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IN THE SUPREME COURT OF NEW ZEALAND SC 22/2024

I TE KŌTI MANA NUI O AOTEAROA [2024] NZSC Trans 19

BETWEEN **SIRPA ELISE ALALÄÄKKÖLÄ**

Appellant

AND **PAUL ANTHONY PALMER**

Respondent

Hearing:	24 October 2024
Court:	Ellen France J Williams J Kós J Miller J O'Regan J
Counsel:	C L Elliott KC, S P Chandra, J A Hunter and W H Ranaweera for the Appellant Q A M Davies and E-J M Tucker for the Respondent

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CIVIL APPEAL

MR ELLIOTT KC:

Yes, may it please the Court. Counsel's name is Elliott for the appellant, and I appear with Ms S Chandra to my right, junior counsel. To her right is

Mr Ranaweera, who is going to run our ClickShare, and behind me first of all is a law clerk and I seek leave for her to be able to sit at counsels' table to assist, and next to her is Mr J Hunter, who is a solicitor and instructor. Ms Alalääkkölä will be viewing the proceedings remotely, and I seek leave for her to do that. Thank you, your Honour.

ELLEN FRANCE J:

All right. That's fine, thank you. Tēnā koutou.

MS TUCKER:

Tēnā koutou, e ngā Kaiwhakawā. He mihi nui ki ura koutou. Ko Mrs Tucker ahau, ko Mr Davies, mō te kaiurupare. E noho ana āia i te Kōti hoki. May it please the Court, Mrs Tucker and Mr Davies for the respondent, and Mr Palmer is here in the court today.

ELLEN FRANCE J:

Tēnā kōrua. Mr Elliott?

MR ELLIOTT KC:

Thank you, your Honour. Just firstly, apologies for the late road map outline of argument. We had a few technical issues and I apologise for its lateness. It's a little bit long as well, but we didn't have time to actually shorten it, unfortunately, at the last minute, but it hopefully will be of assistance.

What I would like to do, Ma'am, is to do a short oral opening by way of outlining the structure of our case, and then I would propose for my junior Ms Chandra to deal with the, basically the property relations issues of the appeal, and then I will deal with the copyright issues after her. So she'll deal with issues 1 and 2 in the road map and I'll deal with the third issue and the copyright issue to the extent that it really interlinks with issue 1 and 2. So we'll try and separate our speaking responsibilities into Property (Relationships) Act 1976 and copyright, and hopefully that will make sense.

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So if I may, in terms of some oral comments, in terms of the structure of our case, this is the first time that the intersection between the Property (Relations) Act, well the PRA, and the Copyright Act 1994 has come before this Court. It's an important case not just for my client Ms Alalääkkölä, but the wider artistic community in New Zealand.

Now Ms Alalääkkölä has given evidence about the pivotal role that art plays in her life. The Court of Appeal recorded that statement in its judgment, and I quote: "I am my art, and my art is me." She explained how when choosing to sell a painting or keep it that each piece has a particular meaning to her, and she makes a conscious decision in each case whether "to let it go", as she put it. Now this is a choice that only the artist can make. Each artist has that sole responsibility to decide whether to let a work go or not, and Ms Alalääkkölä also gives evidence that her paintings are effectively a diary that she keeps of her life, albeit in visual form, and that this charts her life and her development both as an artist and as a human being.

The rights in dispute in this case are not monetary instruments in the normal sense, like fishing licences and insurance payments, they have a very different aspect to them. They go right to the core of the person, the person who actually creates them. And this is not just about the artist, it's about the role that artists and creators play in our society in Aotearoa New Zealand, and we recognise them for that and we reward them for their skills and abilities, and IP law in particular values that creative skill and it rewards them because we enjoy the benefits of their talent.

Now the PRA in very broad terms has a particular role to play, but what is relevant in this appeal in my submission is that its primary purpose is to actually allow parties to separate, to disengage when things have gone wrong, and to allow a parting of the ways which minimises future conflict. So the whole purpose is the clean break and to divide the assets fairly and equitably.

And what I submit is that the purpose of the Act should also be to try and avoid an externally imposed outcome on the parties themselves. If they have

regulated their affairs when things were going better, an externally imposed outcome should not ride roughshod over what the parties themselves had done for in this case 20 years, particularly when the item or items in dispute are so intensely personal to one of the parties. And our primary submission in this appeal is that the assets or items in dispute here, paintings, also impact on personality, and we say copyright in this sense is inseparable from the author/artist.

Now in this particular case the Family Court and the Court of Appeal agreed that the copyright must stay with Ms Alalääkkölä, and that hasn't been appealed so that's not really an issue. The only difference primarily is that the Family Court said, well, the copyright is separate property and the Court of Appeal disagreed and said no, it's relationship property. So that is really the issue that divides the two Courts, and that this Court will no doubt turn its mind to.

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And what we say, with respect, is that the Court of Appeal erred on this issue, but at the same time the Court of Appeal had considerable sympathy for Ms Alalääkkölä and that's very clear from the judgment, and they found that she could keep the copyright but she had to compensate Mr Palmer for doing so, for employing that decision, but the Court of Appeal did not actually determine how the valuation should occur and what we say is that the valuation issue, like every other issue in this dispute, is bitterly contested. So we have a bitterly contested matter that remains unresolved, and what we say is when you look back Mr Palmer throughout has wanted the copyright in all the paintings, not just some of them, with no exceptions, whether they were completed, whether the artist was happy to sell them, whether there was any quality to the painting or any commercial value, indeed even if the paintings were highly sensitive, and what we say is that the PRA must strive to achieve a fair and final outcome and what that amounts to in a practical sense is that it shouldn't permit a disenchanted or embittered spouse to weaponise the asset, in this case the copyright. That would be completely anathema to the purpose of the Act.

Now the evidence that Ms Alalääkkölä has given is that she's traumatised by the situation she's in and that she believes from her perspective that Mr Palmer has threatened to destroy, damage and sell her paintings. So there are real live concerns on her part.

So that is the context in which I'd just like to put to the Court the two different narratives that will be presented today, and first from the respondent's, if I may summarise, fairly hopefully, the position, it is that copyright is a bundle of rights and not only is it property but necessarily it is relationship property and that's certainly what the Court of Appeal found.

Secondly, their main point is that while an artist, or an author, might have moral rights they are not part of the bundle of rights and they must be put to one side, and that is an argument that the Court of Appeal accepted and we submit they erred in doing so because we say that copyright is a unique sui generis right and that's not in dispute, but we say that it encapsulates a diverse range of rights and interests and these include moral rights, and what we say is that the Court of Appeal rightly accepted that the PRA must reflect the unique and personal nature of the copyright and Ms Alalääkkölä's retention of that copyright but that moral rights were really quite separate, and what we say in response to that is that the moral rights, along with the economic rights, both have to be engaged to ensure that there's a clean break between the parties. You can't simply use part of the regime and say, well, the other part doesn't really fit in here, because we say the Copyright Act is a code designed to protect authors' rights and what we say is you can't say: "Well, we're going to carve out part of your rights. You don't need them," and at the same time saying: "Well, they are relevant in terms of protecting your interest and your reputation."

Equally, an issue that has, with respect, caused ongoing confusion and difficulty in this case is the failure to properly distinguish between copyright and the artefact to which the copyright relates, and that is an issue I'll come back to in my submission because in my view it is really central to our argument.

The other key point is that in terms of enhanced earning capacity, which the Court of Appeal endorsed in *Z v Z (No 2)* [1997] 2 NZLR 258 (CA), saying it wasn't property, we say it's the same as enhanced artistic skills as in this case and there's no difference between earning capacity and artistic skills. We say both are harnessed through an external mechanism which is – and the example in *Z v Z* was the partnership deed, in our case we say the paintings. That's the mechanism by which the skill, artistic skill, is expressed. We say that distinction is also fundamental to our argument and where the Family Court, with respect, was right and again, with respect, we say the Court of Appeal fell into error.

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So just to encapsulate what I've put to the Court, we say the central issues are intersection between the two Acts, the relationship between economic and moral rights particularly in a fine art context as here but also generally, and thirdly, the scope of moral rights in Aotearoa New Zealand, which is a really important issue for the artistic community and the wider copyright community.

So as I said, there will be two parts to our submission. First my learned junior will deal with issues 1 and 2, and I'll then deal with issue 3. So if the Court pleases.

ELLEN FRANCE J:

Thank you, Mr Elliott. Ms Chandra?

MS CHANDRA:

Good morning, your Honours. As my learned friend has indicated, I intend to talk your Honours through the framework of the PRA, which will set out what we submit is the context in which copyright needs to be applied. My learned friend will discuss how copyright fits within that framework, so it's really only the relationship property component that I will be dealing with. I will try not to veer too far into the submissions my friend is making, but I will try to give your Honours a bit of a snapshot of the argument so your Honours can start thinking about how it's going to fit into the PRA framework.

The first point I would like to make is that the Copyright Act does not determine the definition of property under the PRA, and this was part of the Court of Appeal's reasoning in concluding that the copyright is property. The Court of Appeal held the view that because the Copyright Act says copyright is property, it is also property under the PRA, and we say that the Court of Appeal respectfully erred in this regard. In our submission, it's entirely possible for copyright to be property under the Copyright Act whilst simultaneously not being property under the Property (Relationships) Act, and the reason for that is because the PRA has its own unique definition of property and that definition doesn't refer to any other piece of legislation, it's just got its own unique definition, and the question for your Honours today is whether the copyright fits within that specific definition set out in section 2.

ELLEN FRANCE J:

That is, nonetheless, the PRA definition is quite wide.

MS CHANDRA:

I do appreciate that, your Honour, and I do actually acknowledge that the definition in the PRA is wide. My submission, your Honour, is that there does need to be an enquiry into the specific nature of the right or interest that we're looking at to see whether it fits within the context of the PRA. I think it would be, in my submission, too simplistic to say the PRA intended to have wide application in terms of its definition of property and the consequence of that is that copyright should fit within that, and these are the submissions my learned friend will be making, is in terms of what the exact nature and purpose of the copyright interest is, which suggests that it shouldn't fit within the context of the PRA.

I just want to briefly touch on the consistency between the two pieces of legislation because the law already accommodates varying definitions of property, and I have given some examples in my written submissions of the different ways that property has been defined in different pieces of legislation, and in my submission, that shows a clear intention by Parliament that the definition of property needs to be with reference to the specific context of the

legislation that you're dealing with, and that's what makes it possible for copyright to be property under the Copyright Act and simultaneously not be property under the Property (Relationships) Act.

ELLEN FRANCE J:

In that context, what do you say about what this Court said in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 which is basically saying it's broadening traditional concepts of property and needs to be interpreted in light of that particular statutory context?

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MS CHANDRA:

Yes, your Honour, and I don't intend to cut across the comments made in *Clayton*. I do accept that the intention is for the PRA to have wide application in terms of its definition of property, although it takes me back to my earlier point which is that we need to look at the specific rut that we're dealing with here which is copyright and it's not like any other right that this Court has dealt with before and so it does require its own specific inquiry even if the definition of "property" is intended to have wide application.

I want to talk briefly about a submission made by my learned friend at paragraph 18 of their submissions. The submission made by my learned friend is that any interpretation of a provision in a statute must be consistent with the statute book as a whole, and the authority for that proposition is the Court of Appeal's decision in *Agnew v Pardington* [2006] 2 NZLR 520 (CA). In my submission that proposition cannot apply in the context of the definition of property and I don't think the Court of Appeal intended for it to apply in this particular context. This case was a decision under the Receiverships Act 1993 in the context of a business going into liquidation and in my submission it doesn't apply across the board to the definition of "property" in the PRA. The very fact that Parliament has adopted varying definitions of "property" across different pieces of legislation shows that the intention wasn't for the entire statute book to interpret the meaning of property in the same way.

The High Court of Australia in *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 also confirmed that position, if I could have my ClickShare colleague turn to the respondent's authorities at volume 9, tab 1. In *Kennon v Spry* the High Court of Australia said that the word – this is at line 52, your Honours – this was a relationship property case and the High Court of Australia said that: "The word 'property' is use did not different ways in different statutory contexts," and that's what we say should apply here. This is a relationship property circumstance as was the case in *Kennon v Spry* and the New Zealand Parliament has adopted that approach by adopting varying definitions of "property".

WILLIAMS J:

In that case was that in order to underscore a narrowing of the definition or a widening of it?

KÓS J:

It was a widening, as I recall.

MS CHANDRA:

In *Kennon v Spry*? I believe it was a widening because the general approach in terms of the meaning of "property" under the PRA has been to slowly make it wider and wider although I do go back to my earlier point that that doesn't provide a justification in and of itself to include copyright within that definition.

The other authority that my learned friend referred to in support of their proposition at paragraph 18 is the *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 decision which says that if a property right exists, it exists in every division of the High Court and every jurisdiction. Now these comments were made in the context of piercing the corporate veil. The issue in that case was whether the husband was beneficially entitled to the assets owned by a company, but these comments were not made in the context of the definition of "property" under the PRA. It was a relationship property case but that proposition was not made in the context of how to interpret the meaning of "property" and the reason we say that that distinction is important is because of the different meanings of "property" across different pieces of legislation.

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WILLIAMS J:

I think what you've got in your favour is section 4A, that says whatever any other statute says, it's subject to this one. So that's an open door for you. Your big problem is the definition of property, which is unbelievably wide and intended to be, because this is supposed to regulate the most ubiquitous form of adult relationship in the system. So –

MS CHANDRA:

That's right, Sir, and I would agree with your comments. The only point that I would make is that, yes, it has slowly been interpreted more and more widely, but there is a limit to that, in my submission. If Parliament wanted every right or interest to be included within the definition it would've –

WILLIAMS J:

Yes, agreed, but you need to convince us about what those limits are. That's the key for you.

MS CHANDRA:

Agreed, Sir. And I think those are the points that my learned friend will be touching on in terms of how copyright fits within that.

WILLIAMS J:

Ah, you pass the ball to him at that point.

MS CHANDRA:

Because it all centres around what the objective of copyright is, what the purpose of copyright is, what the nature of the actual interest is.

MILLER J:

It also –

O'REGAN J:

But the PRA does say "any right", doesn't it?

MS CHANDRA:

It says “any other right or interest”, your Honour. I accept that there is a slow widening as cases progress, but at the same time, if Parliament wanted every right and interest to be included, would they not have said “any right or interest” rather than “any other right or interest”?

ELLEN FRANCE J:

Well…

O’REGAN J:

I don’t think it makes any difference myself, but up to you to convince us, yes.

MS CHANDRA:

I do firmly think that there is a distinction there, your Honours. I think that if every right and interest was intended to be captured then the legislation would have said so. And the case law supports that because there are some rights and interests that have been held not to fit within the definition of property. The earning capacity in *Z v Z* is a prime example of that, as is a discretionary beneficiary’s interest in a trust, and –

KÓS J:

Yes, well there’s a lack of tangibility or ability to value those as an asset of any worth whatsoever.

