IN THE SUPREME COURT OF NEW ZEALAND

SC 61/2012
[2015] NZSC 82

BETWEEN	NEIL STUART JOHNSTON Appellant
AND	CHRISTOPHER FREDERICK SCHURR First Respondent
	DEEM & SHEARER Second Respondent

Hearing:	17 February 2015
Court:	Elias CJ, McGrath, William Young, Glazebrook and O'Regan JJ
Counsel:	C R Carruthers QC, E J Hudson and J S Cooper for Appellant R J B Fowler QC and P J Mooney for First Respondent J M Morrison and N Levy for Second Respondent
Judgment:	12 June 2015

JUDGMENT OF THE COURT

A The appeal is allowed in part. The judgments of the High Court and Court of Appeal in relation to the insurance issue are set aside. The question whether Mr Schurr is liable to the appellant in respect of the surrender of the insurance policies is to be determined in the High Court.

B In all other respects the appeal is dismissed.

C In respect of the appeal to this Court, the appellant is to pay costs to Mr Schurr and Deem & Shearer in the sums of $15,000 and $25,000 respectively together with reasonable disbursements to be fixed by the Registrar.

D The orders for costs made in the High Court and Court of Appeal are affirmed.

REASONS

(Given by William Young J)

Table of Contents

	Para No
The statutory scheme	[6]
The basis upon which the claim against Mr Schurr should be assessed	[18]
The basis upon which the case was presented	[18]
A preliminary comment	[20]
A little legal history	[22]
The supervisory jurisdiction of the High Court	[24]
The basis upon which we propose to deal with the case	[29]
Claims in tort	[32]
The factual background to the relationship property claims	[35]
The relationship property claim against Mr Schurr	[60]
The claim	[60]
The High Court judgment	[61]
The Court of Appeal judgment	[64]
Our assessment	[69]
The relationship property claim against Deem & Shearer	[86]
The claim	[86]
The High Court judgment	[87]
The Court of Appeal judgment	[88]
Our assessment	[91]
The insurance issue	[100]
Disposition	[108]

[1] On 6 January 1999 Neil Johnston, the appellant in this appeal, suffered serious brain injuries in a motorcycle crash. In August 1999, the Family Court appointed Christopher Schurr as the manager of his property under the Protection of Personal and Property Rights Act 1988 ("the PPPR Act"). The appointment was made on an interim basis initially and lapsed in November 1999. It was, however, subsequently renewed on a number of occasions. Eventually the appellant recovered his capacity to manage his affairs and Mr Schurr was discharged as his manager in December 2003.

[2] The present litigation is addressed to two aspects of the way in which the appellant's affairs were looked after while Mr Schurr was his manager:

(a) The first concerns the non-finalisation of a relationship property agreement with the appellant's estranged wife Christine Johnston. Shortly before the accident, the appellant (represented by his solicitors, Deem & Shearer) and Mrs Johnston had reached informal agreement on the division of their relationship property. The appellant's accident and his resulting incapacity meant that a formal agreement was not able to be executed. Although there was an offer made in October 1999 on behalf of Mrs Johnston to divide relationship property, a relationship property agreement was not finalised while Mr Schurr was the appellant's manager and when the appellant and Mrs Johnston finally reached a settlement (in 2004), this was on a basis which was less favourable to the appellant than the settlements which had been proposed just before his accident and in October 1999.[1] The appellant maintains that Mr Schurr, as his manager, and Deem & Shearer, as his solicitors, were at fault in not finalising a settlement of relationship property. He seeks damages against both for the difference between what he would have had to pay under settlements proposed in December 1998 and October 1999 and what he did pay under the settlement ultimately reached.

(b) The second issue concerns the actions of Mr Schurr in cancelling a number of life insurance policies which the appellant held.

[3] The appellant's claim for damages against Mr Schurr and Deem & Shearer was heard by Duffy J. The claim against Mr Schurr was argued on the basis that he had been in breach of his statutory duties under the PPPR Act. Duffy J held that the Act did not impose statutory duties capable of giving rise to a claim in damages and she therefore dismissed the claims against Mr Schurr.[2] She further held that after the accident Deem & Shearer had not been acting for the appellant and thus did not owe him a duty of care.[3] So the claim against Deem & Shearer was also dismissed.

---

1 The reasons why this is so are discussed in detail below at [59].
2 *Johnston v Schurr* [2011] NZFLR 114 (HC) (Duffy J) [*Johnston* (HC)] at [69]–[70].
3 At [93]–[96].

[4] The appellant appealed unsuccessfully to the Court of Appeal.[4] That Court declined to amend the statement of claim so as to include a claim in negligence against Mr Schurr[5] and otherwise upheld the conclusions of Duffy J.

[5] We will discuss the case under the following headings

(a) the statutory scheme;

(b) the basis upon which the claim against Mr Schurr should be assessed;

(c) the factual background to the relationship property claims;

(d) the relationship property claim against Mr Schurr;

(e) the relationship property claim against Deem & Shearer; and

(f) the insurance issue.

The statutory scheme

[6] The purpose of the PPPR Act is to:[6]

> … provide for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs[.]

[7] It does so by, inter alia, conferring on the Family Court jurisdiction to appoint managers in respect of the property of such persons.

[8] Section 28 provides:

> **28 Primary objectives of court in exercise of jurisdiction under this Part**
>
> The primary objectives of a court on an application for the exercise of its jurisdiction under this Part of this Act shall be as follows:

---

4 *Johnston v Schurr* [2012] NZCA 363, [2012] NZFLR 753 (Arnold, Stevens and Miller JJ) [*Johnston* (CA)].

5 At [104].

6 Protection of Personal and Property Rights Act 1988 (PPPR Act), long title.

(a) To make the least restrictive intervention possible in the management of the affairs of the person in respect of whom the application is made in relation to his or her property, having regard to the degree of that person's lack of competence:

(b) To enable or encourage that person to exercise and develop such competence as he or she has to manage his or her own affairs in relation to his or her property to the greatest extent possible.

[9] Under ss 29 and 31, a judge who is of the view that lack of competence has been established in respect of the subject person may appoint a manager (or managers) in respect of some or all of that person's property. The first schedule to the Act provides a default list of powers which may be conferred on managers. When appointing a manager the Court may exclude some of the powers on the list and may also confer additional powers.[7] The manager has "all such rights and powers as the court may confer on the manager in the property order, subject to any restrictions specified by the court in the order".[8]

[10] Under s 35, property affected by an order does not vest in the manager, but the manager may possess and manage it and the subject person is incapable of exercising personally any power that the Court has vested in the manager over such property.[9] The subject person retains the legal capacity to exercise powers not vested in the manager, and to manage property not subject to the order.[10]

[11] Section 36 provides:

36 Functions and duties of manager

(1) In managing any property under this Act, the first and paramount consideration of a manager shall be to use the property in the promotion and protection of the best interests of the person for whom the manager is acting, while seeking at all times to encourage that person to develop and exercise such competence as that person has to manage his or her own affairs in relation to his or her property.

---

7 Under s 29(3).
8 Section 38(1).
9 Section 53(1).
10 See John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, Lexis Nexis, Wellington, 2012) at [14.3.1], where the authors discuss the contractual capacity that persons subject to a property order retain with respect to property to which the order both does and does not relate.

(2) Without limiting the generality of subsection (1) of this section, so far as is practicable in the circumstances and to encourage the person for whom the manager is acting to develop and exercise such competence as that person has to manage his or her own affairs in relation to his or her property, the manager may allow that person to have control of and deal with any part of the property.

[12] Section 37 provides:

37 Security for performance of manager's duties

(1) A court may, if it thinks fit, require any manager (other than a trustee corporation), upon appointment or at any time thereafter, to give such security to Public Trust as the court thinks fit for the due performance of the duties of the manager.

(2) The security may be a bond, with or without a surety or sureties, or such other security as the court directs and approves.

(3) A court may at any time, on the application of Public Trust, require a manager to give to Public Trust further or other security for the due performance of the manager's duties.

(4) A court may at any time give leave to Public Trust to enforce any such security, and Public Trust shall thereupon proceed by action or otherwise to enforce the security accordingly.

(5) All money so received by Public Trust shall be deemed part of the property for which the person is or was the manager, and all costs and expenses so incurred by Public Trust shall be paid out of that property.

