

UNDER Supreme Court Rules 2004

IN THE MATTER OF Appeal against a decision of the Court of Appeal

BETWEEN **SIRPA ELISE ALALAAKKOLA**
Appellant

AND **PAUL ANTHONY PALMER**
Respondent

**SUBMISSIONS OF COUNSEL FOR THE APPELLANT
IN SUPPORT OF APPEAL AGAINST DECISION OF COURT OF APPEAL**

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Instructing Solicitors:

Zone Law Limited
Jeremy Hunter/Theodore Doucas Level
14, 109-125 Willis Street,
Wellington 6011
PO Box 24058, Wellington 6142
Ph: (04) 801 5040
Email: jeremy@zonelaw.co.nz

Counsel Acting:

Clive Elliott KC/Sharon Chandra Barrister
Shortland Chambers
Level 13, 70 Shortland Street, Auckland 1010
PO Box 4338, Shortland Street, Auckland 1140
Ph: 09 307 9808
Email: clive@cliveelliott.com &
sharon@bankside.co.nz

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MAY IT PLEASE THE COURT:

1. This proceeding relates to an appeal against a decision of the Court of Appeal at Wellington, delivered by Collins, Katz and Mallon JJ on 21 February 2024 (the **Decision**). The factual background to this matter is set out at [4] to [7] of the Decision.

2. The questions in respect of which leave to appeal has been granted are as follows:

Whether the Court of Appeal was correct in the answers the Court gave to the questions of law before the Court, as set out below:

- a. Are the Copyrights “property” for the purposes of the Property (Relationships) Act 1976 (the **PRA**);
- b. If the Copyrights are property, how should they be classified in terms of the PRA; and
- c. What orders should be made consequential upon the answers to the first two questions.

SUMMARY OF THE APPELLANT’S (MS ALALÄÄKKÖLÄ’S) POSITION

3. The Court of Appeal erred in:

- a. Determining the bundle of rights comprising copyright is property for the purposes of s 2 of the PRA;¹
- b. Determining copyright and the paintings produced during the relationship are both relationship property;²
- c. Treating copyright and Ms Alaläökkölä’s personal skill and labour as distinct;³
- d. The treatment of moral rights.⁴

4. In respect of whether the Copyrights are property, Ms Alaläökkölä’s (**Ms Alaläökkölä’s**) position is:

- a. The fact copyright is property under the Copyright Act 1994 (“**CA**”) does not mean it is property under the PRA;
- b. Section 2(e) of the PRA only includes any other right or interest within the meaning

¹ The Decision at [24 – 25], [65 – 67] [[101.0132-0133]], [[101.0148 – 101.0149]].

² The Decision at [50 – 67], [[101.0142-101.0149]].

³ The Decision at [41 – 45], [65 – 67] [[101.0139 – 101.0140]], [[101.0148 – 101.0149]].

⁴ The Decision at [25], [[101.0133]].

of property, so not all rights or interests will be captured;

- c. Copyright cannot be property under s 2(c) of the PRA because s 2(c) is only for interests in tangible property and copyright is not an interest in the artwork **(paintings)** – it is a separate right, in and of itself;
 - d. The personal nature of copyright means that properly analysed it is not property under the PRA:
 - i. The purpose of copyright is to protect the skill, prowess and effort of the author;
 - ii. Copyright is intertwined with the author's personal skills;
 - iii. The right to control copyright is an important underlying principle in the copyright regime and it is personal to the author;
 - iv. Copyright is different to other rights and interests addressed by the courts under the PRA;
 - v. Copyright and moral rights serve the same wider purpose, essentially negative rights designed to protect the interests and reputation of the author; and
 - e. A finding that copyright is not property does not cut across or undermine the PRA principle that all contributions should be equally recognised.
5. In respect of whether the Copyrights are relationship property, Ms Alalääkkölä's position is:
- a. The meaning of "acquired" in the PRA necessitates a more nuanced enquiry than just when the Copyrights were created;
 - b. The Copyrights reside in Ms Alalääkkölä's skills, and those skills were acquired prior to the relationship;
 - c. The Copyrights and paintings cannot be viewed individually and in isolation, as an artist is entitled to develop a body of work or oeuvre built on earlier works and skills applied prior to the relationship and to protect their artistic efforts against plagiarism and tarnishment;
 - d. The purposes of both the PRA and CA can be achieved without doing violence to either;
 - e. Treating the Copyrights as separate property does not create a floodgates argument;

- f. Vesting orders do not address these issues; and
 - g. None of the exceptions that convert separate property into relationship property apply.
6. In respect of what orders should be made consequential upon the answers to the first two issues:
- a. If the Copyrights are property and/or relationship property, then the orders made by the lower courts vesting the Copyrights in the Appellant should stand (and no cross appeal is filed against these orders); and
 - b. However, this Court should provide guidance and directions as to how valuation of the Copyrights should be approached, in this case and generally.

ISSUE#1: ARE THE COPYRIGHTS PROPERTY UNDER THE PRA?

7. The first issue of statutory interpretation is whether the Copyrights are property under s 2 of the PRA. Should the definition of property in the PRA be interpreted in a way that includes copyright? The Court of Appeal considered that the Copyrights must be property under the PRA because the CA “...states unequivocally that copyright is a property right...”.⁵
8. Although the CA says copyright is property,⁶ it does not necessarily mean it should be considered property in all respects under the PRA. We submit this is where the Court of Appeal erred. The PRA has its own definition of property and the assessment of whether something is property is to be determined primarily in the context of the PRA.
9. Subsections 1N and 1M of the PRA emphasise equality, the variety of contributions people make to a relationship and their differing economic positions as the purpose and principles of the PRA. Significance is placed on the personal relationship spouses have with each other as contrasted with commercial dealings where parties are essentially treated as strangers.
10. The law can accommodate more than one meaning of property. Copyright can be a sui generis type of property under the CA and simultaneously not be considered property for the purposes of the PRA. This is clear from the differing statutory definitions of property in various pieces of legislation.⁷

⁵ The Decision at [22], [[101.0132]].

⁶ CA, s14(1).

⁷ For example, compare the varying definitions of “property” in the Companies Act 1993, s 2; Insolvency Act 2006, s 3; Property Law Act 2007, s 4 and Domestic Violence Act 1995, s 2.

11. Historically, the PRA has adopted a different definition of property to other pieces of legislation. So, simply because copyright is property under the CA does not, in our submission, mean it will automatically be property under the PRA. It is also relevant that Hammond J⁸ described copyright as “...a *sui generis* form of 'personal property'. It is a bundle of rights conferred by law. It is given the status of property, on the terms laid down in the statute”. This means that not only is copyright a bundle of rights, but the nature of those rights must be construed by reference to the terms of the CA.
12. Granted, the PRA has historically adopted a wider definition of property than other statutes, however, in our submission, that still does not mean the copyrights should automatically fit within the definition of property under the PRA. There must be a specific enquiry into what rights or interests copyright consists of and an assessment of the nature of those rights.
13. Simply because the PRA has a wider concept of property, we submit it is a mistake to include copyright in the definition of property. The specific rights or interests of which copyright is comprised must be considered in their entirety and assessed separately.

Section 2(e) PRA – Any Other Right or Interest

14. The PRA defines “property” under s 2. The Court of Appeal, incorrectly in our submission, found the Copyrights⁹ were property under s 2(e)¹⁰. Section 2(e) of the PRA defines property as “any other right or interest”.
15. The fact that the Copyrights are a right or interest does not, in our submission, mean they should fit within the definition of property under s 2(e). Section 2(e) refers to “any other right or interest” so, it is not just any right or interest that will fit within the definition. It must be read in the context of the words preceding it and in the context of the legislation itself.
16. The context of the PRA is that it is a piece of social legislation¹¹ and the courts should strive to achieve the spirit and policy of the PRA where possible. However, the fact that a particular course of action may not strictly be in keeping with the spirit and policy of the PRA should not prevent this Court from adopting that course of action since the context of the legislation is just one factor to consider.
17. The Court of Appeal in *Z v Z (No 2)*¹² grappled with this very issue. Whilst it acknowledged that treating earning capacity as matrimonial property would be consistent

⁸ *Pacific Software Technology Ltd v Perry Group Ltd*, CA165/02, [2003] BCL 560, BC 200360681 at [101].