MS CHANDRA:

Exactly, Sir, that’s exactly right. And what my –

KÓS J:

Well, that’s not the same as a copyright and an artistic work, which may be reproducible and very valuable. Presumably it is, otherwise why are we all here?

MS CHANDRA:

So far, your Honour, there hasn't been any evidence or valuations completed of the copyright so it's unclear exactly what the value is, but I think I'll summarise this as best I can. It is a point that I think my learned friend is making, but there is more to the copyright than just the commercialisation aspect. If the copyright simply sits there and nothing happens, it operates as a shield rather than a sword. It's a form of protection but nothing else. There's – it simply sits there to prevent someone else from copying your work and nothing really happens with it unless and until someone breaches that copyright and then that gives rise to an interest, but until then it simply sits there as a shield.

KÓS J:

Well I'm going to have an argument with Mr Elliott about that, then.

MS CHANDRA:

Thank you, Sir.

KÓS J:

Can we deal with the point before that, though, because we've jumped over to your point 8 in your outline, but I think we need to deal with point 7, which is that your submission is that copyright is not personal property under section 2(b).

MS CHANDRA:

Yes, Sir. Thank you, Sir, I did intend to get to that.

KÓS J:

Good, thank you.

MS CHANDRA:

I appreciate you bringing me back to that, Sir. If I could perhaps take your Honours to the wording of section 2(b). The definition is actually reproduced in my learned friend's submissions at paragraph 14. Apologies, it's not paragraph 14.

O'REGAN J:

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MS CHANDRA:

Paragraph 12, thank you. Now we've referred in our own submissions to the – Justice Hammond's comments in *Pacific Software Technology Ltd v Perry Group Ltd* [2004] 1 NZLR 164 (CA), which say that the Copyright Act is "a sui generis form of 'personal property'". The point I want to make about that, we do agree with that proposition, hence why we've included it in our submissions, but my submission is that that is in the context of the Copyright Act. So it goes back to my earlier point which is that you can have copyright as personal property for the purposes of the Copyright Act, but personal property in this sense has a different meaning.

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So if you look at subsection (a) it refers to real property and then subsection (b) refers to personal property and subsection (c) is any interest in any real or personal property. In my submission, that order shows that (a) and (b) are intended to be tangible assets. Personal property is essentially anything tangible that's not real property, and then subsection (c) is any interest in that tangible asset. That's why we say section 2(b) doesn't apply here.

WILLIAMS J:

Where do you get "tangible" from?

MS CHANDRA:

I'm taking it from the context of the wording of section 2, your Honour.

WILLIAMS J:

Which bit?

MS CHANDRA:

Well, if section 2(b) were intended to be intangible what would be the purpose of section 2(c)?

WILLIAMS J:

You can have an interest in intangible property. You may not be the entire owner of it. You may just have an exploitation right in it or you may share it with someone else. Intangible property is just as subdivisible as tangible property.

MS CHANDRA:

I do accept that, your Honour. I do maintain my submission that section 2(b) refers to tangible property.

ELLEN FRANCE J:

Well, is – and your best case for that proposition?

MS CHANDRA:

In terms of the meaning of section 2(b)?

ELLEN FRANCE J:

Yes.

MS CHANDRA:

I'll have to find that for your Honour.

WILLIAMS J:

Tell me how you would categorise cryptocurrency?

MS CHANDRA:

Your Honour, I can't say I know very much about cryptocurrency so it's very hard to understand the nature of the right or interest, but based on what I understand of it I would say it fits under section 2(c), or, actually, no, 2(e). 2(e) actually, your Honour. It's a right or interest, because section 2(c) is talking about an interest in any real or personal property. I read that as being you've got a tangible asset and section 2(c) is saying that the interest in that asset is property, and so that's why the Court of Appeal relied on section 2(c) in saying – and I'll get to why this is, respectfully, incorrect shortly – but that's why the Court of Appeal relied on section 2(c) in saying, they said that the copyright is

an interest in the artwork because I think they recognised that the reference to "real and personal property" is a reference to tangible assets.

MILLER J:

What is it about the purpose of the PRA that requires us or justifies us in reading down this apparently comprehensive definition? One can see there may be an argument there in relation to copyright because it's an expression of personality and there are some things that the Act recognises are separate. We really need a policy argument to read this legislation, this definition, down in the way that you're asking us to do.

MS CHANDRA:

Well, I think, your Honour, it goes back to the Court of Appeal's decision in *Z v Z* because even though – the Court of Appeal in *Z v Z* acknowledged that treating earning capacity as property would be in keeping with the spirit of the legislation but its ultimate conclusion was that that was not Parliament's intention. So even if at face value it appears that the copyright should be treated as property because it's within the overall scheme of the Act, we also need to think about what Parliament's intention was in enacting the legislation, and while I'm on that…

MILLER J:

Reflect on that case. What was being sought there was a share of a right representing future post-relationship property and that's why the Court spoke about the "clean break" principle. So one can see that the Act is about that, letting people close the book and move on. So what is it about copyright in works created during the relationship that attracts that concern? Is it the idea that he's allowed to exploit those things if it affects, damages her expression of personality in future works?

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MS CHANDRA:

Well, there's a couple of aspects, your Honour. Just in terms of *Z v Z*, as I understand it, it wasn't future income earning – it was future income earning

capacity but it was also the earning capacity that had essentially been obtained during the relationship. So Mr Z was earning a certain level of income at the date of separation and Mrs Z's argument was that "it's not fair that I don't get a share of that", which is how the –

MILLER J:

Yes, I appreciate that issue arose as well, but she had invested in him as he developed a personal skill. So that's the argument, right, that that gave her an interest in his career-long earnings?

MS CHANDRA:

Yes, Sir, that's right.

MILLER J:

And one can see the force of that, the argument there that says well, actually, that can't quite be right?

MS CHANDRA:

Yes, Sir.

MILLER J:

You need some other way of compensating her. So I'm trying to see where is the parallel with copyright, given that what we're actually talking about here is copyright in particular works created at a particular time.

MS CHANDRA:

Thank you, Sir. I will summarise what my learned friend intends to develop on.

MILLER J:

Right.

MS CHANDRA:

It really goes back to the Supreme Court's comments in *Henkel KGaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577, which I have

referred to in my submissions at the appellant's authorities, volume 2, tab 5, at paragraph 38.

Now this was a Supreme Court decision. It was a copyright decision, but what the Supreme Court in *Henkel* said is that the extent of protection that's afforded in a copyright is dependent on the level of originality, and originality is determined by the level of skill and effort that's applied. And so what that means is that the amount of skills that you apply to achieve the copyright directly determines the scope of protection. The extent of protection that one author has in their copyright is going to be different to the extent of protection that another author has, and it's this interconnection between the personal skill and the scope of the copyright interest that in my submission makes it unique, because there's no other right or interest that works in this manner where the extent of the right or interest is dependent on the level of skill that's actually applied. And I think in our submission, which my learned friend will expand on, that's what makes copyright in part sui generis in this context.

Now I'll just take you – go back to the road map. So I'm just, I think I've already touched on point 8, which was in relation to section 2(e). I'm now –

KÓS J:

I mean those are very different cases though, Ms Chandra, because they involved mere expectancies in equity and there was no certainty or assurance that they could be valuable.

MS CHANDRA:

I do appreciate that, your Honour, and I think that demonstrates the uniqueness of copyright, because there isn't – there aren't any cases on an analogous right or interest that sits directly next to copyright. These are examples of the types of rights and interests that haven't fit within the definition of property, but copyright is such a unique interest in our submission that there isn't really anything analogous to date to compare it to.

KÓS J:

Well except – except that it is immediately valuable because it has these two rights, both negative and positive, associated with one to exploit and the other one to prevent, contra exploitation.

MS CHANDRA:

Yes, Sir. That's right, Sir. Valuable to the extent that an artist decides to commercialise the copyright.

KÓS J:

Well no, valuable to the extent that the copyright owner decides to commercialise it.

MS CHANDRA:

Yes, Sir. That's right, Sir, I agree with that.

My next point is at point 9 of the road map. In our submission, the spirit and policy of the PRA can still be achieved in determining that copyright isn't property, and that is because the entire premise of the PRA is to recognise the equal contributions of both spouses to a relationship, that's why that presumption of equal sharing exists. But in our submission your Honours can still recognise the contributions made to the relationship while still finding that copyright isn't property because there are other ways to recognise the contributions that are made.

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The first is very simple. It's through the artwork itself which is undisputably relationship property. The second way is through the income and revenue that is actually generated from the copyrights during the relationship. So if the copyright is assigned or sold during the relationship any revenue or income generated from that produces something tangible and that is, of course, relationship property. If it's not commercialised during the relationship then it sits there as a form of protection or a shield and, in our submission, that's quite an important distinction that makes the copyright quite unique because with

most rights and interests if you don't do anything with it you don't achieve any kind of benefit but with copyright it's automatically bestowed upon the creator and they automatically receive this protection without really having to do anything.

ELLEN FRANCE J:

Might there be situations, in terms of recognition of contributions, might there be situations where the other person, the other partner's contributions were so significant that otherwise the works wouldn't have been created? How then has that contribution been recognised on your approach?

MS CHANDRA:

Absolutely, your Honour. So, and I will get to this in more detail later in my submissions, but section 9A provides a safeguard where if another spouse has contributed to the increase in value of the property, of the copyright, then it converts part of the interest into relationship property to recognise that contribution. So in broad terms, our submission is that even if your Honours find that the copyright is separate property, that doesn't automatically rule out scope for some aspect of the copyright in other cases to be treated as relationship property. It's just that we say that none of those circumstances in section 9A apply in this particular case.

KÓS J:

But your argument works from the premise that this is not property at all, so 9A is a reserve provision but it doesn't apply on your argument.

MS CHANDRA:

That is right, Sir. So that's more relevant to the argument of whether it's relationship property once there's been a finding that it is property.

KÓS J:

Sure, but if you're right then Justice France's point remains, that this valuable thing has been created with the contribution of the spouse. I'm putting aside

the facts in this case, but in the situation she posed, and there is absolutely no compensation for the contributing spouse.

MS CHANDRA:

Well, the compensation, your Honour, would sit in the fact that if they did sell or assign or commercialise the copyright during the relationship then the other spouse does bear the fruits of that, but otherwise it may be seen as almost revisiting a decision that these parties have made during the relationship not to do anything with the copyright. If they decide not to do anything with that and it's not commercialised then neither of them reap the benefits of their contributions but if they do actually but if they do actually do something with it then, of course, that income or revenue generated is relationship property.

MILLER J:

So that is an interesting argument because it suggests that different pieces of art created during the relationship might be treated differently, and where supposing here that it is property and we're really suggesting now it's separate property or does not have a commercial value, and the decision there is any value is limited to those works in respect of which she did exploit copyright during the relationship. To the extent that she did not, you would be saying that it's no business of the Court to retrospectively force her to do so by deeming those works to have a commercial value?

MS CHANDRA:

That's exactly right, Sir, because under the general scheme of the PRA there isn't a practice of the Courts to go back through and revisit decisions made during the relationship. The Supreme Court's decision in *Scott v Williams* [2017] NZSC 185, [2018] NZLR 507 around section 15 attests to that because you've got this – I'm going to put it in quotes – "presumption of causation" in the context of section 15 where the difference in incomes is presumed to have come about because of the disparity in incomes. There's no going back and revisiting the decisions that are made about career choices and income levels and what each spouse decided to do and my submission is that that same logic should apply in this case in that we shouldn't adopt a practice where we're going

back through and revisiting the decisions these parties made which are all presumed to be joint and mutual, and I think it would be a dangerous slope to adopt a practice that does that.

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WILLIAMS J:

I would have thought the slope, the slope was the other way. Think of a lifestyle block that its maximum value would be kiwifruit but the lawn is mowed. Are you seriously suggesting that the valuation of that property should ignore the fact that it's 10 times the value that's actually been drawn from it as a kiwifruit operation?

MS CHANDRA:

Just so I understand your question, your Honour, are you suggesting that…

WILLIAMS J:

Just because a party has chosen to use property one way doesn't really logically detract from the actual value of the property after separation if that's its value. They may not have got around to it. Who knows? And in this case Ms Alalääkkölä may simply have not got around to selling the paintings or reproducing them as prints. What's the logic in locking them into decisions made during a relationship, the basis for which we have no idea?

MS CHANDRA:

I understand your point, your Honour, and I think that with something as simple as a piece of land or a kiwifruit orchard that that logic could very well apply but I think it comes back to, in our case, the unique nature of copyright and how the interest is more than just a commercial value. There's an –

WILLIAMS J:

Sure but that's a different proposition. On the point you're making the kiwifruit farm is a perfect analogue – they're not farms, are they? Orchards – is a perfect analogue. You're saying whatever choices are made during the marriage in the context of copyright get locked in because if you didn't do that it would be a

slippery slope in all sorts of other contexts. I'm just suggesting the slippery slope runs the other way in fact.

MS CHANDRA:

Well, actually, what I am suggesting, your Honour, is that because copyright is unique it should be treated differently to, for example, a piece of land because it has a unique nature and purpose to it and so it shouldn't be treated like a piece of land.

WILLIAMS J:

Yes, I get that argument.

MILLER J:

So your argument might be that the accountant in *Z v Z* would be entitled to say: "I have this very valuable future earning capacity but I am going to go and live on a kiwifruit farm and not use it," and the Court should not in those circumstances value, treat the relationship property on the basis that he has an asset which is valuable and which she has some claim to as a result of that. She has a choice about, or he has a choice about how it is exploited in the future and that's respected.

MS CHANDRA:

In my submission, your Honour, section 15 is an entirely different beast and what might be seen as fair in the context of section 15 doesn't necessarily apply in the context of copyright. When you look at the objective, and again I'm treading on my learned friend's toes here, in fact I won't go into it but the objective of copyright suggests that it does have a special nature to it and it shouldn't, as my learned friend indicated in his opening statement, be treated only as a commodity. So, in my submission, the right to balance can be struck between recognising the unique nature of copyright by keeping it out of the PRA but making sure that the artwork and any revenue and income generated during the relationship is relationship property. In my submission that strikes the right balance in recognising the nature of copyright, and I expect you'll understand this position a lot more once my learned friend speaks to the nature of copyright.

KÓS J:

Before he does though perhaps some more familiar terms to you in picking up discussion about the kiwifruit farm, I mean – sorry, orchard – what about – often land has a deeply personal significance to parties to a relationship. It might have been in the family for seven generations, that block of land. The husband may have lavished his weekends working on it. We're constantly in relationship property cases tearing people away from land they have a deep personal association with, probably in many respects deeper than might be said about a particular painting. It's true of much property.