(6) Public Trust may commence or institute proceedings against any such manager for any breach of duty, and may apply to the court ex parte for an injunction to restrain any such breach or any threatened breach.

[13] Also material are ss 43 and 44:

43 Manager's duty to consult

(1) In the management of the property of a person subject to a property order, the manager shall, as far as it may be practicable, consult—

(a) the person for whom the manager is acting; and

(b) Such other persons, as are, in the opinion of the manager, interested in the welfare of the person and competent to advise the manager in relation to the management of the person's property; and

…

(2) The manager may follow any advice given to the manager by the person for whom the manager is acting or by any other person referred to in subsection (1) of this section, and shall not be liable for anything done or omitted by the manager in following that advice, unless done or omitted in bad faith or without reasonable care.

(3) In any case where the manager is of the opinion that any such advice conflicts with his or her duty as manager or with any rule of law or would or may expose the manager to liability or is otherwise objectionable, or in any case where conflicting advice is given to the manager, the manager may apply to a Court for directions in the matter, and shall not incur any liability in respect of anything done or omitted to be done in accordance with any such directions.

…

(5) Nothing in subsection (3) of this section shall oblige the manager to apply to a Court for directions.

…

44 Effect of manager's decisions, etc

(1) Every decision made by a manager in the exercise of the powers conferred by or under this Part of this Act, and everything done by a manager in implementation of any such decision, shall have the same effect as it would have had if it had been made or done by the person for whom the manager is acting and that person had had full capacity to make or do it.

…

[14] Section 45 imposes certain obligations on managers to report to the Court. In the case of a manager who is not a trustee corporation, the Court registrar must copy these reports to the Public Trust, who is to examine them and report upon their correctness or otherwise.[11] The Public Trust enjoys access to the manager's books and other documents for that purpose.[12]

[15] Section 49 provides:

49 Liability of manager

(1) Subject to subsection (2) of this section, no action shall lie against a manager in respect of anything done or omitted to be done by the manager in the exercise of the powers conferred by or under this Act, unless it is shown that the manager acted in bad faith or without reasonable care.

---

11 PPPR Act, ss 46(1) and 46(2).

12 Section 46(4).

(2) A manager shall be personally liable in respect of any contract or arrangement entered into with, or liability incurred to, any person if the manager does not, before entering into the contract or arrangement or incurring the liability, disclose to that person that the manager is acting in that capacity.

[16] Part 6 of the Act deals with procedure. Any application for a personal or property order must be served on, inter alia, the subject person.[13] The Court must appoint counsel to represent the subject person unless satisfied that he or she has his or her own counsel.[14] The duties of appointed counsel are set out in s 65(2):

65 Appointment of barrister or solicitor by Court or Registrar

…

(2) So far as may be practicable, it shall be the duty of the barrister or solicitor appointed under subsection (1) of this section to–

(a) contact the person in respect of whom the application is made, explain to that person the nature and purpose of the application, and ascertain and give effect to that person's wishes in respect of the application; and

(b) evaluate the solutions for the problem for which an order is sought submitted by other parties to the proceedings, taking account of the need to find a solution that–

(i) makes the least restrictive intervention possible in the life of the person in respect of whom the application is made, having regard to the degree of incapacity or incompetence of that person; and

(ii) enables or encourages the person in respect of whom the application is made to develop and exercise such capacity or competence that the person may have to the greatest extent possible.

[17] The Court must review property orders from time to time. When making a property order it must specify a date, not later than three years from the date of the order, by which the manager must seek a review.[15] An earlier review may be held on application by the subject person or other interested person.[16]

---

13 Section 63.
14 Section 65.
15 Section 31(8).
16 Section 87(2).

The basis upon which the claim against Mr Schurr should be assessed

The basis upon which the case was presented

[18] The case went to trial on a second amended statement of claim which was not express as to the nature of the claim advanced: it could be read as alleging either or both of the torts of negligence and breach of statutory duty. As noted, at trial the case was presented as a claim for breach of statutory duty. Duffy J, with whom the Court of Appeal agreed, held that the duties imposed by the PPPR Act were not of a kind which gave rise to liability in tort.[17] In the Court of Appeal, Mr Carruthers QC for the appellant (who had not appeared in the High Court) sought, unsuccessfully, to amend the claim to allege negligence.[18]

[19] In this Court it was contended that the appellant had a claim in tort for breach of statutory duty and, as well, that the Court of Appeal was wrong not to entertain a claim in negligence.

A preliminary comment

[20] By reason of his appointment as manager, Mr Schurr had control over the appellant's property and was required to act generally so as to promote his best interests. It would be a strange system of law which did not provide the appellant with a remedy if he suffered loss as a result of lack of diligence or care on the part of Mr Schurr. The problem, however, is to identify the juridical basis of such a remedy.

[21] In the earlier stages in this litigation, the appellant sought to found his claim in tort, either for breach of statutory of duty or (in the Court of Appeal) in negligence as well. There is, however, another basis upon which his claim can be advanced which is grounded in the dual status of Mr Schurr:

(a) by virtue of his appointment as manager, as an officer of the Court (strictly of the Family Court, but, as will become apparent, still subject to the supervision of the High Court); and

---

17 *Johnston* (HC), above n 2, at [69]–[70].
18 *Johnston* (CA), above n 4, at [99]–[105].

(b) by reason of his control of the appellant's property, as a fiduciary for him.

A little legal history

[22] The Court of Chancery exercised jurisdiction in respect of those who were not competent to manage their affairs. Such management was put in the hands of managers.[19] They were responsible to the Court of Chancery for their conduct and there are cases in which monetary claims against managers succeeded. They are shortly reported but the processes by which the claims were enforced show that they proceeded simply on the basis that the managers were officers of the Court and fiduciaries and subject to the control of the Court accordingly.[20] At the risk of stating the obvious, they were not claims in tort. The standard required of managers was high. In one case a manager was held liable for a shortfall of rent, simply on the basis that a higher rent might have been obtained; and this even though the Lord Chancellor considered it to be an "exceedingly hard case".[21]

[23] Against that background, it is unsurprising that the legislature should limit the liability of managers to circumstances in which they had acted in bad faith or without reasonable care. Such a limitation was, for instance, imposed by s 330 of the Lunacy Act 1890 (UK). Similar provisions appeared in New Zealand in the Mental Defectives Act 1911 and the Mental Health Act 1969.[22] These provisions were broader in scope than the current s 49, because they encompassed claims associated with the processes by which plaintiffs had been placed, and the ways in which they had been treated while under the mental health system.[23] Nonetheless, in light of this history, it is clear that s 49 was intended to limit what might otherwise be the wider liabilities of managers in relation to losses arising out of their conduct.

---

19 For ease of discussion we will use modern terminology.

20 As in *Ex parte James Evers-Swindell* (1852) 2 De G M & G 91, 42 ER 805 (Ch). The case concerned a failure to collect rent, with Cranworth LJ saying "No other conclusion can be arrived at than that this loss has arisen because the [manager] was wanting in that vigilance which the Court is entitled to expect, and is bound to require from one holding that fiduciary situation": at 93. See also *In re Wilkins* (1842) 6 Jur 308 (Ch).

21 *In re Wilkins*, above n 20, at 308.

22 PPPR Act, ss 131(1) and 124(1) respectively.

23 See for instance the discussion in *B v Crown Health Financing Agency* [2009] NZSC 97, [2010] 1 NZLR 338.

The supervisory jurisdiction of the High Court

[24] The supervisory jurisdiction in relation to managers to which we have just referred is now vested in the High Court of New Zealand by s 17 of the Judicature Act 1908 which currently provides:

> **17 Jurisdiction as to mentally disordered persons, etc**
>
> The Court shall also have within New Zealand all the jurisdiction and control over the persons and estates of mentally disordered persons, and persons of unsound mind, and over the managers of such persons and estates respectively, as the Lord Chancellor of England, or any Judge or Judges of Her Majesty's High Court of Justice or of Her Majesty's Court of Appeal, so far as the same may be applicable to the circumstances of New Zealand, has or have in England under the Sign-manual of Her Majesty or otherwise.

[25] There were similarly expressed provisions in the Supreme Court Ordinance 1841 and the Supreme Court Acts of 1860 and 1882.[24]

[26] Somewhat awkwardly, s 17 continues to be expressed in the present tense despite English judges not having exercised jurisdiction under the Sign-manual for many decades.[25] It is clear, however, that s 17 must be construed as maintaining for the High Court the jurisdiction formerly exercised by English judges under the Sign-manual[26] and thus the jurisdiction exercised in the cases to which we have just referred.

