evidence was.

Blanchard J Which makes you wonder about intent.

Tipping J Even in the sense of motive.

McCartney But whether it was mentioned or not, in my submission isn't relevant. It was there. The Lightbodys both knew it was there. They had no assets. Mr Lightbody was insolvent. Capro wasn't improving. They had to meet the balance of the term loan in two years' time and they had no assets to pay the balance of the term loan. And they had that crushing significance of having to find $4,000 every month in order to continue to make their term loan debt repayments. Now in my submission those are the relevant

considerations because they are *objective indicia* which established that the Lightbodys were well and truly aware at the time they set up the trust that they had, as I say, crushing debts and that in transferring the home to trust they knew in those circumstances they exposed Regal to risk and in my submission their action could not be described as anything other than dishonest at the time.

Tipping J Forgive this question but was the alienation to the trust coincident with it's establishment or very much close to.

McCartney I think exactly the same day.

Tipping J Same day. Thank you.

Blanchard J And the first deed of gift was the same day.

Tipping J Same day.

McCartney Same day.

Tipping J So the very day they set up the trust.

McCartney Set up the trust to transfer the home to it and adopted the debt forgiveness programme at the same time.

So if I may, having dealt with what Regal had to prove, just to summarise, it was that at the time in November 1998 the Lightbodys knew they exposed Regal to risk and that's the relevant state of mind. In terms of characterisation, characterising that state of mind as dishonest in my submission the obvious dishonesty was that the Lightbodys knew they'd never be able, they were unlikely to be able to repay the debt that they knew they had. They knew that Glen Lightbody was insolvent, they knew that neither of them had any other assets and they put Regal at the risk that their uncertain trade with Capro, which can be shown to be uncertain if not at a loss, was going to enable them to make the commitments that Glen Lightbody had taken on personally. And in my submission just quite clearly that's dishonest. And the President, Justice.

McGrath J Your argument really though isn't it that you don't have to show that they knew it was unlikely that they would repay the debt, that it is was sufficient that having every intention and if you like a belief that they could repay the debt, they exposed the creditor to risk in the event that they couldn't.

McCartney Well yes. But their intention needs to be judged against what it was that they were facing and that was apparent as at November 1998. And yes in

my submission that is all that's required and the President in the Court of Appeal said he has never known, in a situation such as this where a debtor is insolvent and the disposition is voluntary and the debtor knows of the risk to which the creditor's been exposed, that that transaction has been characterised as anything other than dishonest. And in my submission that applies in this case.

Tipping J That leads me to perhaps a slightly pedantic structural point. I've always understood that if you knowingly expose to risk in these circumstances, the law treats you as being dishonest. It's not a separate and additional inquiry as to whether that is dishonest. To do that is treated in law as amounting to an intent to defraud.

McCartney Well with respect I agree but it's a question probably of degree and in that regard one takes into account the, if you like, the extent of the insolvency, the extent of absence of other assets and the extent of the debt that they were facing.

Tipping J But if the intent is to prejudice creditors, putting it at the very simplest level, that in these circumstances of insolvency, of present inability to pay debts, is taken as being dishonest isn't it.

McCartney Well I agree. I agree, I don't think it's necessary to go further.

Tipping J It's not a separate and additional question as to whether that is dishonest.

McCartney Well if the test is addressed from the point of view of the state of mind, disposing of assets knowing it exposes to risk, and then the second step of was it dishonest, it could be dishonest just because you do it. But it's certainly dishonest when you know what the extent of the debt is.

Tipping J Yes but if you've got knowledge in there as part of your mental state, then I don't see how it could be other than dishonest for present purposes.

McCartney Well for present purposes I agree with respect.

Blanchard J I find it interesting in Mr Horrocks's evidence which I'm just reading now, he says at page 307, "In my experience if a person has a problem with creditors that's usually the first thing they ask you about. When people come to me about a trust and I've had it happen many times, it comes out fairly quickly if there's a problem like that and I inform them of the legal position and the lack of wisdom in attempting to venture down the path of forming a trust with specific intent of eluding creditors because in practice it simply doesn't work." Now the position here according to this evidence is that Mr Lightbody, having been told about the protection from creditors didn't mention any creditors. And Horrocks didn't ask the Lightbodys

about any unsecured creditors that they might have and didn't find out about this debt to Regal until about three years later.

McCartney He said 2001.

Blanchard J It's quite extraordinary.

McCartney It is quite extraordinary. At the top of that page 307 I asked Mr Horrocks, "Because you either elected to not raise the issue of creditors or you have forgotten what was said." And the answer was, "I definitely have not forgotten the general discussion at that initial conference in 1998." In other words he's giving clear evidence of what happened 6 years before. He said, "But it is not my practice to interrogate any prospective client who wants to form a trust in minute detail about their financial affairs." And the question, "I'm not talking about minute details, I'm talking about a matter to an ordinary person which would be overwhelming, a debt of $300,000, do you call that minute."

Blanchard J So we're having to take it then that Mr Lightbody just forgot about the debt but on the previous page there's evidence where you're putting it to Mr Horrocks that at the same time as he's dealing with Mr and Mrs Lightbody the accountant is reporting to them in respect of the 1998 trading and the accounts show the existence of debts.

McCartney Yes. And show a loss for the 1998 year. Yes Your Honour that's what the evidence was.

McGrath J Was there any evidence of a discussion between Gibson the accountant and Mr Horrocks.

McCartney No, no accountant was called to give evidence. Although they all said that the referral came from the accountant, the accountant wasn't called to give evidence.

Blanchard J Which accountant was it that referred them. There's a reference here to a Mr Vennell.

McCartney There was some confusion as to who in fact referred them. I think that Mr Vennell was acting for the company at the time and Mr Vennell was the accountant to whom Mr Horrocks made inquiry to get the value of the Capro shares. But the accountant apparently who referred them was someone by the name of Jeremy Gibson.

Blanchard J And who's he.

McCartney A new accountant who, I think the evidence suggested, he was running some sort of trust promotion seminar. Oh, I'm sorry, no here it is, it's on page 297.

Blanchard J Wilson.

McCartney Yes, Jeremy Wilson.

Tipping J Was there any submission made in the High Court or the Court of Appeal that the matters that my brother has just been covering with you lead of themselves to a fairly strong inference. Maybe it was all wrapped up in a general submission.

McCartney No there wasn't that discussion. It was just, the chronology from the point of view of Regal was overwhelming. Because you start off with this new accountant, Mr Jeremy Wilson.

Tipping J I don't mean the sequence, I mean what appears on the face of it to be a rather strange mismatch of information between the client and the solicitor or at least a strange lack of.

McCartney Recollection.

Tipping J Yes. Was any weight put on that in the submissions.

McCartney Yes.

Blanchard J Yes.

McCartney Because Regal found it unbelievable and submitted it as such that when you're referred to a trust accountant who you don't know previously to set up a trust and you put everything immediately in trust and adopt your forgiveness programme, that no-one mentions the reason why you're doing it is because you've got a debt to a creditor that you're trying to get protection from. And when Mr Horrocks said I had to sell the idea of the trust to the Lightbodys.

Tipping J I don't think you need, unless you wish.

McCartney No, no I don't.

Tipping J You've developed it enough for my purposes for the moment thank you.

McCartney So, unless in relation to that topic there's anything further, can I turn to the good faith defence under s 60 subs (3) which is paragraphs 157 to 161.

Elias CJ I think Ms McCartney we don't need to hear you enlarge upon those submissions unless there's anything in particular you want to bring to our attention.

McCartney No thank you. The only aspect that I'd like to bring to Your Honours' attention is in relation to notice and the minority, the dissenting judgment of Justice Kirby in *Cannane* which is at tab 14 of the first bundle and it's under the heading commencing at page 595, "Acting in good faith – applicable principles".

And in this case what had happened is that shares had been transferred by Mr Cannane or his company to his wife Mrs Cannane and to a son who was at the time about 20. And the issue was one of good faith on the part of the purchasers. And at p 597 Justice Kirby refers to the approach so-called "wilful blindness" and goes on to refer to a deliberate abstention from inquiry about the purpose and consequence of a transaction.

Blanchard J Do you need to get into that. Mr Lightbody's on both sides of this transaction.

McCartney Well I agree Your Honour.

Tipping J Isn't he in fact his co-trustee.

McCartney Yes.

Tipping J Just putting it in a very colloquial way.

McCartney Yes. And the basis of the, it's, I'm sorry, I couldn't resist referring to it because, I'm not going to go any further, but it's such a with respect very good judgment about Mrs Cannane, the wife and the way in which her intent is the intent of her husband because she acted on the basis of what he asked her to do and the same thing as Andrew Cannane who, the Court found at p 601, if he just does what his father bids him to do he can't say that he's got any other intent than his father. But I agree with respect with Your Honour Justice Blanchard, one doesn't have to go into it. It's apparent to me that Your Honour Justice Blanchard has read of what Mr Horrocks asked and didn't ask and the cross-examination goes on for some time.

Blanchard J Well I'm not suggesting that Mr Horrocks may not have been in good faith but if his co-trustee or co-trustees weren't in good faith then it would seem to me that that goes for all of them.

McCartney Yes, with respect I agree.

Blanchard J You can't be excused because you have a large number of people and one of them acts in good faith if their obligations are joined.

McCartney And in that regard the judgment that I passed up at the commencement of the appeal, the *Diemasters Pty Ltd* judgment dealing with persons who take as joint tenants and the doctrine of unities that requires unity of title and unity of interest so that one cannot take more than the other.

Blanchard J Is this dealing with this question of being infected by lack of good faith.

McCartney It does Your Honour. The part of the judgment that deals with it is as p 571 commencing at paragraph.

Blanchard J Sorry which page.

McCartney 579 and 580.

Blanchard J Yes there's a reference there to one being a party to fraud.

McCartney Yes.

Tipping J It's a bit like a partnership isn't it, if one partner behaves wrongly within the course of the business it infects all the others.

McCartney Yes.

Tipping J I mean that's a bit of a sort of long step, but conceptually it would have thought it's much the same. You have a unity if you like between them.

McCartney Mm. And the Partnership Act's referred to at the top of 580.

Elias CJ And in the case you couldn't forebear to mention, and I haven't been able to forebear to read, Justice Kirby says that relevantly the quality of the wife's actions was therefore imprinted with the intent of her husband.

McCartney Yes.

Blanchard J Where's that.

Elias CJ That's at p 600. But you need to start at page 599.

Tipping J Imprinted, yes.

Elias CJ Mm.

Tipping J The law could hardly be otherwise. If it was otherwise it would be very useful to have a tame trustee who simply sat around doing nothing.

Elias CJ A stupid trustee yes.

McCartney Yes, as the President said, a cheat's charter. And if I may just deal with indefeasibility to the extent that I haven't yet. I have passed up the, as I said, the Supreme Court decision in *Murtagh*. It's with the appellant's supplementary authorities.

Tipping J That's Justice Macarthur isn't it.

McCartney Yes.

Tipping J Where is it again.

McCartney It's the supplementary authorities that were passed up this morning.

Tipping J Oh don't worry about me, I recall vaguely. Oh it's the most obvious document in front of me, sorry.

McCartney It's page 899 of the judgment. At the top, "The next question is whether Mrs Duthie's title to the mortgage is indefeasible, the transfer to her having been registered under the Land Transfer Act 1952." And for the purposes of the argument the Judge was, "prepared to accept the contention that the evidence does not establish that Mrs Duthie herself was guilty of fraud."

And the Judge deals with this matter, which by the way is being dealt with in the context of relationship property or at that time matrimonial property and the provision in the Act to set aside a transaction in the event that it was to defeat creditors.

I come down to line 40 on p 899 where reference is made to s 63 of the Land Transfer Act and Justice Macarthur says, "That section provides that no action for possession or other action for the recovery of land shall lie or be sustained against the registered proprietor under the provisions of the Act for the estate of which he is so registered except in certain cases in which the only one that could apply here is the case of a person deprived any land by fraud. I agree that the petitioner does not come within these words because she has never had any interest, either at law or in equity, of which she has been deprived by fraud. But the answer to Mr Holland's argument is that s 63 precludes only the types of action specifically mentioned therein. The matter is dealt with in *Hutchen* on Land Transfer Act. There is a discussion on s 63. It is state that the words 'or other action for the recovery of land' refer to actions in the natures of ejectment;

and that 'the Act does not preclude actions against a registered proprietor for specific performance of contracts or for the execution of trusts subject to which he holds."

Blanchard J That's *in personam*.

McCartney Yes. The next paragraph, "The foregoing authorities clearly state that the rule as to indefeasibility is not an unqualified rule. None of those cases however bears a close resemblance to the present case. I think that a type of case closer to the present case would be the setting aside of a fraudulent conveyance under the Statute (1571) of Elizabeth or other similar statute." And then reference is made to *Kerr* dealing with the Australian Land Titles (Torrens) System. And the universal opinion there that the Torrens statutes do not prevent the operation of the Statute of 13 Elizabeth clause 5."

And then further down at line 35, His Honour says: "After careful consideration I have come to the conclusion in this case that Mrs Duthie's title to the mortgage is not indefeasible. I do not think that the rule as to indefeasibility of title referred to above applies to this case at all. The proceedings by the petitioner are not a claim for possession or recovery of land as envisaged by the provisions of the Land Transfer Act. They are proceedings brought under the authority of a separate statute. I do not think that s 63 or any other provision in the Land Transfer Act precludes or provides any bar to the proceedings.