1050

MS CHANDRA:

My point is probably, in that last point your Honour made, is that in my submission the intensely personal nature of copyright is far more than any inherently personal nature that someone could have in land because – and I know that sounds like a big generalisation but when you think about what the objective of copyright is, it's consistent with it being a unique right and that's why it should be treated differently to something like land. I do appreciate and acknowledge that there are other assets that people have a personal connection to. In my submission, copyright goes further than that.

WILLIAMS J:

Your point is that the copyright is an extension of the person. The land, however close the relationship is, is never that?

MS CHANDRA:

I think you've put it very well, Sir, thank you.

WILLIAMS J:

You're welcome.

MS CHANDRA:

Sorry, just give me a moment, your Honour. I'm just trying to find my place again.

ELLEN FRANCE J:

Yes.

MS CHANDRA:

The last point I wanted to make about issue number 1 of whether the copyright is property is in relation to section 2(c) which is point 11 of the road map.

ELLEN FRANCE J:

If we just put 2(c) up.

MS CHANDRA:

I think it's the respondent's submissions at paragraph 12.

ELLEN FRANCE J:

Thank you.

MS CHANDRA:

The reason I'm talking about section 2(c) is because the Court of Appeal's primary finding was that copyright is property under section 2(e) but it also made an additional finding in saying that it's property under section 2(c) and we say that respectfully this finding is problematic for two reasons.

The first is because in the Court of Appeal's reasoning it referred to the *Pacific Software* case which talked about copyright being a sui generis form of personal property and that was part of the basis upon which the Court of Appeal said, well, if copyright is a sui generis form of personal property then it fits within section 2(c) as being an interest in personal property. Now we say that that's not respectfully the correct approach and it goes back to my earlier comment of the comments by Justice Hammond in *Pacific Software* were in the context of the Copyright Act and it's okay for copyright to be personal property under the Copyright Act but it shouldn't follow from that that that creates an estate or interest in real or personal property under the PRA.

1055

The second point was that when the Court of Appeal found that the copyright was property under section 2(c) it relied on Judge Grace's findings in the Family Court, so the Court of Appeal said Judge Grace was correct to find that the copyrights also fall within paragraph (c). Now I'll just turn to the Family Court decision. It's in the case on appeal, document number 101.007 at paragraph 101 – sorry, 15, paragraph 15. The Family Court Judge said because of the definition of copyright in the Copyright Act, the copyright that attaches to the artwork would be "property" under section 2(c), and the reason that this finding is problematic is because the copyright is not an interest in the artwork. It's a separate and distinct right in and of itself, and I think the simple fact that the painting can be sold and the copyright interest retained demonstrates how distinct and independent they are, and so we say it's wrong to view the copyright as being an interest in the artwork itself. If you sold the piece of art to a third party it wouldn't be correct to say that the copyright owner has an interest in this piece of art that is owned by a third party.

KÓS J:

Well, the problem there is with the word "attaches".

MS CHANDRA:

That's right, Sir.

KÓS J:

That's infelicitous.

MS CHANDRA:

Well, actually, Sir, in our submission we would go further than that and say it not only attaches but it's not even an interest in the artwork. It's a separate right completely from the artwork itself.

KÓS J:

I understand that.

WILLIAMS J:

It's really an interest in relation to the artwork?

MS CHANDRA:

That would be more apt, your Honour, thank you.

KÓS J:

As the moral rights are also.

MS CHANDRA:

Yes, I won't venture into moral rights, your Honour, if that's okay.

KÓS J:

Well, leave that to Mr Elliott. But it seems to me you're dealing with three levels when you create an original artistic work. One is the artistic work itself is an item of property, sell that but you don't necessarily sell the copyright. The copyright's a second level which floats above. Sometimes it's assigned with, sometimes it's not, and the third level is the moral rights.

MS CHANDRA:

Yes, Sir. I would almost put a subcategory under the copyright and say that income and revenue generated from assigning the copyright is a distinct, I suppose, category from the shield or the form of protection that copyright provides. In fact, it could almost be two subcategories so one is the income and revenue generated if it's assigned and the other is the protection element, so the negative/positive rights.

KÓS J:

All right. Well, that might be another argument. I'm making a list of arguments to have with Mr Elliott.

MS CHANDRA:

Thank you, Sir.

ELLEN FRANCE J:

Does that take you to the second issue?

MS CHANDRA:

Yes, I believe I'm onto the second issue now, thank you, Ma'am.

Now the starting point is, of course, section 8(1)(e), that all property acquired during a relationship is relationship property, and that's why in our submissions we've focused on the meaning of "acquired" and in our submission we say that copyright is not technically acquired in the ordinary sense of the word. It's more apt to say that it is something that's created because it's automatically bestowed on an author when they create an original piece of art.

WILLIAMS J:

You use word, verb, "bestowed".

MS CHANDRA:

I think that's correct, your Honour.

WILLIAMS J:

Aren't "bestow" and "acquire" from the…

MS CHANDRA:

This is the question, your Honour, and so this is why, your Honour, I have looked at other types of rights and interests and how they've been classified because I don't want to take up a lot of time because I'm running a little bit behind in my submissions but in terms of the examples of other rights and interests and the assessment of the meaning of "acquired", there's an inquiry into what the purpose of the right or interest is, like redundancy payments, for example. Is it a reward for past services or is it to compensate for the loss of future income? If you don't know the purpose of the payment then you can't, in our submission, ascertain whether it's been acquired for the purposes of the PRA. The same goes with a cause of action, for example. I think in my submissions I've referred to a case *Gill v Gill* HC Rotorua AP24 94, 12 June

1995 where the cause of action arose prior to the relationship when she first started suffering injuries but she didn't make the claim until during the relationship and received the damages during the relationship, but it was held that the interest was acquired prior to the relationship because that's when the cause of action first arose.

So the point I want to make is that it's much more nuanced. Whilst it might at face value appear to be a really straightforward inquiry, it requires looking behind the purpose of the right and interest to understand when it is actually acquired.

WILLIAMS J:
So is your argument about when it's acquired or whether "acquired" is the correct verb?
1100

MS CHANDRA:
Well, your Honour, it's not for me to criticise the wording of the section but it does take me to my next –

WILLIAMS J:
No, no, I'm not suggesting that we copy edit the section. I thought you were arguing that because the section uses the word "acquired" it doesn't apply here because these are self-created, not acquired.

MS CHANDRA:
That is what I'm suggesting, Sir. I'm not criticising the wording of the PRA but I'm saying copyright isn't acquired in the sense of the PRA and it does take me to this distinction between the word "created" and "acquired" which the PRA does actually recognise, and I have referred in – well, actually, my learned friend has referred to this authority. It's volume 12, tab 5. This is an article by Susan Corbett and Jessica C Lai, a couple of professors from Victoria University, "To Have and to Hold? Intellectual Property as Relationship Property" (2022) 30 NZULR 169, and they – at page 4 where it starts:

"Confusingly and somewhat illogically". So this is Corbett and Lai pointing out the discrepancy in section 18(1)(d) of the PRA. 18(1) sets out the different types of contributions that can be made to a relationship and subsection (d) says one of those contributions is the acquisition or creation of relationship property.

Now what Corbett and Lai are suggesting is that that wording indicates that the PRA distinguishes between something being created versus something being acquired.

ELLEN FRANCE J:

It's interesting, though, isn't it, that when you actually go to section 8 itself, the definition of relationship property, that doesn't refer to "creation"? It only refers to "acquired".

MS CHANDRA:

That's exactly right, your Honour, and I think if something that is created was intended to be captured in 8(1)(e) then section 18(1)(d) wouldn't use the word "created" or vice versa. The word "created" would be included in 8(1)(e).

ELLEN FRANCE J:

Well, it might also mean that the "acquisition or creation of", "acquisition or" is actually not meaning different terminology. In other words, it's not suggesting that they are two different terms.

MS CHANDRA:

That is one way to look at it, your Honour. I suppose my answer to that, your Honour, would be – I mean succinctness is key when it comes to drafting, so if a word means the same thing it would almost seem superfluous to use it in the legislation.

KÓS J:

Looking at the three levels of property possibly involved, what's the status of the painting itself as an asset?

MS CHANDRA:

That is relationship property. That's undisputed, Sir.

KÓS J:

And is that acquired?

MS CHANDRA:

Well, I think my learned friend is going to speak to that. I apologise, your Honour. I am really only talking about the relationship property framework.

KÓS J:

And that's exactly what I'm talking about. So I'm talking about the painting and the piece of canvas with the paint on it, not the copyright. Is that an asset acquired by the parties?

MS CHANDRA:

I mean it is relationship property under 8(1)(e) so it must be acquired.

KÓS J:

Yes. So the process of creation results in the acquisition of property. The painting itself, perhaps the copyrights?

MS CHANDRA:

Perhaps the copyrights, but in my submission the copyrights are separate to that and they don't – they come into existence in a different way to the artwork. It's not as simplistic as "this is the work that I've done and it's represented in this tangible form". It's more than that in my submission.

1105

WILLIAMS J:

The problem is really, and this is an existential question, is the nature of property itself because the painting is, of course, an object but it is not the property. The property is a bundle of rights in respect of the object. It is not property although we use that in common usage. Property is a term of legal art

denoting certain rights in respect of that object. That's your problem really because in that sense property is the same in form whether it's intellectual property or personal or indeed real property. Real property isn't the land, it's the rights in respect of the land.

MS CHANDRA:

Yes, Sir. In a sense, Sir, that's right in that once it is determined to be property then we are in some ways constrained by the wording of section 8 which determines what relationship property is and I can see the difficulty here because obviously I'm talking about the relationship property framework and your Honours really do quite understandably want to understand what, how copyright fits into that framework, and I will – I'll touch on the crux of the argument which my learned friend will talk about more and that's really set out in our submissions at paragraphs 93 to 95, if I could get that up on the screen please.

The argument is that once an artist starts painting, when they paint their first piece of original art they start to build their reputation and in the appellant's case this was before the relationship commenced. So by the time she enters into a relationship with the respondent she's already created various pieces of art. She's already built a reputation, and what that means is that any artwork and copyright that she creates during the relationship is built on that previously established reputation, and because the scheme of the PRA is about recognising the fruits of the marriage to the exclusion of contributions made prior to the relationship, if the copyright as a whole is to be treated as relationship property in its entirety, then it doesn't account for the contributions that have been made already pre-existing the relationship because one could say part of the value in perhaps even the artwork itself and the copyright, part of the value has already been established from the work that she's put in prior to the relationship and if the overarching principle of the PRA is to recognise only contributions made during the marriage then treating the entire copyright as relationship property doesn't account for that. But the solution that I'm suggesting for your Honours is through section 9A, so your Honours would still say that copyright is separate property and then we look at section 9A to see

whether any of those scenarios apply to convert it into relationship property, and this is, of course, only – I'm talking specifically about this case, not a situation where someone starts painting or produces their first piece of art during the relationship.

I will just talk briefly about section 9A.

ELLEN FRANCE J:

Yes, I'm just conscious of time. How are you going?

MS CHANDRA:

I think I don't need to talk further about section 9A if your Honours understand my point on that front. It's really just that it provides a safeguard or a sense of backstop.

I'll go straight to my last point just in terms of timing, and the reason I'm talking about why vesting orders don't address the issues that we're raising today is because all vesting orders do is allow the appellant to control the copyright going forward, but if the copyright is linked with the appellant's skills then vesting orders doesn't recognise that interconnection, it doesn't recognise the intertwinement of the skills with the copyright interest, and so even if the copyright is held to be property and relationship property vesting orders won't recognise this unique connection that we say that copyright has. In our submission the scheme of the PRA can be met by determining that the copyright is separate property and then using section 9A as a safeguard in other cases where it can potentially be converted into relationship property.

1110

I will finish there, your Honours, because I'm conscious my learned friend still has quite a lot he would like to say.

ELLEN FRANCE J:

All right. No other questions? Thank you.

MS CHANDRA:

Thank you, your Honours.

MR ELLIOTT KC:

Your Honours, on the copyright question, paragraph 19, and I just wanted to start with a couple of points on the nature of copyright and that's paragraph 25 of my submissions, and my learned friend's already given some comments about it being primarily a negative right and his Honour, Justice Kós, has obviously got some thoughts on this which I'm looking forward to engaging on.

If I could ask our junior to put up a chart which is the "Nature of Copyright", I've just tried to summarise it in a simple form there, is that when this is conceptualised you basically at one end of the continuum is the artist, the person, at the other is the art or the paintings that the artist creates, and the continuum is from the intangible end to the tangible end and I've tried to simplify it by looking, first of all, at the intangible end is the artist, then the moral rights and then moving from left to right you then move into the more economic rights which are not necessarily tangible but they do become tangible when you look at the painting itself where those rights reside to a limited extent, and the continuum in the next line is moving from the abilities of the artist or the personal characteristics and then you go into an area which I submit is important is the question of integrity and attribution of the artist. Those are very much at the intangible end, and you then move to the tangible end is obviously the fixed medium or the artefact itself, and when you look at the third line we move from the human capital end to the chattel, to the artefact, and what we say is that when you actually look at the fourth line, the intangible end, with the person, there's no realisable monetary value in being a good artist or being an artist at all and likewise in terms of the moral rights, those are deeply personable, they can't be alienated and they are there to protect honour and reputation, or in a New Zealand or in an Aotearoa New Zealand concept, and I'll come back to this, is the question of mana, a very important concept which is really captured by the moral rights regimes in a New Zealand context, and then when we move to the right-hand column we obviously come to the monetary value of a painting. It can be sold. It can be valued without any difficulty.

So that's really just a starting point to provide some context in terms of my submission, so –

WILLIAMS J:
Where is this in the bundle? Is it in the bundle?

MR ELLIOTT KC:
No, this is really just a submission I'm making.

ELLEN FRANCE J:
Have you got a hard copy? Have we got a hard copy?

MR ELLIOTT KC:
I don't…

ELLEN FRANCE J:
If not perhaps you could get copies over the break for us.

MR ELLIOTT KC:
Yes, certainly. I've got one but it's been written on so I'll get one at the morning break.

WILLIAMS J:
Well, you've got copyright in it. Perhaps your learned technician might send us an electronic copy as well.

MR ELLIOTT KC:
Yes, we can do that straight away. I've got three charts on the same page and they're really just trying to sort of condense the argument.
1115

So if we could then look at a couple of extracts. This is in the supplementary bundle, and the first is the *Copinger and Skone James on Copyright* text, there at paragraph 2-04, and I've highlighted the passage at the top there, and this is in terms of the justifications for copyright. It is worth stepping back and

reminding ourselves that in terms of the underlying justifications we come back to the four underpinning theories of copyright, and the first of that is natural law which is often connected with Locke, the philosopher, and it is one of the important underpinnings of this "exclusive natural right of property" which is referred to in *Copinger*, and what we say is that this is really where the intense personal nature of the attachment to the work arises and leads into the moral rights regime that we now have in New Zealand, and when modifications are made to a painting which undermine the value of that work or attack the integrity of the artist their reputation is at stake and this is what moral rights are designed to protect.