[27] The s 17 jurisdiction is exercisable in respect of the estates of "mentally disordered persons, and persons of unsound mind". This language, although at least in part referable to legislation which has been repealed[27] is applicable to the estate (that is the property), and thus the managers, of those subject to orders under the PPPR Act. This is consistent with s 114 of the PPPR Act which provides:

> **114 Savings**
>
> Nothing in this Act shall limit the general jurisdiction of the High Court under section 17 of the Judicature Act 1908 or otherwise.

---

[24] Supreme Court Ordinance 1841 5 Vict 1, cl 5; Supreme Court Act 1860, s 5; and Supreme Court Act 1882, s 17.

[25] As explained in *Re R (a protected patient)* [1974] 1 NZLR 399 (CA).

[26] See *In Re P (A Mental Patient)* [1961] NZLR 1028 (SC); *Re R (a protected patient)*, above n 25; and *Re W* [1994] 3 NZLR 600 (HC).

[27] A point discussed in *Re W*, above n 26.

[28] The combination of the supervisory jurisdiction and s 49(1) means that Mr Schurr is liable if, in the exercise of his powers, he acted in bad faith or without reasonable care and thereby caused the appellant loss.

The basis upon which we propose to deal with the case

[29] Because the case was not argued on the basis of the supervisory jurisdiction, we called for further submissions from counsel which we have received and to which we have given due consideration.

[30] As noted, the supervisory jurisdiction vested in the High Court (as modified by s 49) has the practical consequence that Mr Schurr is liable to the appellant for any losses caused by the exercise of his powers under the Act if he acted in bad faith, or with a lack of reasonable care. Subject to one possible qualification this is substantially the basis upon which the case against Mr Schurr was presented at trial and we see no reason why we should not so address it on appeal.

[31] The possible qualification is that in respect of the relationship property issue, the argument advanced by the appellant is not necessarily confined to exercise by Mr Schurr of his powers under the Act (which excluded concluding a relationship property agreement) but rather his failure to obtain orders which did provide for resolution of the relationship property issue. We do not see this qualification as real. As run in the High Court, the appellant's case focused on Mr Schurr's obligations under the statute. In any event, Mr Schurr's entitlement to make representations to the Court was a function of his appointment as manager. For this reason, when he was placing material before the Court he was doing so in the exercise of his powers as manager.

Claims in tort

[32] The existence of the supervisory jurisdiction explains the provisions of the PPPR Act which presuppose that managers are liable to make good losses caused by the exercise of their powers and which were relied on as supporting the availability of a claim for breach of statutory duty. These include s 49 which was heavily relied on by Mr Carruthers supporting his argument that a claim for breach of statutory

duty lies for breach of the duties imposed by the PPPR Act. Given the history to which we have referred, it is more easily read as limiting what might otherwise be a broader liability under the supervisory jurisdiction.

[33] We see no need for a determination in respect of the claims in tort. This is because the availability of claims for breach of statutory duty or negligence would not affect the outcome of the appeal. This is because if there is no claim under the supervisory jurisdiction, there would likewise be no claim in tort. As to this:

(a) The claim against Mr Schurr as argued was founded fairly and squarely on his obligations as manager; this despite some indications in the pleadings and evidence as to a possibly broader basis associated with Mr Schurr's role as the appellant's accountant and advisor. There is therefore no injustice to the appellant in treating his claim as confined to the way in which Mr Schurr performed his functions as manager.

(b) The reasons why we reject the claim in relation to the non-finalisation of a relationship property agreement would also be applicable if this aspect of the case were assessed in terms of the claims in tort which were advanced. And:

(c) We are of the view that the claim in relation to the surrender of the insurance policies must be reconsidered in the High Court and there is no basis for considering that the position of the appellant in respect of it would be any better if it were addressed as a claim in tort rather than by way of resort to the inherent jurisdiction.

[34] For these reasons, we do not propose to otherwise discuss the legal and pleading issues argued by the parties as to the claims for breach of statutory duty or in negligence.

The factual background to the relationship property claims

[35] The appellant and Mrs Johnston separated in 1996 after 21 years of marriage. They have three children. Both before and after separation they farmed in partnership a family farm along with other land that was leased or bought and sold through family trusts. Upon separation Mrs Johnston moved to a house they owned in New Plymouth and, although the partnership was not dissolved, she took no active part in the farming operation.

[36] In 1998, the appellant initiated relationship property negotiations. Before he did so, he sought the assistance of Mr Schurr, who had provided accounting services to the partnership for many years, and his solicitor, Geoffrey Shearer of Deem & Shearer. The appellant and Mr Shearer have had a long association which goes back to playing sport together at school.

[37] On 23 July 1998 Mr Schurr wrote to the appellant and Mrs Johnston suggesting that relationship property be settled on the basis of figures which he provided. On his calculations, the gross assets were $1.59 million. This included the farm which was said to have a government valuation of "around" $1.1 million but which Mr Schurr valued at $800,000 to allow for a share milking agreement which still had four years to run. After deducting debts of $765,578, Mr Schurr arrived at a net asset figure of $824,422. Of this, it was proposed that Mrs Johnston would receive $398,144 (in assets or cash). Mr Schurr advised Mrs Johnston that the values were fair and the offer generous. He observed that she was being offered a little less than 50 per cent of the net assets, but that legal proceedings were unlikely to result in an equal split.

[38] It soon became apparent that certain life insurance policies carried a higher surrender value than had been allowed for by Mr Schurr and this resulted in the total assets figure increasing. However, despite this, the amount offered to Mrs Johnston did not increase. In the course of negotiations, Mrs Johnston's solicitors, Govett Quilliam, challenged Mr Schurr's valuation of the farm. The appellant responded by dealing directly with Mrs Johnston and this resulted in her abandoning her challenge. And on 21 December 1998, Govett Quilliam wrote to Deem & Shearer saying that

Mrs Johnston believed "agreement regarding final settlement has now been reached". They invited Deem & Shearer to forward a relationship property agreement. We will refer to this as the 1998 agreement, recognising as we do that it was informal.

[39] On 11 January 1999, Deem & Shearer sent an agreement to the appellant. We will refer to this as the January 1999 draft agreement. Under it Mrs Johnston was to receive assets and cash to a value of $398,144 – that is the figure originally proposed by Mr Schurr. As will be apparent, however, by the time the January 1999 draft agreement was sent to the appellant, his accident had occurred.

[40] In the aftermath of the accident, the appellant's family arranged to keep the farm partnership running. His parents and his brothers, Ian and Roger Johnston, were involved. So also was Mrs Johnston, who remained a partner in the farming partnership and now took responsibility for keeping its books of account.

[41] On 22 March 1999 Mrs Johnston's solicitor wrote to her, recording that he had earlier experienced "discomfort in that [the appellant] was intimidating you to take a significantly lesser sum" than her entitlement in law. He invited her to advise whether she still wished to settle on the terms agreed in 1998 or whether her views had changed. In her evidence at trial Mrs Johnston said that the appellant had worn her down in the negotiations, but that, with the accident, the pressure to settle had disappeared. It also appears that after she had seen the books of account of the partnership she formed the view that the appellant had not made full financial disclosure to her. Whether her suspicions in this regard were well-founded was in dispute at trial but not the subject of express findings of fact. It is clear, however, that she did become very suspicious and indeed was still suspicious when she gave evidence at trial.

[42] The appellant considered that he had at least a moral entitlement to a greater than equal share in the relationship property by reason of assistance which he and Mrs Johnston had received from his parents. But on our appreciation of the material we have seen, Mrs Johnston had a strong claim to an equal share in the relationship

property.[28] As well, the farm was never properly valued. Instead the assumed government valuation of "around" $1.1 million was adopted as a starting point. As far as we can tell, the actual government valuation of the farm was $1.21 million.[29] From the assumed government valuation figure, an arbitrarily calculated and excessive $300,000[30] was deducted to allow for the burden of an unusually long share milking arrangement[31] entered into by the appellant after separation and without consulting Mrs Johnston. Despite an indication from Mr Shearer that a higher value would have been appropriate, the appellant was not prepared to revisit the value of the farm. No allowance was made for dairy company shares recorded in the accounts as having a value of $106,896 (albeit that it is possible that ownership of these shares was assumed for the purpose of the government value of the land). In addition, even though it came to be recognised that Mr Schurr had valued the life insurance policies at $60,000 less than their surrender value, the net payment figure to Mrs Johnston was not adjusted upwards. All in all, it is clear that the January 1999 draft agreement provided for Mrs Johnston to receive less than her legal entitlement.