Tipping J The separate statute there was the then Married Women's Property Act or Matrimonial.

McCartney Maybe Divorce and Matrimonial Causes Act.

Tipping J Causes Act.

McCartney I'll just have a look.

Tipping J Yes Divorce and Matrimonial Causes Act, section 34. He says it in the next.

McCartney Yes. And the statutory provision is set out on p 891 at the commencement of the judgment.

Tipping J So you cite this in support of your submission that although not expressly stated, s 60 overrides.

McCartney Yes.

Tipping J Indefeasibility.

McCartney Yes.

Elias CJ Because it's not inconsistent with policy of indefeasibility as expressed in the Land Transfer Act.

Blanchard J Well I would have to signal that I'm a bit suspicious of this authority because of it's time. It's before *Fraser v Walker* and in relation to what *Kerr* is saying, and one would have to look at the whole context, it's before the Australians decided that after *Fraser v Walker* the position was that a volunteer did get an indefeasible title. That seems to be the predominant opinion in Australia although the High Court has never ruled on it. So that I just flag my concerns about this as an authority.

McCartney Well then I'm going to go down the line of reasons why indefeasibility doesn't in my submission defeat Regal. If I can just say about s 60 before I move from it, in terms of the submission that it's separate statutory authority, what is relevant is s 63 makes it own separate provision for the innocent purchaser or for the purchaser who is registered on the title. Because if they've taken in good faith and without notice then the transaction is not set aside.

And then a number of other grounds on which indefeasibility in my submission doesn't apply. First of all *Dungey v McCallum* which didn't say the indefeasibility provisions preclude relief in the event that the subject of the disposition is land but rather simply reversed the onus of proving absence of good faith in notice and in my submission to the extent that Regal carries that onus, Regal has discharged it.

The next point is that the indefeasibility provisions are directed to fraud against a previous proprietor and fraud against the holder of unregistered interests, not fraud against a creditor of the alien. Also there's not in my submission a good fit.

The third reason is that in my submission fraud has been established because Mr and Mrs Lightbody did act with actual fraud and that Mr Horrocks in my submission was either wilfully blind in that he abstained from making the regular inquiries that a person in his position would make. And in this regard I just need to add that Mr Horrocks wore so many hats in these transactions. He was, as a trustee, one of the purchasers.

Tipping J Can I signal my anxiety about this Court holding for the first time on the papers that someone has been guilty of actual fraud for land transfer

purposes. Because you've got no finding below have you to that effect on a precautionary or other basis.

McCartney Well I've got no finding in favour of Regal at all.

Tipping J Well that obviously comprehends my question. But can we properly for the first time, wouldn't we have to send it back if we felt that that was you know, your only hope. I'm not saying that's my present view at all. But how can we make a finding of actual fraud.

McCartney Well can I say, rather than actual fraud, can I say actual dishonesty.

Tipping J Well no, sufficient to amount to land transfer fraud which we all know what that means, or some of us think we know what it means. How can you have a finding to that effect for the first time in your final court of appeal just on the papers. I'm not out of sympathy with what you're seeking to achieve in this respect because you want the whole thing concluded at once. But if you had to resort to that argument, and it may be a big if, you're going to have to persuade us aren't you that we can make such a finding on the papers on second appeal.

McCartney Well.

Elias CJ *Coleman v Myers* perhaps. Some of the judges were prepared to.

McCartney Well certainly.

Tipping J Well it was never pleaded, it was never pleaded that there was common law fraud for the purposes of the Land Transfer Act. Because it was never perceived presumably at that stage that you'd get anywhere near the point.

McCartney No.

Tipping J It just makes me slightly anxious. I just signal that, you may want to come back to it.

McCartney I think Your Honour can see that from Regal's point of view it's viewed differently. But if we can go to *Baden*.

Tipping J What I'm saying is I'm far from saying you'll need this point.

McCartney Alright.

Tipping J But if you do, I'm saying that I have some anxiety about us engaging upon such a finding.

Blanchard J Am I right in thinking that the Official Assignee under the old Insolvency Act, as I think is also the case under the new one, can override the Land Transfer Act.

McCartney Yes, s 58 of the Insolvency Act of 1967.

Wilson J Your submission at 163(a) addresses this.

McCartney Yes it does.

Blanchard J And there's no time bar on the Official Assignee entering the lists.

McCartney Is that correct? There is no time bar, no I'm told there is no time bar.

Blanchard J So that if the Court made other findings in your favour, the Official Assignee could come along and do the job for you.

McCartney Yes, the answer is yes. I mean we'd prefer that it doesn't get to that point but the answer is yet. Section 58 expressly provides the Land Transfer Act provisions do not restrict an application under s 60 of the Property Law Act.

Blanchard J Which might be an indicator that that's supposed to be the position anyway.

McCartney Here.

Blanchard J Well it certainly is under the new Property Law Act where it's expressed that it overrides the Land Transfer Act.

Wilson J Well the argument might be said to go the other way in that s 58 would not be necessary unless s 60 was otherwise subject to the indefeasibility provisions.

Blanchard J Well except in the case of the Official Assignee.

Wilson J Yes except in the case of the Official Assignee.

Blanchard J Taking action himself.

McCartney I take s 58, and this is at para 163 of the written submissions, to support Regal's position that s 60 overrides the indefeasibility provisions in the Land Transfer Act.

Blanchard J With great respect I would have thought it was neutral Ms McCartney.

Tipping J I would have thought it was neutral Ms McCartney.

McCartney Would you.

Tipping J It's quite a long jump from that to saying that that of itself creates an override.

McCartney Well it's strange that the Official Assignee isn't barred but a creditor is.

Tipping J Well yes but the bankruptcy regime is really quite a special one. It's for the benefit of all creditors. Here we have simply an action for the benefit of one creditor. I don't know, I'm not expressing a.

McCartney But it's not for the benefit of one creditor.

Tipping J Well it is in practical terms here, or maybe not.

McCartney Well it's in practical terms because Regal's the only creditor of any substance. But it's not for the benefit, I mean, in a general sense it's not for the benefit of one creditor.

Tipping J No that's true. No, we discussed that earlier.

McCartney It's for the benefit of all creditors. So I actually don't see the reason for the distinction and I do rely on it in terms of s 60.

Tipping J But why should you get an ability, there may be a very good answer to this, and I think I can think of one myself, but why should you allow this to be in policy terms an override. Is it because there is no prejudice to anyone other than the person who's received the benefit of a fraudulent conveyance.

McCartney Yes. Yes that is correct. Because in this case the fraud is of the alienors.

Tipping J Yes.

McCartney And s 60 provides for the protection of the purchaser if they're in good faith and without notice. So no-one, no-one is harmed if the conveyance disposition is set aside.

Tipping J You mean the section provides its own protection.

McCartney It does.

Tipping J For those who deserve protection.

McCartney The only ones who are going to need to be protected. And as I say, the indefeasibility provisions are directed at something quite different. They're directed against, as I say, fraud of previous propriety or fraud against the holder of an unregistered interest. And you can see then why its different provisions would apply.

Tipping J A pretty important point this.

McCartney I have to say I have, I can't accept the concept that whether you get relief or not depends on how quickly you get to the land transfer office and get your transaction registered. That in my submission can't be right. If s 60 extends to Land Transfer Act land, why is it that the relief that you're entitled to is totally dependent on whether you manage to injunct the registration of the transfer or not in circumstances where, as I say, the only person who would be prejudiced is the purchaser and if they acted in good faith they are protected by the provisions of s 60 itself.

Tipping J Mm. Well apparently under my brother's Act it's covered now, under the new Act.

McCartney Yes, yes. So I'm unfortunately not able to draw anything from that. *Dollars and Sense*.

Elias CJ Well it has been flagged as a loose end.

McCartney Yes.

Elias CJ So one can understand reformers tying up that loose end. It doesn't necessarily mean that it's a reform other than to remove uncertainty.

McCartney Yes, thank you Your Honour.

Blanchard J The old Property Law Act was generally subject to the Land Transfer Act. The advantage of the *in personam* route is that it's not inconsistent with the Land Transfer Act.

McCartney Well that's because it's been found to be not inconsistent.

Blanchard J Yeah, well.

McCartney But if you applied it in the way that you're wanting to apply it to s 60, without the authorities that have been decided, you could argue that it was inconsistent. It's just the courts have always said that if you've got your claim in trust or specific performance, you can get around **12.55.15**.

Elias CJ But you have to think what's the purpose of the land transfer system and it's to stop those dealing on the faith of the register being prejudiced by unregistered interests.

McCartney Yes, yes.

Elias CJ And that just doesn't apply.

McCartney With respect I agree. Just the last point unless there's anything else, *Dollars and Sense*. I regret I've only just come to the fact that the judgment has been delivered.

Elias CJ It's only just been delivered.

McCartney And I've seen, I think it's para about [149] and probably, I mean agency isn't a good fit here. I think that imputive fraud or anything else is better.

Blanchard J I'm glad we're not taken to agency.

McCartney No.

Tipping J I don't think you need wrestle with that masterpiece Ms McCartney.

McCartney Alright, I'll look forward to reading it in full. So unless there's anything further Your Honours at this stage.

Wilson J Can I just ask you a question Ms McCartney. If you do succeed in your appeal, what's your position on party and party costs. Are there legal aid considerations that are relevant.

McCartney Mr Wilson can answer that question, I'm not aware of any grant of legal aid.

Wilson J So you'd seek costs in the usual way.

McCartney Yes.

Elias CJ Right well, thank you Ms McCartney. We'll take the lunch adjournment now and resume at 2.15.

Court adjourns 12.56 pm
Court resumes 2.19 pm

Elias CJ Yes Mr Wilson.

Wilson Thank you. I'd like to start with looking at *Freeman v Pope* and the legal principles relevant. It's not the respondents' case that somehow the

decision is wrongly decided. It's an example of the facts where they show there's really no doubt about the settlor being insolvent at the time. And that the settlement was a voluntary one. The judgment of Lord Hatherley which we looked at this morning puts some emphasis on the fact that on the day of the settlement he had made the Reverend Custance, who was the debtor who'd made arrangements about his financial affairs, he made an arrangement with his bank for time to pay, he also borrowed the 350 pounds from his housekeeper and he gave security over his furniture. And he's said to have used the 350 pounds to pay some creditors. And the judgments make I think at least two references to him being pressed by his creditors at the time.

Now no other factual matters appear to have been put before the Court and perhaps that is unsurprising given that by this time the settlor was deceased. There's no explanation given on his behalf. It's also quite clear from the judgment that the assignment of the policy to Julia Pope was an outright gift. That's really not in issue in the judgment. One may be left with some puzzlement as to whether it really was, but that would only be speculation which I'm not going to go into in relation to what may have been his position with the housekeeper. But we have to take it that clearly it was a gift.

Now I think it's fairly plain, and it certainly won't be disputed by me, that when somebody, when a debtor does transfer a gift, when a debtor does make a gift and is insolvent and there's no other facts, then an intention to defraud is bound to be established.

My submission is that the telling part of Lord Hatherley's judgment is the one that we looked at this morning on the report under tab 5 at page 541 about a third of the way down the page. And I'd just like to make a couple of points about that quotation.

It was said there: "But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay the creditors, and that the case is within the statute."

Now there are a couple of points from that. One is that it is in terms of the statute where the question at issue to be decided by the Court is whether there's been intent to defraud. Essentially and ultimately the process is looking at the question of has there been intent. Now it is also mentioned

there that the word infer in the second or third to last line, so it seems clear in my submission that Lord Hatherley was dealing with the question as what is inferred as to the debtor's intent.

The other two parts that are important about it are that the real question is, one of the real questions of at least two or three, is to look at this question of the property which is the proper fund for payment of those debts. He doesn't actually deal with it in terms of saying do we enquire whether he is solvent or insolvent. It's a matter of looking at what is the proper fund for the payment of the debts. And then if there's subtracted an amount which means debts can't be paid, then the question, the second point that I'm addressing, is the issue of the necessary consequence of the settlement is that some creditors are not going to be paid.

So you have the issues of inference about intent, what is the proper fund for payment of those debts, is it the necessary consequence of the settlement that some creditors won't be paid. That's the essence of the judgment in my submission. One may describe it because of the absoluteness of the terms of speaking about a presumption but really the process that is being looked at is those elements. It's still essentially a process of drawing an inference as to intention.

Tipping J Which is an inference that must be drawn.

Wilson It must be drawn if there's those two elements, the proper fund is depleted, there's the necessary consequence that creditors won't be paid. In a way it may with respect just be a matter of the words you use, perhaps the semantics. It's certainly going to be accepted by me, for the respondents, that if the necessary consequence of the alienation is that creditors won't be paid, then there'll be intent to defraud. Really the whole case is going to boil down to was the necessary consequence of the transfer of the house to the ft that Regal in particular would not be paid. Now that analysis I submit is actually in line with President Lord Cooke as he later was said in the *Swann* case which is under tab, the last one in volume 1.

Elias CJ Mr Wilson I must be being rather obtuse here but I'm not quite sure what your submission on this is.

Wilson Well my submission is that essentially the global position for me about the legal principles is that it is not a matter of an irrebuttable presumption. The legal principles in my submission were correctly set out in some detail in the judgments in the *Cannane* case. And they'll be the ones that I rely on. What I'm proceeding through here is that in fact if you look at *Freeman v Pope* it is really identifying two key factors that you need to look at. One is this question of the necessary consequence and the other is

the question of what is the available fund for creditors etc. In a sense what is meant by that.