In a local context in terms of our country, reputation is the equivalent of mana and that is the mana of the artist and it is also relevant in terms of the Māori context of mauri which is about the life force that an artist has and that an artist imbues into his or her paintings.

It is very much moral rights were a European concept going right back to Locke but they have a particular resonance in New Zealand today.

WILLIAMS J:

Are moral rights considered Lockean, are they?

MR ELLIOTT KC:

Yes. Well, there's debate about this. Locke, Kant and Hegel.

WILLIAMS J:

Yes.

MR ELLIOTT KC:

The three of them have all – and I think there's some debate you'll hear later today about which one has precedence. We say it doesn't matter. They all worked together towards the same end which was to give authors rights. But Locke is typically connected with the natural law. In other words it's an inherent right which all creators have.

WILLIAMS J:

He certainly said that putting the self into the resource creates property in it. Perhaps that's the point.

MR ELLIOTT KC:

Yes, that's right, and putting your spirit into the work, which is the Māori view of artistic merit.

At the bottom of that page I've highlighted a passage where the authors there say, and generalising here, that certainly in terms of the Anglo-American laws more weight has been given to the economic and social arguments rather than natural law. But what we say is, we deal with that later, where Professor Frankel deals with that and relies on a paper by Jane Ginsburg, a leading American academic, saying at the end of the day the difference between the US and European systems are not that great. They all had the same underpinnings. I think that that hopefully will be a point that we can deal with reasonably quickly.

If we could go to the next page in *Copinger*, 2-05. "No copyright in ideas." There's no debate about that. We accept it's a property right. It says: "Copyright is a property right," and the Act says so. So we're not disputing that. But it's a negative right preventing copying of material.

So…

WILLIAMS J:

Is this because the right to copy does not require a statutory entitlement? The positive end of copyright, if you like.

MR ELLIOTT KC:

Yes, because the – so the negative right is the right to stop others from copying your work. It doesn't give you an entitlement to do anything.

1120

WILLIAMS J:

But is that because it doesn't need to?

MR ELLIOTT KC:

Yes. Doesn't need to. It exists, and the author can decide to do what they wish with the work, even destroy it.

KÓS J:

They have the exclusive right to reproduce?

MR ELLIOTT KC:

Yes.

KÓS J:

That's the positive right?

MR ELLIOTT KC:

That's right, that's a positive right, or a negative right is the right to actually put a knife through your painting because you don't like it.

WILLIAMS J:

Or because that'll enhance it.

MR ELLIOTT KC:

Well, it could enhance it if you're Banksy or someone like that, but typically they don't put knives through them, unless they have a dislike, change their mind and say: "I'm going to paint over this."

KÓS J:

As some owners have too.

MR ELLIOTT KC:

Yes.

WILLIAMS J:

Your point is that you don't need a Copyright Act to have that positive right?

MR ELLIOTT KC:

Well, not according to Locke.

WILLIAMS J:

You inherently have it.

MR ELLIOTT KC:

It's just that –

WILLIAMS J:

Well, under the current law, is that the case?

MR ELLIOTT KC:

Yes. No, no, you do need a Copyright Act because otherwise –

WILLIAMS J:

No, no, to the positive side of copyright.

MR ELLIOTT KC:

Yes. Yes, you don't need that to reproduce. In other words, if you go out in your backyard and paint something you don't need an Act to allow you to do that. That's something you're entitled to do.

KÓS J:

But it does become important when, for instance, you sell the painting?

MR ELLIOTT KC:

Yes.

KÓS J:

And then there's some confusion as to who has the right?

MR ELLIOTT KC:

Yes, and that's when you fall back on your negative right becomes positive, when you sue someone.

I deal next on this point, if I could look next at the Corbett and Lai paper. So this is my second bullet point in paragraph 19. So the page we're looking at here is 701.0028 of the bundle and it's the paragraph which is highlighted which we say is where the authors say that, on the point we've been discussing, is that with respect Isac J's analogy of "skill" misses the vital distinction between IP and other categories of property and it's not simply the creator's skill but their creativity, inventiveness and personality, and they in this paper deal with creators together, not just in terms of copyright but inventors and in fact creators and users of trademarks, to say that there is a connection between the trademark and the user of the trademark, so they do look at it in a broad sense. Ours is focused on copyright here but what we say it's important to actually recognise that distinction.

KÓS J:

Well, I'm not sure I understand it. I mean it seems to me that a lot of creative work is the product of talent and historical training and a whole mixture of things.

MR ELLIOTT KC:

Yes.

KÓS J:

And some of it gives rise to copyright if it falls within an original artistic or literary work and some simply doesn't give an intellectual property right at all.

MR ELLIOTT KC:

That's right because it may not be sufficiently inventive or –

KÓS J:

Correct. So in that situation all you have is the hard asset, the piece of furniture, which is not copyright.

MR ELLIOTT KC:

Yes, that's right. Say you've just had a modicum of originality and you've just changed a piece of furniture, you won't have any rights in it. That's right. So the whole IP regime is based on a continuum from highly to minimal inventiveness or contribution, and so what we say is that in this particular case you have an artist who has been successful, has a significant body of work which she wants to protect and what we say is she is entitled to do so as the creator of the work and that in essence we say that it would be wrong to allow a partner to use that copyright to actually continue the discord between the parties because it's unique in the sense that you're not just saying: "I'm going to take the car and you can have the house," you can't use the car to create antagonism going forward. You can with copyright because you can say: "Well, I'm going to," as the Court of Appeal recognised, "put it on ash trays and toilet seats," and cause a huge amount of anxiety to the artist. So this is quite unique. There's no other right that, in the PRA context, which is similar to this.

1125

WILLIAMS J:

There is a flip side to that though and that is that the reverse weaponisation, which is a desire to commercialise, is suppressed by the owner of the copyright for vindictive reasons. On your argument that would be permissible.

MR ELLIOTT KC:

I accept the point your Honour is making. What I would say though is that the Court should look at what the parties did during their marriage and that will provide a very reliable guide as to what is right and proper and if they chose to do it in a certain way we say that that's what the Court can look at and should do.

ELLEN FRANCE J:

Might that not go to the value you ascribe rather than whether or not it's the subject of the PRA?

MR ELLIOTT KC:

Yes, it is. Well, we're going really to the end of the equation is to say, well, if you're against us on our first two points, and you say it's relationship property, but how are we going to deal with the valuation problem, that's when I say it becomes a real issue because it's no use saying: "Well, the artist can keep the copyright but you go away and solve your valuation problem," when it's just going to extend the dispute even longer, and that's where we say on our final point, the valuation point, is that where we ask this Court to give some guidance to the Family Court about how this valuation process is going to occur, and we say that that's really important in this case because there are different categories of work and to just treat them all as a bunch of paintings is not going to solve the problem. It's just going to extend it. So I will come to that issue because the categories of works – and I think your Honour, Justice Williams, asked the question whether they're going to be different paintings. Well, it might be, your Honour. I accept there are. There are at least four different categories and they have to be treated differently, and we accept that one of the categories is saleable art and that should be sold and the value will be split equally. So we don't have any issue with that. That was decided by the Family Court because my client didn't dispute that he was entitled to a share of the value of the paintings.

KÓS J:

But you're talking about the wood, canvas and paint, aren't you?

MR ELLIOTT KC:

Yes, yes, the artefacts. It's the IP that's in issue here.

So that's the Lai paper, and…

O'REGAN J:

That paper is really about saying the law needs to be changed, isn't it, rather than saying that's what the law is?

MR ELLIOTT KC:

I think they are quite critical of where it stands at the moment in relation to intellectual property and they say that it is different. They do argue very strongly in our favour on that and –

O'REGAN J:

But aren't they saying the law needs to reflect that difference rather than it already does?

MR ELLIOTT KC:

Well, they are, yes, they are arguing on a policy basis. I accept that. But what we say is that the other way to look at that is that the definition of "property" is so broad that it could cover anything under the sun, but to say maybe that's what Parliament intended, to have a broad threshold but then to have wide discretion, and there are a number of discretionary components to the Act which allow the Court to adjust the situation and that's what we say in here is that if we are wrong on the first two points, on the third point, the valuation and vesting issues, well, the vesting issue's been resolved, on the valuation issue we say that there's a very strong argument to say it has to be done in a principled way, and I did set out in my submissions at the end various points on that because I believe that this Court does have the ability to actually shape the way the Act works in relation to IP.

WILLIAMS J:

Doesn't this case, easy for a Judge to say this after you've had four rounds, this case really cry out for the parties to agree a protocol for exploitation of the copyright in the existing works going forward, a basic protocol?

MR ELLIOTT KC:

Well, I think I would agree with your Honour but that hasn't been possible.

WILLIAMS J:

Has it been tried?

MR ELLIOTT KC:

It's been tried and it hasn't succeeded. That's why we're here.

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WILLIAMS J:

Another alternative might be for you to give the Court a number and the other side to give the Court a number and we'll kill this then.

MR ELLIOTT KC:

Well, your Honour, I'm all for that but I think that what's going to have to happen is it has to go back to the Family Court and –

WILLIAMS J:

Not if you give us a number and the other side gives us a number and we make a decision.

MR ELLIOTT KC:

Well, I'm always open to that, but…

WILLIAMS J:

It just seems such a pity that this entire estate would get chewed up in yet another round. It seems unjust for that to be allowed to happen.

KÓS J:

It's unlikely to finish in the Family Court, is it?

MR ELLIOTT KC:

It could go back up the pecking order again. That's the problem.

WILLIAMS J:

Precisely, and it's starting to smell like *Jarndyce v Jarndyce*.

MR ELLIOTT KC:

Yes, I accept that, your Honour, and so what I'm arguing for on my final point, on the valuation, and I don't want to jump ahead, is to say that if this Court gives

firm guidance that there are four categories and only one category is really relevant and if the artist had throughout the 20-year period put some paintings aside for her personal collection, as she calls it, then it would be wrong for the Court to say: "Well, we don't care," that those should be put on the open market, if she had good reason to want to keep them private, because that is the right that every artist has is to not sell some paintings, as da Vinci never –

MILLER J:

So one answer on those is that the value ascribed to them should be nil?

MR ELLIOTT KC:

Exactly. They don't have any value because if they are kept in her private possession by her choice and with his concurrence, they have no value other than the personal attachment.

ELLEN FRANCE J:

I think we'll take the morning adjournment, Mr Elliott, but how are we going for time?

MR ELLIOTT KC:

We're a little bit behind, your Honour, but I'm very happy to engage in an answer and question process if that would get us along. I do have a couple of points I would like to make and I think we do need to deal with the attachment issue because I think there's a basic misconception there which really goes to the heart of the Court of Appeal's decision. So I would like to do that.

ELLEN FRANCE J:

Well, I'm not suggesting you don't address things you want to. I'm just signalling we do need to keep it moving.

MR ELLIOTT KC:

Yes, your Honour.

ELLEN FRANCE J:

So perhaps you could have a think about the particular things you wanted to address and we could deal with those first.

MR ELLIOTT KC:

Yes, all right, thank you.

KÓS J:

May I just say I'm particularly anxious to hear you on the last point.

MR ELLIOTT KC:

Yes. Yes, I think it is important.

ELLEN FRANCE J:

All right, we'll take the morning adjournment, thanks.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.47 AM

ELLEN FRANCE J:

Thank you, Mr Elliott. Thank you for the sheet.

MR ELLIOTT KC:

Yes, thank you, your Honours. Maybe I'll deal with the chart first and it's very much in summary form. So the first one was the Artistic Continuum. The second is the Bundle of Rights issue, and what we say is that you look at the – I've conceptualised it on the basis of choice or control or management of the copyright through to monetary value and they are different. They are different conceptually because at the left end is the talent and ability or the skill as Judge Grace described it and that includes, once you start looking at moving towards some sort of monetary value, that could include, for example, the right to issue copies to the public under section 16(1)(b), and then, towards the right-hand side, you get into the expression ability and that's really the ability and skill to allow an artist to intermingle their talent with a physical item such as

a painting. So this is where you get the intermingling of the two, and the painting we say then finds expression through a tangible medium and it's obviously separate property and you have a mixture then of intellectual property and physical or real property, and then on the right-hand side when it's coming to monetary value is the fructus, the Latin term for basically the fruits from the tree, and so they are quite different conceptually.

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But moving on to my third part of the chart is the categories of the appellant's artwork, and I'm dealing with these. They are separate issues. I'm just really summarising, and in my submission there are four categories of work here and it's really important to distinguish between the unfinished works on the left-hand side, which are incomplete, completely unsuitable for exploitation, and they are things like sketches or damaged paintings, and I've provided the Court there with the references. I won't take you to those now.

The next category are –

KÓS J:

I mean they almost certainly have no value either.

MR ELLIOTT KC:

That's right, we say –

KÓS J:

So they are almost irrelevant for these purposes.

MR ELLIOTT KC:

Yes, yes. And then the private collection is – and Ms Alalääkkölä does give evidence on the fact she has these private paintings and they include nudes, culturally and sensitive paintings that she's done which she now regrets but still keeps the paintings because they have a personal attachment to her but she would never exhibit them, and basically what she regards as insensitive. So I think the private collection is similar to the unfinished works. They don't have

any value because she would never commercialise them and never did commercialise them.

Then you get one-off unique paintings. Now these are the paintings that she's actually sold and she's contractually bound with those purchases to not make prints. So there's a contractual arrangement, and we say that those certainly have a commercial value but that commercial value can be ascertained based on past sales. So there's no real difficulty with those. But those –

O'REGAN J:

But if they've been sold they're no longer her property.

MR ELLIOTT KC:

They have been sold. So the assets of those sales will be part of the pool.

O'REGAN J:

They were sold after the separation, were they?

MR ELLIOTT KC:

No, no, these were sold during the relationship.

O'REGAN J:

Right, so that's the money that she derived from them is part of the pool?

MR ELLIOTT KC:

Yes. So the money there is in the pool. There's no debate about that.

KÓS J:

But she still has the right to copy?

MR ELLIOTT KC:

Yes.

KÓS J:

Or would do except she's conceded it?

MR ELLIOTT KC:

Yes. She's got the right to copy or to continue to – she could do that but she hasn't.

KÓS J:

But what's the value of this pool? I mean there's nothing here because if she's given away the right to copy then there is nothing of value in that category.

MR ELLIOTT KC:

No, no, that's right.

KÓS J:

The artefact's gone, the copying right is gone.

MR ELLIOTT KC:

Yes.

KÓS J:

Nothing left.

MR ELLIOTT KC:

No, that's right.

KÓS J:

So it's an irrelevancy really?