⁹ The more appropriate description would be “works in which copyright subsists” but for consistency we have retained the Court of Appeal’s description of the copyright when referring to the Court of Appeals treatment of the issue, but not otherwise.

¹⁰ The Decision at [29], [[101.0135]].

¹¹ *Clayton v Clayton* [2016] NZSC 29 at [38].

¹² *Z v Z (No 2)* CA 197/96, 20 December 1996 at pg 39.

with the policy and spirit of the legislation, the Court considered it was outside its role to extend the definition of property to include earning capacity.

18. The Court of Appeal considered that extending the definition of property would “appear incongruous”¹³ and if Parliament intended to include earning capacity as property, it would have made express reference to it and provided machinery for its implementation.¹⁴ The Court of Appeal considered that expanding the definition of property in this way would be a radical departure from the concept of property that Parliament endorsed.
19. Whilst the Court of Appeal’s observations were made in the context of treating earning capacity as property under the PRA, the factors which were considered (the context, spirit and policy of the PRA and Parliament’s intentions) are just as relevant to assessing whether copyright should be treated as property under the PRA.
20. The question for this Court is where to draw the line. Some intangible rights or interests have been held to be property under the PRA (such as powers in a trust¹⁵ fishing rights and options to purchase). However, equally, there are some intangible rights or interests that have been held not to be property under the PRA (e.g. enhancement of earning capacity¹⁶ and a discretionary beneficiary’s interest in a trust).¹⁷
21. We submit that while copyright is, at least in a broad sense a right or interest, it should not be treated as “any other right or interest” for the purposes of the PRA.

Section 2(c) PRA: Any Estate or Interest in any Personal Property

22. Whilst the Court of Appeal found that the Copyrights were property under s 2(e), it also considered the Family Court Judge was correct to find that the Copyrights also fall within the definition of s 2(c) of the PRA – “any estate or interest in any real or personal property”.¹⁸
23. It is unclear from the Court of Appeal’s decision what its reasoning was, nor is it clear what the real or personal property was that the Appellant has a so-called interest in. Real and personal property are not defined in the PRA, but ss 2(a) and (b) include real and personal property within the definition of property, and s 2(c) includes an interest in real and personal property within the definition of property. The context suggests the reference

¹³ *Z v Z (No 2)*, above n 12 at pg 43.

¹⁴ By comparison, the Court of Appeal referred to the superannuation provisions in s 31 of the PRA which support the substantive provision in s 8(i).

¹⁵ *Clayton v Clayton* [2016], above n 11 at [39].

¹⁶ *Z v Z (No 2)*, above n 12 at pg 39.

¹⁷ *Hunt v Muollo* [2003] 2 NZLR 322 (CA); *Johns v Johns* [2004] 3 NZLR 202 (CA); *Nation v Nation* [2005] 3 NZLR46; (2004) 23 FRNZ 783 (CA).

¹⁸ The Decision at [29], [[101.0135]].

to real and personal property must be tangible property, which means s 2(c) relates to an interest in tangible property.

24. Whilst the Court of Appeal did not specifically say what the real or personal property in question was, it must have been referring to the paintings, which is incorrect. The copyright is not an interest in the paintings. The paintings are a chattel, but the copyright remains with the author unless assigned. They are a distinct set of rights separate from the paintings. The mere fact that a painting can be sold, and the copyright retained, demonstrates this. The Court of Appeal viewed the Copyrights as being an interest in the paintings. We submit this is not the correct approach as it conflates the paintings with the Copyrights when the two are distinct and independent of each other.

Nature of Copyright

25. As with other forms of intellectual property, copyright is primarily a negative right.¹⁹ Copyright is both an intangible and hypothetical construct. Central to this construct is the distinction between the (intangible) copyright and the (tangible) work that embodies that copyright. It is only the physical work, that embodies the copyright, in this case, the paintings.
26. One of the difficulties that arises in the present appeal is how the High Court and Court of Appeal conceptualised copyright - as “attaching” to each individual painting, effectively as it is painted. This wrongly assumes the copyright somehow moves from the artist to the work, thereby separating itself from the artist and attaching to the work. Copyright does not pass when property in any physical manifestation of the copyright is transferred unless copyright ownership is separately transferred.²⁰
27. The underlying copyright might apply or relate to the painting, in the sense of a negative right prohibiting the owner of the painting, or indeed anyone else, from reproducing the work without the owner’s permission. However, it does not mean the copyright moves onto or somehow attaches itself to the painting or, the copyright is somehow diminished as a result. The copyright remains a negative right comprising both economic and non- economic rights which the artist may or may not choose to deploy. The copyright is not altered. Indeed, in the case of the artist’s moral rights, it is enhanced by adding to the artist’s body of work, protecting all the works in the oeuvre and all the artist’s skills, abilities, and reputation during and after their lifetime.
28. Copyright requires an exercise of skill, judgement or labour to produce a work in which

¹⁹ *Ortmann v United States of America* [2020] 1 NZLR 475 at [242].

²⁰ *Ibid.*

copyright can subsist.²¹ The greater the skill and labour the greater the degree of originality.²² Copyright is inherently connected with the author, a connection recognised by the grant of moral rights.²³ Moral rights are not something of a curiosity or as some commentators have described them an “essentially alien concept”.²⁴ They are a part of our law.²⁵ In fact, the 1962 Copyright Act²⁶ recognised moral rights and provided a remedy to an author if there had been a false attribution of authorship. This was the forerunner of the current provisions in Part 4 of the 1994 Act.

29. Moral rights may not be regarded as a “property right” in the strict sense, but they reside within and are inalienable from the author. However, the difficulty arises from distinguishing between economic or financial rights traditionally associated with a property right and other rights that are directed more towards protecting the moral integrity of the author or their integrity and ability to engage in their chosen vocation. Likewise, moral rights are directed towards personal exploitation of the author’s rights including the right to be recognised as the author. Further, just how and when a copyrighted work is commercialised is an integral part of creating financial value from the work.²⁷
30. Ultimately, whether described as economic or non-economic rights or as an aspect of sui-generis property rights, moral rights are actionable by the author as a breach of statutory duty and as Professor Eagles points out:²⁸ “All agree that the moral rights regime exists to protect and assert the creative personality irrespective of the needs or values of the market”. That, however, is not to say that the needs and values of the market are to be ignored.
31. That is, rights to protect morality, integrity, and personal exploitation and reputation all have an economic aspect to them²⁹ because if an author has their reputation damaged their ability to earn a living through their artistic endeavours can be seriously, if not irrevocably, damaged.³⁰ Indeed, in the unusual circumstances of this case, where a disaffected former

²¹ *Husqvarna Forest & Garden Ltd v Bridon New Zealand Ltd*, HC Auckland CL47/95, 29 April 1997 at 15.

²² *Henkel KgaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577 at [38].

²³ CA, pt 4.

²⁴ Andreas Rahmatian “Non-assignability of authors’ rights in Austria and Germany and its relation to the concept of creativity in civil law jurisdictions generally: a comparison with U.K. copyright law” (2000) 11(5) Ent LR 95 at 98.

²⁵ As required by New Zealand’s adherence to art 6bis of the Berne Convention for the Protection of Literary and Artistic Works, Paris Revision of 1971.

²⁶ Copyright Act 1962, s62(4) provided the author with a remedy if an artistic work was altered after the author parted with possession of it, a right which, pursuant to s 64(5), could be enforced by the author’s personal representatives for up to 20 years after the author’s death.

²⁷ Debora Polacheck “The “Un-Worth-y” Decision: The Characterization of a Copyright as Community Property” (1995) 17(3) Hastings Comm & Ent LJ 601 at 611-612.

²⁸ Ian Eagles *New Zealand Moral Rights Law: Did Something Get Lost in Translation?* (2002) 8 NZBLQ, at 30.

²⁹ Ian Eagles (2002), above n 28, at 32.