[43] At a meeting on 9 July 1999, members of the Johnston family, Mrs Johnston, Mr Schurr and Mr Shearer agreed that it was best to defer the division of relationship property and that applications should be made to the Family Court for the appointment of a property manager.[32]

[44] On 30 July 1999 Ian Johnston applied for orders appointing Mr Schurr as temporary property manager and Mr Shearer as counsel for the appellant. Deem & Shearer acted for Ian Johnston on this application. In his affidavit Ian Johnston

---

28 The family assistance had been to both the appellant and Mrs Johnston rather than to the appellant alone. They had farmed in partnership for 19 years and had three children. The appellant would have found it difficult to establish a clearly greater contribution to the marriage partnership for the purposes of what was then s 15 of the Matrimonial Property Act 1976.

29 This figure comes from the partnership accounts and was accepted by the appellant in evidence as correct.

30 The net value of $800,000 originated with the appellant. $300,000 was the amount necessary to get from the assumed government valuation of $1.1 million to $800,000. Mr Schurr's calculation of the discount was only $270,000 which was in effect rounded up to $300,000. The correspondence prior to 21 December 1998 (including a letter from Mr Shearer to the appellant) suggests that the $270,000 was far too much. So too does a valuation obtained much later by the appellant from Mr John Larmer which indicates that the appropriate discount was $70,000.

31 It was a five year agreement as compared to the more usual three year agreement.

32 The appointment of a welfare guardian was also proposed but, in the end, the application for a welfare guardian was not persisted with.

explained although Mrs Johnston was an experienced farm manager a property manager was required to ensure that the appellant's interests were sufficiently represented, given that the appellant and Mrs Johnston were estranged. It was also noted that a relationship property agreement was in negotiation at the time of the crash. In an accompanying memorandum Mr Shearer explained that he had been acting for the appellant until the crash. He did not suggest that relationship property had to be resolved soon. He emphasised that it was in the appellant's long term interests that the farm be retained as it would aid in his rehabilitation. He noted that Mr Schurr might not be suitable as the "permanent property manager" because the ultimate resolution of relationship property posed a conflict of interest, but suggested that Mr Schurr was ideally placed to act on an interim basis.

[45] Judge Fitzgerald responded with a minute asking that Deem & Shearer file a memorandum detailing which powers Mr Schurr would have over what property, and directing that counsel be appointed for the appellant. Deem & Shearer filed a memorandum in response, suggesting that powers to settle relationship property be excluded, on the basis that a settlement, while important, could be put aside for the time being. Mr Shearer appears to have assumed that the earlier minute from the Judge had appointed him as counsel for the appellant. That, however, had not been the intention of the Judge as he clarified in a second minute making it clear that he was not was not prepared to appoint anyone associated with Deem & Shearer as counsel for the appellant as they were acting for Ian Johnston. The upshot was that Mr Shaun Gifford was appointed as counsel for the appellant.

[46] In a subsequent memorandum to the Court, Mr Gifford supported Mr Schurr's temporary appointment as the appellant's property manager but drew the Court's attention to Mr Schurr's conflict of interest if the appointment were made permanent. He did not suggest that the relationship property settlement required immediate attention.

[47] On 19 August 1999 the Court appointed Mr Schurr property manager for three months, conferring upon him all of the powers that had been sought. As noted, those powers did not extend to settling relationship property. This order expired on 18 November 1999 and was not immediately renewed. However, on 10 December

1999 Margaret Harrop of Deem & Shearer, acting for Ian Johnston, and Mr Gifford filed a joint memorandum seeking a six-month "extension" to Mr Schurr's appointment. The memorandum drew the Court's attention to Mr Schurr's conflict of interest, noting that he had not been given power to deal with relationship property but suggested that this issue might be "put aside over the next six months as [the appellant] works towards recovery and control of his affairs".

[48] By minute of 8 February 2000 the Court appointed Mr Schurr manager for a term of six months, again excluding the power to settle relationship property. The minute also directed that Mr Gifford's appointment as counsel for the appellant was to continue "at this stage and until either the orders expire or are reviewed in six months time".

[49] The appellant's evidence and, to a large extent his case, were premised on the assumption that if someone representing him had pushed the issue, Mrs Johnston would have settled on the basis agreed in late 1998. In contradistinction, Mrs Johnston's position at trial was that with the appellant's accident and the cessation of his ability to put her under pressure, she was no longer prepared to settle on the terms agreed in December 1998.

[50] The evidence on the point rather suggests that Mrs Johnston's views as to settlement evolved somewhat more slowly than she suggested at trial. We say this because:

(a) There is a file note made by Mr Schurr on 31 August 1999 of what appears to have been a discussion with Mrs Johnston which at least suggests that she then wanted to receive a gross settlement of $408,000 (compared to the $398,144 as agreed December 1998 and provided for in the January 1999 draft agreement.

(b) On 12 October 1999, a new solicitor for Mrs Johnston, Paul Carrington of Reeves Middleton Young, wrote a letter to Mr Schurr about relationship property. We will refer to this as the "Carrington letter". He updated some of the values which had formed

the basis of what had been agreed in 1998 and, in particular, included the farm at what he said was its latest government valuation of $980,000. We are uncertain of the provenance of this figure. As already indicated, on the basis of the evidence it would appear that the government valuation of the property was $1.21 million. Using the values he listed, Mr Carrington calculated Mrs Johnston's half share of the net assets at $530,656. Mr Carrington invited Mr Schurr to respond if he disagreed with the calculations but did not propose any course of action. If Mr Schurr did anything with the letter, there is no record of it and it is likely that he ignored it.

(c) On 17 January 2000 Mrs Johnston left a message for Mr Shearer expressing concern about the delay in settling relationship property. When told why Mr Schurr had not been given power to settle, she observed that the same conflict would affect Mr Shearer.

(d) There is no clear post-January 2000 indication of any wish on the part of Mrs Johnston for a prompt settlement of relationship property and nothing to suggest a willingness to settle at any discount to her legal entitlement.[33]

[51] Notes of discussions involving those caring for the appellant show that during the first half of 2000, the appellant was raising issues about relationship property. At a discussion on 26 March 2000 he expressed concerns about relationship property and as to whether he might have to leave the farm. This seems to have led to a further meeting on 13 April 2000 which Mr Shearer attended. The minutes of this meeting record that Mr Shearer agreed that he would proceed to settle the appellant's affairs, with the goal of letting him stay on the farm, although the possibility of getting a smaller landholding was raised.

---

[33] There is a file note of Mr Schurr dated 9 July 2001 which includes calculations as to what might be paid to Mrs Johnston based on an unequal sharing of relationship property but a substantially increased value of the farm. It is not clear that these calculations were based on any indication from Mrs Johnston as to what she would have been prepared to accept.

[52] This initiative led nowhere as Mrs Johnston in a telephone call to Deem & Shearer on 14 June 2000 objected to Mr Shearer acting for the appellant. As well she indicated that she did not wish to resolve relationship property until the share milking agreement expired (which would not be until May 2002). There is also a file note of Mr Schurr of 13 July 2000 which suggests that Mrs Johnston's position was that resolution of relationship property should be deferred until the end of the share milking agreement.

[53] Deem & Shearer wrote to Mr Carrington on 7 July 2000 confirming that they would not act for the appellant if Mrs Johnston was uncomfortable with them doing so. The letter also suggested that relationship property issues be deferred until "nearer the time that the current sharemilking agreement is due to expire (31st May 2002)". Given the content of the letter as a whole (which as noted made it clear that he was not acting on behalf of the appellant) this suggestion must have been made by him as solicitor for Ian Johnston. The letter indicated that it was then proposed "to instruct Shaun Gifford to deal with matrimonial property issues".

[54] On 3 August 2000 Mr Schurr sought an order extending his appointment until 31 January 2002. He advised that that he understood that Mrs Johnston wanted to delay settlement until the share milking contract expired at the end of May 2002. He attached Deem & Shearer's letter of 7 July 2000 and other correspondence between the solicitors. Mr Gifford signed a memorandum which supported the renewal of the order and the appellant's family and Mrs Johnston consented to an order being made as sought.