MR ELLIOTT KC:

Yes. And then the third category is "sold or gifted and prints". Now there is evidence that she did make a small number of prints but there's no evidence as to the number of them and her evidence is that it's not something that she favoured. It was done by Mr Palmer as part of his involvement but it was a very small part of the business. So there is a fourth category there and that may have some value but, in my submission, if it is, if the valuation is done according to her wishes and past practice, there would be a very small value ascribed to that based on the past performance of the parties.

KÓS J:

Can I just ask is that also an artefact-free category?

MR ELLIOTT KC:

The fourth category, I suppose a print would be an artefact.

KÓS J:

So she has prints?

MR ELLIOTT KC:

I think, I'm not sure if she has any in her possession. I think they've been sold or disposed of.

KÓS J:

Right.

MR ELLIOTT KC:

One of the issues is that all the –

KÓS J:

So all the artefacts sound as if they're now in the private collection, the ones that matter?

MR ELLIOTT KC:

No, there are paintings held in the District Court in Blenheim.

ELLEN FRANCE J:

That's what I was just going to ask about. So the ones that are in the District Court, which, what are they? A fifth category?

MR ELLIOTT KC:

Well, I suppose, yes. I mean there's no dispute that they are paintings but they – sorry, they would fit into this whole category because some of them are unfinished, some of them are private.

ELLEN FRANCE J:

Well, that's all I wanted to know, do they cross across the categories.

MR ELLIOTT KC:

Yes.

MILLER J:

Some of them are things from which prints might still be made in the fourth category, so they have a value from that perspective.

MR ELLIOTT KC:

They do but the question then would –

MILLER J:

For instance, suppose there was a painting there from which they made prints in the past, it's now sitting in the Family Court at Blenheim. If we were to value this it would be on the basis that it was treated in the same way as it had been in the past.

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MR ELLIOTT KC:

I think that's a fair point your Honour. You can't have it both ways. If we're going to say past practice, then it has to look forward as well.

KÓS J:

This is really a fifth category of not private collection.

MR ELLIOTT KC:

Yes.

KÓS J:

Where multiple copies have not been made, they're simply sitting there waiting for exploitation or sale or not.

MR ELLIOTT KC:

Yes. That's right, and they are saleable. So there's a saleable group that should be sold as soon as possible if the parties could resolve things.

WILLIAMS J:

Sorry, so the second of the categories, the private collection, including nudes, presumably are protected by section 105, insofar as they're photographs, and if it's a painting, by derogatory treatment?

MR ELLIOTT KC:

Yes, they would be, yes.

WILLIAMS J:

Yes, no doubt about that?

MR ELLIOTT KC:

No. They would be protected. The moral rights would apply to them equally.

WILLIAMS J:

To protect privacy?

MR ELLIOTT KC:

Yes.

WILLIAMS J:

Because the privacy rights only relates to photos and the films, doesn't it?

MR ELLIOTT KC:

Yes, yes, the privacy right would only apply to photos and –

WILLIAMS J:

But to the extent that any painting is a painting taken from a photograph, does the derogatory treatment right protect –

MR ELLIOTT KC:
It would kick in then, yes.

WILLIAMS J:
– it from publication?

MR ELLIOTT KC:
Yes it would. Or treatment for treatment which undermines the integrity or diminishes the value of the painting.

KÓS J:
What would be derogatory about a perfectly artistic reproduction of a nude painting, which respects the artist's creativity, without derogating from it?

MR ELLIOTT KC:
Well I think that the, if the artist would never have exhibited that painting, it would be highly intrusive, and the treatment of that, in my submission, would be caught by the damage to the integrity of the work.

KÓS J:
Authority?

MR ELLIOTT KC:
I think, it does – you can use – sorry, reproduce a work of art, and not change it significantly, but the treatment could still be treated as, as…

KÓS J:
Derogatory.

MR ELLIOTT KC:
Caught by the moral rights provision. There was a Canadian case where the same work was put on, I think it was a painting, and it was put on a wall in three-dimensional form, and the artist said, there's no way I would have allowed that, and that was upheld by the Court.

WILLIAMS J:

That's right, yes.

MR ELLIOTT KC:

I can supply a copy of that.

WILLIAMS J:

Yes, I remember it, yes. So that's the privacy interest.

MR ELLIOTT KC:

Yes.

WILLIAMS J:

Then there is material you describe as insensitive, which on reflection the artist simply does not want in public.

MR ELLIOTT KC:

Yes.

WILLIAMS J:

Is there anything in the copyright and the moral rights regime that would allow that expectation to be vindicated?

MR ELLIOTT KC:

In my submission there would be because if there was a, say the artist has done two paintings of Māori faces that she doesn't want to exhibit now, and if she was – if a court order said, well, sorry you've lost control of those paintings, and they were exhibited, that would be highly damaging to her personally, because she's chosen to keep them private, and I would submit that that would be derogatory treatment of the work simply by exhibiting it.

WILLIAMS J:

All right.

KÓS J:

Really? Of the work?

ELLEN FRANCE J:

Well…

MR ELLIOTT KC:

Yes, well of the artist's reputation through exhibiting the work, because the moral rights are there to protect the reputation of the artist, and if the artist said, I did these paintings 10 years ago when I was unmindful of what I know now, and I regret doing them, but they're still paintings I want to keep, I would say that would be damaging to her reputation, and to her mana as a considered painter.

WILLIAMS J:

Right.

ELLEN FRANCE J:

And do you say the sort of line of authority supports that, because of the link to reputation?

MR ELLIOTT KC:

Yes, yes. That is the purpose of the moral rights regime, is to protect the honour, which is very much a European concept, but honour, we say, is the equivalent to reputation.

WILLIAMS J:

And the derogatory right, I don't know enough about it, so I'm asking for your assistance here, but the derogatory rights protections have a subjective content, do they?

MR ELLIOTT KC:

They are both subjective and objective. There is an objective overlay, but the artist's views are relevant, but they are not the primary, they're a mixture of the two.

WILLIAMS J:

They're not decisive.

MR ELLIOTT KC:

Yes.

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WILLIAMS J:

So is that where that idea of rational subjectivity comes from?

MR ELLIOTT KC:

Yes, yes. So they would – the artist would need to convince a court that her honour was sufficiently damaged by the exhibiting or the treatment, and the treatment would be to put it onto say a different medium, say for example a print rather than a – rather than on a canvas.

WILLIAMS J:

But would it cover artistic regret, if that's what you're talking about here?

MR ELLIOTT KC:

Not if it was – not if it was unreasonably subjective and –

WILLIAMS J:

Right.

MR ELLIOTT KC:

So I think there's a balance. It's not simply the artist saying: "I don't like it."

WILLIAMS J:

Okay.

MR ELLIOTT KC:

They would have to convince a court that their views were reasonable.

WILLIAMS J:

On a mana-based approach, you'd think that should be relatively straightforward to do.

MR ELLIOTT KC:

Yes, yes. I think when you look at mana in a broad sense, if it would damage the ability of that artist to continue in her vocation and to be viewed differently by the public, then it definitely –

WILLIAMS J:

That's more instrumental. It's rather more the artist's own sense of self and mana being objectively damaged?

MR ELLIOTT KC:

Yes, yes.

KÓS J:

So what you're doing here is we're looking at the categories, which I think we now accept there are five categories?

MR ELLIOTT KC:

Yes.

KÓS J:

And we're looking at the bottom of them and saying, well what – in a way what we're doing is saying what is this worth?

MR ELLIOTT KC:

Yes.

KÓS J:

Because it comes down at the end of the day to a valuation, and we might look at the first category, unfinished works, and say, well nothing?

MR ELLIOTT KC:

Yes.

KÓS J:

The private collection, you say a combination of what is both predictable and permissible, pretty much nothing?

MR ELLIOTT KC:

Yes, yes.

KÓS J:

And so you work your way across to work out essentially a number, based on what is a predictable and permissible exploitation?

MR ELLIOTT KC:

Yes, yes. And what I'm submitting, your Honour, is that this Court can give other courts guidance on this issue because it is going to be something that comes up again, and we say that it can be done on a principled basis because it is basically looking back at what the parties did, to then look forward to say, well, this is what happens now, because this is a deferred community system where the Court has the ability to say, well, you own the copyright for 20 years, but now things have changed and we need to close this matter down.

KÓS J:

So the permissible is easy to get to grips with because, at the end of the day, it's just a question of what the law permits?

MR ELLIOTT KC:

Yes.

KÓS J:

You're also applying an overlay of what is a predictable exploitation, and that might be in conflict with what would be an ordinary valuation approach?

MR ELLIOTT KC:

Yes.

KÓS J:

Which is to say what is the highest and best use?

MR ELLIOTT KC:

That's right. Because the ordinary approach would be to say, well look, you just look at a hypothetical situation and say if this was on the open market what would an art dealer do with it, and they would exploit it to the max, but we say that that would be wrong in this context because the Court has to look at what is fair and equitable in this case, and we say that the facts speak for themselves.

ELLEN FRANCE J:

In terms of guidance on that, we don't have much from the courts below in relation to that.

MR ELLIOTT KC:

No.

ELLEN FRANCE J:

So we would be launching out afresh, to some extent. At least to some extent.

MR ELLIOTT KC:

You would be, your Honour, but what I'm advocating for is really a principled formula to deal with situations like this, that are not – and that principle would not be based on the facts, but just that in this case there are different categories and each category should be treated differently, and they – and I've tried to group them into, you know, into discrete but identifiable categories. So I think it is well within the ability of this Court to do that and to really guide the future

of this legislation. And this is all predicated on us being wrong on our first two points, which I don't want to for a minute suggest my enthusiasm for this argument.

KÓS J:

No, no. But you say this is a principled approach. I gather, if we look at your four categories – five categories now?

MR ELLIOTT KC:

Yes.

KÓS J:

And look at the last of your printed ones, which are sold or gifted ones, I think you're accepting there that the predictable, permissible and predictable use would be close to the highest and best value, because they have been exploited, they can be re-exploited. Is that your –

MR ELLIOTT KC:

Yes, yes, Sir.

KÓS J:

So the difficulty is then with the fifth category, which is of saleable items that are not within the first four categories.

MR ELLIOTT KC:

I don't think there's a difficulty there, because the – her paintings would have a realisable value.

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KÓS J:

Well the artefacts would.

MR ELLIOTT KC:

Yes, I'd think.

KÓS J:

But what we're really arguing about here is the copyrights.

MR ELLIOTT KC:

Well the copyrights we say don't have any value.

KÓS J:

Why not? In the fifth category of – I mean they're not private, they're not one-off that have been sold subject to a copyright limitation because they're still available for sale?

MR ELLIOTT KC:

I think you still have to – if they do have a value, I think that that value would still be determined by the past sales rather than looking at a hypothetical situation of saying, well, we're going to put them on the open market.

KÓS J:

Well in the past, some of the paintings have been exploited on a multiple printing basis.

MR ELLIOTT KC:

They have.

KÓS J:

So why should none of these ones come within that?

MR ELLIOTT KC:

Well because I think – there's no reason why they shouldn't other than that it would allow Mr Palmer to say: "Well I'm going for broke here and I don't care what you, what your views are, I'm going to get a valuer to come in here and we're going to aim for the stars," and then we start another round of – and I think that we, I think there needs to be some, there needs to be some strictures on how this process can continue in – certainly in this situation.

KÓS J:

If we're applying a permissible and predictable approach, you're –

MR ELLIOTT KC:

And fair, and fair.

KÓS J:

Yes, okay. I'm not sure about fair, but permissible and predictable, you would look at some of the – you would look at the fifth category, saleable items, and say some of those might be treated in the same way as the fourth category?

MR ELLIOTT KC:

I accept that, your Honour. I accept – but once we get to that end of the continuum we start getting into –

KÓS J:

Yes.

MR ELLIOTT KC:

I'm not suggesting it's all or nothing.

KÓS J:

Right.

MILLER J:

So the forms of exploitation, permissible exploitation, that you would accept would be those that had happened during the marriage?

MR ELLIOTT KC:

Yes.

MILLER J:

In other words, possibly prints but not Christmas cards?

MR ELLIOTT KC:
Yes.

MILLER J:
So she would retain some control in that sense?

MR ELLIOTT KC:
Yes.

MILLER J:
Do you also say that she ought to be able to limit that because it has an impact on her future as a painter?

MR ELLIOTT KC:
Absolutely, your Honour.

MILLER J:
So she will say: "I'm not now a painting machine, I'm only interested in fine art," shall we say?

MR ELLIOTT KC:
Yes.

MILLER J:
And therefore seek to limit the value, the exploitable value that's attributed to these other paintings? And if so, what's the basis in which we do that?

MR ELLIOTT KC:
I think that – I would say that the principled approach would be to look at what they had done previously and for that to be the yard stick, that if they had made prints in a certain, say in certain areas, not on postcards but on good quality giclee prints, you know, with limited edition then that provides you with the ability to say you – she can manage the copyright in a reasonable fashion in accordance with past practice.

MILLER J:

Right.

MR ELLIOTT KC:

And so I think if she was to say: "Well sorry, I'm just going on holiday now. I'm not painting anymore," that would be different because she's a painter and that's what she does. So I think there's an ability to control the process, is to say do what you did before, no – you know, no holidays, and also –

WILLIAMS J:

Well, value on the basis of what you did before.

MR ELLIOTT KC:

Yes.

MILLER J:

Yes, because she in fact is going to control the extent to which they are exploited, yes.

MR ELLIOTT KC:

That's the critical point, your Honour. As long as she can control the process.

KÓS J:

Well yes, but that's not how you value relationship property. You have to value it on the basis that it's jointly owned, remains jointly owned, surely?

MR ELLIOTT KC:

Well –

KÓS J:

And you have to assume therefore that this couple who seem unable to deal with themselves, deal with each other in any form, nonetheless can agree to exploit this in the manner that this Court says it may be exploited?

MILLER J:

Yes. I may have put you wrong there, because I was supposing that as a matter of fact, looking forward, she gets to control how it's exploited.

MR ELLIOTT KC:

Yes.

MILLER J:

But for the past valuation it's as Justice Kós says, you look at it on the basis that they in fact exploited it during the relationship, yes.

KÓS J:

Yes, and assume they're reasonable.

MILLER J:

Yes.

KÓS J:

And the question then is, is it highest and best use or is it something below that on a principled basis, which is what you're contending for.

MR ELLIOTT KC:

Yes. It's the latter, it's the latter.

KÓS J:

Well you would say that.

WILLIAMS J:

Isn't it just highest and best use consistent with moral rights?

MR ELLIOTT KC:

Well no, that would be the opposite of that, because it would be consistent with the maintenance of her reputation as opposed to flooding the market with prints.

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WILLIAMS J:

But that's the point, isn't it? Aren't you – isn't that what you're saying, that in this particular case moral rights would constrain what could be done?

MR ELLIOTT KC:

Yes, they would and –

WILLIAMS J:

But not Christmas cards, because they're not derogatory enough?