³⁰ Ian Eagles (2002), above n 28, at 37.

spouse's intention is to monetize the copyright in a manner unacceptable to and against the wishes of Ms Alalääkköla, her moral rights are her primary means of redress.

32. The Court of Appeal considered s 16 and defined the bundle of rights provided to an author under the CA. However, the Court took an unduly narrow view of the bundle of rights provided under the Act as a whole. This is evident from looking at the language of the Act itself. A copyright work is defined as “a work of any of the descriptions in s 14(1) of this Act in which copyright exists”. Section 14(1) states that “copyright is a property right that exists, in accordance with this Act, in *original works* of the following descriptions.” (emphasis added) These are said to include artistic works, e.g. a painting.
33. Section 94(6) of the CA states that “The author of an artistic work has the right to be identified as the author of the work” regardless of how the work is published, exhibited or communicated to the public. Likewise, s 99(1) sets out the circumstances in which the author is able to object to derogatory treatment and describes how the right conferred by s 98(2) “is infringed”. It is clear from the above that the right vested in the author is in relation to a copyrighted work, and it provides the author with a right to prevent infringement of the rights. Thus, moral rights relate to original works in which copyright subsists and in which moral rights have been infringed.
34. These rights are an integral part of the raft of protections provided to an author under the CA. It is difficult to see why these rights should not be treated as part of the author's overall bundle of rights given the author is able to employ them to protect their work not just from being reproduced but also from being treated in a derogatory or otherwise prejudicial fashion.³¹
35. Section 16 of the CA provides the exclusive right to the owner of the copyright to, *inter alia*, copy the work and issue copies of the work to the public, the two restrictive acts of relevance in the present appeal and (e) showing the work in public. However, all these restricted acts, whether to make a copy of a painting to sell it (without assigning the copyright) or showing the work (exhibiting it in public), are different manifestations of the right to *control* the work, which the Court of Appeal correctly accepted has always resided in the author Ms Alalääkköla and should remain with her as the creator of the artistic works.
36. The evidence clearly establishes that Ms Alalääkköla seldom, if ever, assigned the copyright, deliberately retaining it at all times. In this case, the only right to make copies was a right to make prints of the paintings, something which Ms Alalääkköla also chose not to do in most cases.

³¹ See CA 1994, s 98(1)(b).

37. This Court recognised³² that the reproduction right, i.e. the right to copy the work, was one of the most important rights and that like the other rights, was negative in nature, effectively “a right to stop someone from doing something”. The right to benefit from copyright is inchoate: artists regularly choose not to exercise those rights for financial benefit. There is no legal requirement for the copyright owner to exercise their rights, nor any sanctions if they fail to do so.³³
38. Copyright is distinguishable from other encumbrances which are necessarily attached to the property, for example, an RMA consent which does attach to and passes with the land. It is not a personal right that the owner of the land can transfer separately. It is quite different to copyright which resides with the author and is not transferred unless the author chooses to do so and only then by formal deed of assignment.
39. In [25] the Court of Appeal erred in not recognising that moral rights are a necessary component of the bundle of rights conferred by s 16. The Court of Appeal’s reasoning makes no allowance for the influence and effect of the author’s moral rights. These rights might not be treated as an economic right in the strict sense, but they undoubtedly provide the author, and in this case, the artist, with important rights in terms of controlling any misuse of the copyright.
40. To the extent that there is a conflict or tension between the PRA and copyright regimes, it can be managed by the courts. Once it is recognised it is only the manifestation of the copyright which is property for the purposes of the PRA, and not the copyright, the two regimes are not in conflict with each other.
41. Where spouses are both authors, the CA provides for joint authorship. As in the expression of any other form of skill, the economic benefit derived from that skill can be property for the purposes of the PRA but the skill itself is not.³⁴ This is the approach the Family Court Judge took, and which was also consistent with how the parties had dealt with the paintings and the copyright, while they were married. Judge Grace did so to achieve an outcome that his Honour saw as both right and fair under the circumstances. It is also predictable.
42. This is important because Judge Grace rightly accepted³⁵ that “The creative ability is “her”” and Ms Alalääkkölä would effectively be competing with herself and lose control over her artistic endeavours, a concern echoed by the Court of Appeal, as it could undermine the value and saleability of any new work.³⁶

³² *Ortmann v United States of America* [2020], above n 19 at [242].

³³ Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs*, (4th Ed.) at [3.121].

³⁴ *Z v Z (No 2)*, above n 12.

³⁵ *Alalääkkölä v Palmer* [2020] NZFC, at [31] per Judge Grace [[101.0082]].

³⁶ The Decision at [78] (b) [[101.0153]].

43. To conclude on this point, we submit that this is a case where the author's moral rights have real utility and practical value and to exclude them from the bundle of rights provided to an author under the CA is unjustified in principle, and in particular in this case.

Purpose and Objective of Copyright Protection

44. It is well-established that the purpose of copyright protection is to recognise and protect the skill and labour of the author. The objective of copyright protection, and intellectual property laws more generally, is to provide an incentive for authors, inventors, creators, artists, innovators and entrepreneurs to create new works.³⁷ It is to encourage human creativity and innovation. This objective is achieved in two ways. First, a creator can generate an economic return from their work but, second, and more importantly, the law recognises the contribution to a creative work that is attributable to a creator's personality.³⁸

Right to Control Copyright is Personal

45. The basic premise of copyright is the author has the right to decide whether and how their works, whether an individual work or body of work created over a period of time, will be used – whether they do nothing with it, show it to the public or allow copies to be reproduced.³⁹ This right of an author to decide how their work will be used is fundamental to a proper understanding and application of copyright.
46. The Court of Appeal considered the relevant bundle of rights in the artistic work includes the rights set out in s 16(a), (b) and (f) of the CA namely the exclusive right to copy the work, issue copies of it to the public and communicate the work to the public.⁴⁰ Notably, the Court of Appeal did not refer to the rights in s 16(1)(e) to show the work in public or s 16(1)(i) to authorise another person to do any of the acts set out in s16(1).
47. The rights that comprise copyright are more than just the economic benefits that can be gained from exercising those rights. The right to control whether and how a work is shown or reproduced is, in our submission, not just the most fundamental aspect of copyright but intrinsically personal to the author.
48. For example, in Ms Alalääkkölä's case, there are nude paintings based on photographs taken by Mr Palmer⁴¹ which were created by the appellant during the relationship, which she never intended to publish or reproduce. Ms Alalääkkölä's personal intentions in such

³⁷ James and Wells, James & Wells Intellectual Property Law in New Zealand, (3rd ed, Thomson Reuters, New Zealand, 2017), at [1.3] Rationale for grant of exclusive intellectual property rights.

³⁸ Corbett and Lai, *To Have and To Hold? Intellectual Property as Relationship Property*, New Zealand Universities Law Review, vol 30, Number 2, 1 December 2022.

³⁹ CA, s 16.

⁴⁰ The Decision at [20], [[101.0131]].

⁴¹ Affidavit of Ms Alalääkkölä, 4 October 2024, at para 33, [[201.0026]] and 46 [[201.0028]].

an example must be the primary consideration over and above economic factors in deciding whether to show or reproduce the work and, indeed, how to classify the work. In fact, there are four categories of paintings:⁴² Ms Alalääkkölä's private collection includes works painted before the marriage, unfinished works or rejects, and paintings created during the relationship and available for sale. Only the final category should be genuinely in dispute, and it would be wrong to lump all the paintings/copyright works together and assume the same considerations apply equally to each category.