[55] As it turned out, the Judge extended Mr Schurr's appointment on the basis that he was to apply for a review not later than 31 January 2002. It seems to have been contemplated that if such an application was made, the order would subsist until the review was completed.[34]

[56] On 20 September 2000, Mr Gifford wrote to the Court. In his letter he noted:

---

[34] The terms of the order were, on this point, not crystal clear and the continuation of the order assuming that an application was made prior to, but not resolved by, 31 January 2002 was not explicitly provided for.

> A series of discussions between the various parties and their counsel has produced agreement whereby Mrs Johnston will defer pursuing matrimonial property for approximately two years.

[57] Mr Schurr made a timely application for review in January 2002. He explained that his understanding was that Mrs Johnston did not seek settlement in the next three years and everyone benefited from delay. From the appellant's perspective delay allowed him to remain on the farm. Mr Schurr explained that the partnership could afford to buy a smallholding, which would give the appellant a direction and an interest in life. Pursuant to a direction from the Court, Mr Gifford filed a report on 30 May 2002. There was nothing in the report to suggest that there was any pressing necessity to finalise a relationship property settlement. The upshot was that on 10 October 2002, the order was renewed for a further three years.

[58] By October 2002 there were some indications that the appellant was getting better and from the beginning of 2003, his condition improved rapidly and dramatically. During 2003, Mr Schurr acted as an intermediary between the appellant and Mrs Johnston with a view to facilitating an agreed division of relationship property. His attempts in this regard, however, were not successful. In mid-November 2003 the appellant sought an order discharging Mr Schurr. This application was supported by medical evidence and was duly granted the following month.

[59] The appellant and Mrs Johnston eventually entered a relationship property agreement in 2004. The appellant's case proceeds on the basis that Mrs Johnston received a total of $1.2 million under the agreement, a proposition about which we have some doubts as this figure encompasses payments received by Mrs Johnston from the partnership, some and perhaps most, if not all, of which might be thought to be referable to remuneration or maintenance for the children. The details of this are, however, of limited significance because the difference between what was agreed in 1998 and 2004 is primarily due to changes in the value attributed to the farm. Whereas it was valued at $800,000 for the purposes of 1998 agreement, its value as at 2004 was $2,355,000.

The relationship property claim against Mr Schurr

The claim

[60] The basis of the claim against Mr Schurr is that he generally failed to take the steps necessary to settle relationship property issues with Mrs Johnston. Such steps would practically have involved obtaining an order from the Family Court authorising someone to act on behalf of the appellant in relation to relationship property. The claim is factually premised on the contention that there were opportunities to settle with Mrs Johnston on the basis of either the 1998 agreement or the letter from Mr Carrington which should have been taken.

The High Court judgment

[61] Duffy J made some findings which provide support for the appellant's case. In particular she accepted that an opportunity to achieve a better settlement was lost:[35]

> The failure to ensure that someone had responsibility for managing the relationship property issues is unfortunate. The appointment of Mr Schurr as a temporary property manager made sense as the accountancy role he had performed for [the appellant] and the partnership for many years meant that he was very familiar with the property and business affairs of [the appellant]. Mr Schurr had been unwilling to take responsibility for resolving the relationship property issues because he considered this would place him in a conflict of interest with Mrs Johnston, who was an equal partner in the partnership. This stance is understandable. But it had the unfortunate result that no one was made responsible for determining how the relationship property issues were to be resolved. Whilst the management regime that was first adopted as a temporary measure made sense, it was allowed to remain in place for the duration of the time [the appellant] was subject to the PPPR Act. But since most of [the appellant's] property was relationship property, it also meant that his interests in this property remained intermingled with Mrs Johnston's interests. Because no one assumed legal responsibility for resolving the relationship property issues, the opportunity to make other choices and so arrive at other outcomes was lost.

[62] In reaching that conclusion, the Judge found that as at 6 January 1999, execution of an agreement in terms of the January 1999 draft agreement was just a formality.[36] She rejected the contention that Mrs Johnston was unwilling to settle after the accident. It was true that the appellant's condition and initially poor

---

35 *Johnston* (HC), above n 2, at [15].
36 At [17].

prognosis for recovery counted against buying Mrs Johnston out at that time, but "there is correspondence which suggests to me that in 1999, had someone pushed the issue of resolving the relationship property, Mrs Johnston would have entered into a settlement. The opportunity was there, but it was not taken".[37] She did, however, qualify this by saying that whether such settlement would have been financially viable for the appellant or whether it would have placed his long term ownership of the farm at risk was "another issue".[38]

[63] As against Mr Schurr these findings were of no assistance to the appellant because she concluded that the claim for breach of statutory duty against Mr Schurr was not sustainable.[39]

The Court of Appeal judgment

[64] The Court of Appeal agreed with Duffy J that a claim for breach of statutory duty under the PPPR Act was not available[40] and it was not prepared to amend the claim so as to encompass negligence.[41] But although it approached the case on a basis which differs significantly from the one we have adopted, certain of the comments made in the judgment are nonetheless of interest in the present context.

[65] In the first instance, the Court had distinct reservations in relation to Duffy J's finding of fact as to Mrs Johnston's willingness to settle after the accident. Although this was made in the context of its assessment of the claim against Deem & Shearer, it is material for present purposes:[42]

> There is much to be said, in our opinion, for [the] submission that before his crash [the appellant] had managed to negotiate an advantageous settlement through Mrs Johnston's reluctant acquiescence, which swiftly dissipated. After 6 January 1999 she had no need to defer to him, and she was soon better informed about the partnership's financial affairs. For some time matters were reasonably put on hold while [the appellant's] prospects of recovery were assessed. When it seemed apparent that he would not recover, she preferred to wait until the sharemilking contract was at an end. For all of these reasons, there was, post crash, no real possibility of a settlement on

---

37 At [16].
38 At [16].
39 At [69].
40 *Johnston* (CA), above n 4, at [86]–[98].
41 At [99]–[105].
42 At [113].

> either the 1998 or the Carrington letter terms. Care must also be taken to avoid hindsight bias; in particular, it cannot be said that anyone ought to have anticipated that property values would rise to the levels reached in 2004, or that, having failed to improve in the first year, [the appellant] would ultimately recover his independence

[66] Secondly, the Court's analysis of who, if anyone, was responsible for the fact that the Family Court did not appoint anyone to take control of relationship property issues repays careful analysis. As to this, the Court began by observing:[43]

> … the PPPR Act does not confer upon a manager all of the subject person's powers over his or her property. Rather, the Family Court decides which powers the manager will have over what property. The statute does not permit, let alone oblige, the manager to exercise a power that the Court has decided not to confer, and a duty to do so cannot be read into s 36, which defines the manager's objective when using the powers that the Court did confer. The section speaks of managing and using the property, but the manager may do (or omit to do) those things only to the extent that the Court has conferred power to do them. In this case, the Family Court expressly excluded the power to settle relationship property.

[67] The Court then addressed the contention that Mr Schurr ought to have sought additional powers or the appointment of a co-manager:[44]

> [95] Any duty of inquiry and recommendation is intimately connected with the application process, so it must apply principally to the person who asks the Family Court for orders appointing a property manager. The applicant need not be the manager or proposed manager. As in this case, the applicant may be a family member or welfare guardian who comes to the Court seeking assistance. The legislation does not clearly contemplate, and [the appellant] does not suggest, that the applicant attracts any actionable duty to identify for the Court and seek all powers that might be necessary. On the contrary, the legislation contemplates that the Court will inquire into the matter as it did in this case, involving the subject person so far as appropriate, holding if it thinks fit a pre-hearing conference to seek agreement on the problem and its solution, and appointing if it thinks fit counsel to assist the Court. Unlike a property manager or welfare guardian, an applicant gains no express exemption from liability under the PPPR Act, presumably because the legislature thought such exemption unnecessary.
>
> [96] It follows that any actionable duty of inquiry and recommendation on a review must derive from the manager's powers rather than his or her status as applicant on any review. But for the reasons given above, the manager possesses only such powers as the Family Court has chosen to confer. The Court did not confer any power of inquiry and recommendation on Mr Schurr.