MR ELLIOTT KC:

Well, they may be.

WILLIAMS J:

Well, there you go.

MR ELLIOTT KC:

But, I mean, this is where the parties would be in active dispute about, well, I don't –

WILLIAMS J:

But what would the law say, is my question?

MR ELLIOTT KC:

Well, that would depend on the type of Christmas card, the type of market if it was sold in, say, cheap tourist shops.

WILLIAMS J:

Right, so my question is really does the concept of moral rights provide you with your parameter?

MR ELLIOTT KC:

It does, it does. It's important –

KÓS J:

I don't think your argument has tort, if I may say so.

WILLIAMS J:

That's what I – yes.

KÓS J:

Because you are, you – I go back to my attempt to categorise, your argument is permissible and predictable. Permissible is what the law permits and that includes moral rights, the rights limits created by moral rights. But you want something more than that, you want us to look at the way they're exploited in the past. That's not about moral rights. It may reflect moral rights but it's another constraint and you say that that should limit the way in which we value these assets, assuming they're still jointly held.

MR ELLIOTT KC:

Yes, I am.

KÓS J:

So it is a – it's both, I think.

MR ELLIOTT KC:

Yes, it has a –

KÓS J:

Permissible and predictable.

MR ELLIOTT KC:

Yes, but the moral rights overlay can't be ignored.

KÓS J:

Well, it's part of permissibility.

WILLIAMS J:

That takes –

ELLEN FRANCE J:

That, yes.

KÓS J:

Because if it invades the moral rights, you cannot exploit in that way.

MR ELLIOTT KC:

Yes, well, yes. So, I did add to your – to the – that it's fair. It's fair and in other words –

KÓS J:

Don't know where that fits.

MR ELLIOTT KC:

Well, fair and equitable in this situation would also include the artist's subjective views on the exploitation.

WILLIAMS J:

So would Matisse during the course of, under our regime, the lifetime of copyright or 20 years after his passing, have been able to prevent through the medium of moral rights the reproduction of his works in forms other than limited editions if –

MR ELLIOTT KC:

Yes.

WILLIAMS J:

– the experience was that was what he wanted to do and all he wanted to do?

MR ELLIOTT KC:

Yes, in my submission.

WILLIAMS J:

And there's no question about that?

MR ELLIOTT KC:

No.

WILLIAMS J:

Well, then isn't that your – that's your fence, isn't it?

MR ELLIOTT KC:

Well, it is, but that means having to go back to court to relitigate these same issues.

WILLIAMS J:

No, I'm looking for a principled basis upon which to scribe the parameter?

MR ELLIOTT KC:

Yes, well, that's why I'm arguing against Justice Kós' point that it's just a question of whether it's predictable.

WILLIAMS J:

Well, your point is the predict –

KÓS J:

No, no, I'm – that's not my point.

MR ELLIOTT KC:

Yes.

KÓS J:

I am inferring from your argument that you want to place limits on the valuation process.

MR ELLIOTT KC:

Yes.

KÓS J:

One of them is the way they behave in the past which I have called predictable.

MR ELLIOTT KC:

Yes.

KÓS J:

And the other one is what is permissible which includes all the limits the law imposes on the exploitation.

MR ELLIOTT KC:

Yes. Oh, well, then I'm in agreement with your Honour.

KÓS J:

And you want to add “fair” to that, so it's a triple.

MR ELLIOTT KC:

Yes, yes.

KÓS J:

I don’t know what “fair” adds, but yes.

MR ELLIOTT KC:

Yes, I think it's just in terms of the policy of the Act, that fair and equitable split of the pool.

WILLIAMS J:

Sorry, can I just have another bite at this because it, I took you to be saying, that my suggestion to you about moral rights and its parameter, their parameter, is coextensive with the category just described by Justice Kós.

MR ELLIOTT KC:

Yes.

WILLIAMS J:

And you agree that that’s the case?

MR ELLIOTT KC:

I did, I did agree.

WILLIAMS J:

All right, thank you.

MR ELLIOTT KC:

Yes, definitely, and that's the overlay and I think that if I could just come back to the bundle of rights issue, that that's why I submit that the Court of Appeal was to separate moral rights from economic rights, because I say they are part of a greater bundle of rights, to simplify that argument. That they are both in the Copyright Act, they both form part of the code to protect artists, authors, and we say to say, well, just because it's a noneconomic right it should be treated differently is what we are talking about here is artistic reputation which is just as important as the ability to monetise.

WILLIAMS J:

I guess my, the underlying my question, is how controversial that proposition is. Is it a matter of, is it a matter that you contend that moral rights are that broad, or is as a matter of orthodox intellectual property law about which you will know much more than me, is that an orthodox proposition?

MR ELLIOTT KC:

It's, yes, it's orthodox in my submission. There's no law in New Zealand, that's part of the problem.

WILLIAMS J:

But the Canadian case in the mall gets you there, you say?

MR ELLIOTT KC:

Yes, yes.

WILLIAMS J:

Okay.

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MR ELLIOTT KC:

In terms of treatment, that was subjectively unacceptable and I'll supply that case to the Court. Your Honour, could I deal with the question of attachment, because in my submission it is an important error on the Court's part.

ELLEN FRANCE J:

So where are you in the –

MR ELLIOTT KC:

So this is now point 20 in our road map and if I could just summarise the –

ELLEN FRANCE J:

And sorry, the relevant paragraphs from the Court of Appeal judgment?

MR ELLIOTT KC:

Yes, so the relevant paragraph there is paragraph 42. I'll just get my junior to call that up. I think it is a key – I had another read of it this morning to try and find the error and it's actually staring you in the face. It's really the last line of –

ELLEN FRANCE J:

Just keep to the microphone.

MR ELLIOTT KC:

Sorry. Yes, it's really the last line of paragraph 43 [*sic*]: "... the Copyrights attach to the individual Artworks to which her skills have been applied." And if you analyse the reasoning in that paragraph, it's basically that there's two, there's two concepts here: the first is the bundle of rights which the Court refers to as property rights, and there's the personal skills and qualifications. So, those are the two, the two parts that the Court says we've wrongly conflated. The Court then goes on to say, well, the personal skills stay with the author. There's no, no one's disputing that. But those personal skills stay with the author, they're not actually attached in any way to the artwork. So, you, it's what the Court is

saying, that the personal skills stay and the artwork is created but the personal skills don't actually imbue themselves into the artwork. But the Court then says, the bundle of rights attach to the artworks. So, the personal skills stay with the artist, the bundle of rights attach.

Now, the difficulty I have with that is it has almost a concept of like a limpet attaching to the side of a ship, inextricably connected, whereas that's simply not the case at all and, in my analysis, the error that has occurred in that reasoning is that the personal skills clearly go into the painting, because the artist is adding his or her artistic abilities to the canvas. So, there is no doubt that the personal skills are attached in the form of paint and brush strokes and the law recognises that in terms of moral rights, to protect that artist from having that work treated in a derogatory fashion.

Now, the difficulty that we face here, conceptually, is that you have, first of all, the painting, the artefact that we discussed, there is the copyright which is the bundle of rights and also the moral rights and those are the three categories that his Honour Justice Kós identified. So, there is no argument about that, but what we say is that, and I will come to this point in a minute, is that *Copinger* – sorry, Laddie, Prescott and Vitoria makes the point that copyright law actually protects the mental element of the artist. The mental element is the ability to paint, to create, as opposed to the artefact and what the Court has done is actually mix up the two and the reason I respectfully submit this paragraph is flawed is that when you look at that mental ability, the mental ability is what is recognised by copyright law but it is also the same mental ability that actually creates the painting and the two are connected through the same process, the same mechanism, and the reason that this reasoning is flawed, in my submission, is that by creating the artefact and the copyright, the artist becomes the first owner, the copyright attaches to the artist, not to the painting, to put it in very simple terms. And "attached" is the wrong term, resides in the artist, and that is a key problem with this reasoning because the painting – and the painting is actually separate from the copyright.

1220

And I think that there's an important passage in *Copinger*, and this is – and I'll ask my junior to – 3-74. If you look at 3-74, the authors there are talking about fixation, and fixation is a different concept, that is the copyright has to fix itself in some medium. That is the painting in this case. But fixation is different to attachment, and they do set out the reason that that is important, because if you look at – they say that: "Copyright does not subsist in a work unless and until the work takes some material form." So material form is fixation. It's different to attachment: "This principle is known as…fixation. The reasons for this principle are practical." And I won't go into them. It's basically so you can say: "Well there's a work that we can look at, we can compare it if someone copies it for infringement purposes." A very different issue to what the Court of Appeal was envisaging.

And if I could just ask my junior to look at 3-78, just one page on. This is an important passage, separate existence: "It follows from what has been said that the work, once fixed, continues to have a separate, disembodied, existence." And it's the disembodied, they are quite separate, and I think that what the Court has done is wrongly assume that the copyright and the artefact are connected when they are not, and the reason for that is quite simple, because the artist may wish to sell the artefact and keep the copyright, and they're entitled to do so.

KÓS J:

Well the chart that you gave us or the table gives quite a good example of that, because in the one-off paintings where she has contractually bound herself not to make prints, she has given away in that she's sold effectively her exclusive right to reproduce, the positive right, but she has retained the negative right because it doesn't follow that the purchaser of the artefact has the right to reproduce.

MR ELLIOTT KC:

That – exactly right.

KÓS J:

There's two different elements that are associated with it, the positive and the negative right.

MR ELLIOTT KC:

Yes, yes, they – there's a very subtle difference, but you're right.

KÓS J:

Yes.

MR ELLIOTT KC:

So she's contractually bound, she's given away the right to reproduce that painting, but –

KÓS J:

But she hasn't assigned the copyright enabling them to do so.

MR ELLIOTT KC:

That's right, yes.

KÓS J:

So no one can reproduce it.

MR ELLIOTT KC:

Yes. But I think another point that I'd like to make, and I will try and do it as briefly as possible, is that the Court of Appeal spoke about copyrights in individual paintings and I think that that is wrong, because an artist would have a body of work and all artists have a series of works which one leads to the other, one modifies the other slightly, one adds a different colour or texture. So you would be able to recognise a Woollaston painting immediately and say: "Well that's one and that's another one." And so there is this oeuvre of work which all artists have.

Now the important thing is that we say in this particular case Ms Alalääkkölä acquired artistic skills at a very high level in Helsinki, brought that ability to New Zealand, and that her artistic ability runs through her entire body of work, and the copyright could be described almost like a ribbon running through a series of works rather than attaching somehow to a number of works. And I think that's where the Court of Appeal got it wrong in terms of understanding an artist's ability and need to be able to control the entire body of work, because the changes might be very small.

1225

And I don't have time to take you to the passage, but there are in my – and I am just mindful of time – in the Laddie work there's discussion about the reason why works have to be original, but the originality might be very low and an artist might just – yes, I think my learned junior is ahead of me here. In paragraph 1.10, this is *Copinger* [*sic*], talks about: "The work is original in the sense that it originates with its author." And there may be a relatively small amount of change to an earlier work, but that's the ability an artist has to say: "Well I'm going to use the same painting I did. I'm just going to put an extra tree in or a different shadow," and they don't have to worry about that being an infringement of someone else's copyright because they own all the copyright, the whole series of works, and the originality may be very low, but as a body of work they can say: "Well that's my phase when I was painting trees or I was painting dogs." And –

WILLIAMS J:

But isn't that just that the copyright owner is entitled to copy their work because it's –

MR ELLIOTT KC:

Yes, they are, yes.

WILLIAMS J:

And so the fact that they've added another tree, which would be breaching if they weren't the original author –

MR ELLIOTT KC:

Yes.

WILLIAMS J:

It's not breaching if they are original or not because of some magical mystical artistic ability, but because they're entitled to copy it?

MR ELLIOTT KC:

Yes.

KÓS J:

Yes, I think you've got the example the wrong way round. It's better looked at from the perspective of a copyist who changes aspects.

MR ELLIOTT KC:

Yes, yes.

KÓS J:

If I paint a Warhol painting, something very much like a Warhol painting but I use a Wattie's soup can rather than a Campbell's one, I may still have breached his copyright.

MR ELLIOTT KC:

Yes, yes, that's right. Yes, so –

WILLIAMS J:

It probably wouldn't sell anyway.

KÓS J:

Hmm, I don't know.

MR ELLIOTT KC:

The – so I'm just mindful of time, your Honours.

ELLEN FRANCE J:

Sorry, could I just check? So in terms of what you say is the error in paragraph 42, where does that – what's the effect you say that has on the approach taken by the Court of Appeal? Where does it mean they go wrong then?

MR ELLIOTT KC:

Where – yes, where they go wrong is that they misinterpreted the purpose of copyright, which is to protect an author, an artist in this case, in terms of what is an intensely personal endeavour, which the Court recognised when it came to the third issue but not when it came to the first issue. I think that the error is that the Court moved too quickly to the third issue to say: "Well let's just give her the copyright and that solves the problem."

ELLEN FRANCE J:

Yes, well that was my next question. Because they do recognise that at that stage, is it really right to say that they've made the error that you're saying they have?

MR ELLIOTT KC:

Yes, yes. Because what we say is that the art, in terms of my ribbon analogy, is her entire body of work, her reputation as an artist, her ability to continue to be a valued artist after separation, but it also is important to recognise the fact that she brought existing skills to the relationship. And so this continuum, we say the ribbon didn't start in New Zealand, it started in Finland and continued to run through her body of work in New Zealand, and that that is why this should not be categorised as relationship property, is that it is very different to the fishing licence and it's very similar to the enhanced earning ability.

So we're saying it is – it goes to the very heart of the Court's reasoning in terms of how copyright is assessed and how an artist and an artist's ability to protect their artistic output is viewed, and I think that the other key error was to separate moral rights from economic rights when they have the same purpose, which is to protect the artist, and we say here the protection is afforded to the entire

oeuvre and not just individual paintings. So we say it goes to the heart of the decision.

WILLIAMS J:

How does that work with computer programmes? And the more workaday copyright subject matter?

1230

MR ELLIOTT KC:

I think that is a valid question, your Honour, because I think that the Court of Appeal did say: "Well, look, if this was an engineering drawing it may not be the same result," and I don't think that's right, because I think any creative activity should be recognised but, in my view, this case is at the top end of in terms of artistic ability and the need for protection and to distinguish this from the fishing licences and –

WILLIAMS J:

How do courts, when establishing principles about the application of copyright in all of its forms, how do they draw those lines in a way that doesn't turn this into a lolly scramble?

MR ELLIOTT KC:

I think on the basis that the Parliament has given the Courts that ability through their discretionary powers within the Act, a broad definition of property and, in my submission, intellectual property is different to everything else that's been dealt with in the past and I think that this is an opportunity for the Court to express a view on that, particularly in relation to the moral rights which have a unique New Zealand context in terms of the issues we've been discussing, your Honour, and in terms of issues of tikanga influencing the interpretation. There is specific recognition of taonga being excluded from family chattels. So, Parliament has already turned its mind to that and what we have here is a unique opportunity to fashion the way that moral rights are viewed in a local context rather than as some European importation.