Copyright is Different to Other Rights/Interests

49. Copyright is distinguishable from other types of intangible rights or interests that have been held to fit within the meaning of "property" in the PRA. These other rights or interests are fundamentally impersonal whereas copyright has an unavoidably personal nature – the right to choose if and how a work is exploited is more personal than, for example, an option to purchase.
50. The Court of Appeal took the view that a copyright owner's right to exclusive enjoyment of a work parallels the right of a landowner to exclude others from trespassing on their land or the right of the owner of a motor vehicle to exclude others from using that vehicle.⁴³
51. The rights in copyright are not, in our submission, analogous to a landowner's right to exclude others from entering their land, nor are they analogous to the owner of a motor vehicle preventing someone from using their vehicle. These rights exist inherently in the ownership of the tangible property, the right to exclude others stays with the property.
52. The same cannot be said of copyright. Copyright is distinct and independent from the work created. In Ms Alalääkkölä's case, the original paintings can be sold, but the copyright is retained. The Court of Appeal, as Isac J had done earlier and, with respect, inaptly described the Copyrights and paintings as "attached"⁴⁴ to each other. In our submission, the paintings sit separately from the copyright, and the two must be assessed separately.
53. This is consistent with the Family Court's finding that the copyright is severable from the works created. Although the paintings themselves were relationship property, the copyright arising from Ms Alalääkkölä's artistic prowess and thus authorship are not.⁴⁵

The Bundle of Rights and their Intersection with Moral Rights

⁴² Affidavit of Ms Alalääkkölä, above n 41, at para 17, [[201.0023]].

⁴³ The Decision, at [24] [[101.0132]].

⁴⁴ The Decision, at [42] [[101.0140]].

⁴⁵ *Alalääkkölä v Palmer* [2020] NZFC, above n 35, at [22] & [23] [[101.0081]].

54. In paragraph [25] of the Decision, the Court concluded that moral rights do not form part of the copyright bundle of rights, and there was no dispute the moral rights in the paintings belong to Ms Alalääkkölä, and the respondent accepted as much.
55. What this does is to erroneously conflate the property rights with the medium in which they find expression (the paintings) while separating them from the critical connection the artist has with her reputation and her ability to continue her vocation as an artist and earn a livelihood. This connection finds expression through the ability of the artist to control the copyright and protect her reputation, including by relying on her moral rights. Indeed, by treating these moral rights as outside the bundle of rights, the Court has eviscerated those rights.

The Economic Rights Distinction

56. The distinction between economic and non-economic rights is, with respect, overstated - moral rights have significant economic implications for the author, and moral and other rights relate to and impact on the copyright works. Central to the Court of Appeal's reasoning is that moral rights are materially different from economic rights protected under the CA. An analysis of the history of how moral rights were adopted in non-European countries paints a different picture. Rigamonti⁴⁶ notes that "moral rights are rights in *copyrightable works* similar in structure to economic rights, which is why moral rights law is considered an integral part of copyright law – the body of law governing rights in works of authorship" and this is why "legislators decided 'to insert moral rights into the copyright statutes' and because they 'ought to be formally regulated as a part of copyright law'".⁴⁷ (emphasis added). This point alone casts doubt on the Court of Appeal's central reasoning on this issue.
57. Even so, van Melle, in discussing the right of integrity in the CA⁴⁸ provides some support for the Court of Appeal's thinking, noting that moral rights "are totally distinct from the more familiar economic rights in the Copyright Act". However, van Melle then qualifies this rather sweeping statement, identifying a number of factors suggesting the rights are not totally distinct from economic rights in a copyrighted work. First, Van Melle correctly notes that both paternity and integrity rights contribute to the "creator's ultimate economic survival".⁴⁹ In other words, they have clear economic consequences.
58. The author then notes that while honour is said to refer to a creator's personal integrity, by contrast, "reputation" refers to more commercial matters, such as business or

⁴⁶ Cyrill P. Rigamonti *Deconstructing Moral Rights* (2006) 47 (2) Harv. Int.Law J, vol 47 353, at 360.

⁴⁷ Rigamonti, above n 46, at pg 360.

⁴⁸ Abraham I van Melle *Moral rights: The right of integrity in the Copyright Act 1994* (1995) NZLJ, at 301.

⁴⁹ Van Melle, above n 48 at pg 302, column 1.

professional standing.⁵⁰ Finally, van Melle accepts that derogatory treatment of a work is only actionable when it is *commercially* published, publicly performed, broadcast, exhibited in public etc.⁵¹ (emphasis added). All of this points to economic interests and consequences.

59. Copyright, unlike moral rights, is proprietary in nature - it is said that there is a fundamental divide between (proprietary) and moral rights (not proprietary). Professor Ian Eagles, in examining the moral rights regime⁵² suggests that judges will need to “abandon the comforting illusion that moral rights are or can be wholly a creature of statute”,⁵³ in other words, they have a broader relevance.
60. Eagles explains that in German copyright law, the distinction is not between moral rights and “real” copyright, but rather between “core” rights covering all aspects of an author’s intellectual and personal relationship with the “work”. He refers to this as the monist approach.⁵⁴ He points out that these principles found their way into the Berne Convention in Article 6bis which represents a balance of views, and in the final post-Stockholm version reflected the “monistic view that economic and creative rights should be co- extensive”.⁵⁵ This is arguably the obverse of what the Court of Appeal found.
61. Eagles then analyses whether moral rights are property or obligation-based. He accepts that it could be contended that an intention is evidenced by the legislator treating them as liability-creating rather than property-conferring.⁵⁶ However, he goes on to say that “Against this must be set the complex scheme for the post mortem transmission of the moral rights of integrity and paternity and the commissioner’s right to privacy set out in s 119”. These are in the nature of “property-conferring”, and they suggest something more than the mere survival of a personal action.
62. Van Melle broadly supports this view, submitting that the distinction between ownership and personal rights is misunderstood, and that “even though moral rights do in a sense provide the creator with some sort of ‘ownership’ of the work, the economic rights in copyright law have never furnished ownership of the work per se...”⁵⁷

The Distinction between Assignability and Waiver Rights

⁵⁰ Van Melle, above n 48, at pg 302, column 1, referring to Australian Government Discussion Paper, Proposed Moral Rights Legislation for Copyright Creators, Commonwealth of Australia, June 1994, para 3.49.

⁵¹ Van Melle, above n 48, at pg. 302, middle column, referring to s 99 CA.

⁵² Ian Eagles, above n 28, at 26.

⁵³ Ian Eagles, above n 28, at pg 27.

⁵⁴ Ian Eagles, above n 28, at pg 32.

⁵⁵ Ian Eagles, above n 28, at pg 40, para (b).

⁵⁶ At pg 41.

⁵⁷ Van Melle, above n 48, at pg 302 right-hand column.

63. While the s 15 CA rights remain with the author they can be assigned. In New Zealand, moral rights cannot be assigned⁵⁸ but they can be waived⁵⁹ and the copyright simultaneously licensed, including through an exclusive licence. The waiver provision in the United Kingdom⁶⁰ which is very similar to the New Zealand provision, has been described as “exceptionally generous” insofar as it allows the author to “consent to any act that violates their moral rights”.⁶¹ Professor Eagles considers that the breadth of these waiver provisions raises the question of whether they can really be called moral rights at all “because the statutory validity of unconditional blanket waivers extinguishes any trace of inalienability, which is one of the key features of the concept of moral rights in a contractual setting.”⁶²
64. Some commentators have raised concerns that New Zealand’s broad waiver provision allows publishers to exert undue economic leverage on authors. Whether this is correct or not, a waiver of moral rights, accompanied by a grant of an exclusive license is, in reality, a relinquishment of all of an author’s effective rights arising under the CA and for all intents and purposes very close to a transfer of rights in the copyright.
65. Professor Eagles opines that New Zealand’s “regime also exhibits traces of a closet monism” as none of the rights extend beyond the copyright period and that the “interests of licensees and assignees are given limited recognition by allowing them to shelter under waivers given to the copyright owner”.⁶³ In practical terms, this significantly narrows the perceived gap between moral and economic rights in New Zealand under the CA. Eagles notes that “in both cases [in France and Germany], waiver is either non-existent or controlled”.⁶⁴ The appellant submits that the allowance of a wide-ranging waiver regime makes New Zealand different, and this difference must be weighed up in assessing where the bundle of rights boundary should lie.

The Close Nexus between Moral Rights and Specific Copyright Works

66. Contrary to what the Court of Appeal seems to think, moral rights are not some sort of abstraction. Like the s 15 CA rights, moral rights can only be exercised against and vindicated in relation to infringement of moral rights in relation to specific copyright works. Van Melle notes, rightly, that the paternity rights of an author are “inexorably linked with their published work”⁶⁵ while integrity rights protect the creator’s work from distortion. In other words, the rights are closely aligned with and linked to individual

⁵⁸ CA, s 118.