---

43 At [91] (citations omitted).

44 Citations omitted.

> [97] Further, such duty arising could not be confined to forming an independent view about what the Court needs to know. Having regard to the statutory object of interfering in the subject person's autonomy as little as possible, such duty presumably must extend to consulting the subject person and communicating such views to the Court. Any such duty must largely replicate that of the subject person's appointed counsel, to whom the statute assigns responsibility for contacting the subject person, explaining the application, and ascertaining and giving effect to that person's wishes. If [the appellant] wanted to settle relationship property, it was for his counsel to ascertain that and promote his wishes. We recognise that counsel's appointment is not normally co-extensive with that of the manager. It may subsist only while an application is pending (although Mr Gifford's appointment in this case was continued for six months after Mr Schurr's reappointment in February 2000, coinciding with the period during which Mrs Johnston's willingness to settle finally dissipated). But the subject person and other interested persons may trigger a review at any time.

[68] The Court also expressed adverse views as to the proposed claim in negligence:[45]

> Even if we had been minded to grant leave to amend, any claim in negligence would have faced formidable obstacles on the facts. The Court and Mr Gifford knew that relationship property remained to be settled, and that Mr Schurr could not attend to it. It is very debateable whether any duty to inquire and recommend could exist in these circumstances.

Our assessment

[69] We differ from the Court of Appeal as to the juridical nature of Mr Schurr's potential liability. We are also of the view that at least in the period between August 1999 and January 2000, Mrs Johnston was rather more interested in achieving a prompt division of relationship property than the Court of Appeal was inclined to accept. We also think it at least conceivable that she might have been prepared to settle along the line proposed in the Carrington letter which was, of course, written on her instructions,[46] albeit that it seems implausible to think that she would in fact have been prepared to settle on the basis of what would appear to be an incorrect government valuation figure. We are, however, otherwise in substantial agreement with the approach which the Court took.

[70] There is a high level of uncertainty as to the two key premises upon which the appellant's case is founded, that is the willingness of Mrs Johnston to settle on

---

45 At [105].

46 See above at [50](b).

either the basis agreed in 1998 or the terms proposed in the Carrington letter and practicality of retaining the farm after a division of relationship property.

[71] The case against Mr Schurr has not been premised on the assumption that he should have put in place arrangements to enable a division of relationship property through litigation. Rather the basis of the claim was that if Mrs Johnston had been approached appropriately she would have agreed to a settlement on the basis of the 1998 agreement or the Carrington letter. That the case was advanced on this basis is unsurprising. Litigation against Mrs Johnston with a view to securing a result akin to that agreed in 1998 would have necessarily addressed issues as to valuation, unequal sharing and Mrs Johnston's suspicions about disclosure. For these reasons it would have been both stressful and expensive and very difficult to run given the appellant's condition. In any event, such litigation would have been most unlikely to produce an outcome which was closely aligned to the 1998 agreement or the Carrington letter.

[72] This hypothesis must be assessed in relation to what may be quite a narrow window of time. There was not much, if any, challenge on the part of the appellant to the decision made in August 1999 to defer consideration of relationship property. Mr Schurr's initial appointment as manager expired in November 1999 and he was not re-appointed until February 2000. By June 2000, Mrs Johnston's preferred position was to defer division until May 2002.

[73] More generally:

(a) It is unlikely to say the least that Mrs Johnston, properly advised, would ever (that is in 1999 or subsequently) have been prepared to revert to the terms agreed in 1998.

(b) It is very doubtful whether Mrs Johnston, properly advised, would have been prepared to settle on the basis suggested in the Carrington letter given that the farm had not then been the subject of an independent valuation. As noted, there is a very substantial question mark over the $980,000 figure on which the Carrington letter was

premised. In any event, it would not have been prudent to divide the relationship property without a valuation. As well, the Carrington letter preceded the critical period on which we must focus which did not begin until February 2000.

(c) It is also open to question whether the appellant (who was not so incapacitated as to be unable to express a view) would have been emotionally able to accommodate a settlement on terms which were appreciably less favourable to him than those agreed in 1998.

[74] During the first half of 2000, Mrs Johnston reached the point when she was no longer seeking a prompt settlement and from this point on, we see no substantial likelihood at all that she would have agreed to a settlement which did not fairly represent her legal entitlements.

[75] There was a good deal of evidence and argument at trial as to whether it would have been possible for the appellant to have stayed on the farm if a relationship property agreement had been concluded. Duffy J, however, did not make any findings of fact on this issue and although the Court of Appeal referred to the issue, it too did not make a finding one way or the other.

[76] On our understanding of the evidence, the appellant could have settled with Mrs Johnston on the basis of either what was agreed in 1998 or the Carrington letter without having to borrow further money. There was, however, dispute at trial whether, after a settlement on such terms, the farm would have been financially viable in the medium term and, in particular, whether the farming operation (on this hypothesis conducted by Mr Schurr as manager for the appellant) would have had the resources to deal with adverse events. On our appreciation of the evidence, a settlement of the kind postulated would at least have raised a question mark as to whether the farm would be able to be retained in the medium to long term.

[77] The Family Court did not confer on Mr Schurr the power to conclude a relationship property agreement. He cannot therefore be said to have relevantly lacked diligence in the performance of the powers which were conferred on him.

Whether such powers should have been conferred on some other person was primarily the responsibility of the Court. The Court appointed a lawyer to represent the appellant. A claim that, say, Ian Johnston was negligent (or otherwise liable) to the appellant because of the way in which the original or any later application to the Court was framed would be untenable. Such a claim would infringe the general privilege which applies to litigation and which precludes the appellant suing Mr Shearer (or his client, Ian Johnston for that matter) for the way in which Ian Johnston's application to the Court was framed. And it seems to us that the same is true of this aspect of the claim against Mr Schurr. He was entitled to take the view that what, if any, orders should be made so as to permit relationship property negotiation was a matter for the Court to determine after hearing from the lawyer appointed to represent the appellant. The Court was informed that there was no relationship property agreement and appointed counsel to represent the appellant. It would have been open to the Court to have departed from any recommendations which were made. In this context, the claim against Mr Schurr in substance comes down to a complaint about the orders of the Family Court.

[78] We appreciate that, on the basis of his evidence at trial, Mr Gifford had a reasonably narrow conception of his role. In his evidence, he explained this by reference to two points: (a) he thought that Deem & Shearer would be addressing relationship property if this was required, and (b) he had been told (by Messrs Schurr and Shearer) that a division of relationship property would entail a sale of the farm.

[79] On the first point, Mr Gifford relied on a letter of 8 November 1999 he received from Deem & Shearer in which the author (Mrs Harrop) discussed the alternatives to renewing the August 1999 order which was about to lapse. She noted that, on the assumption that the order was not renewed:

> It may be that … the situation can be addressed:
>
> (a) by [the appellant] executing a power of attorney in Chris Schurr's favour to deal with the farm business; and
>
> (b) by relying on his Solicitor, Geoff [Shearer], to deal with other matters such as his matrimonial property situation.

As it turned out, however, a further application was made under the PPPR Act in December 1999 and the situation that Mrs Harrop envisaged was overtaken by events. As well, it is clear that by August 2000, Mr Gifford was aware that it was then proposed that the division of relationship property be deferred until May 2002, a deferral to which he took no exception.

[80] On the second point, when Mr Gifford was asked to flesh out his assertion that he had been told by Messrs Schurr and Shearer that a division of relationship property would result in the farm being sold, he relied on:

(a) a file note of a discussion he had with Mr Shearer on 11 August 1999 in which he recorded Mr Shearer telling him, "Christine doesn't want to sell the farm. She is not pushing to sell everything"; and

(b) a file note of a discussion with Mr Schurr of 28 May 2002 in which he recorded Mr Schurr telling him of Mrs Johnston, "she doesn't want to upset" and "we could not buy her out".

The latter file note no doubt did reflect Mr Schurr's opinion at the time, but (a) this second discussion came rather late in the piece, and (b) neither discussion could fairly be taken to have left Mr Gifford with the view that Mr Schurr or Mr Shearer had assumed responsibility in relation to relationship property. As Mr Gifford knew, the powers conferred on Mr Schurr did not extend to division of relationship property. As to Mr Shearer, the Court had rejected the proposal that he be appointed as counsel for the appellant and when Deem & Shearer later proposed acting for him in respect of relationship property this was, to the knowledge of Mr Gifford, vetoed by Mrs Johnston.