There was one other point that I did want to make and I realise I am – it's the question of artist resale rights. Not something we raised in our written submissions and I think it is –

ELLEN FRANCE J:

I was going to say, where has that appeared before?

MR ELLIOTT KC:

No, no, it's something that I've really come to in the last few weeks and if I could get my junior to look at tab 26 and it's the *Resale Right for Visual Artists Regulations Discussion Document* – April 2023. This was a discussion paper from the government. Now, this is a new Act that's coming into force next month and it basically allows artists who resell, or paintings that are resold, to get a royalty back and so this is important in this context because visual artists are treated quite differently and I think the first point I'd like to make is that, and I have included in my bundle the Act, and there is specific recognition of Māori and Pacific Island artists. So, we are moving into a situation of recognising that our artists are actually important and they need to be protected. So an artist who sells paintings on a one-off basis will be paid once but if they become famous enough and those paintings are resold they will get a royalty, a 5% royalty on each sale through an art dealer.

But the discussion which is relevant to the point here is this final paragraph where they talk about the limited options that artists have and they distinguish visual artists from musicians and composers who receive royalties for performances and for multiple copies of books. Now, that's a really important point here, because I think my learned friends are going to ask the Court to look at overseas cases to say: "Well, look, there is this rock musician who got royalties and had to share them with his wife." That's quite different to the situation here. This is not a royalty arrangement. This is a one-off sale business, in the main, so it's quite different to someone who sells their copyright to a publisher and gets a royalty stream. That, the copyright there, has been monetised and it has a value and that value has to be shared with the partner. So there's no, there's – we're not disputing that principle, but the difference here

is that as the discussion paper says, visual artists can grant a licence to a book publisher, et cetera, but that's just for the cover of a book, for example. But in the next paragraph: “Creative professionals generally derive copyright income from multiple reproductions or repeat performances,” and “visual artists’ primary income is largely limited to the one-off initial sale ... [and that's in] the primary art market.”
1235

So there’s a clear distinction being drawn between visual artists and Ms Alalääkkölä is very much in that category and we say that this legislation is designed to allow them to tap into the secondary market once their works are resold. But what it shows here, is that this is a quite separate situation from other artists who assign their copyright or get royalties from APRA or AMCOS and what we say is that each case has to be determined on its own facts and we say that this is a case that should be dealt with on its specific facts because another artist or author may have a completely different situation and the courts should say, well, just because Ms Alalääkkölä was able to achieve that outcome doesn’t mean it's going to work for everyone.

So that’s really, unless there are any questions, your Honours, I'm really happy to answer any, but that...

ELLEN FRANCE J:
So you are happy you’ve canvassed what you wanted to say about the valuation aspect?

MR ELLIOTT KC:
Yes. Well, I haven’t taken you to my vesting valuation point because I think that the submission is quite detailed and I set out the –

ELLEN FRANCE J:
Yes.

MR ELLIOTT KC:

– the factors and I would really just emphasise that that does provide a principled approach forward and I'm happy to expand on it, but I think it's pretty clear.

ELLEN FRANCE J:

Anything further?

WILLIAMS J:

No.

ELLEN FRANCE J:

Right, thank you.

MR ELLIOTT KC:

Thank you, your Honour.

MS TUCKER:

Thank you, your Honours. Now, I do apologise in advance, your Honours. I am very much a paper person rather than technology, so I may just duck to the side to grab my books.

ELLEN FRANCE J:

You're not alone.

MS TUCKER:

As indicated in our outline, your Honours, the first thing that I would like to do, well, that Mr Davies and I would like to do is make an acknowledgement of Mr Brian Fletcher. Mr Fletcher was counsel for Mr Palmer in all of the lower courts and he would have been here today as counsel with me but for his own personal circumstances and I think it is really important to acknowledge his effort and work; without that, we wouldn't have been here today.

ELLEN FRANCE J:

Right, thank you.

MS TUCKER:

Your Honours, I have filed an outline of oral argument but having listened to the submissions of my friend this morning, I think what might be more useful is for me to respond to some of the points that they have already made and then to answer any questions that you have following that. I am, of course, treating my written submissions as having been read.

ELLEN FRANCE J:

Yes.

MS TUCKER:

My oral argument was essentially to take you through them. I don't think that's necessary, your Honours. Given what I have heard this morning, you're clearly across these issues.

So the first point that I would perhaps like to make, your Honours, is in his opening comments my friend said that we should be really careful not to let external forces ride roughshod over arrangements that parties have made during their relationship. I would wholeheartedly agree with that. The Act agrees with that, that's why we have section 21 agreements. You can make your own arrangements, you can decide that something shouldn't be in the pot to be divided at the end and provided that you do it in accordance with the Act, that you get legal advice that tells you what you might be giving up and that it is recorded in written form, the Court will be slow to intervene. There are, of course, some cases where the Court can but it will be slow to intervene. That is a high threshold, manifestly unjust, and on that point, your Honours, I would note that that is something that has been around for many years. Something that Justice Woodhouse referred to in *Reid v Reid* [1979] 1 NZLR 572 (CA) when that was before the Court of Appeal in 1979 and what Justice Woodhouse urged at that point was do not lose sight of section 21 agreement. This gives the parties the ability make their own arrangements and not rely on the Act. And if your Honours would like that reference, that's at page 592 of the first *Reid v Reid* case from the Court of Appeal.

1240

ELLEN FRANCE J:

So just to check, how far do you say that goes? Do you say the effect of that is to rebut the argument Mr Elliott's been making about look at this in terms of the way in which the parties operated at the time?

MS TUCKER:

Well I think, your Honour, no, because that – as I understand it, that part of the argument sort of goes towards valuation, so that's if we get to the end point, look, these are in the pot to be divided, how are we going to value them? And I do think that is a useful aspect, bearing in mind that these parties did operate a commercial business and they did sell these prints. Mr Davies will address you more on that point, but in terms of this idea that if we say copyright is property and that it might be relationship property for the purposes of the PRA, we might be riding roughshod over arrangements that artists might already have with their spouses. On that point I would submit that, well, that's where section 21 agreements come into play and that is no difference from anyone else that would like to protect something they consider valuable to them. And just there, your Honours, on the screen is just that quote from Woodhouse J.

And turning now, your Honours, to the idea of whether or not copyright should be property, and there has been some suggestion that like enhanced skills or a discretionary beneficiary's interest in a trust, it shouldn't be property, and we would say, your Honours, that in this case all copyright can be quite clearly distinguished from those. In *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) they said, look, your skills aren't and your enhanced earning capacity is not property, it is something personal to you, it's an inherent characteristic, how you harness that can be property. The shares in the partnership, even though they weren't transferrable, they could be given a monetary value. To that extent, that is property. To that extent, that gets included. It's – that's the mechanism in which those skills are harnessed.

The same, we would submit, goes for copyright. The copyright is how – arises when Ms Alalääkkölä uses her skill. It is something separate to her skill. In fact, the Act – would indicate that the Copyright Act, because you can sell those

rights, they can be severed from her, it's not something that is inherently personal to her that can't be severed from her. And in that, to that extent, we would submit that *Z v Z* is not an appropriate analogy for –

WILLIAMS J:

You can't sell your moral rights.

MS TUCKER:

No, your Honour, but we're not – under the Copyright Act the economic rights, which we are talking about here, and the moral rights are two distinct bundles. They are two coins. Mr Davies has a lot more to say on this than I do, but essentially the approach we have taken and other Anglo-American courts and jurisdictions have taken is that we have two coins in the same hand and you can give one of those away. That's the economic rights. You can't give away your moral rights. And –

KÓS J:

Well, you can waive them.

MS TUCKER:

You can waive them, yes, but you can't sell them, you can't give away that coin, whereas the approach that my friends are arguing for is you've got one coin with two sides. That's not the approach we have taken in New Zealand. The Act, the Copyright Act does say they are separate things. And to the extent – I mean our view is that moral rights could in theory be included as property under the Relationship Property Act. They probably have little value and they're not sought to be included in this case.

1245

WILLIAMS J:

They're much – they're quite close conceptually to Mr Elliott's suggestion that there are some rights or interests in creativity that have kind of woven into the personality of the maker and that might be corroborated in the fact that you can't

sell them, you can only say: “I am not going to enforce them.” You can only say: “I don’t consider my mana to be at stake here”?

MS TUCKER:

Yes, Sir. And whilst I think that there could be some merit in that argument, your Honour, I think the fact that the Copyright Act does treat them as two distinct and separate things, so my friends were talking about under the economic right bundle you’ve got your positive rights and your negative rights sort of thing, but they can still – all of those can be alienated from you, they can be severed from you, and you might still retain that inherent ability as the first, as the author to say: “I don’t like what you’re doing with this work,” but that is quite different to the economic rights that you may have already sold.

WILLIAMS J:

Yes, but I took Mr Elliott to be saying that those rights are enough to prevent Mr Palmer from doing what she doesn’t want him to do.

MS TUCKER:

And that might be the case, Sir, and that we’d – I would submit that that would come down to the way they get valued and to the way they are treated once you are looking at dividing the pooled relationship property.

WILLIAMS J:

Well if he’s right about that, that will have a fundamental impact on value.

MS TUCKER:

Yes, Sir. But I would submit that that doesn’t prevent them from never being included in the pool in the first place, which is his first point there. I – yes.

WILLIAMS J:

Right.

MS TUCKER:

In terms of discretionary beneficiary interests, the other thing I would say about that is that's not property under the PRA for the very simple reason that it's not property. If you're a discretionary beneficiary you have a space, you have a hope that you might get something, but until the trustees actually exercise their discretion in your favour, you don't have an equitable or legal right to the trust's assets. That's why that's not property, because you don't actually have any right to it until it's exercised, and that I would say is distinguishable from this case, where clearly there are the rights that exist.

In respect of whether or not the definition of "property", I mean I understand it to be agreed that copyrights are property and are a form of personal property if we're looking at them under the Copyright Act and that the argument is that just shouldn't be transferred across to the PRA, and our submission is that's not right. Where definitions can be consistent amongst statutes or can be interpreted consistently they should be, but even more fundamentally than that, an interpretation in legislation should be interpreted consistently with that statute as a whole. And we had referred to *Agnew v Pardington* in our written submissions on that point. What we perhaps should have done more is refer to the legislation that *Agnew v Pardington* was referring to.

So in *Agnew v Pardington*, it was referred to the Interpretation Act 1999, section 5. That is at paragraph 32 and that talked about section 5 of the Interpretation Act and how you ascertain the meaning of legislation, and that needs to be "from its text" and from "and in light of its purpose", and that principle has been carried across into section 10 of the Legislation Act 2019. I would submit, your Honours, that the idea that a provision in an Act should be read consistently with the statute book as a whole is not a new submission made in the courts.

ELLEN FRANCE J:

Well I'm not sure how far you can take that in the sense that it's quite plain, isn't it, that in some situations a narrower definition of property for example has been adopted?

MS TUCKER:

Yes, your Honour, but I would submit, your Honour, that that's on a very factual, you know, fact by fact basis, that the general position is the one set out by this Court in *Clayton v Clayton* [2016] NZSC 30, [2016] 3 NZLR 590, that it should be, in terms of property for the PRA, it should be an expansive division.

1250

ELLEN FRANCE J:

Well, that's my point though. I'm not, all I'm saying is, I'm not sure how far you can get from this idea of interpretation consistently across the statute book when, in fact, it's quite clear that some definitions will be deliberately broader than others and vice versa.

MS TUCKER:

Yes Ma'am. I would say your Honour that that is when you do come back to looking at these sections and the legislation that you're looking at in general. If you look at things like the Property Law Act 2007, they have quite broad – the wording is different, but the intention behind them is the same. It wants to include all real property, all personal property, all incorporeal property. But then you look at something like, and I understand that my friends have included the Domestic Violence Act 1995 in the bundle, but it's now the Family Violence Act 2018, that definition is a little bit narrower but you would look at that in the context of what that legislation deals with for property. It's talking about, in the Family Violence Act, it's when you're getting ancillary orders to go with your protection order, that's when you're getting your orders for the chattels and the furniture. You're not necessarily talking about the intangible rights that you would be when you're talking about dividing the entire relationship property pool under the PRA. But –

KÓS J:

Anyway, you rely on *Clayton* is really your short point, isn't it?

MS TUCKER:

Yes, your Honour, yes. There has been some suggestion that a definition or that the PRA shouldn't cut across or override the Copyright Act. The first point that I'd make is that it doesn't. What we are proposing would be consistent between the two but failing that, your Honours, section 225 of the Copyright Act says nothing in this Act is going to affect any right or entitlement under any other enactment and then section 4A of the PRA says every other Act has to be read subject to this, unless expressly said otherwise. So, in that circumstance, your Honours, I would say, I would submit, that the PRA does take precedence if there is a conflict, although I would also submit there is no conflict.

And just further on that point of whether or not it should be property, I think it's useful if you consider what an owner means under the PRA and the definition of "owner" is: "In respect of any property, means the person who, apart from [the PRA], is the beneficial owner of the property under any enactment or rule of common law or equity." And that, your Honours, I submit would also go to distinguishing copyright from things like discretionary beneficiaries, because, of course, they don't have that beneficial interest at that point, but it would also go towards distinguishing copyright from skill in that you don't beneficially own skill, that's something inherent in a person.

I think just the last point I wanted to make from my friend's submissions, your Honours, is much has been made of what occurred during the relationship and what occurred after the relationship in terms of the way this artwork was treated and how it gets valued and I do think it is just important to come to the idea that this was a business that these parties were running. That is Ms Alalääkkölä's evidence. She says: "I was a serious artist and then I entered this relationship and I had to become a commercial artist. I had to give up doing the kind of the art that I wanted to so that I could paint to support our relationship." During the relationship, the parties marketed and sold prints and cards. After the relationship, she has marketed and sold fridge magnets with her art, t-shirts, towels and I understand there was an intention to sell mugs and art books and calendars. Well, I think she may have actually sold calendars,

your Honours. That is the context in which this factual case should be considered. It was one for a business.

I'm not sure if any of your Honours are familiar with her earlier works, the ones from pre the relationship, but they are distinctly different to the ones that were produced during the relationship and that would also, your Honours, go towards the idea of this body of art and whether or not this ribbon is running through with that consistency. The paintings produced during the relationship are very colourful, very whimsical, scenes from New Zealand. The ones prior to the relationship, when she called herself a "serious artist", much more muted in colour, much more serious in subjects. She's been painting people from the Himalayas, from Tibet, in the Outback. All good art, but that body of work is entirely distinct and separate to the body of work created during the relationship which was for commercial purposes, which was for the benefit of the relationship.