⁵⁹ CA, s 107.

⁶⁰ United Kingdom, Copyright, Designs and Patents Act 1988, s 87.

⁶¹ Rigamonti, above n 46, at pg 402.

⁶² Rigamonti, above n 46, at pg 403.

⁶³ Ian Eagles, above n 28, at para 4.1.3, pg 43.

⁶⁴ Ian Eagles, above n 28, at para 4.1.1, pg 41.

⁶⁵ Ibid.

copyright works rather than existing at large. The learned author acknowledges that the period of moral rights is generally concurrent with that of copyright protection.⁶⁶ This is different from the situation in France where moral rights extend beyond the term of copyright.⁶⁷

67. The fundamental premise of integrity rights is that “creators’ reputations are inseparably linked to their work”.⁶⁸ This reinforces the important point that moral rights are inextricably connected with the work and do not somehow exist in a vacuum. Eagles agrees, noting⁶⁹ that “moral rights are attached to particular works, not to creative activities in general”.
68. Rigamonti comments on cases where a moral rights claim has been brought in conjunction with a claim for copyright infringement and resulted in increased damages being awarded.⁷⁰ *Sawkins v Hyperion Records Ltd* provides an example of how moral rights were used to successfully supplement a parallel claim for copyright infringement.⁷¹ In addition, where a party has acquired the copyright from the author or obtained a license to use the work, reliance on the author’s moral rights becomes even more imperative.
69. In a New Zealand context, in *Radford v Hallensteins Bros Ltd*⁷² the artist John Radford brought a claim against Hallensteins for infringement of his moral rights in relation to sculptures placed in Western Park, Ponsonby and for T-shirts which depicted the sculptures, alleging that they distorted and mutilated his works. Judge Joyce QC found that the claim was tenable and Hallensteins strike out application was dismissed.
70. For these reasons, we submit that the distinction drawn by the Court of Appeal between the relatively narrow bundle of rights, i.e. the restricted acts, and skills and abilities are illusory because moral rights bridge the two and are inextricably connected to both. Indeed, this case is a graphic example of why the copyright as a whole should not be treated as relationship property but as a unique form of personal property, which should remain with the author/artist and not become weaponised as part of an acrimonious relationship breakdown.

Moral Rights and Copyright Should be Treated the Same

71. As discussed above, the Court of Appeal took the view that moral rights sit independently

⁶⁶ CA, s 106; and Van Melle, above n 48, at pg 302, column 1.

⁶⁷ Rigamonti, above n 46; and Abraham I van Melle, above n 48.

⁶⁸ Van Melle, above n 48, at pg 304, right-hand column.

⁶⁹ Ian Eagles, above n 28, at pg 44.

⁷⁰ Rigamonti, above n 46, at pg 369, referring to the French decision CA Versailles, 1e ch., Nov. 5, 1998, 180 RIDA 1999, 367 (Fr.).

⁷¹ *Sawkins v Hyperion Records Ltd* [2005] E.C.D.R. 33 at pgs 478 and 479.

⁷² *Radford v Hallensteins Bros Ltd* [2009] DCR 907, 2009 WL 2872139.

of copyright and should be dealt with separately under the CA.⁷³ It is accepted that moral rights fall outside the ambit of the PRA. In our submission, if moral rights sit outside of the PRA, so too should the Copyrights given both are intensely personal in nature.

72. The purpose of copyright is to protect and honour the author and provide them with recognition for their efforts as the original creator of the work. That is what the rights set out in s 16 of the CA protect. Moral rights are similar in that regard as their purpose is to protect the creator's reputation. In the case of both copyright and moral rights, the rights that are being protected are intensely personal to the creator. For those reasons, the Copyrights should be treated the same as the moral rights and sit outside the ambit of the PRA.

Contributions

73. One of the principles of the PRA is to recognise the equal contributions of both spouses to the relationship.⁷⁴ What the Appellant is seeking in this case does not, in our submission, cut across this principle. Ms Alalääkkölä's skill, labour and judgement create the copyright. The contributions of the parties are recognised by treating the paintings as relationship property. That is the product of the parties' respective contributions to the relationship and the principal value of that property is shared by dividing the value of the paintings.
74. So, if the paintings are relationship property, that adequately recognises the contributions of the parties to the relationship and focuses on the area where the value, if any, resides i.e. the paintings themselves (see accounts prepared by Mr Palmer in the Family Court distinguishing between paintings and prints/cards).⁷⁵
75. The Court of Appeal in *Z v Z (No 2)*,⁷⁶ for example, did not apply s 1N overly strictly. Even though the Court acknowledged that parties' efforts are often directed at improving a husband's earning capacity to earn a higher income, the Court still wasn't prepared to extend the definition of property to include earning potential. Instead, the Court considered that what is shared as relationship property is the income which is applied i.e. the assets purchased using the income and it is not until it is reflected in material wealth that it is taken into account. Although the portion of earning capacity that is not reflected in material wealth is not taken into account, the Court wasn't concerned by this as it considered that the majority of contributions are still accounted for.

76. The same goes for the copyright. Dividing the paintings as relationship property means

⁷³ The Decision at [25].

⁷⁴ Property (Relationships) Act 1976, s 1N.

⁷⁵ Inventory of assets, [[101.0058]].

⁷⁶ *Z v Z (No 2)*, above n 12 at pg 31.

all or the vast bulk of the contributions are accounted for and, in our submission, the principle of the PRA that all contributions are treated equally is achieved in this instance.

ISSUE#2: ARE THE COPYRIGHTS RELATIONSHIP PROPERTY?

Section 8(1)(e): Meaning of “Acquired”

77. Subject to certain exceptions,⁷⁷ s 8(1)(e) of the PRA states that all property acquired during the relationship is relationship property. The date the Copyrights were acquired, therefore, determines whether they are relationship property under s 8(1)(e). This leads to an enquiry of the meaning of “acquired” for the purposes of the PRA and, more specifically, when copyright is acquired.
78. There are complexities to consider because copyright is not technically “acquired” in a traditional sense as it would be more apt to say copyright is created. Property that has been created by one party is not the same as property that has been acquired. For example, s 18(1)(d) of the PRA refers to “*the acquisition or creation of relationship property...*” (as part of the definition of a contribution). This would suggest that acquiring something and creating something are two different things. This is inconsistent with interpreting the meaning of “acquired” under s 8(1)(e) as being synonymous with creating something.
79. The Court of Appeal, however, took the view that the copyrights were “acquired” when the paintings were created.⁷⁸ This erroneously conflates the copyrights with the paintings. As discussed above, the copyright is a distinct set of rights or interests separate from the paintings and they must be assessed separately.
80. It should not be assumed that the Copyright was acquired when the paintings were created as the authorities demonstrate the assessment is more nuanced. When assessing when a right or interest is acquired under the PRA, the focus is not on when a spouse actually receives the right or interest; rather, the focus is on when the relevant entitlements or cause of action arose. So, it is not as simple as saying a right or interest is acquired as soon as it is received or even created by a spouse.
81. The meaning of the term “acquired” was assessed by the High Court in *X v X*.⁷⁹ The Court was required to assess whether the benefits under a long-term incentive plan with Mr X’s employer were “acquired” during the marriage. The Court stated at [46] that the critical issue was when the right to receive the benefit was acquired.⁸⁰
82. It was argued that the right was not acquired until Mr X had discharged his obligations

⁷⁷ Section 8(1)(e) is subject to ss 9(2) to (6), 9A and 10 of the PRA.

⁷⁸ The Decision at [66].

⁷⁹ *X v X* (2008) 2 NZTR 17-004, [2007] NZFLR 502, 2007 WL 730644.

⁸⁰ *X v X* (2008), above n 79, at [46].

under the arrangement, however, the Court considered “*this confuses the right with the obligations...*”.⁸¹ The entire benefit was treated as relationship property only because it was traceable to the efforts of the marriage. Similarly, in *Batterham v Batterham*,⁸² fishing quota obtained through the efforts of the husband 3 years post-separation was relationship property because it was clearly traceable to the efforts of the parties during the marriage. A further example is *Young v Young*⁸³ where a retiring leave payment made to the wife post-separation was only relationship property because it was the product of years of work done during the marriage.