Tipping J You're placing an extremely heavy burden on the precise words of the Lord Chancellor. Lord Justice Gifford puts the matter more directly. And later cases have expanded on. You're trying to pin you hat, so I understand you, on necessary consequence and proper fund. Which really aren't reflected in the developed jurisprudence of this are they.

Wilson Well they're, with respect, what Lord Hatherley was saying because his emphasis on if the effect of the disposition is that creditors are going to be defeated, then it's going to be fraudulent intent. His emphasis is on the effect and in my submission there's not much difference between effect and necessary consequence. In fact it's the same.

Tipping J But it's the effect at the time isn't it. If you give away property, thus rendering yourself unable to pay your debts, you are deemed if you like to be making a voidable transaction under the section.

Wilson If you give away your property and the effect of that giving away is that you can't pay your debts that's correct. That was similar to what I was about to say the President said in the *Swann* case when he was dealing with the risk of, in my written outline I attempted the draw the similarity in basic factual outline between *Swann* and *Freeman v Pope*.

Elias CJ I'm sorry but if you give away your property and you can't pay your debts, well isn't that what we're meant to be, the position we're meant to be in here. I'm not sure why we're concentrating on this. I'm just trying to see the point of where you're taking this concentration on the language.

Wilson Because with respect Your Honour it's followed through and it's seen in cases like the *Swann* case and in the *Cannane* case which aren't seeing this question of what the effect, the consequence of an action is as an irrebuttable presumption. They're seeing it as one out of the circumstances to take into account in deciding the ultimate question of whether there's intent to defraud.

Elias CJ But I understood you to say that if you can't pay your debts and you give away your property that's intent to defraud.

Wilson It's going to be if it's the necessary effect of the giving away.

Elias CJ Yes.

Wilson That you can't pay your debts.

Elias CJ Yes.

Wilson And leaving aside the time matter, I agree it's at the time of the transfer, then it is plain that there's going to be intent to defraud. It's going to be inferred. And Lord Hatherley uses the word inferred.

Elias CJ Yes.

Wilson It's probably no use, it's no use the debtor saying, Oh my, he would say his intent but the courts would say his purpose, was to benefit somebody else.

Elias CJ Or my hope is that I would be able to repay because I'll trade out of it.

Wilson Well I would see with respect describing that issue there as relating to the question of, and in part it relates to both, it relates to what is the fund to meet creditors and is it the necessary consequence that creditors won't be met by this action.

Tipping J I think you with respect may be fully misunderstanding the context and purpose of the reference to proper fund. He's just simply saying that if you give away money when you're indebted, you're removing from the proper fund otherwise available to the creditor that part of it.

Wilson Yes, I accept that in a general sense. He's sort of contemplating a position where you might be solvent but the effect of the giving away, in that case 1,000 pounds, you're not going to be able to pay your debts. And in the Freeman v Pope case the facts were fairly significant on that as to insolvency and there's really nothing else to take into account because his biggest asset seemed to be this policy for 1,000 pounds and related to his other assets, they were, the other matters were relatively small.

Tipping J Is your escape from Freeman v Pope, which you say you generally accept, (a) that your client wasn't insolvent and (b) that there wasn't any giving away.

Wilson That's always been at the heart of my case but I don't with respect see it as an escape. I said at the outset that.

Tipping J You say you're not within Freeman v Pope.

Wilson We're not within Freeman v Pope essentially, but I'm looking at Freeman v Pope because in my submission Freeman v Pope has these elements to it of looking at what is the asset and debt position of the debtor so that if he gives away property that's one of the factors to take into account and the other is, is it the necessary consequence. That was the heart of the

decision because Lord Hatherley was clearly saying, if the effect is there then that establishes the intent.

Tipping J Isn't the necessary consequence that you prejudice the creditor. Not that you unequivocally make yourself unable ultimately to pay.

Wilson Well that would lead to an issue that would make it inappropriate to have an irrebuttable presumption because the wording use is either effect or necessary consequence. I'm not sure that it would be my submission that creating some risk to a creditor, depending on what future circumstances may occur, is different from a necessary consequence is that the creditor won't be paid.

Tipping J There's a huge difference between unequivocally making it impossible to pay and risking that you won't be able to pay.

Elias CJ Mm. And the cases do deal with risk. There are cases of people about to embark on risky ventures who shed their assets.

Wilson Well of the cases we've looked at Your Honour, I agree that some of the cases suggest that if the debtor gives away his property knowing that he is going to go into a risky venture that it may be grounds for drawing intent but that's not a *Freeman v Pope* line of case of an irrebuttable presumption with respect. I'm just trying to recall which one that one.

Blanchard J You accept that there is an irrebuttable presumption if you're within Freeman v Pope.

Wilson Well, I suppose it's the heart of my submission that calling it an irrebuttable presumption is one way of describing the process but it's not particularly a necessary or helpful way to describe it. In fact Lord Hatherley doesn't say irrebuttable presumption. Lord Gifford does say presume.

Tipping J But if you must draw the inference or the jury must be directed in that way to draw it, surely it's irrebuttable in whatever the circumstances are that a triggered by Freeman v Pope.

Wilson The point that's in issue here is, I mean one of the problems with this case, when discussing *Freeman v Pope*, is to identify what exactly is the question or difference is partly what I struggle with. Perhaps one may see it in terms of cases as looking at Freeman v Pope, the language of it, and then looking at other cases like *Cannane*. Looked at more simply, the two positions seem to be Freeman v Pope, is he insolvent, is it a gift, no other factors come into play, it's fraudulent intent.

Another approach perhaps may be, and I'm trying to identify the two approaches so that you can see which we're deciding between, the second is: the question is, overall, is there intent to defraud, because that's what the section is asking. There may be actual evidence of intent. It may be a matter of inference. The next stage of the second thing is consider all the facts, give appropriate weight to those factors according to their relevance, and when you take that approach obviously if you view all the facts and the key things are that he is insolvent and it's a gift, then the inference is drawn. There's no two ways about it.

So you may come to the same conclusion but not necessarily. The second way of putting the matter puts more emphasis on infer intent from consideration of all the facts. And in the *Cannane* case which the High Court of Australia Judges outlined the principles there and looked at Freeman v Pope, I'm not sure whether I need to take Your Honours to it because their cited in the Court of Appeal judgment. The Judges all indicate that it's a matter of considering all of the circumstances of the case.

You see that in, if you look at *Cannane* which is under tab 14, you see it under tab 14 page 566 dealing first with the judgment of Chief Justice Brennan and Justice McHugh on p 566 at line 12 they say: "Although the party impugning the disposition must show an act intent to defraud creditors at the time of the disposition, the intent may be inferred from the making of a disposition" and they refer to the exact wording that we've looked at here. "The proper fund may consist in assets out of which future creditors as well as present creditors would be entitled to be paid a dividend in respect of what is owing to them. Therefore a subtraction of assets which, but for the impugned disposition, would be available to meet the claims of present and future creditors is material from which an inference of intent to defraud those creditors might be drawn. Whether that inference should be drawn depends on all the circumstances of the case."

And Justice Gaudron said in her judgment at p 571, last line on p 571, "It's notoriously difficult to provide an exhaustive statement of what is involved in the concepts of fraud and intent to defraud. Fraud involves a notion of detrimentally affecting or risking the property of others, their rights or interests in property, or an opportunity or advantage which the law accords them with respondent to property. Conversely, it is not fraud to detrimentally affect or risk something in or in relation to which others have no right or interest or in respect of which the law accords them no opportunity or advantage. And there is no intent to defraud if the person in question believes that others have no right or interest in or in relation to the property concerned" etc.

Then in the next paragraph, “It is to be remembered that the operation of s 121,” which is the equivalent of what we’re dealing with, “depends on the intent of the bankrupt or, where it is applied in a company winding up, the intent of the company concerned. What is in issue in each case is, as Dixon J said, a real intent. And as Starke J observed in the same case, fraud is not to be presumed. That is not to deny that it may take very little to justify a finding of fraud or intent to defraud for the purposes of the section if the person or company concerned disposes of assets when facing financial difficulty. Even so, the real intent must be ascertained.”

And then finally, in the dissenting judgment of Justice Kirby, this is somewhat longer and I might not delay things with reading all this out. But it begins at page 591 of the report and perhaps his discussion begins earlier because at page 589 he set out the two competing approaches. And here we see a bit of an examination of what may indeed be the question to consider here of competing approaches. And he picked up his two approaches, one from the decision of *Hardie v Hanson* and one end of the scale and at the other end of the scale from the description in the Australian text, *Lewis Australian Bankruptcy Laws*. And you see him quoting that at the top of page 590 where he quotes *Hardie v Hanson*. This is the more relaxed approach perhaps, if I could describe it that way. “The onus lay on the respondent to prove affirmatively that the carrying on of the company’s business was characterised by an intent to defraud creditors of the company. An actual purpose, consciously pursued, of swindling creditors out of their money had to be established against the appellant before a declaration under the section could be made. It’s not enough to prove the appellant acted with blameworthy irresponsibility knowing that he was gambling in effect with his creditors’ money as well as his own.”

And perhaps I'm sure you’ve got the flavour of that. At the other end of the scale is the extract that His Honour quoted from *Lewis* which is essentially very close to what we’ve seen from *Kerr* as well. “The general principle may be stated that any dealing with property (other than at a reasonable price) made with the object of putting it beyond the reach of present or future creditors comes within the definition of a fraudulent conveyance if the person concerned cannot immediately pay his debts or anticipates some event which may render him unable to pay his debts in the future.”

I won’t read all the rest of it but you can see that His Honour identified those as the two approaches to the intent to defraud question. Then His Honour gave his conclusion about them beginning at the following page, 591 at line 92 and he set out some six principles about this. It’s a page and a half so I won't go through it in detail, but the first was that the section is to prevent insolvent debtors making away with their property to prejudice creditors.

And 2: “It is clear from the provisions of s 121 that a disposition of property by a debtor alone, is not sufficient to attract the operation of the section. There must be a coincident intention of the specified kind to put the disposition at risk of avoidance. That intention must be with the disposition in the sense that it accompanies it. The sequence of events must be a disposition of property, subsequent bankruptcy, or in the case of a company winding up, and a demand by a trustee or liquidator against whom the disposition is, by law, avoided. The intent must be that of the person disposing of it.”

And then 3: “Proof of the intention” and this is the section quoted by the majority in the Court of Appeal, “Proof of intention of a person represents notorious difficulties in every area of the law where it’s encountered. Even when the distinction between intention and motive is kept in mind, knowledge of subjective intention will ordinarily or often be reserved to the person whose interests may be so affected that an assertion one way or the other cannot necessarily be accepted at face value. That is why, at least in this provision it is not necessary to establish that the transferor of the property in question actually had in mind an intention to defraud creditors if the effect of what that person did would reasonably be expected to have such a consequence. Courts will therefore infer the intention in issue, deciding it as a question of fact. This does not mean that the intention so derived is one imputed by the law. It is not a fiction. It is the real intention of the transferor decided objectively rather than upon protestations of innocence on the part of the debtor.”

And then, “In order to decide whether the requisite intent existed at the relevant time, and whether the disposition was made with that intent, the decision-maker must look at all the circumstances surrounding the impugned transaction. As the cases show, it is often a feature of transactions susceptible to avoidance that the debtor has disposed of property to a close family member” etc. “However, the recipient of the disposition is no more conclusive of the intent in question than is the adequacy of the consideration afforded. These, and like facts are the building blocks upon which the decision about intent will ultimately be derived from all of the evidence. Obviously the fact that the transferor is shown not to have been in a sound financial position at the time of the disposition in question will commonly be a prerequisite to the operation of the section.” Otherwise it wouldn't be inferred. “In judging what that intent was, a court is entitled to ask itself: what was the purpose of placing the property at such a time in another’s name. If that purpose was to defeat creditors the trustee or liquidator will be in a strong position to establish” the case.

Then in 5 just briefly, “It is not necessary for the section to apply to establish that the intent to defraud was the sole intent of the debtor. Nor is it necessary to demonstrate that the debtor intended to defraud all of the creditors as a class. An intention to defeat future debtors will be sufficient. However, that intention must be shown to exist with the disposition of the property in question.”

“The burden of showing the requisite intention lies upon the trustee or receiver who is asserting that the disposition otherwise valid on it's face, is void as against him or her. It will often be the case, as here, that the intent will be contested. Because the evaluation of the evidence and elucidation of intention commonly require the exercise of judgment which may be affected by the impression that witnesses make, appellate courts will ordinarily defer to the primary judge’s estimate and judgment.”

Tipping J Going back to step 1, where Justice Kirby talks of the object of the section as he sees it, I take it you, well do you or do you not accept that as being the object of the section.

Wilson Yes I accept that.

Tipping J Well if that were shown, that an insolvent debtor has dealt with his property to the prejudice of creditors it would be very odd wouldn't it if that wasn't caught.

Wilson If there’s no other factors to take into account. Because what His Honour is saying there is that obviously that situation is a key factor but he’s saying that is one of the matters to take into account in determining the ultimate question. I think he says that at the end of point 4. If he has discussed the situation of the transferor being a difficult financial position and if that purpose was to defeat creditors the applicant will be in a strong position to establish that the section attaches. So the essence of my.

Tipping J So you're really asking us not to make it irrebuttable. You accept that it is a presumption but it’s not irrebuttable.

Wilson It's not irrebuttable.

Tipping J Is that your position.