[81] For the reasons just given, it could not fairly be concluded that Mr Gifford was told anything which negated the need for a personal assessment as to the appropriateness of deferral of the division of relationship property. As to this, he provided reports or submitted memoranda to the Court prior to the making of each of the orders, that is the temporary order of 18 August 1999 and the later orders of 8 February 2000, 8 September 2000 and 10 October 2002.

[82] The remarks we have just made are not to be taken as involving criticism of the Family Court Judge, or anyone else connected with the applications and orders made in relation to what happened at the time. In company with the Court of Appeal, we see a good deal of hindsight in the claim. It would have been far from apparent in the aftermath of the accident that the value of the farm would more than double in five years. Our view of the evidence is that there was a comparatively limited period of time (between August 1999 and the middle of 2000) during which Mrs Johnston may have been receptive to an offer to finalise relationship property. But in relation to this period, we see no good reason for concluding that she would ultimately have been prepared to settle at a discount to her entitlement and we have real reservations whether the appellant would have been emotionally able to accommodate a non-discounted settlement. As well, we think it is at least uncertain whether any settlement that could then have been achieved would have provided substantial assurance that the farm could have been retained in the medium term. Prior to it becoming apparent around late 2002 or perhaps early 2003 that the appellant might make a full recovery, it was well open to honest and diligently formed opinion that the best course of action was to defer a division of relationship property.

[83] The considerations just discussed are also decisive in relation to the claims in tort. The position as to non-finalisation of a relationship property agreement was put to the Court. Counsel was appointed to represent the appellant. Given the relationship property exclusion in respect of Mr Schurr's powers and, importantly, the reason for it, we think it untenable to suggest that he had an obligation to engage more forcefully than he did with the question whether the Court should make orders addressed to finalisation. The practical effect of the orders made, after hearing from counsel for the appellant, was that finalisation of the relationship property agreement should be deferred. Mr Schurr's statutory duties, if any, did not go beyond acting in accordance with the orders made. And given that the issue had been addressed by the Court we can see no tenable basis upon which it could be said that he was under a relevant duty of care to the appellant or was in breach of any duty imposed by the PPPR Act.

[84] We recognise that the appellant may consider that our focus on the terms of the orders overlooks the extent to which Mr Schurr engaged with the relationship property issue. There are, for instance, file notes made by Mr Schurr of 31 August 1999, 19 October 1999, 13 July 2000, 7 August 2000 and 27 May 2002 which address relationship property.[47] As well, during 2003, he attempted to facilitate a relationship property agreement and, to this end, acted as an intermediary between the appellant and Mrs Johnston. This level of engagement was relied on by Mr Carruthers in his submissions for the appellant but we are left with the view that, when viewed in context, it does not have the significance which was attributed to it.

[85] That there would, sooner or later, be a division of relationship property was a reality that had to be faced and Mr Schurr had to be cognisant of the implications of such eventual division. As well, in the period between August 1999 and early 2000, Mrs Johnston was still interested in a reasonably prompt settlement. If she pressed her claim there would have to be a response. So it was appropriate for Mr Schurr to seek an understanding of the likely range of such a claim. What is important is that prior to 2003, Mr Schurr did not set about taking steps to procure or facilitate a settlement. That being so, we do not see his actions as indicative of an assumption of responsibility to procure a settlement. There is scope for debate as to the wisdom of Mr Schurr's action in 2003, this given the terms of the Court order, albeit that by this time, with the appellant's recovery, the underlying dynamics of the situation had changed. More significantly, these actions came too late in the piece to be material to the claim against Mr Schurr.

The relationship property claim against Deem & Shearer

The claim

[86] The appellant's claim against Deem & Shearer proceeds on a number of overlapping bases. The appellant maintains that their retainer in respect of relationship property survived the accident, they in fact continued to act for him and they throughout therefore owed him a duty of care as their client. In the alternative, and on the assumption that the contract of retainer was terminated, he says the

[47] We should note that the notes are cryptic in nature and it is not always obvious (a) whether they record conversations and, if so, (b) the identity of the other party.

relationship between them was sufficiently proximate to give rise to such a duty. The appellant complains that Deem & Shearer were negligent as they neither finalised a relationship property settlement nor applied to the Court to have a manager appointed to deal with relationship property. He also contended that even if Deem & Shearer had no duty to take positive steps to protect his interests, they were required not to act in a way which was contrary to those interests and that they were thus in breach of duty in advising the Court and Mr Gifford that the relationship property issues should be deferred.

The High Court judgment

[87] Duffy J could identify no evidence that suggested the firm had assumed responsibility for settling relationship property after the accident. The retainer did not extend to completing the settlement without further instructions, and the accident brought the retainer to an end, since the appellant could no longer give instructions.[48] Continued contact between the firm and the appellant did not create a duty.[49] The firm did not act for him after the accident. Rather, they represented Ian Johnston when he applied for orders under the PPPR Act.[50] The Family Court had appointed Mr Gifford to represent the appellant and thus to advise him and give effect to his wishes where appropriate. The firm had no obligation to apply under the PPPR Act to have a property manager appointed to address division of the relationship property.[51]

The Court of Appeal judgment

[88] The comments made by the Court of Appeal as to Mrs Johnston's willingness (or otherwise) to settle relationship property which we have set out were made in the context of the appellant's claim against Deem & Shearer.

[89] The Court also observed:[52]

---

48 *Johnston* (HC), above n 2, at [75]–[78].
49 At [92].
50 At [90].
51 At [94].
52 *Johnston* (CA), above n 4.

> [107] Deem & Shearer were retained in 1998 to negotiate the relationship property settlement, but it is not in dispute that as at the date of [the appellant's] crash they had done everything required of them. Immediately after his crash they could do nothing more, for [the appellant] was incapable of making an informed decision to execute the relationship property agreement they had drafted or of giving instructions about it. That remained the case until October 2002 at the earliest. His property was placed in Mr Schurr's hands. Settlement was excluded from Mr Schurr's powers, but not because [the appellant] remained capable of dealing with it. On the facts, it cannot be said that he retained competence to instruct lawyers about his property.
>
> [108] In the circumstances the firm's retainer could not continue, and we are satisfied that it did not. … .
>
> [109] Mr Shearer sought appointment as Neil's counsel, but that was vetoed by the Family Court. Thereafter Mr Gifford represented Neil on each extension.
>
> [110] We accept that from time to time [the appellant] may have conveyed to Mr Shearer, among others, his desire to resolve relationship property, but it cannot be said that Mr Shearer was under a duty to treat that as an instruction, let alone act on it. On medical advice [the appellant] was considered incapable of managing his affairs, and Mr Gifford was his appointed counsel at that time. Messrs Schurr and Shearer did draw the issue to Mr Gifford's (and the Court's) attention. To the extent that [the appellant] could express a desire to settle, it was Mr Gifford's function to verify that and ask the Court to give effect to his wishes. In this case it would have been necessary to have a co-manager appointed to negotiate the settlement. Mr Shearer could not have made such application. He acted for Ian Johnston, whose instructions, in which the wider family concurred, were that it was in Neil's interests to defer the settlement. And while Neil may have wanted to settle, that process carried financial risks that he was incapable of evaluating. In particular, there was some risk that, having settled relationship property and without any off-farm income, he would be unable to stay on the farm in the long term.
>
> …
>
> [112] Not until April 2000 can it be said that Mr Shearer assumed any responsibility to deal with relationship property. At the meeting of 14 April 2000 he agreed to take the matter in hand, but again he was not acting on instructions from Neil. He seems to have assumed that the Johnston family would go along with the caregivers' wishes. In any event, Mrs Johnston almost immediately put a stop to Mr Shearer's involvement by invoking his conflict of interest. At about the same time she made it clear that she did not want a settlement in the short term; she preferred to wait until the sharemilking contract was at an end. That ruled out a swift settlement.

[90] There then followed the remarks which we have earlier set out.[53]

---

[53] See above at [65].

Our assessment

[91] Mr Carruthers maintained that the contract of retainer remained in effect after the accident. In support of this argument, he contended that (a) a loss of capacity of the kind suffered by the appellant does not automatically terminate a contract of retainer; and (b) on the facts of the present case the contract of retainer was not terminated.