83. The issue in *Gill v Gill*⁸⁴ was in respect of compensation received for injuries suffered from a defective contraceptive device. The Family Court wrongly proceeded on the basis that the simple receipt of the money during the relationship made it relationship property. The issue was when the cause of action actually arose. As the cause of action accrued prior to the marriage (because Ms Gill began suffering injuries prior to the marriage), that is when the thing in action was acquired. Whilst this case was decided in the context of s 9(2), the Court’s assessment of when the right or interest was acquired is just as applicable to s 8(1)(e).
84. The High Court in *Creighton v Creighton*⁸⁵ and *Greaves v Baldwin*⁸⁶ were called upon to assess whether payments from income protection insurance policies were relationship property. In both cases, the property right was held to crystallise upon the insured event occurring rather than when payment was actually received.
85. In both these cases, as the insured event occurred during the relationship, the payments under the policy were relationship property. However, the Court in *Greaves v Baldwin* recognised the unfairness of this given that the purpose of the policy was to compensate for loss of future income (including post-separation income) and, on that basis, invoked s 13 and ordered an unequal division of relationship property.
86. Other examples include holiday pay only being acquired during the relationship if it relates to a period when the parties were living together⁸⁷ and damages or compensation only being acquired during the relationship if the cause of action accrued during the relationship.⁸⁸
87. The assessment of redundancy payments depends on the purpose of the redundancy

⁸¹ Above n 79, at [47].

⁸² *Batterham v Batterham* [1993] 1 NZLR 742.

⁸³ *Young v Young* [1992] NZFLR 376.

⁸⁴ *Gill v Gill* HC Rotorua AP24 94, 12 June 1995.

⁸⁵ *Creighton v Creighton* HC Auckland CIV-2003-404-6892, 10 September 2004, Harrison J.

⁸⁶ *Greaves v Baldwin* [2019] NZHC 3390.

⁸⁷ *Roberts v Roberts* (1990) 6 FRNZ 77, [1990] NZLFR 193 (HC).

⁸⁸ *Gill v Gill* HC Rotorua AP24 94, 12 June 1995.

payment and whether it is referable to the period during the relationship⁸⁹ – a redundancy payment may not be relationship property where its purpose is to compensate for lost future income.⁹⁰

88. What can be discerned from the above authorities are the following general principles. First, the focus tends to be on when a spouse became entitled to receive the right or interest rather than when the right or interest is actually conferred or received. Secondly, the purpose of the payment or right or interest is assessed to determine whether it is acquired during the relationship. Thirdly, an assessment needs to take place of whether the right or interest is clearly traceable to the efforts of the marriage.

Section 8(1)(e): When were the Copyrights Acquired?

89. In this case, the Court of Appeal, wrongly in our submission, considered that the Copyrights were acquired when the paintings were created. However, the copyright, particularly when it is the expression of an established and successful artist's oeuvre, is distinct and separate from the paintings as a whole and the individual paintings in that collection and should have been assessed independently of the paintings.

Scheme of the PRA

90. The question for this Court is not when the Copyrights are acquired generally, but rather when they were acquired under the PRA. The underlying premise of the PRA is to recognise what has been created during the relationship to the exclusion of what has been created outside of the relationship. This ensures the fruits of the marriage are shared and, conversely, the fruits of labour prior to the marriage are kept separate (except in certain specific circumstances).⁹¹ That underlying premise must, in our submission, be taken into account in assessing when the Copyrights were acquired.

Family Court's View

91. The Family Court, correctly in our submission, took the view that the copyright is severable from the paintings created and the copyright emanates from and resides in Ms Alalääkkölä's skills, not the paintings themselves. As the Appellant had already acquired and started honing her skills and developing her style as an artist prior to the relationship, the copyright is correctly described as separate property.⁹²

Idea vs Expression of Idea - and Works Building on Earlier Works

⁸⁹ *McDonald v McDonald* (1987) 3 FRNZ 437, 4 NZLFR 504 (FC).

⁹⁰ *H v K FAMC Whangarei* FAM-2006-088-712, 27 October 2009 (2009).

⁹¹ The following sections provide for separate property to become relationship property in certain circumstances – ss 8(1)(ee), 9(4), 9A and 10.

⁹² *Ibid.*

92. Copyright law draws a distinction between the idea of a work and the expression of that idea. An idea is not protected by copyright, but the expression of an idea is.⁹³ Copyright protection arises once an (original) idea is expressed in some form. The High Court in *Plix Products Ltd v Frank M Winstone (Merchants) Ltd*⁹⁴ drew a distinction between two kinds of ideas, general ideas and those that are transformed into concrete form. Using the example of a novelist, an idea to write a novel is not protected by copyright but, once the ideas of characters, dialogue, and plot are expressed in concrete form, copyright will reside in the form they take.
93. One of the complexities in this case is that contrary to the approach taken in both the High Court and Court of Appeal, it is artificial to look at individual Copyrights somehow “attaching” to individual paintings. In short, an individual painting cannot be viewed in isolation. Each painting is influenced and coloured by the artist’s skills in creating other works that have gone before it. When one looks at Ms Alalääkkölä’s paintings, it is an embodiment of her undoubted abilities and evolved style as an artist. Each painting of hers is identifiable because of those paintings that have gone before and will follow after it.
94. For example, once one understands Picasso’s different periods, for example the Blue Period, one can identify one of his paintings. Viewing one painting in isolation would make it more difficult to recognise a Picasso, and distinguish it from a Matisse, for example. What this means is, the skills and efforts applied by the Appellant in creating paintings prior to the relationship have formed a basis for the recognition of her body of work (and thus the copyright in the works as a whole) created during the relationship.
95. Whilst each painting carries its own separate copyright interest, if each subsequent copyright is built on and draws upon artistic insights and work done prior to the relationship, how is that accounted for if the copyright is treated entirely as relationship property? To put the question slightly differently, in a hypothetical situation and taking the Harry Potter series – if J K Rowling had written the first Harry Potter book prior to entering into a relationship and wrote the second book during the relationship, would the copyright in the second book be relationship property in its entirety? The answer must be in the negative as one must account for the pre-relationship efforts and those would be significant in terms of plot, characters et cetera.

Purpose of the PRA and CA

96. If, as set out in the above authorities, the assessment is based on how a spouse became entitled to receive the right or interest (rather than when the right or interest is actually received), it is arguable that, for the purposes of the PRA, the Copyrights were in fact

⁹³ James and Wells, James & Wells Intellectual Property Law in New Zealand, (3rd ed, Thomson Reuters, New Zealand, 2017), at [4.3] Subsistence of copyright at [701.0007- 701.0008].

⁹⁴ *Plix Products Ltd v Frank M Winstone (Merchants) Ltd* (1984) 1 TCLR 176, 3 IPR 390 (HC) at [419]- [420].

“acquired” prior to the commencement of the relationship.

97. Looking at the purpose of copyright protection, being to protect the skills and efforts of the author, the Copyrights may have been acquired earlier than the creation of the paintings because the skills and efforts applied to each painting formed the basis for the creation of each subsequent painting. Going back to the underlying premise of the PRA, being to recognise only the fruits of the marriage, if the copyright is (at least in part) the product of skills and efforts applied by the Appellant prior to the relationship, how does that pre-relationship skill and effort get taken into account if the copyright in its entirety is treated as relationship property?

How are Other People with Skills Different?