Wilson Indeed. It's not irrebuttable. It’s a matter of assessing all the circumstances of the case. But I have accepted a number of times that if there’s insolvency and gift and no other factors to take into account, nobody’s going to be in Court arguing about it. It would be clearly fraudulent intent. But the heart of this case in my submission is that the two key points, neither of the two key points were established. Voluntary

nor that the necessary consequence, is one way of putting it, the effect, had to be that creditors would not be paid. And that's what I've endeavoured to address in my submissions.

Tipping J But creditors would not be paid is different from prejudicing creditors. It's a much higher threshold.

Wilson You could, this could be anywhere along a scale. You could have very slight risk to a creditor from a transaction and you could have the same situation as we see in some of the cases like in the *Noakes* case that my learned friend referred to, where the man transferred his shares to his wife. He said in a deed that there was consideration but when pressed there was none. That's at one end of the scale. That is, it's no longer described as prejudice to creditors, it's clearly defeating them in my submission. But there can be lots of other scenarios to consider as well. Somewhere along the scale the facts will fit in.

Elias CJ Well I've been wondering really whether it might be better to concentrate on where along the scale you say the facts fit in here. Because this discussion, though interesting, doesn't seem really to me, well it's not bringing your argument into very sharp focus for me Mr Wilson and it may be best to look at the circumstances of the case if what you're saying is the cases say you take all the circumstances into account as to whether you can draw an inference or not.

Wilson Yes indeed. I'm sorry if the focus is not clear. But my position in summary is that the parts I've just read out from *Cannane* correctly describe the relevant legal principles with respect.

Elias CJ Yes.

Wilson Secondly, when you apply them to these facts here, Glen Lightbody was not insolvent at the time of the transfer. It was not a matter of property going out of his name that thereby meant that creditors would not be paid. Secondly it was not voluntary. And thirdly.

Elias CJ Do you say that, sorry, *in contra distinction* to the forgiveness of debt when you say that it wasn't property going out of his hands from which creditors could be paid.

Wilson No I'm essentially saying he was not insolvent at the time of the transfer.

Elias CJ Yes.

Wilson It was not a voluntary one. And then the third factor is that if one is applying the law as being a rebuttable presumption, assuming that there

was insolvency and assuming gift or looking at the circumstances generally, then the third are there are all these circumstances which the Judge in the High Court took into account which need to be taken into account. That is the essence of my case.

Tipping J Assuming insolvency and gift, the presumption nevertheless has been rebutted.

Wilson I beg your pardon sorry Your Honour.

Tipping J Assuming insolvency and gift, you contend that the presumption is nevertheless on all the evidence rebutted.

Wilson Yes that is one element of it. My first element is that he was not insolvent.

Tipping J Look I understand that. I'm just trying to capture your third.

Wilson Well that is correct but it may not be quite as restricted as that. I'm saying on any basis, even if he was insolvent and it was a gift, the Court should still be taking into account the whole of the circumstances of the matter.

Tipping J And when we do that the presumption is rebutted.

Wilson The presumption is rebutted, yes.

Elias CJ You may still be left with an inference however irrespective of any presumption. An available inference.

Wilson Yes I agree, that's the point I was endeavouring to make in response to His Honour, is that I have to deal with the presumption part of it, of solvency and gift.

Elias CJ Yes.

Wilson I raise these other circumstances that have to be taken into account but I also have to deal with the situation that if Lightbody would solvent or if it was for value, it's not the end of the case, I accept that. One has to look at all the circumstances of the case.

So the first issue to consider among those, so just to be clear I'm going to be looking at solvency, voluntary, whether it's voluntary, and the circumstances generally.

Dealing first with solvency, there's a couple of preliminary matters which I had in my outline, in my submissions at para 27. There is a difficulty

here with having to consider solvency which I raise because in the hearing in the High Court there was no focus on this particular issue. Her Honour Justice France recorded in her judgment that in the hearing the two elements of Freeman v Pope had not been the subject of any particular focus in the evidence. She did also say it hadn't been pleaded but I'm not taking any point about that.

What is more important is that Her Honour recorded that throughout the three days of hearing in the High Court there had not been a focus on the two elements and by that she must have mainly meant insolvency because of the two elements that make up Freeman v Pope, solvency and gift. The gift matter was in issue before the Court. Her Honour had before her all the evidence about the agreement for the sale of the property to the trust, the loan contract and what had occurred about gifting. So Her Honour had that before her.

But when she said that there'd not been a focus on this part, in my submission it must clearly be that there was no focus on the question of Glen Lightbody's solvency or insolvency. It may be, obviously some aspects, quite a lot of aspects of his financial position were in issue but some key parts did not receive any focus. There was information generally as to his assets and the financial statements of the company. But you will notice reference has been made already to the application in this case which is quite long and sets out the grounds for the matter, it's the application seeking to set aside the agreement to sell the property to the trust. Nowhere does that application signal that there is an allegation that Glen Lightbody was insolvent at the relevant time. And together with that Her Honour noted that the appellant had not presented it's case in that way.

Now unfortunately that creates a difficulty because the appellant subsequently in the Court of Appeal and in this Court has wanted to make it one of the key parts of the case that he was insolvent. But there's an unfairness here because the parts that are relied on weren't focused on. They must therefore to an extent just be a hypothesis or a speculation. Behind it all is probably.

Elias CJ Are you talking about as a matter of evidence or are you talking about it as a matter of submission.

Wilson It's just a preliminary point I'm making Your Honour. This inquiry and there's consideration of solvency takes us essentially to what was his circumstances at the time and effectively what would have happened if he had been asked to pay what money was due to his creditor at that time. What could he have done. Now that wasn't put to him in the High Court.

Tipping J There's a list of figures in para [29] of Her Honour's judgment on page 72 of the case volume 1 where the Judge says, "There is no real dispute between the parties about the financial figures. The relevant figures are as follows".

Wilson Yes I accept that Your Honour.

Tipping J Doesn't that really lead to an inevitable inference of insolvency at the time, particularly after. I mean it doesn't focus directly on Mr Lightbody I appreciate that. But there is no suggestion is there that he had the means without the house to pay the debt.

Wilson Well he did in my submission and this is the point of my submissions. The debt I accept was a concurrent debt. He owed the debt and Capro the company also owed the debt. It was the same debt to Regal. I accept that and the thrust of my case is that when you look at this point you have to look at the combined financial position of both the company and the debtor. Because if he had been called upon to pay it, he can look to his own resources, he can look to the company's resources, he can look, I don't know, perhaps even to his wife. She was joint owner of the company. The point is that that leads to.

Tipping J But the Judge says at para [30], "Further it is plain", and I think she's talking here jointly between the two of them, Lightbody and the company, "It is plain there were no other assets other than the house which were available to repay the debt." She must have been talking jointly, otherwise she couldn't have included the house because the house was.

Wilson Her Honour there is considering both the position of the company and the Lightbodys personally.

Tipping J If that's not insolvency I don't know what is.

Wilson Well she's saying that there were not other assets to repay the debt. The question is were there assets there that could have repaid the debt.

Blanchard J Well what were they Mr Wilson.

Wilson First of all, well they were the company's position for a start, in summary, which I'll take you to the balance sheet. Secondly the Lightbodys did have some assets. They had their interest in the house which was being transferred and then they had the loan back from the trust. They also on the evidence.

Blanchard J Well they didn't have the interest in the house once they'd transferred it. They had the, so it's the portion of the price as had not been gifted away, but they didn't have the house any more.

Wilson No they didn't have the house. If we're looking at the place, looking at this assuming the transaction has taken place, so you're looking at it five minutes after it.

Blanchard J Yes well that's the appropriate point to look at this, immediately after the transaction.

Wilson Immediately after.

Blanchard J Was this man insolvent.

Wilson Immediately after it, instead of their joint interest in the house they jointly had a debt back from the family trust.

Tipping J Well that's the not voluntary point isn't it. I suppose it goes to the other as well.

Wilson It goes to the other as well but it's one of their assets at the time. And just before I leave their position, you see, it was never.

Blanchard J Well you're going to have to put some figures in front of us to help us with this.

Wilson Well.

Blanchard J Because you've got findings from the Courts below effectively that there weren't enough assets and warrant insolvency.

Wilson Well I think with respect Your Honour, Her Honour at para [30] was saying that there were no other assets available to repay the debt. It's not saying that there were insufficient assets to repay the debt at that time if it had had to be paid. The primary basis for why I say and submit that he was not insolvent is that being a concurrent debt, one needs to look at both his position and that of the company. And one assumes, one asks the sort of hypothetical question, what would have occurred had the creditor required payment at that time. And the first question is what repayment or debt was there that could have been demanded by the creditor at that point in time. And the courts below have held correctly in my submission that the debt that could have been demanded at that time was the outstanding balance on the company's current account which was $65,000. When you look at the summary that Her Honour gave at para [29] of her judgment, which His Honour Justice Tipping referred me to and which I wish to

make clear I accept that Her Honour has correctly outlined in that paragraph the financial situation between the company and Regal at various points mentioned there.

And when you get to the time, the second bullet point on page 73, at the time of the transfer to the trust the total outstanding to Regal was around $336,000, that is $113,000 approximately on the current account and $23,000 approximately on the term loan. And in other parts of the judgment the account was a monthly one and there were arrears and the arrears were $65,000 at that time and you will see that that's referred to in the Court of Appeal judgment several times as the outstanding balance that could have been demanded at that point.

Blanchard J Well why wouldn't you take into account the whole of the $113,000.

Wilson Well it depends on how quickly you're talking about paying it. If you're talking about this hypothesis Regal demands payment from Glen Lightbody of the current account, part of it is due on the 20th of the next month as I understand the terms of trade.

Blanchard J Yes but you'd take that into account.

Wilson And part of it is the overdue balance.

Blanchard J Yes but you then project forward and say well what would the position have been on the 20th of the month. Would they have been able to meet.

Wilson Yes well probably, I mean we are talking about an hypothesis here that didn't happen. But I think it's really accepted that if a creditor makes demand for payment it would be demand for payment within a reasonable time. And reasonable time is an unknown factor. On a reasonable time basis you might take in the whole of the $113,000 but the reasonable time on that basis would be to pay would be something like a month on average. If you're talking about reasonable time just being 5 days or 3 working days or something like that, then technically one wouldn't take into account the whole $113,000.

Tipping J Well what authority have you got to say that present debts, albeit dischargeable in the future, don't count for this exercise.

Wilson They do count Your Honour and I'm taking you through what the situation is which hasn't been discussed and wasn't taken in evidence in the High Court but we have had to look at it since.

Tipping J You're trying to restrict the amount that was immediately payable aren't you at the date of the transfer. You're trying to say that that's all that

matters, the amount that was immediately due at the date of the alienation. Is that your purpose in these submissions.

Wilson I'm saying that there's essentially two possibilities. What is immediately due but you also have to take into account what he was owing on current account at that time. Because that's going to be due the next month anyway.

Tipping J Why not on term loan also.

Wilson Well because the term loan was a fixed agreement that so long as he made the, the company made the monthly payments, then the creditor didn't have the entitlement to make demand for the balance. Now that's in the term loan documentation.

Tipping J I understand that it wasn't actually payable. But it was a present debt. It wasn't a contingent debt or anything like that.

Wilson It was a debt that the company was paying off over a period of years at $4,000 per month. And which it virtually did. It made, over a period from 1993 to 2002 it missed one payment which was not regarded as being significant.

Tipping J But if you have to take into account future creditors, why should you not also take into account future debts. Debts that are present in the sense that they're established but not payable until a future date. I just don't understand this submission I'm afraid.

Wilson The gist is that the authorities suggest you do take into account future debts but it's my submission that you look at the whole of the financial circumstances. So if you're going to take into account future debts it would also be fair that you take into account future creditors. You take into account a trading company going on and producing profits so that it meets the scheduled debts that it has.

Tipping J Leaving aside the fact that you say there's a counterbalancing asset, ie the debt back, surely this transaction was going to prejudice creditors. Surely.

Wilson With respect no Your Honour. The position was.

Wilson J Well it's **a bid 3.12.50** for $54,000 virtually immediately with the initial gifts.

Wilson The husband and wife did.

Blanchard J What was going to be the source of payment of the $65,000 in current account.

Wilson If that had been demanded?

Blanchard J Mm.

Wilson Well on that, I know I'm going to be criticised here because this is speculation. This is the point that was not investigated in the High Court at all. Glen Lightbody was.

Blanchard J Yes, never mind that, what was going to be the source.

Wilson There are several possibilities. There is using funds coming into the company to pay the debt rather than to buy more product. If you look at the current.

Blanchard J But that's going to put the company out of business. If it hasn't got product it can't do its work.

Wilson Well if you look at the financial statements of the company, the relevant page is at volume 4, 233. Now I'm going to take you through some of these, this page of financial statements but I do request it be borne in mind that we are talking about an hypothesis here. We are talking about when it's looked to answer the question, several sources could well have been available. Other examples I'll come to just in summary like the money that was going to be used on home improvements on the loan and any other borrowing that the, or dealing with assets that the Lightbodys could have done.

But looking first just at this section. There are accounts for both 1999 and 1998 and we're dealing with the period in November '98. At that time you will see that under current liabilities the company had accounts payable of $168,000. The end of 1999, which is nearest to the time we're dealing with, their $139,000. So they did, one of the examples of the company improving it's position over those two years.

Blanchard J Sorry, what are you comparing with the figures on p 233.

Wilson I'm dealing first with the fact that it owed money, the company owed money, $139,000.