[92] In support of his first argument, Mr Carruthers relied on *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust*[54] for the proposition that a solicitor's retainer does not automatically terminate when the client loses capacity to give instructions. *Blankley* involved medical negligence litigation on behalf of a claimant whose mental capacity (which had been affected by brain damage caused by the negligence of the defendant) fluctuated. This litigation had been commenced on her behalf by a litigation guardian. In issue was whether a contingency fee agreement entered into by the claimant with her solicitors after the litigation was underway and shortly after she regained capacity was automatically terminated when she subsequently lost capacity. The litigation continued under the control of a Court of Protection appointed deputy who was a partner in the firm of solicitors involved. Due to an oversight, a replacement contingency fee agreement was not executed. The litigation, however, was continued and, in the end, settled on terms which required the defendant to pay, inter alia, the claimant's costs. In proceedings to fix those costs, the defendant claimed that the solicitors had no retainer to act for the claimant after her second incapacity and were therefore not entitled to costs in relation to all subsequent work. Not unsurprisingly, this unmeritorious argument was ultimately unsuccessful. The reality always was that the litigation was going to be prosecuted irrespective of the claimant's capacity either by the claimant or by someone on her behalf. Accordingly, there was no good reason for treating the conditional fee agreement between the claimant and the solicitors as being terminated by her subsequent incapacity.

---

[54] *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2014] EWHC 168, [2013] 1 WLR 2683.

[93] We accept that a loss of capacity may not result automatically in the termination of a contract of retainer. Indeed, given the exclusions in respect of relationship property in the powers conferred on Mr Schurr we also accept that orders made by the Court did not in themselves take away the appellant's legal capacity to enter into a relationship property agreement. So theoretically at least, the appellant could have completed an agreement through his solicitors or possibly by appointing an attorney to do so. These possibilities, however, seem to us to be more apparent than real.

[94] As is apparent, we see no substantial likelihood that Mrs Johnston would have been prepared to settle on the terms agreed in 1998. Any settlement would thus have required further negotiation and thus further input from the appellant. He was, however, in no position to provide such further input. Without such input, Deem & Shearer were not in a position to advance matters. Indeed, even if Mrs Johnston had been prepared to execute the agreement prepared in January 1999, it is difficult to see how the execution formalities prescribed by s 21 of the Matrimonial Property Act 1976 could have been satisfied. It is also not clear that a division of relationship property, even if formally agreed to, could have been implemented without the approval of a manager appointed in respect of the property which was to be affected by it, in particular the assets to be transferred to Mrs Johnston. And once Court orders had been obtained which were premised on the assumption that a division of relationship property was to be deferred, we think it entirely unrealistic to think that a division of relationship property could have been agreed to and implemented without the sanction of a manager appointed by the Court for that purpose.

[95] On this aspect of the case we are therefore in substantial agreement with the judgments of the High Court and Court of Appeal and conclude that the contract of retainer between the appellant and Deem & Shearer came to an end as a result of the January 1999 accident as a result of (a) the appellant's loss of the practical ability to give instructions, and (b) the radically different circumstances which then obtained and which lay outside anything contemplated when the contract of retainer was formed.

[96] The termination of the contract of retainer does not in itself exclude liability in tort for breach of a duty of care associated with an assumption of responsibility on the part of Deem & Shearer towards the appellant. In this respect there are some aspects of Deem & Shearer's conduct which can be relied on as evidencing such an assumption of responsibility. It must be borne in mind, however, that Mr Shearer had a very long standing association with the appellant and was plainly anxious to assist him to the extent that he could. In those circumstances some caution is appropriate when assessing the significance of initiatives which, in the end, did not go anywhere.

[97] As we have noted, Deem & Shearer acted for Ian Johnston on the application which was made to the Family Court. It was also proposed that Mr Shearer be appointed to act as counsel for the appellant. Had this proposal been implemented, Deem & Shearer (or at least Mr Shearer) would have assumed some responsibilities to the appellant. But, as it turned out, the Judge dealing with it was not prepared to allow Mr Shearer to continue as the appellant's counsel. In the context in which the appellant's affairs were substantially under the control of the Court and independent counsel had been appointed to represent the appellant, we see no basis upon which it could fairly be concluded that Deem & Shearer assumed a general responsibility to finalise an agreement on behalf of the appellant.

[98] As already discussed, there was a brief period in 2000 when Mr Shearer did try to pursue the finalisation of a relationship property agreement. This was between April and June 2000. To this extent there was an assumption of responsibility but an assumption that was limited to what was practical. It was practical to explore with Mrs Johnston whether she was seeking a prompt division of relationship property and if so on what terms. It will be recalled that up until at least January 2000, Mrs Johnston was interested in a prompt settlement. But by June 2000 Mrs Johnston was no longer so interested. Her objection to Mr Shearer acting and her stance that a division of relationship property should be deferred until May 2002 necessitated a decision whether someone should be appointed on behalf of the appellant to pursue the issue. This was addressed by the making of orders which presupposed that a division of relationship property should be deferred. The relevant correspondence between the solicitors was placed before the Court and the orders were made only

after the Court had heard from Mr Gifford. In this context, we think it unrealistic to infer from the events of April – June 2000 a general assumption of responsibility in respect of relationship property.

[99] We are therefore of the view that the contract of retainer was terminated by the accident, that Deem & Shearer did not subsequently owe the appellant a duty of care pursuant to a general assumption of responsibility to finalise a division of relationship property and that, to the extent to which there was a more limited assumption of responsibility, there was no breach of any associated duty of care.

The insurance issue

[100] Prior to his accident, the appellant had a number of life insurance policies. In part this may have been a function of his close association with an insurance salesman. Complicating this aspect of the case is a degree of suspicion on the part of Mrs Johnston in relation to this association. Unwisely, this salesman was called to give expert evidence on behalf of the appellant in relation to this aspect of the case.

[101] The insurance policies held as at January 1999 were as follows:

Policy number	Nature of policy	Sum insured	Bonus	Yearly premium
Z1915428-V	Owned on the life of the appellant's mother	$335,000	$62,147 (reversionary), $31,000 (terminal)	$20,837
Z1915441-J	Owned on the appellant's life	$100,000	$21,870	$2,210
Z1915434-B	Owned on the appellant's life	$150,000	$32,806	$3,315
Z1442595-W	Owned on the appellant's life	$29,259	$6,536	$3,560.67

[102] As will be apparent, the premiums associated with these policies were substantial.

[103] Mr Schurr was of the view that the life insurance policies in question were not appropriate investments and accordingly he surrendered them. The amounts received were as follows:

(a) $98,322.99 for policy Z1915428-V;

(b) $12,451.16 for policy Z1915441-J;

(c) $18,676.58 for policy Z1915434-B; and

(d) $14,097.66 for policy Z1442595-W.

[104] The appellant claims that the decision to surrender the policies was inappropriate and he claims damages accordingly.

[105] This aspect of the case has received very little attention in the judgments of the Courts below.

[106] In the High Court the claim failed because the Judge held that a claim for breach of statutory duty was not available. She did not discuss the merits of the decision made by Mr Schurr. The point was mentioned briefly by the Court of Appeal in these terms:[55]

> With respect to insurances, the claim would almost certainly fail; Mr Schurr did evaluate the policies as investments, the plaintiff's witness agreed that their merit as such depended on one's view of risk, and at the time it was not thought that [the appellant] would recover sufficiently to buy the farm. The claim is informed by hindsight.

[107] The problem we face on this aspect of the claim is that there are insufficient findings of fact upon which the Court could fairly reach a conclusion. Accordingly, in relation to this aspect of the case, we must allow the appeal and direct a reconsideration of the issue.

---

[55] *Johnston* (CA), above n 4, at [105].

Disposition

[108] We make the following orders:

(a) The appeal is allowed in part. The judgments of the High Court and Court of Appeal in relation to the insurance issue are set aside. The question whether Mr Schurr is liable to the appellant in respect of the surrender of the insurance policies is to be determined in the High Court.

(b) In all other respects the appeal is dismissed.

(c) In respect of the appeal to this Court, the appellant is to pay costs to Mr Schurr and Deem & Shearer in the sums of $15,000 and $25,000 respectively together with reasonable disbursements to be fixed by the Registrar.

(d) The orders for costs made in the High Court and Court of Appeal are affirmed.

Solicitors:
Kit Clews, Hamilton for Appellant
Mooney & Webb, New Plymouth for First Respondent
Govett Quilliam, New Plymouth for Second Respondent