98. The High Court Judge was concerned that what the Appellant is seeking would allow people who acquire skills prior to a relationship to avoid the equal sharing regime on the basis that they acquired skills prior to the relationship.⁹⁵
99. First, this analogy fails to recognise the fundamental distinction between copyright and other types of property. Copyright is more than just the skill expended by the creator – it is an expression of their creativity and personality. The Supreme Court’s comments in *Henkel* about the scope of copyright protection is determined by the amount of time, skill labour and judgement applied, support this. Treating the Copyrights as separate property does not create this floodgates argument for anyone with skills because copyright is different, as the facts in this case show.
100. Secondly, the skill or experience of a lawyer or accountant is reflected in their income level. Again, the fruits of that skill and labour are divided, not the qualification. That can be from an enlarged property pool or through a claim under s 15 of the PRA for economic disparity.
101. If the copyright is held to be relationship property in its entirety,⁹⁶ they will automatically be divided equally (by way of an adjustment payment). There will not be any scope to apply a discretion or any type of discount because the PRA mandates that all relationship property is to be divided equally (except in certain circumstances).⁹⁷
102. The Court of Appeal in *Z v Z (No 2)*⁹⁸ referred to this in considering that most of a party’s

⁹⁵ *Palmer v Alaläökkölä* [2021] NZHC 2330 at [36].

⁹⁶ But, assuming that the only category of work in play here is the fourth category, referred to in *Alaläökkölä v Palmer* [2020] NZFC, above n 35.

⁹⁷ The ways in which relationship property is not divided equally under the PRA is by virtue of s 13 (extraordinary circumstances exist making equal sharing repugnant to justice), s 15 (economic disparity) and ss 14, 14A and 14AA (short duration).

⁹⁸ *Z v Z (No 2)*, above n 12, at pg 31.

earning capacity is reflected in the material assets acquired using a spouse's income. It is only the portion of a person's earning capacity that is not reflected in material assets that is not accounted for and the Court of Appeal was comfortable with that approach.

103. In summary, if the Court accepts that Ms Alalääkkölä's paintings created during the relationship are the product of skills and efforts she began expending prior to the relationship, it is open to this Court to consider that the copyrights arose or were acquired at an earlier date before the paintings were created.
104. The approach is consistent with the purpose of copyright, being to protect the skills and efforts of the author and consistent with the PRA regime that seeks to protect rights or interests that are not borne out of the relationship and, on analysis, properly reside in one or other of the parties. If the Court accepts that the copyright was acquired prior to the relationship, then it is not relationship property under s 8 (1)(e).

"Exceptions" to s 8(1)(e)

105. There are some exceptions to the general rule that property acquired prior to the relationship is separate property. So, even if the Court considers that the Copyrights were acquired prior to the relationship and are, therefore, separate property, it must then consider whether any of the relevant exceptions apply. The relevant exceptions in this case are, ss 8(1)(ee), 9A and 9(4).

Section 8(1)(ee): Common Use or Benefit

106. Section 8(1)(ee) treats as relationship property, all property acquired for common use or benefit after the relationship began out of property owned by either party prior to the relationship. It requires that the relevant property is acquired after the relationship "out of" separate property. Even if the Court finds that the Copyrights are not relationship property under s 8(1)(e) because they were acquired prior to the relationship, it must then consider whether there is any property acquired out of the Copyrights that was applied for the parties' common use or benefit.
107. In our submission, s 8(1)(ee) does not apply because there is no property that has been acquired out of the copyrights. The only possibilities are income derived from the copyrights and the paintings itself. If there was any income received from commercialising the copyrights during the relationship (and Ms Alalääkkölä's position is there was none or it was minimal),⁹⁹ that income would undoubtedly be relationship property having been acquired during the relationship but that would not make the Copyrights relationship property.

⁹⁹ Affidavit of Ms Alalääkkölä, above n 41, at para 17, [[201.0023]].

108. Even if it could be said that the paintings were acquired out of the copyrights, there is no dispute that the paintings are relationship property, having been acquired during the relationship. Thus, in either case, the copyrights do not become relationship property by virtue of s 8(1)(ee).

Section 9A: Increase in Value

109. Section 9A allows the increase in value of separate property to become relationship property if: first the increase in value is attributable to the application of relationship property (s 9A(1)); secondly, the increase in value is attributable to the actions of the spouse (s 9A(2)); or thirdly the separate property is used with the consent of the owner spouse to acquire, improve or increase the value of relationship property (s 9(3)).
110. Both ss 9A(1) and (2) require that the separate property has increased in value. The copyrights derive from the skill, judgement and effort of Ms Alalääkkölä. Their value has been captured in the works sold or created during the relationship. Without Ms Alalääkkölä there is no copyright so the Copyrights do not have any value independently of her (similar to the application of skill of a qualified professional).¹⁰⁰
111. Additionally, in respect of s 9A(2), the Family Court Judge found that the paintings were created solely by the Appellant and the Respondent was not involved in the creation of the work.¹⁰¹ As a result, s 9A(2) cannot apply.
112. Section 9(3) requires that the separate property is applied to relationship property. In this case, there is no evidence that the copyrights were applied to any relationship property. As the copyrights were not commercialised, they were not applied in any way and, even if they were, it would be the income derived from the copyrights that is the property applied to relationship property (not the copyrights themselves).

Section 9(4): Just to Treat it as Relationship Property

113. Section 9(4) classifies as separate property all property acquired when parties are not living together, but the Court has a discretion to treat it as relationship property if it is just to do so. The purpose of s 9(4) was noted by the Court of Appeal in *Brown v Brown*:¹⁰²

“...the purpose of s 9(4) is to bring forward for consideration as separate property all the property acquired by either spouse during a period of separation and so that a decision can then be made in terms of the proviso

¹⁰⁰ Even on the respondent's own evidence, the vast majority of the value lies in physical paintings rather than prints, which supports the contention that Ms Alalääkkölä's activity was very much tied up with selling one-off pieces rather than multiple prints; Affidavit of Ms Alalääkkölä, above n 41.

¹⁰¹ *Alalääkkölä v Palmer* [2020] NZFC, above n 35 at [22].

¹⁰² *Brown v Brown* [1982] 1 NZLR 513, (1982) 1 NZFLR 157(CA), at pg 4.

as to whether it would be just to treat some part of such property as matrimonial property.”

114. Section 9(4) is therefore aimed primarily at property acquired by a spouse post-separation. There is no evidence in this case of any property acquired by the Appellant post-separation let alone any such property being acquired out of relationship property. Granted, if the Court accepts the contention that the paintings created during the relationship are built on Ms Alalääkkölä's pre-relationship work, then, in principle the same could be said of any paintings created post-separation. However, if that position were to hold, there would need to be evidence of what property acquired post-separation is said to have been acquired out of relationship property, of which there is none. Therefore, in our submission, s 9(4) does not apply.

Vesting Orders don't Address the Issue

115. Whilst at face value, it may appear that some of these issues can be ameliorated by vesting the Copyrights in the Appellant, that does not, in our submission, adequately address the issue. The issue is the copyright in the works is closely intertwined with Ms Alalääkkölä's personal skills and, for that reason, it should not be treated as property or relationship property. It is the connection and inter-relationship between the two that is important.
116. If the copyright resides in Ms Alalääkkölä's artistic skills, then a) it should not be treated as property as it is akin to a personal characteristic and prowess b) the skills (and thus the copyright) was acquired prior to the relationship so is therefore separate property.
117. Vesting simply does not address the inter-relationship between the copyright and Ms Alalääkkölä's artistic skills. What vesting does is allow Ms Alalääkkölä to utilise or exploit the copyright at her discretion, but it does not address this connection.
118. Ms Alalääkkölä's position is that the copyright resides in and is connected to her personal skills to such an extent that they should not be separated. As those skills were acquired prior to the relationship, so too was the copyright. The copyright is therefore not relationship property under s 8(1)(e) and none of the "exceptions" to s 8(1)(e) apply. This is not an unfair outcome. The fruits of the marriage are still recognised by the paintings (and in practical terms the repository of most, if not all, of the remaining economic value in the paintings) being divided as relationship property.
119. Additionally, the "exceptions" set out above provide a safeguard. The ability to essentially convert property acquired prior to the relationship into relationship property by virtue of ss 8(1)(ee), 9A or 9(4) is a backstop. If a claimant can demonstrate the requirements of any of those sections are met, then the separate property can be relationship property. Those exceptions are not, however, made out in this case, and thus, as Judge Grace correctly found, the copyright should remain separate property.

ISSUE#3: WHAT OTHER ORDERS SHOULD BE MADE?

120. The final issue for the Court is what orders should be made consequential upon the answers to the first two questions. There are two matters to consider: vesting and valuation.