Blanchard J Oh I see, yes.

Wilson And I think it can be assumed that most of that is owed to Regal. Regal's debt tended to be, you'll see other parts and I can refer you to other parts, to what was Regal's debt at relevant months. So it had liabilities.

Tipping J It had both current and term liabilities.

Wilson Yes it had both current and term liabilities, down the bottom is the term loan which is a term loan debt to Regal plus the $48,000 is how the accountants as I understand it have dealt with this. The combined debt to Regal is the term loan item under term liabilities, plus the current portion of the term liability of $48,000 which was 12 monthly payments of $4,000 each.

Then under the assets position the company had money owing to it. It had $126,000 in 1999 and $137,000 in the previous year. Now one of the things that would have occurred if there'd been this sudden demand from Regal to pay $65,000 is that it would have obvious that one would scurry round and get in prompt payment from one's debtors. That would be the clearest thing to do. And secondly it had a number of assets. It had an inventory. This hasn't been investigated as to what the inventory meant, but in thinking about it, it's fairly obvious that it is the jewellery and stock of jewellery that the company had for sale at the particular time. So it had property there. It presumably could have had a large Christmas sale and sold off property. I mean I know I'm being forced into speculation as I keep repeating.

Blanchard J Mm.

Wilson Because this was never investigated in the High Court. And the thrust of my case is going to be on this point is that it would be unfair to the respondents to now subsequently on appeal just look at a limited amount of evidence and say, oh we don't think he could have paid if he'd had to at that time.

Tipping J Surely your clients' financial position was absolutely central to any inquiry as to whether or not this was a transaction intended to defeat creditors. I mean it's so basic and obvious that I find it staggering that you should say that this wasn't investigated in the High Court. I mean if this company had millions of dollars in the bank, I just don't understand this Mr Wilson.

Wilson The basic financial position is there in the material that I'm looking at and in other aspects that are covered. But Her Honour recorded that there was no particular focus on this area. It wasn't put in issue by the appellant that we're going to say Lightbody was insolvent at the time of the transfer. Much of when you look through the notes of evidence and the affidavits, a lot of what is being discussed is the approach that.

Tipping J Was there no pleading that you were insolvent.

Wilson It was not mentioned in, there was not pleading of that, Her Honour recorded that.

Tipping J What was the pleading in relation to your then current state of financial affairs. At the very least they must have said presumably you were wobbly. Because if you were strong there couldn't be much case.

Wilson The amended application Your Honour is at approximately volume 1 page 20, page 21. It is an important document. There was no statement of claim.

Tipping J No, but there's something that's equivalent.

Wilson There's equivalent by this application.

Elias CJ But no statement of defence is there.

Wilson There's a notice of opposition I think.

Elias CJ Notice of opposition. Does that take contention with. Oh sorry, you'd better take us to the notice of claim first.

Wilson The notice of claim Your Honour is at page 21 and you'll, and we've covered this before, it sets out asking for orders, the first being an order that the agreement for the sale of the property to the trustees be set aside. And the other orders aren't particularly relevant to the present inquiry. And then it sets out some three pages of grounds.

Tipping J Well para 19 says at the date of the agreement that was the indebtedness, totalling about 336 and a half thousand.

Wilson That's correct, that squares exactly with what's in Her Honour's judgment.

Tipping J Yes.

Wilson But it doesn't, and then it says, "the first defendant retained control of the property". Then in paragraph 21, "The agreement was made with intent to defeat creditors of Glen Michael Lightbody in that the simple consequence of the transfer to trust would be that the debt to Regal may be able to be avoided."

Tipping J Well isn't that a pretty clear allegation that this transaction as against your clients' financial position was going to prevent the debts from being paid.

Wilson Well Your Honour the response to that was that Mr and Mrs Lightbody set out in their evidence and extensive cross-examination why they were satisfied that they had the debt to Regal under control and were meeting it over the term.

Tipping J Yeah well that may not have met the point in law.

Wilson But that meets.

Tipping J I'm curious you're saying this wasn't sort of sufficiently pleaded. Okay it wasn't pleaded in terms of insolvency precisely. But isn't it an inevitable inference from this that they're saying the financial position of the company and Lightbody were such that giving away this property was going to stop the debts from being paid.

Wilson Well Her Honour who heard the case for three days with respect Your Honour particularly noted that it was not pleaded or the focus of the case. And that is in, I take you to that, it's at.

Tipping J Well I'm not with great respect so worried about what Her Honour thought. I'm more worried about whether I think this was sufficiently flagged.

Blanchard J Mr Wilson you made a point that, well you started to make a point a little while ago that might be helpful. I think you were going to say that in addition to being able to find money from within the company, which looks to me as though it would be a bit of a stretch, they also had some borrowing capacity from the National Bank.

Wilson Which they were going to use.

Blanchard J Which could have been utilised.

Wilson Which they were going to use on home improvements.

Blanchard J And they could have not improved the home, they could have put that money into the company to pay Regal. Was that what you were going to say.

Wilson That's what my understanding of the matter is. But again, I can't take you to specific evidence about that because that again is another point, it seems clear that at the time they were doing this transaction they dealt with the Bank and refinanced and put the loan up to $140,000.

Tipping J I may have misunderstood Ms McCartney but I understood that by the time this transaction was implemented, those monies had been expended on the home improvements. But I may be entirely wrong.

Wilson I'm unable to point clearly to it although this case has been with us for a long time, or it's been with me and my learned friend, I don't think the evidence makes it absolutely clear one way or the other. And when you look at the part of the cross-examination where that is raised, that doesn't make it particularly clear either. I could take Your Honour to that if you wish. It was at volume 3 page 282 I think. It's the bottom section of page 282 but it doesn't spell it out clearly although I think, I haven't had the opportunity to check the loan documents, from para 28. "So the position if we go back to the report from BDO of 1993 was at that time the company had borrowings from the bank of $15,000?" "That's correct." "Somewhere between $60 and $80,000 was borrowed for home improvements?" "Not sure what year that was." "By the time you transferred property to trust in 1998 the amount owed to the bank was $140,000".

Blanchard J Well that rather suggests that the money had been spent or am I misreading that.

Wilson It doesn't suggest the money had been spent.

Tipping J Draw down 9 November '98 which is very close isn't it to the date of.

Wilson Of the transfer.

Tipping J The transfer.

Wilson Which I think it is. And if you're going to do home improvements, you I think it's fairly obvious that you arrange your finance and then you proceed to go about doing it, would be the logical thing to have with people of these circumstances. Now I know this part of the evidence is unsatisfactory, but it gets back to unfortunately there not being focus on this. You see when we look at that part Your Honour is correct Justice Tipping to point to it being spelt out in the application that the consequences were that Regal may not be paid.

Now what do the respondents do in relation to that. Their whole case in the High Court was to demonstrate that they had entered into a term loan agreement with Regal to meet. The debt had got to $500,000 in 1995. They had operated the company in conjunction with accountants instructed by Regal and they had progressively brought the debt down. They had it in hand and were coping with it.

Each year they had made their monthly payments on time to satisfy Regal's term loan debt. They made it abundantly clear when asked in the High Court in cross-examination that they were always concerned about Regal's debt and they had matters in hand through the company and it's trading to be meeting that debt. And that is proved, that they did that is proved by the facts.

And Her Honour Justice France held specifically that they had a commitment to meet that debt. She pointed out that in the year of this transfer was one of the years in which the financial position between the company, the Lightbodys and Regal improved more than in other years. That was the year in which the transfer occurred. You see what in my submission is very important here is that we're dealing with a trading relationship between Regal and Lightbody and his company over approximately 10 years.

Between 1993, it did go earlier than that but we're dealing with the debt and financial issues between 1993 and 2003. And you see when you look at the part in Justice France's judgment which summarises these things, this was at p 72 of Vol 1 paragraph [29]. The debt of $349,000 in 1993, two years later in 1995 the debt was $436,000. In October '95 was when the term loan was established, agreed to repay $356,000 and Regal waived about $94,000 of interest owing to it. And Her Honour noted at December '95 that figure had increased to around $500,000. That was the highest it got, in December 1995. So at that stage one would have to accept Lightbody and the company owed half a million dollars. The trading goes on. The current account debt at that stage was 155. At the time of the transfer to trust the total outstanding to Regal was $336,000.

Now you can see there Your Honours that that was a period from December 1995 to November 1998, approximately three years, the company had reduced its indebtedness by $160,000. So one needs to bear in mind when one's considering was this company trading profitably over the relevant times, it was trading sufficiently to produce an income for the Lightbodys and to substantially reduce what had been a debt of half a million dollars to Regal.

So we have the debt reducing by 160-odd thousand dollars in that three year period. Her Honour recorded in the next bullet point that the company owed 5000 to IRD and 18 for income tax. Well in the order of things that is not a particularly substantial or significant amount. And the Lightbodys had by then increased their mortgage on the house to $148,000. And I think that is consistent with the mortgage being raised for home improvements.

And then the last stage is when the company went into liquidation in April 2003 the amount owed to Regal was $15,000 under the term loan and 149 on the current account.

So there is real substance to what the Lightbodys said in the High Court, that they were acutely conscious of Regal's debt, that they were attending to it, operating the company as a process of repaying the debt and that is what has occurred. And they've carried that out. And the case for the respondents was largely presented that way in response to the claim that by transferring the house to the trust Regal would not be paid. The Lightbodys said yes, we were absolutely well aware of the debt and we were repaying it.

Tipping J What would you say if the test was prejudicing creditors rather than ensuring they won't get paid.

Wilson Still the same Your Honour. And it's borne out by looking at what happened over a very long period of time. They had the Regal debt in hand, they were managing it and repaying it. And Her Honour found that this was why the company goes into liquidation in 2003 and the factors as to why it went into liquidation, while not decisive, like every other thing in this case, there are factors to go into the equation to look at whether there's intent to defraud.

But we get to the stage where Lightbody has an accident to his hand and he can't continue to work as a jeweller because it requires as I understand it fine movement with one hand in particular, they have a son who unfortunately their eldest son who was 20 at the time of the Court hearing, had got into trouble. Mr Lightbody had said that that had been ongoing for a year or two where he'd been on drugs and they'd had difficulty managing him. And the disruption was another factor that lead to Lightbody really being unable to, in conjunction with the accident, fulfil his work.

McGrath J Wasn't it the effect of the 1998 transaction to transfer, if you like, the risks of unanticipated difficulties in trading and in life over to the creditor. That is, didn't in effect the Lightbodys pass that risk to their creditor of those sort of problems. And wasn't that to the prejudice of the creditor.

Wilson Well the answer to that with respect Your Honour is that because it's such an ongoing and longstanding trading relationship, if you're going to take into account that there could have been negative factors that affected their ability to pay the debt, there may also have been positive factors. There could have been. I mean it is speculation. This is part of the problem. It's clear enough in a case where you have somebody served with Court proceedings so they transfer their house to their wife. That's quite plain.

But we're nowhere that case, that type of case. We're in a situation where you have a transfer, it occurs three years into a programme of reducing a debt where the Lightbodys have shown they have the commitment and have done it and then they continue to do it for another four years.

Wilson J Why was the transfer concealed from the major creditor.

Wilson I think the Lightbodys were somewhat taken by surprise by that being made as a submission in the High Court.

Wilson J I'm frankly not surprised it was made as a submission on the evidence I've read.

Wilson They saw it I think, I'm sorry I can't take Your Honour to the cross-examination on this part off-hand, but going from memory I think the response was that they did work closely with Mr Astley and obviously had a lot of dealings with him. He didn't ask that particular matter. They saw it as their family transaction.

Wilson J Why should Mr Astley have asked about it. Surely he, as a major creditor who as I read the evidence had shown a great deal of consideration to your clients, could expect to at least have been consulted about a move being made which had the potential to, as I read the evidence, prejudice his client's interests very significantly.

Wilson Well the primary response taken by the Lightbodys Your Honour was to say we were dealing with the Regal debt. They had that in hand. They had it under control. I wouldn't be able to make that submission if they'd been defaulting on their monthly payments, if the debt had been getting bigger, I wouldn't be here making that submission. But I am here and I think with respect that there can be a reasonable amount of credit to the fact that a debt had got up to $500,000 and it was reduced down a long way over a period of '95 – eight years, with this transaction occurring three years into it.

McGrath J I can see that they made considerable efforts. I can see if you like that they behaved in an honourable way faced with a huge debt which they owed concurrently with the company. But what still I come back to is that even whether I might even concede it's certainly not one of the worst cases of the kind, but that in the end what happened was that they passed the risk of future adverse effects over to the creditor. And that that it seems to me could only be to the prejudice of the creditor. It could be seen in no other way. And that in those circumstances at the moment it seems to me to be fitting directly within s 60.

Wilson Well obviously I have to accept that because of what happened four and a half years later, there was a risk that something could happen negatively. Everybody knows that.

McGrath J It wasn't the fact that the risk came home later, I mean that could or couldn't have happened, but if the risk hadn't come home there'd be no problem. But it was apparent from day one when the assets were moved to the trust against the plan to immediately forgive.

Wilson Or to have a gifting programme.

McGrath J As much as possible that could be forgiven without paying gift duty and then entering into a further programme, it's quite apparent that this was going to be to the prejudice in the sense that if the risk did eventuate, the Lightbodys would be protected against it because the creditors would assume the burden.

Wilson Well, I feel I'm obliged to accept that some of that comes into the circumstances to take into account in determining whether there was intention to defraud. It has to. But there must be quite a lot of other balancing considerations as well.

Tipping J They were changing an appreciating asset into a depreciating asset at the very best from your point of view weren't they.

Wilson Sorry I'm not sure that I understand that clearly.

Tipping J Well the value of the house was going to go up. The real value of the debt, assuming we look at it that way, was going to go down.

Wilson Well the debt was going down, that was the process. And it did go down.

Tipping J I'm sorry we're at cross purposes Mr Wilson, don't worry.

Wilson I accept that.

McGrath J There was nothing for Regal in this. There was absolutely nothing for Regal in this. Regal only had downside risk in this transaction. Now I'm not saying that that means that your clients intended to walk away. I have knowledge of those sort of matters, but they were passing the downside onto Regal. And you can't, there's no upside for Regal in this arrangement was there.

Wilson There's no upside for Regal in looking strictly at transferring the house to the family trust. But there was an upside to Regal in the ongoing trade. And I've drawn that out. If you look at the various possibilities. If they'd,

instead of forming the trust, if they were insolvent and Glen Lightbody had said okay, I'm giving up, I can't pay $350,000.

McGrath J Yes, yes I can certainly see. I mean I think early on in this case I took issue somewhat with Ms McCartney's characterisation of this as an indulgence, I mean it may well have been a business assessment. But we have to look at the matter in terms of the indebtedness, the risks in relation to that indebtedness, and what was done in relation to assets of the Lightbodys, in particular Mr Lightbody.

Wilson Yes I accept that Your Honour but I was just responding to the point and I make it more in my written submissions and I'm not going to go over it here again because I'm sure Your Honours have taken it onboard, but the evidence does specifically show that from the time of the transfer the company went on trading with Regal and it bought 700-and something thousand dollars worth of goods. And it paid approximately a similar amount. The term loan came down to $15,000. So there was that upside for Regal from that part. I accept that there wasn't an upside in terms of the house.

McGrath J Yes I understand from that perspective there was upside the way it turned out. But in terms of the transfer, if we could just focus for the moment, if we focus not on the continuance of trading but we focus on this particular isolated transaction that was undertaken by the Lightbodys, there was no upside in that.

Wilson No Your Honour, on that part. And I also accept that the question, the ultimate question for a Court decide on these facts is was there is intention to defraud. And in the submissions I've made is that that is a matter of considering all the circumstances. So I accept that one can take into account that risk. I accept that Mr Astley wasn't told about it. Those are factors that can go into the equation. Those factors I think in my submission were properly taken into account by Justice France.

McGrath J You accept it all has to be assessed as at 1998 when the transaction happened.

Wilson Yes.

McGrath J Rather than in relation to how well overall it might have turned out for Regal, that can't then be relevant can it.

Wilson Yes but in terms of something like *Freeman v Pope*, that's not the only approach there is. It's a matter of what was a necessary consequence, what was the effect, and the intention has to be assessed at that time. So

they have to transfer the property with the intention of defeating the creditor.

Blanchard J Just coming back to this question of solvency, would you mind looking at page 222 of volume 4 which is a file note relating to the National Bank.

Wilson I'm sorry Your Honour 200 and?

Blanchard J 22. Now I may have this wrong but I understood that the borrowing from the National Bank at the time when the property was transferred to the trust was about $148,000. This file note appears to detail what that consisted of. It refers to a figure of $147,000. There's an existing loan, there's $70,000 which was going straight round and back to the bank again to clear the company's indebtedness to the bank apart from it's overdraft facility which continued. And then there was a boat loan. Now when you tot all that up there's not much room for home improvements or for diverting what would have gone to home improvements into the company. Which means, if I've got that correct, that if the company had to find the 65,000 and had to resort to inventory or to accounts receivable, maybe it could find the wherewithal on the 20th of the following month to pay the 65,000 as well as other amounts which were due, but it was going to potentially placed under huge strain. So it seems to me that if the company wasn't actually insolvent, it was at grave risk of insolvency if Regal decided to make demand. And if Regal had been told about what was going on, is it highly likely it would have made demand.

Wilson With the file note Your Honour, I hadn't looked at that again but I'm not sure that it really clarifies the matter. I mean we're in the situation unfortunately where this evidence isn't very clear because there wasn't focus on it in the High Court about what would have happened.

Blanchard J Well it does indicate that the 147,000 and 148,000 has been spent.

Wilson Well I'm not sure what the existing loan is. It doesn't detail the amount.

Blanchard J Well the existing loan is clearly money that's been spent. Otherwise the money would be sitting in the bank.

Tipping J And the 70,000 is the extra which was going to be drawn down ostensibly for house arrangements, but apparently not under this.

Wilson I have made it clear Your Honours that I am not aware that the evidence is clear enough to help us about this. I certainly saw some evidence that they were going to do home improvements. I can't put it forward as a categorical fact that that is where $64,000 would have come from. I'm not seeking to do that. I'm seeking to say that if we had this hypothesis that

they had to find $65,000 quickly, there would have been some ability, a reasonable ability to do it from one or more of.

Blanchard J Yes but not without prejudicing the company's business. He would have had to have sacrificed inventory, and we all know that if you have to sell inventory in a hurry you don't get the sort of value that you would hope out of it. It might have involved not paying some of the other creditors. If you did pay all the other creditors. It seems to me paying them plus the $65,000 would have made this company, if not actually insolvent, at extreme risk. And this was a risk which was being thrown onto Regal which was owed a great deal more money than that. It was being thrown onto Regal by a transaction which involved the sale of the house, an immediate gift and the postponing of the trustees' obligation to pay the rest for seven years, with in fact the intention to gift the rest but forgetting about that. There is still a delaying element of the seven year term loan.

Wilson I have indicated that I have difficulty being clear about what would happen because this was not in focus in the High Court. I regret that if it had been signalled that it was going to be said Glen Lightbody was insolvent at this time.

Blanchard J Well I'm not putting it on the basis that the company was necessary insolvent. What I'm suggesting is that it's pretty obvious it would have been under great financial strain and there's not much indication where money would have come from to salvage the situation.

Wilson Well I do submit Your Honour that one needs to take into account the company's operation generally. And in my submission it couldn't have been an insolvent company at this point.

Blanchard J Why.

Wilson Well for a start, in the previous three years it had found from it's trading operation $160,000 to repay a debt that it had at that point.

Blanchard J But it was $65,000 in arrears with it's current account.

Wilson It was and when you look through the account the trading account tends to fluctuate. It goes up and down and it meets debts from time to time. And it seemed to have a pattern of meeting debts soon after Christmas sales so the debt reduced after that time. One sees that in the document. One of the points that I do submit ought to be taken into account is that the company must have been making reasonable headway in terms of profits in that it generated sufficient to reduce it's overall indebtedness by quite a substantial extent. So it was worthwhile doing that. It wasn't, what we're

dealing with here is something that didn't happen. So it's very difficult to answer it now on incomplete evidence.

Blanchard J Well it didn't happen because Regal didn't know about what had occurred and didn't make any demands.

Wilson There's quite a substantial amount of evidence that Regal and Lightbody traded for the mutual benefit of both sides over a long period of time and got on reasonably well. Mr Astley, the director, right at the end was of the view that the only reason, the reason why the company failed was that Capro went to a different supplier. If it had stayed with him, things would have been well. That's his evidence and it's recorded by His Honour, noted by His Honour Justice France in the judgment. I can take you to it.

Wilson J But didn't Mr Astley also make it quite clear that he would have been very unhappy had he been told about the transfer.

Wilson Well he's done that later.

Tipping J He also said he would have made demand if he'd known.

Wilson Once the occurrence has happened in 2003 and it's found that he couldn't trade on.

Tipping J Is there any evidence Mr Wilson as to why the structure of the transaction was a seven year term for the trustees of the trust to pay the balance owing that amount that had not been released immediately on the implementation.

Wilson I don't recall that it was ever discussed in the evidence.

Tipping J Because that puts the money out of reach of a creditor doesn't it for seven years.

Wilson Yet there's still an asset there though.

Tipping J Oh yes.

Blanchard J Yes but it's a delaying factor. And it's enough to bring s 60 into play that creditors are delayed.

Wilson I don't recall there being any question or consideration of that seven year term as a particular matter on it's own.

Tipping J Well maybe not but I would have thought if it's not **3.52.53**.

Blanchard J You've got replaced by gifts.

Tipping J You've got replaced by gifts, that's the point. But at the time it was substantially to prejudice creditors even on a non-gifting basis because they couldn't get, they might get hands on it ultimately but not for seven years. Anyway, I just put that into the mix Mr Wilson. It just strikes me as being a point that may have been a bit overlooked.

Wilson Well I don't like to labour the point but the thrust of the case was that from the respondent's viewpoint.

Tipping J Well I know what the thrust of the case is. Can you directly answer the seven year point, how it wasn't obviously going to delay at least creditors if things went belly-up.

Wilson Well one's looking at it with the benefit of hindsight with respect. One has to look at what the situation was at that time in 1998 and here you have people like the Lightbodys who are not sophisticated people, don't go about things in a calculated way as Her Honour found and they enter into this family trust arrangement. The key part of their case has always been that they were dealing with Regal over that time. So this situation was going to arise. I'm quite certain that it probably wasn't brought to Mr and Mrs Lightbody's attention that there was a seven year term there. I don't recall it being noted in the evidence at all. The documents were completed by the lawyer who set up the family trust.

Blanchard J And signed by the Lightbodys.

Wilson Yes signed by them.

Tipping J Well you can't have the law, the more stupid you are, and I'm not saying your clients are stupid, please don't think that for one moment, but if the law were that the more undiscerning you were, the more protected you are from the section, that would be a huge counter intuitive approach.

Wilson I wasn't submitted that Your Honour, I was submitting that Mr Glen Lightbody can demonstrate from the evidence that he was a jeweller and trading by the making and selling of jewellery, dealing with supplies from Regal over a long period of time. He had his ups and downs and he had a commitment to make sure the debt was satisfied. He says he was ultimately prevented from the last bit of it by two unfortunate events that happened quite some time after.

Tipping J Are you saying really the answer in this case is that if they did prejudice creditors in the result, that they honestly didn't think they were.

Wilson At the time when.

Tipping J That this transaction would do so. That must be essentially your argument isn't it.

Wilson It is essentially my argument Your Honour because I'm submitting that we're well outside a *Freeman v Pope* position.

Tipping J You don't need to go through all the facts again, I'm just wanting you to agree or not that that captures at least one part of your.

Wilson It does.

Tipping J They didn't mean to. It wasn't their, their motive was not to prejudice.

Wilson They weren't acting dishonestly in relation to Regal in relation to it. Essentially because they can show.

Tipping J Well dishonesty is an external standard in this field.

Wilson There is.

Blanchard J What was their motive in putting the house into a trust.

Wilson There's not a lot on that Your Honour. They say that they were doing it to ensure it stayed in their family. And the only part that Glen Lightbody was asked about, he might have been asked about it once or twice, but the part one picks up in the evidence that I noted I'll refer you to it. It's at page 290.

Blanchard J How would they ensure it was going to stay in the family by putting it in a family trust. What were they insuring against.

Wilson One gets the impression that, they specifically said in case, effectively, either of them died. But I'm sure that they obviously, one infers they obviously meant if their marriage failed which it did not long after. At page 290 of volume 3 in the cross-examination at line 20 is said: "Well given you rule debt situation you'd also be able to recognise that if you had an accident and couldn't work your creditors wouldn't be paid?" "That never crossed my mind. I've had a lot of accidents but nothing bad enough to stop me working." "So if I were to suggest to you that the dominant purpose of transferring the house to the trust you would disagree?" "The dominant reason for transferring the house was to protect the house so my kids would have somewhere to live." "And who were you protecting it from?" "I didn't want the house sold because one of my children had a drug problem and I didn't want the house sold and split up."

Blanchard J Who was going to sell it?

Wilson He's indicating if something happened to myself and my wife, that's the next part of it, "I didn't want the house sold." "I'll repeat my question," He says at line 33, "I wasn't protecting it from anybody. It was putting it aside for my children if something happened to myself and my wife."

Tipping J They could deal with that in their will.

Blanchard J I just don't understand their explanation. It doesn't make any sense to me.

Wilson Well Your Honour one has to perhaps understand a bit of what the Lightbodys were like as people. They were before Her Honour in the High Court. Unfortunately Your Honours don't get the opportunity of hearing them. Mr Lightbody is present in the Court but he won't be speaking obviously. They are not people who rationalise things or indeed understand things in a way that trained lawyers would or people who have a knowledge of these sort of things.

Blanchard J But he maintains he wasn't protecting it against creditors, he says that never crossed his mind, but who else was there who might have got at the house and taken it away from the children.

Wilson Well if one of them died, if he died and his wife remarries the house may go. If the marriage fails the house may go.

Elias CJ Well the trustees have a power to sell.

Wilson They do yes.

Tipping J There are two passages in Justice France's judgment, she being the Judge who saw the parties, that strike me as having some relevance in this area. One is in para [54] on page 78 where she notes, I think this is Justice France, I apologise if I've got the wrong judgment, I think this is it.

Wilson Yes.

Tipping J She notes: "The minutes also not the trust was initially formed for the acquisition and protection of the family home." And then she says in [57], "I also conclude that at least by the time they'd completed their meeting with Mr Horrocks the Lightbodys knew that one of the effects of the trust arrangement was to protect assets.

Wilson Yes although they say it was protection for the sake of their children.

Tipping J Well yes.