Vesting

121. The issue of vesting relates to who should retain the copyright as part of the overall relationship property division. All three lower courts made orders vesting the Copyrights/copyright in the Appellant. Ms Alalääkkölä's position is those orders should not be disturbed (and the respondent has not cross-appealed on this issue). This case will undoubtedly set a precedent for how copyright is classified under the PRA, and this Court's decision will be important in charting the course ahead.
122. A question that arises, is what if there is insufficient value in the pool of relationship property to make an equalising payment? In such a case, it may not be possible to vest the copyright in the author-spouse, in which case, difficulties might arise in terms of recognising the connection between copyright and author's personal skills. That could potentially be the situation in this case as the copyright is yet to be valued.
123. There are a myriad of compelling reasons set out by the lower courts as to why the copyright should vest in the author, hence why all three courts reached the same conclusion on this issue. Any situation that is going to vest the copyright in anyone other than the author spouse should be approached with great caution. The Court should endeavour to ensure the copyright remains with the creator so as to ensure a clean break between the parties.

Valuation

124. While the Court of Appeal remitted the matter back to the Family Court to determine the valuation and division of the relationship property, it did not provide any directions or guidance as to how the valuation exercise should be undertaken. That is unfortunate because the question of the valuation methodology could prove to be contentious and perpetuate the conflict between the parties, and others in the future.
125. In the present appeal, when the situation is analysed through this lens, to suggest that the copyright should be valued on the basis that each painting was, in theory, capable of being reproduced in multiple prints and sold in, for example, souvenir shops is in jarring conflict with the way the parties had actually chosen to manage the copyright during their marriage.
126. It must be wrong to allow a disaffected non-author spouse to exert a form of control over the copyright once things have soured and to use the valuation process to weaponize the

copyright and oppress the author-spouse. That is, by trying to impose a valuation methodology at odds with what they had agreed while together. Indeed, to do so would be contrary to the guiding principle that the division of assets should be fair and equitable to both parties.

127. It is acknowledged that ultimately, the issue of valuing the copyright has to go back to the Family Court for determination. However, potentially this could be a complex exercise and, in this case, it is likely to be as heavily contested as previous hearings. To avoid this, Ms Alalääkkölä respectfully urges this Court to give clear guidance and direction to the Family Court to avoid these types of disagreements arising in the future.
128. Assuming for purposes of this submission that Ms Alalääkkölä is unsuccessful on her arguments on the first two points and a valuation needs to be made, the value of the copyright will determine the lump sum adjustment Ms Alalääkkölä is required to pay to Mr Palmer for his half-share of the copyright. Whilst the Family Court is well-placed to determine the value of intangible rights such as goodwill in a business, valuing the copyright is more complex and potentially fraught. The Court of Appeal was astute to this issue, noting that Mr Palmer would likely be incentivised to maximise profits regardless of the impact on Ms Alalääkkölä.¹⁰³
129. The Court of Appeal, correctly in our submission, did not consider it appropriate to demand that the copyright be monetised in an aggressive manner, inconsistent with Ms Alalääkkölä's reasonable wishes and her determination to protect her artistic reputation. Whilst vesting the copyright in Ms Alalääkkölä could be said to address this issue to some extent, what it does not address is that she may be required to pay a greater sum to Mr Palmer for the value of the copyright than what she is likely to actually receive from exploiting the copyrights in practice. Such an approach would be unprincipled and unjust.
130. The High Court Judge also appears to have recognised these potential complexities in recognising that the copyright and the vesting of the work did not necessarily go together.¹⁰⁴ Additionally, if the copyright is valued on the basis that it is exploited to its fullest extent, that is likely to affect the value of the original paintings. For example, if the market

¹⁰³ The Decision at [78(b)].

¹⁰⁴ *Alalääkkölä v Palmer* [2021] NZHC 2330 at [49].

is flooded with cheap prints of paintings, that is likely to provide Mr Palmer with a financial return but ultimately diminish the value of the original paintings and Ms Alalääkkölä's ability to make a livelihood in the future.

A Principled Way Forward

131. The appellant submits that the questions arising in this appeal are highly fact sensitive and that having been in a relationship for 20-years there is a factual substrate to assess just how the parties chose to deal with the copyright during their relationship and how they should be compelled to wrap things up now. Thus, if Ms Alalääkkölä had decided to monetize the copyright, for example, to licence the rights to a third party and to waive moral rights, then that would be an important factor to take into account. The converse is true. For example, if Ms Alalääkkölä has always been highly protective of and kept a tight rein on her copyright (as is the case here).
132. The appellant submits that in the circumstances of this case the following approach should be adopted:
- a. The starting point and an important consideration is that the Court of Appeal rightly found that Ms Alalääkkölä's copyright is highly personal to her;¹⁰⁵
 - b. Equally important, it is necessary to give appropriate consideration to the underlying purpose of the CA as a whole, which is to recognise the unique nature of authors' rights - and that artists don't stop being an artist, just because they are in a relationship or become married;
 - c. Judge Grace recognised the importance of party autonomy and the parties' ability to regulate their own relationship affairs in the way they choose.¹⁰⁶ The Judge tried to do justice to both of them on separation, while recognising (a) above;
 - d. The Court of Appeal confirmed that the PRA applies a deferred community of property regime;¹⁰⁷
 - e. That means an author/artist retains control of the copyright throughout the relationship, as Ms Alalääkkölä did in this case;
 - f. As discussed above in paragraph 131 the courts have an established track record to assess how the parties actually treated the copyright – in this case 20 years of established conduct.

¹⁰⁵ The Decision at [78] (a), [[101.0153]].

¹⁰⁶ *Alalääkkölä v Palmer* [2020] NZFC, above n 35, at [29], [34] and [35].

¹⁰⁷ The Decision at [53].

- g. On separation, the assets of the relationship are divided, but only at that point;¹⁰⁸
 - h. The asset in dispute is the paintings in category 4¹⁰⁹ held in the Blenheim District Court but excluding the other three categories;
 - i. The assets be divided in the manner set out in (c) above;
 - j. This is consistent with the Court of Appeal approach that Ms Alalääkkölä should retain control at all times – see (a) and (b) above;
 - k. The assets should be split on an orthodox basis, but the valuation should be done according to (e), (f) and (g) above;
 - l. Mr Palmer should not be able to demand valuation is done contrary to:
 - i. the way the parties have conducted their affairs when together; and
 - ii. a fair and equitable split of assets that reflects (c) above.
133. This approach is consistent with and supports the clean break principle and avoids conflicts as to how to value the copyright and what is a fair and equitable split of the assets. It would also thwart any attempts by Mr Palmer to exercise control over Ms Alalääkkölä and to weaponize the copyright after separation.¹¹⁰ More importantly, it will allow the parties to move on and put this acrimonious dispute behind them.

ORDERS/DIRECTIONS SOUGHT

134. The Appellant seeks the following orders:
- a. The copyright is not property under the PRA;
 - b. If it is property, then an order that the copyright is Ms Alalääkkölä's separate property under the PRA; and
 - c. Orders vesting the copyright in the Appellant.
135. If the Court finds that the copyright is not property, then it falls outside the ambit of the PRA and only an order confirming as such is required.
136. If the Court finds that the copyright is property but not relationship property, then an order classifying the copyright as separate property is sought.

¹⁰⁸ The Decision at [54], [[101.0144]].

¹⁰⁹ See Affidavit of Ms Alalääkkölä, above n 41.

¹¹⁰ The Decision at [75] [[101.0152]].

137. If the Court finds that the copyright is relationship property:

- a. The Appellant seeks the orders made by the Court of Appeal (and High Court) vesting the copyright in her to be reaffirmed;
- b. Appropriate guidance given to the Family Court on how to approach the valuation of the copyright both in this case and more generally; and
- c. The matter is remitted back to the Family Court to determine the value of the copyright in accordance with (b) above.

Dated this 26th day of July 2024

Clive Elliott KC/Sharon Chandra Counsel for Appellant

We have made appropriate inquiries to ascertain whether this submission contains any suppressed information. To the best of our knowledge, this submission is suitable for publication (that is, it does not contain any suppressed information).