Blanchard J Protection from what. Mr Lightbody says I was protecting it so my kids would have somewhere to live if anything happened to myself and my wife. Well that doesn't sound like he's worrying about divorce at this point.

Wilson I think he's worried more about if he died.

Blanchard J Yes if he died. But why wouldn't the house be protected in the event that he died.

Wilson Well if it wasn't in a family trust his widow, being the joint owner, takes the house by survivorship. She may deal with it.

Blanchard J But if she takes by survivorship, the debts other than those charged on the property don't go with it.

Wilson Yes I accept that.

Blanchard J So there's in that sense automatically a protection against debt if that's the event he's worrying about.

Tipping J It's very difficult, I'll put it to you bluntly, it's very difficult other than to draw the inference **4.02.01** with less obfuscation here.

Wilson Well Her Honour in the High Court didn't come to that conclusion after having the parties before her for three days.

Tipping J Well I'm not sure Her Honour really had her mind directed to the correct legal test.

Wilson The thrust of the Lightbodys' case was to point to their record and what they were doing in relation to the particular indebtedness in question. And they, in my submission, must be given the benefit of being genuine and reasonably effective about that. And that's proved on the facts.

Blanchard J I think we can accept that as at the stage they were doing this they would have had an intention to try and keep paying the amounts in question. But I find it difficult to see that they didn't appreciate that they were, by this transaction putting the asset beyond the reach of the creditors if it should happen to be needed for discharging the obligation to the creditors. They hoped that the company would keep going and could do that. But they took the asset away so that when the company eventually failed, the asset wasn't there and wasn't available.

Wilson With respect Your Honour it was never expressed that it would be a hope. They relied on what had actually occurred and this is why the evidence relays this.

Blanchard J Well that can never be more than a hope.

Wilson Well it might have only been a hope if you just take the situation at one point and there's no history to it. Nothing of fact and reality that they can rely on to demonstrate what they've been doing. And that's what they had here.

The ultimate question is whether there was intent to defraud. And I've accepted, and indeed Justice France found, that there were some factors pointing towards that. There were quite a few other factors that point away from it as well.

Elias CJ Mr Wilson I think it might be sensible for us to take a short adjournment shortly. But I just wanted to ask you, I can't understand the submission you've made to us that there wasn't any emphasis in the hearing on the financial position. Because I've just been going through pages and pages of cross-examination directed at the financial position.

Wilson Well with respect it wasn't directed at the sort of inquiry that we've just discussed here – what would happen in particular if Regal said, well sorry you must pay $65,000 now. And the Lightbodys haven't, because they weren't focused on that, as Her Honour found, they haven't adduced the evidence as to clarify exactly the loan situation, the particular position about home improvements and how that fits into it. They haven't.

Elias CJ Well there's quite a lot of discussion about all of those topics.

Tipping J They haven't, and I have to say with respect that I think they're naïve.

Elias CJ Anyway, when we come back I'd like to know where you're going to take us next in relation to this.

Wilson Yes thank you Your Honour.

Elias CJ Because I think we've understood the points that you've been putting very effectively to us. Thank you.

Court adjourns 4.06 pm
Court resumes 4.15 pm

Elias CJ Thank you Mr Wilson.

Wilson Yes thank you Your Honour. To conclude my submissions there's just two points I wish to sum up on the question of solvency. Then I have a small amount to deal with over whether the transfer was voluntary or not. And then an equally small amount about section 60 subs (3), the indefeasibility issue.

Elias CJ Thank you that's helpful.

Wilson So I probably won't be all that.

Elias CJ No you're right to have concentrated on this and we've found it very helpful thank you.

Wilson Thank you Your Honour. Well it is important to my client's case, that's how they addressed this problem and what they put to the hearing in the High Court, it was the whole focus of their case. So the two points that I wish to sum up before leaving insolvency is first, what they would have done if they had to pay $65,000. And secondly the point about their repayment.

Firstly, if they'd had to pay $65,000, this is speculation now, but I would put it, after looking at the financial statements that it would have come from getting money from debtors and from dealing with the inventory. There was also a car that had just been put into the company at $18,000 and no doubt could have been taken out and disposed of. So on this hypothesis of how would the company and Glen Lightbody have met a debt at that point, there'd be those three particular sources, the inventory, the debtors and the car just put into it. I am not in a position, because there wasn't focus in the High Court, to advance other matters like the home improvement money or overdraft the company had with the bank. Simply there was no dealing with those in the High Court, those type of issues, because, and you can see this is the way the Lightbodys' case has been presented in the High Court, it was not presented to address an allegation of insolvency. It was just not presented in that way.

And the second and final point I wish to make about the insolvency is that what was presented was the genuineness of their ability to repay the Regal debt by his work in the company and Glen Lightbody can point to reducing the debt from 1995 to 2003 from over half a million dollars down to around $160,000. So when one's looking at the mix of factors here on the ultimate question of intent to defraud, it is my basic submission that he can say rightly, look at my record, I got that debt down by $360,000 from my work as a jeweller.

He didn't quite get there. I know there's debate about the accident and the son with a drug problem and probably, possibly Glen Lightbody's position

is that he's been too bashful in not wanting to focus too much on those factors. But I do point out that Her Honour did recognise that they were real factors and they, like many other things, went into the mix on her decision about intent to defraud.

The next topic Your Honour is voluntary disposition. I don't want to go over what has been considered in the High Court and the Court of Appeal but the majority there, and Her Honour in the High Court, can see the documentation and accepted that it was not a voluntary transfer of the house. It was done properly and regularly through the solicitor, the transfer of value. And there was the gifting programme. I accept that one can say well there's clear evidence of an intention to have a gifting programme. That's accepted. But it doesn't take away from the fact that if you stopped the clock a week after the transfer of the house, the asset position then was Mr and Mrs Lightbody personally don't have the house but they do have a gift, they do have a loan sorry, from the trust. Different considerations would go into whether the gift at any particular times in the following years was made with intent. But we haven't addressed that. That's not what the appellants application has ever been. The application has been to go the whole way and seek to set aside the transfer of the house.

Incidentally on that, there's always been a difficulty in my mind as to what exactly the appellant is seeking because when you look at their application that we have gone over before, it is suing both Mr and Mrs Lightbody. It is specifically saying that, in a sense it's saying that the whole of the transfer has to be set aside. That's what the application is.

At the end of the judgment in the High Court Her Honour dealt with this point that an issue may arise but she didn't have to decide it as to whether Mrs Lightbody's share should go or what was the effect of the property being jointly owned and jointly transferred by the Lightbodys to the family trust. I think in the Court of Appeal, to be fair to my learned friend, there was some kind of concession but it's not I think recorded in the judgment that Regal was now only attacking Mr Lightbody's interest I the property which was a joint interest with his wife. That wasn't the case in the High Court. But it did seem to reduce to that in the Court of Appeal. And I don't think the matter's been touched on today. For my part, with respect Your Honours, if it is found against Glen Lightbody that he did have intent to defraud, it would only be Glen Lightbody that we're concerned with because he was the only one who had a relevant creditor. Mrs Lightbody was not a debtor of Regal. There's never been any suggestion of that.

Tipping J How can you set aside half a transfer.

Wilson That was a question I raised in the High Court Your Honour. And I do not know the answer to it. Half of a joint transfer.

Blanchard J Well what Ms McCartney is saying in para 165 of her submissions is that they're seeking an order which will have the effect that Mr Lightbody's share in the property vests with the Official Assignee if that helps.

Wilson The joint interest he had in it.

Blanchard J No, presumably an order that his undivided share should be severed and a half interest vested in the Official Assignee.

Tipping J You could have a setting aside couldn't you to the extent that what my brother's just said take place.

Wilson Yes so it would finish up with the house then being owned partly by the trust and partly by the Official Assignee.

Blanchard J It would involve a severing of the joint tenancy. But the trust presumably could be directed to transfer a half share to the Official Assignee. Off the top of my head I don't see why that couldn't be done as a mechanical exercise. But it might be necessary to think about that if we get that far.

Wilson Well I was of course, on that particular point, concerned about Mrs Lightbody's position because the claim was definitely made against her.

Blanchard J Well if it was done like that the trust would simply be left with the half share that she'd transferred to it.

Wilson Anyway.

Blanchard J I don't know what the internal trust documents, how they would affect that situation but that really would be over to her and the trustees.

Tipping J The end result would be that effectively only she had settled her share of the house. And that would reflect the policy of the section, if, as my brother says, we get that far.

Wilson Yes, I haven't come prepared to argue this in detail, but I had been concerned in the High Court that they had a joint, that is undivided interest in the property which they'd transferred to the trust.

Tipping J The Court can sever that.

Wilson So you've got to sever that retrospectively back to the point when the transfer occurred I take it then.

On this point, sorry I've diverted a little bit, I was discussing the question of the transfer being voluntary. And apart from that, what we have here are clear documentation about a sale, a loan agreement and gifts reducing the loan. And it's one of my submissions that the legal status of those transactions ought to be accorded to them. That's in line with *Mills v Dowdall* and I'm sure Your Honours are familiar with that. I agree that we're in a slightly different area here. But it would lead to considerable uncertainty if in this area or other ones you depart from the normal legal status of transactions.

This has come about because the appellant effectively has directed the application at the transfer of the property to the trust rather than at the gifts made by Glen Lightbody. But despite that, I am with respect opposed to the appellant being able to somehow say, oh we'll just fudge over that or treat it as the gifting programme as coming into it. Essentially what I presume the appellant would like to do would be attack the gifts. That was where the gift was. And if we're reducing that we would have to look at Glen Lightbody's circumstances at that time.

Blanchard J Do you accept that this argument is relevant only in relation to *Freeman v Pope.*

Wilson Yes.

Blanchard J Because that I think is the only point at which the voluntariness of the transaction is an element.

Wilson Yes I have raised it in my submissions specifically that if one is applying Freeman v Pope as the law, that wouldn't apply on the facts here because of the two reasons, the second being that it wasn't voluntary.

Blanchard J Yes.

Wilson I accept that if you move away from Freeman v Pope and then you go to put all the different circumstances in the basket to consider them with their various weight, then you can look at aspects of this. But it does seem fundamentally wrong that there has to be.

Elias CJ Aspects of value. You said aspects of this, do you mean aspects of value.

Wilson Aspects to this, no it's fundamentally wrong that we can really move from an application that was saying a transfer was with fraudulent intent to really saying it's individual gifts given in subsequent years with fraudulent intent.

Tipping J Well your primary point then is that you'd need to focus on the circumstances and purposes and so on that then apply.

Wilson Yes.

Tipping J Rather than those that applied at the date of the transfer and that's a point of some force.

Elias CJ Although you could look at the gift which was contemporaneous with transfer.

Tipping J Yes.

Wilson Yes I haven't, the majority in the Court of Appeal have taken that view, that's $27,000. But that I submit is not a big sum in relation to the figures here at that point.

Blanchard J Well there's $27,000 but there's also the seven year postponement of the rest of the loan. That of course isn't addressed to the question of whether it's voluntary.

Wilson Yes well that's been raised with respect for the first time today. I don't think it was asked about specifically. I accept that that's there on the documents. The only submission I'd made about it is that it would be very unlikely in my submission, looking at inferences of intent to defraud that you could say Glen Lightbody was conscious of that and saw that as some element that should go into working out what his intention was in this. There's nothing in my submission.

Blanchard J Well one has to assume it was deliberately done for some reason, on advice. I mean you don't want us finding that this was a sham and I'm not suggesting it was. So therefore it's a real loan under which the obligation to pay is postponed for seven years. Which is clearly going to be a hindrance to creditors if there's an insolvency, a real insolvency, a little time after this occurs and creditors are looking to realise on the unforgiven loan.

Wilson Yes well curiously of the seven year period, four and a half years went by with trading. If there hadn't been.

Blanchard J Yes but we're looking at the potentiality as at 1998.

Wilson Yes I know and if there hadn't been the gifting and the loan was still there it would have become due about the time we had the hearing in the High Court.

Blanchard J So what, if you're looking at it in 1998.

Wilson Well what we're looking at in 1998 is in my submission the ability of Glen Lightbody to satisfy his creditor, particularly Regal. And that was the focus of his case in the High Court. It simply didn't feature, or his attention wasn't drawn to it, that somehow an improper motive is to be drawn from the fact that the document he's signed.

Tipping J It's got nothing to do with motive.

Wilson Alright, then, sorry with respect his defence has focused on what he had done in practical terms and achieved in satisfying Regal's debt.

Blanchard J We're focused on what the consequence is of what he's done. One of the consequences is that there is an asset which in practical terms is not realisable for seven years.

Wilson It's a factor to take into account I accept in relation to weighing up all of these factors on intent to defraud along with the other elements that he has based his case on.

Blanchard J Well I accept it has nothing to do with voluntariness which is what you were talking about. I'm sorry if I've diverted you.

Wilson That's alright, it's something that could happen. But my submission is that it's overtaken by the case that the Lightbodys put forward and which Her Honour, having considered it in detail over three days, accepted that they were dealing with it. They had a commitment and they've shown that they did satisfy to a very considerable extent this debt.

Tipping J Isn't the intent that it be wholly voluntary the key factor rather than whether it was in fact immediately wholly voluntary.

Wilson Well I didn't read Freeman v Pope with respect Your Honour as suggesting intent.

Tipping J I'm not talking about Freeman v Pope. I'm just talking about the way we should look at it. Because clearly Freeman v Pope doesn't precisely deal with this sort of sign. What I want help on is it not more, does it not go more to intent than what actually happened later. The intent was that it be wholly voluntary.

Wilson The intent was that they enter into a gifting programme because that's shown there. But it doesn't mean to say they have to carry it out. The circumstances could have changed just as he has an accident and closes down is a negative side. He may have died. Other events could have

happened. The gifting programme may have changed, it may have been halted. And some acceptance of that needs to be given in my submission.

The final point I needed to address is the question of s 60(3). And I have from my written outline the key points of my submissions here and I won't be long, is that the fraud that sets aside a title must be actual fraud in my submission and I rely on that as I'm sure Your Honours would expect.

If you come to the conclusion that Glen Lightbody did have a fraudulent intent, it's not the same sort of fraud as justifies the setting aside of a land transfer title.

Tipping J Oh this is 60(3) of the Land Transfer Act.

Wilson Yes.

Tipping J I thought you were talking about s 60 subs (3) of the Property Law Act.

Elias CJ Yes I've headed it up that too.

Tipping J It's s 60(3) of the Land Transfer Act you're now addressing.

Wilson No, I was addressing in general terms subs (3) of s 60, whether they can.

Blanchard J But that's a different point.

Tipping J Yes.

Blanchard J It's not the point you were making which seemed to be related to the Land Transfer Act.

Tipping J It's getting late in the afternoon I know Mr Wilson but we have to be very clear what you're saying.

Wilson Yes I know. Whichever part it is under Your Honour, the thrust of my case on this point is if you have found that there was fraudulent intent on Glen Lightbody's part, it is not the kind of nature of fraud that.

Tipping J It's not land transfer fraud.

Wilson No.

Tipping J It's as simple as that.

Wilson It's as simple as that. And I do, the only other part that I make about that is I have in my written submissions addressed wilful blindness as discussed by Justice Kirby.

Blanchard J I don't think we're into wilful blindness. The wilful blindness is presumably related to Mr Horrocks. But we don't need to ascribe participation, actual participation in any fraud or wilful blindness to Mr Horrocks. He surely is infected with whatever disease Mr Lightbody had. If Mr Lightbody was fraudulent to one degree or another, then the trustees must all be treated as affected by that.

Wilson I certainly accept there's force in that argument Your Honour. I didn't understand that was the case that I was addressing. But it has been raised today and I am quite content to leave that to Your Honours to rule on. I accept that generally that if you say two people are involved as in a partnership and one of them was fraudulent it affects both of them as a general proposition. But nevertheless it is a kind of fraud if we've got this far which is not land transfer fraud, it's something that's come about either by an irrebuttable presumption or by an inference that a Court has made.

Blanchard J No moral turpitude.

Wilson Mm.

Tipping J So your client's title can't be upset, but what about the *in personam*. I'm not saying that it's my conclusion but if your client's title can't be upset for land indefeasibility purposes, what about the *in personam* approach. Have you anything to offer there.

Wilson Regrettably I haven't Your Honour on that point. I haven't come prepared on that. From the elements of it of unconscionability, because of the kind of fraud that we're talking about here and the circumstances, I don't think the unconscionability is made out or indeed.

Blanchard J If there was a finding of intention to defraud in the sense that we know is given to it, wouldn't it be unconscionable for the transferees to accept title in those circumstances. Wouldn't their consciences be affected.

Wilson Well it's a question that very much overlaps with the whole question there is in the case, in my submission it's not.

Blanchard J Yes but I'm assuming for the sake of this part of the argument that Ms McCartney has got us to this point and that we are prepared to ascribe intention to defraud to Mr Lightbody. I'm not saying that's what we're going to do but we have to assume it for the purpose of looking at where we go in relation to the Land Transfer Act. Now if Mr Lightbody, who

sits on both sides of the transaction, has that intention, isn't it unconscionable for him as transferee to accept the transfer and to proceed to register it.

Wilson Well I'm not entirely sure how this works Your Honour because it hasn't really been what I had prepared to address and what we've addressed in the previous courts in that the appellant is seeking to set aside a transfer and now limited to this.

Tipping J Well doesn't it inevitably arise if you're going to try and stand on the Land Transfer Act.

Wilson Well I see it as a matter of reliance was placed by my clients in the High Court that, if it was held that there had been an intent to defraud then subs (3) of s 60 applied.

Blanchard J Well we've got past that point. We're saying that there's no merit in that because they can't be said to have acted in good faith because Mr Lightbody's bad faith which we're assuming for the moment, infects them.

Tipping J I thought you were saying that we can't do anything about it because of indefeasibility of title.

Wilson Indeed Sir.

Tipping J Yes well doesn't that immediately introduce the *in personam* route or possible route.

Wilson Regrettably Your Honour I hadn't come prepared to respond to that submission. It wasn't quite what I thought I was being required to address in this case.

Elias CJ Would you like an opportunity to put in some written submissions on that.

Wilson That would help Your Honour.

Elias CJ It may be that we don't get to that point. But if we do, it would be useful to us to have your views.

Wilson I would appreciate that essentially because I hadn't heard of the concept of an *in personam* claim and the implications of that prior to our hearing today.

Tipping J Well if we get as far as Ms McCartney wants us to go and you would otherwise succeed in resisting on the Land Transfer Act, we will get to this.

Wilson Well I would ask for time to put in some submission about it.

Elias CJ Yes how much time would you like for that.

Wilson Just seven days, something like that.

Elias CJ Alright, well in fact the Court is about to disperse I should say, or some of us will be away, so I think you could have two weeks Mr Wilson and you two weeks to reply Ms McCartney on that point.

Wilson I appreciate that Your Honour. I mentioned one week because I'm going to be away for a week, the week after. So it'll have to be either one week or three weeks. I will have to do it in seven days.

Elias CJ Right.

Wilson That concludes my submissions.

Elias CJ Yes thank you Mr Wilson. Is there any issue of costs in particular is there a question of legal aid.

Wilson There's not a question of legal aid Your Honour.

Elias CJ Thank you.

4.46 pm

Elias CJ Ms McCartney don't address us on the *in personam* aspect but are there any other matters you wish to refer to in reply.

McCartney I have a small number of short points. And the first short point is, as Your Honour Chief Justice has dealt with in a question to my learned friend when he said there's no focus on Mr Lightbody's financial circumstances, that was the case that Regal put up. And this is apparent from the High Court in Justice France's summary of what Regal relied on at para [25] of her judgment, page 71 of volume 1. And the very first point, the financial circumstances of the company and of the Lightbodys at the time of transfer of the home in late 1998. And the references to the cross-examination on the point of assets and liabilities to establish Mr Lightbody's personal position are at pages 278 lines 22 to 33, 279 lines 1 to 10, 282 lines 10 to 34, 282 lines 5 to 34, 284 lines 1 to 25, 286 lines 4 to 34, 287 lines 1 to 39, 288 lines 1 to 5 and 291 lines 5 to 34.

In the course of that cross-examination at volume 3 page 278 I directly asked Mr Lightbody, this is line 27, "If Regal castings had called up the

debt in 1995, you would have lost your home because you couldn't repay the debt." "I'm not sure, I guess that would be correct." And at line 30, "And if the debt had become payable in 1998, the same thing, you would have lost your home because you couldn't repay the debt."

Blanchard J That's the whole debt though isn't it.

McCartney That is the whole debt. But the whole debt is, in my submission, in issue because Mr Lightbody now says, well if there'd been a demand made, I could have met that initial demand by going to get the debts recoverable and so forth.

Blanchard J But the argument I think is that it was only $65,000 that could have been demanded.

McCartney At that particular moment.

Blanchard J At that point. Is that incorrect?

McCartney Well I mean up until another I think fourteen days and then the balance of something like $113,000 would have been asked for.

Blanchard J Yes.

McCartney So I wasn't just scurrying around to get one sum, there was another.

Blanchard J It was arrears of current account, plus current current account which was going to fall due on the 20th.

McCartney The 20th of the month.

Blanchard J But nothing else could have been demanded.

McCartney No until they made default.

Tipping J And what was the total of the arrears plus the 20th of the month figure.

McCartney The total was, it's in the judgment of Justice William Young, the exact figures. Paragraph [103] on page 59, oh the whole amount's not there. It was 65,000 in arrears and I think, I'd better get the exact figure. Oh it's in the High Court judgment, my learned friend's assisted me. Page 73, yes 113,000 approximately on the current account and $223,000. On the term loan account, of the 113,000, 65,000 approximately was overdue and the balance was due on the 20th of the month.

Tipping J Sorry, I didn't quite follow that. How much was due literally at the time of the transaction, 113? And some more on the 20th of the same month.

McCartney No. No the document Your Honour is as at 30, I'm sorry the date I think was 7 November. I think the page number is at 131 Mr Wilson would you agree with that. It's 131 of volume 4, as at 30 November 1998 the overdue amount was $64,969.93. Then a further amount due on the 20th of the following month of $26,440.32.

Blanchard J And the transaction was settled on the 12th of November.

McCartney Yes.

Blanchard J So in another eight days there was going to be the balance of 113,000 due.

McCartney Yes.

Tipping J Mr Lightbody personally without resort for the moment to the company's assets, he being a concurrent independent debtor, all he had available to him as I understand it is something that's just short of 90,000, being half of the unforgiven portion of the debt. You've put this schedule at the summary of your argument in at the first page of your primary submissions. And my understanding of what the result of that was that Mr Lightbody's indebtedness, at the time of the transaction the bank and Regal was 213,000 and his only available asset of any consequence was the 88,500.

McCartney Yes.

Tipping J So he, looked at individually without resort to the company was completely unable to pay.

McCartney Completely.

Tipping J So he has to be able to say, well I could have scratched up some money from the company.

McCartney Yes.

Tipping J In order to defray those two debts that he owed personally of about 213,000.

McCartney Yes. And *Kerr* deals with who the onus is on at page 312 under the presumption of insolvency. Commencing, "Where there is no positive proof of insolvency in the sense last mentioned at the date of settlement but the settlor was then in debt to a large amount and soon afterwards

becomes absolutely insolvent, then unless he can prove his solvency at the date of settlement and although there may have been no actual intent, the settlement will be void."

At the bottom of that section 312 with reference to *Townsend v Westacott* held that the burden of proving solvency at the date of the settlement was upon the settlor and that he'd failed to give such proof and that under these circumstances the settlement was void.

Now the next point, just taking them as they arose in my learned friend's submission, no pleading of insolvency. With respect I submit the notice of opposition pleads insolvency explicitly or at least impliedly. I have to, if this point's being taken, draw Your Honours' attention to the fact that the notice of opposition filed, which is at page 17 of volume 1, relies only on the fact that the sale and purchase agreement and transfer were not an alienation of property with the intent to defraud creditors. And the second point is there was no notice of opposition whatever filed by the second respondents. And that may be relevant to the issue of indefeasibility.

The next point is in answer to Your Honour Justice Wilson, why did he conceal the transfer to trust. The response from Mr Astley in volume 3, I think it's page 288. The question is asked at the bottom of that page, line 36, "You never told Regal you transferred the house to trust did you." The answer, "I didn't see the need to tell Regal. My personal business and company business were separate." "You made a deliberate decision to keep the transfer to trust secretive." "As I said I didn't see the need to tell any of my creditors at that point. They were being paid. The trust was set up as I said in case my wife and I had an accident. My kids would have somewhere to live."

Now the evidence of Mr Astley on this point is I submit worth considering. His evidence is at volume 2 page 185. The paragraph number is 21 and it's about a little below half way down through that paragraph. He said, "Had it known (with reference to Regal) that Mr and Mrs Lightbody had in December 1998 taken steps to transfer their home to a family trust, Regal Castings would not have continued to property up Capro III and Glen Lightbody."

Wilson J Was that evidence challenged in cross-examination.

McCartney No. No challenge to that evidence, it was unchallenged.

And the next point, my learned friend Mr Wilson submits that there were genuine reasons for the liquidation and while in my submission this isn't really a relevant, it does go to credibility because Mr Lightbody asserted he had an accident to his hand and his son went to jail and for personal

reasons he couldn't see through his, what he said was, commitment to Regal. The medical report he relied on is at volume 4, sorry volume 5 page 348, that's the last page which records the summary in relation to that evidence. And the doctor wrote, "Returning to work is difficult, as there appears to be significant psychosocial issues. Mr Lightfoot (they say) liquidated his company within a very short period of a minor trauma."

And the cross-examination of Mr Astley on that point, which I have referred to is at page 259 of volume 3, lines 15 to 35, I'm sorry starting at 258 where he was asked about these reasons. And at 258 line 15, Mr Astley said, "I do recall those and I disagree with them both." And he went on to say that it was the change of supplier that caused the problems. He was asked at line 32, "The point I'm asking you about was these two specific reasons Glen Lightbody gave." To which, at line 37, Mr Astley said, "I only got that from his affidavit, and I would say they are nonsense."

And at beginning of 259, line 1, "I would say he went into receivership because he couldn't get any supplies and that these excuses he's come up with are just that." "Just nonsense?" "They might be, there might be some fact in them but they're not the reasons he went into receivership."

Elias CJ Well all of this is not anything that we can resolve Ms McCartney.

McCartney I agree Your Honour.

Elias CJ And it is only opinion stuff.

McCartney Yes. And no, I've got nothing else thank you very much Your Honours.

Elias CJ Thank you very much. Well thank you counsel. We'll of course reserve and receive your further submissions. Thank you very much for your assistance, it's been a very interesting case.

Court adjourns 5.02 pm