Other than that, your Honours, I don't think that I have anything further to add on to what we've already set out in our written submissions, so if there is any questions from you.

KÓS J:

What do you say about Mr Elliott's argument which is that if it is property, it's property that's effectively impressed with some sort of limitation? It's almost as if, to take Justice Williams' example of the Kiwifruit orchard or almost orchard, what's being traded here is a piece of land with a right of way across it, this inherent limitation that it cannot, that implicit in the property is a limitation on how it can be used?

MS TUCKER:

I think, your Honour, that that example, or in this case it would be a lot more useful if the parties hadn't already done things that might be objected to. So, as I understand it, the limitation there relates to the moral right and the right to object to the work being, say, marketed on toilet seats or things like that and I think that that would go to a point of value, it absolutely would, as to how valued

the copyright is, given there is that inherent ability to object to things like that. So in that respect, yes, I do think there is a limitation but I don't see that that limitation is what stops it from going into the pot to begin with.

KÓS J:

No, I'm accepting that, I'm just trying to work out what the property is that we're valuing? Because it seems to me it's inherent in the nature of the property here that there is a limit on its use, just as there would, for instance, if what was being traded, what the land being, it's like one of the assets being passed over was a leasehold estate with 90 years to run, it's a lot less valuable than a freehold estate.

MS TUCKER:

Yes, your Honour, and I think that if the parties hadn't already operated that commercial aspect of the business I think my friend's argument would have a lot more force, but they have operated that commercial aspect. During the relationship there was prints, canvas prints, paper prints, cards.

KÓS J:

Are you accepting that this, I used the word "predictability" as a shorthand for part of Mr Elliott's argument, are you accepting that that predictability limitation does apply? You just simply say what's predictable is much broader than Mr Elliott's idea of what is predictable?

1300

MS TUCKER:

To a certain extent, yes, I do think that, your Honour. In terms of the evidence from the Family Court, my understanding is when the parties went to approach valuers to even ask about valuation it was – the indication that came back was this is going to be very hard to value, this is quite a niche sort of thing you're asking, this is going to be very hard to value. And I think to the extent that the parties have already been doing something like this, they've already been selling and marketing these prints, I do think that is quite useful for informing how it might be treated and how a copyright might be valued in the future.

KÓS J:

Well let's put the question another way. Are you accepting that it's not a question of valuing it at highest and best use? In other words, you're accepting that the toilet seats are out?

MS TUCKER:

Yes, Sir. I think that – I think that we would accept that, and Mr Palmer has always been very clear that whatever – if he was to get the copyrights, and he is no longer seeking they be vested in him, but if he was to get them he would never seek to devalue the work because that only really harms himself. I think that he would say yes. In terms of what we have done in the past and what has been intended to be done, putting it on mugs or on calendars and fridge magnets, I think that is all a valid way of valuing it and that's how it should be treated. That's not stretching it to say what can we possibly put it on, everything, that's what its value is, but it is a – as my friend and you have said, your Honour, a predictability basis, what have they done in the past is a…

KÓS J:

Shall we come back to this after lunch?

ELLEN FRANCE J:

Yes. Now in terms of time, how are you going?

MS TUCKER:

Your Honour, in terms of my part, it is entirely up to the questions you have for me, any further questions.

ELLEN FRANCE J:

And how long will Mr Davies want?

MR DAVIES:

No more than an hour, Ma'am.

ELLEN FRANCE J:

All right. So 2.15.

MS TUCKER:

Yes, your Honour.

ELLEN FRANCE J:

Thank you, we'll adjourn.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.18 PM

ELLEN FRANCE J:

Ms Tucker, I'm not sure if it's you or Mr Davies who would deal with it, but we'd be interested to hear what you have to say about Mr Elliott's five categories.

MS TUCKER:

Your Honour, Mr Davies is going to deal with that.

ELLEN FRANCE J:

All right.

MS TUCKER:

I have one more point that I just thought of over the lunch break, your Honour, and that's just in respect to the idea that the Copyright Act is a code. And I just note that this Court has previously held the Copyright Act is not a code for the purposes of the Crimes Act 1961, and the rationale behind that was the Crimes Act is broad-reaching, it is intended to cut across other Acts, and we would submit that the PRA is just as broad-reaching, all other Acts are to be read subject to it unless expressly said otherwise.

KÓS J:

That was in *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475, I assume?

MS TUCKER:

That was in *Ortmann* your Honour, yes.

KÓS J:

Yes.

MS TUCKER:

Other than that, your Honours, I am happy to answer any further questions that you have, or I will hand over to Mr Davies.

ELLEN FRANCE J:

All right, thank you.

MS TUCKER:

Thank you, your Honours.

1420

MR DAVIES:

Tēnā koutou katoa. I just want to very briefly draw the Court's attention to another authority, just briefly reprising one of my friend's arguments, and that is the Atkin article on relationship property, "What Kind of Property is 'Relationship Property'?" (2016) 47 VUWLR 345. So Bill Atkin wrote a reasonably recent article about relationship property, and that I'll – sorry, I should have preloaded it for my friend, apologies – but the critical element of that is to note that the definition of "property" in the Property (Relationships) Act is similar to that in the Crimes Act and in a long list of other Acts and that article also makes reference to this Court's decision in *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678, which you'll recall was a circumstance where Mr Dixon had property in the form of a video recording of an incident in Queenstown and that, in this Court, was held to be property so that is an example, like cryptocurrency, of a incorporeal property which is property for the purposes of the Crimes Act and, in my submission, would also were it relevant be property for the purposes of the PRA given that the definitions are identical.

Also just in terms of the road map at point 10, I draw the Court's attention to some antecedent legislation and in particular section 22 of the Copyright Act 1913. That Act expressly, or I think is the context of that Act obviously was in patriarchal times where the property of married women was often appropriated by the husband but the 1913 Copyright Act made it clear that where there was a joint copyright between husband and wife, the wife was entitled to property as her separate property and then later after the Law Reform Act 1936 her property. That antecedent legislation obviously indicates that at the time Parliament was conscious that copyright was property in a domestic sense and provided rules for particular circumstances.

I had wondered whether or not that 1913 Act was a response to something that had happened in New Zealand, but in my research over the last few days I have identified that, in fact, section 22(4) of the Copyright Act 1913 is analogous to the UK Copyright Act 1911 section 16(4). So, that wasn't a New Zealand innovation, it was in fact a United Kingdom innovation and, as your Honours will note, the New Zealand Copyright Act has a close analogue to the Copyright, Designs and Patents Act 1988 UK statute as well. A large number of the provisions have been borrowed from that legislation.

The next part of my submission, beginning the road map at paragraph 11, addresses some of the policy questions which your Honour Justice Miller raised with my learned friend earlier today and to see whether or not from a policy perspective there was something different about intellectual property or particular intellectual property and other forms of property.

I wish to draw your attention to the Reid article which is in the bundle, Joseph P Reid "*Rodrigue v Rodrigue*: Another Copyright and Community Property Case *Worth*-y of Controversy*"* (2000) 75 Notre Dame L Rev 1183. That article, beginning at page 1191 or page 10 of the PDF, does indicate the intellectual property lawyers' distaste of the two American cases which are most often cited, so *In re Marriage of Worth* 241 Cal Rptr 135 (Cal Ct App 1987) and then *Rodrigue v Rodrigue* 55 F Supp 2d 534 (ED La 1999) and then two pages on, so at page 1193, or page 12 of the PDF, refers to the family law writers about

the same cases and notices that while the intellectual property lawyers are not in favour and criticise both the decisions of *Marriage of Worth* and *Reid v Reid*, the family law or community property lawyers in the United States indicate that that is the legislation working as they would expect it to. So I guess in terms of the context of this, this is two different areas of law which – and we are dealing with the intersection of that and there are very different reactions, depending on whether one comes from an intellectual property approach or from a family law approach.

1425

In terms of – when talking about international legislation, the obvious point needs to be made that obviously context in other countries and language in other countries is different. And Professor Atkin in his textbook at page 1077, and this was picked up by the Court of Appeal judgment in their judgment at paragraph 53, indicates that there is perhaps five species of relationship property law, and in the – I won't take you to them but in the outline there is reference to Grace Ganz Blumberg *Community Property in California [Connected ebook]* (8th ed, Aspen Publishing, Maryland, 2021) which talks about the history of Californian community property legislation, Katharina Boele-Woelki and others *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions*, (Intersentia, Cambridge, 2013) which talks about a number of European jurisdictions, and obviously New Zealand falls into those.

I have had a, sort of a quick look at the antecedent to the Matrimonial Property Act 1976 as it was then called, and it is clear that the drafters of the New Zealand legislation looked at at least Quebec, Spain, Denmark, Sweden, California, Texas, Hungary, and Poland, and for interest probably more than any particular relevance to the context of this case, but the Swedish model of a deferred property was in fact picked up and used in New Zealand. So if one is wondering about where the idea of a deferred property comes from, as I believe it having looked at the sources, Sweden was the analogue used in that case.

As my friend has indicated, there are – and he took you to the *Copinger and Skone* reference which I will briefly mention, that was in the supplementary bundle filed a couple of days ago, but Professor Eagles, Ian Eagles "New Zealand Moral Rights Law: Did Something Get Lost in Translation?" (2002) 8 NZBLQ 26, in his text identifies a number of sources of copyright law and different sources depending on different jurisdictions. France is identified by him as being Lockean. Germany is Immanuel Kant. And the Anglo-American tradition, I've written there Hegel but I could also have put Locke, Hume, and Bentham as part of that from his paper at 28.

And I do acknowledge Professor Ginsburg's paper where she identifies that in actual fact the sources are perhaps somewhat more fluid than that set out in Eagles, but nonetheless, there are different philosophical starting points for the copyright law in a number of different countries, and I understand it needs to be read in that context.

My friend took you to the *Copinger and Skone* on page 29. I won't take you back there, page 6 of the PDF, but it does indicate that the Anglo-American approach is different from that in French-speaking and German-speaking jurisdictions.

So with those cautions in terms of the nature of the different jurisdictions, I have attempted to identify cases in the lit – in the authorities from each of those jurisdictions. The *CB v KB* [2019] EWFC 78, [2020] 1 FLR 795 case is – was a rockstar. It was a bassist in a reasonably well-known UK band and the issue of what was property and what was not property was not heavily debated. There were in fact five streams of income and they are detailed at paragraph 8 of the decision, and then at paragraph 43 the Court or the Judge rejects the fifth of those streams as not being property because it required future effort and work on behalf of the rockstar and consequently was entirely dependent on how much time or effort he did or did not spend in creating that future income stream.

1430

ELLEN FRANCE J:

Sorry, Mr Davies. Would you just remind me where you see – what the proposition is you're relying, you're using these cases for?

MR DAVIES:

So the proposition is that in other jurisdictions, and I guess the UK case is the most similar to New Zealand because it is – it has the closest both in terms of copyright jurisdiction and the Court is in that case attempting to divide property undefined, but property in terms of the UK Matrimonial Causes Act 1973 sections 21 and 25, so that case is the closest analogy to this case from a legal text perspective in the authorities. It is a first instance decision, but it was – when one has very little authority –

MILLER J:

It doesn't seem very apt though, does it, because we're talking about something that's been created presumably during the relationship and we're talking about repeat performances of the same thing, and it's because its future value depends on him getting up on stage and playing it that the Judge says you can't claim an interest in that. Is that not the –

MR DAVIES:

That's the fifth stream. The – 1 to 4 is TV rights, radio rights, other performers performing the same. So (inaudible 14:31:58) my friend, this is the five streams of income. It is different, a sound recording and a published song is different from a visual work, I do accept that, but on the basis that this is the only case where – which is published that this issue has been raised. So there are four separate streams.

Interestingly, well just while we're at stream 2, so secondly, maybe just scroll up a little bit please if you don't mind, that was a non-assignable right, was stream 2, nonetheless divided by the Family Court in the UK. And the sums involved here were quite substantial, they were £2/3 million of interests which were divided.

While I'm on the UK, there is one article which I don't think features in – it is in the bundle, I don't know if it features in our outline, but it's an article by Jane Foulser McFarlane called "For richer for poorer?" (2009) 159 NLJ 1246, and that is an article, that's the only academic article I can find from the UK which addresses relationship property.

WILLIAMS J:

So the non – the uncovered category was subsequent performances by the author?

MR DAVIES:

Correct.

WILLIAMS J:

So the performer's rights?

MR DAVIES:

So this was a musical recording and various songwriting and associated rights, yes, but his – well his touring income effectively, so –

WILLIAMS J:

Yes, so it was – that's a performer's right.

MR DAVIES:

That's right, that's right. So that – and at paragraph 43 of the judgment the Court said that is not a property right, that is reliant on –

WILLIAMS J:

It hasn't been created yet.

MR DAVIES:

That's right. So –

WILLIAMS J:

And he didn't need copyright because it was his stuff, so you can see why if he had been a third party doing it of course then money would flow, right, but because he wouldn't be breaching copyright by performing the same words and over and over again, there's nothing vested at that point?

MR DAVIES:

That's correct, but other people playing his songs, obviously that's a royalty situation.

WILLIAMS J:

Correct.

MR DAVIES:

And my friend makes a point, well that's been monetised and is subject to a – shows an action and consequently claimable in that way, but the underlying right is a copyright.

1435

WILLIAMS J:

Right, so your point, I take it, is that all the qualifying categories reflect the categories in this case.

MR DAVIES:

Correct.

WILLIAMS J:

Subject to moral rights considerations.

MR DAVIES:

Subject to moral rights considerations which I will get to, but so there are, with the exception of Canada, sorry, so there's this case and that is, seems to be the best case. There are some unreported judgments, decisions, which are, for example, McFarlane refers to the, I think, the breakup of the rock group Genesis

and so the McFarlane article does make reference to those property rights and then goes on and has a discussion about the nature of intellectual property and division in the context of the Matrimonial Causes Act 1973.

There are some other cases which have been reported, not in the law reports, but in the popular press. It doesn't really help if we can't find the reasoning of it, but nonetheless the only cases which I, or so the only English case that I could find and I believe Justice Katz found this case in the Court of Appeal although it didn't make it into her judgment but was that *CB v KB* case.

There are a number of first instance decisions in Canada along similar lines, some of which will reflect royalties, some of which reflect copyrights in books, again each of them on their facts. The only appellate decision and it's very brief is the *MacLellan v MacLellan* 2001 NBCA 82, 18 RFL (5th) 322 — [2001] NBJ No 266 case but it's basically a paragraph which summarises the point. I guess, in terms of, I mean, there isn't, a short point is, there isn't anything beyond that in Canada.

There are two cases in Australia. Of note, the first *G & T* [2002] FamCA 613 (31 July 2002) and that is someone who was identified in the judgment as sort of one of the most well-known singer-songwriters in Australia and in that case, again, we know what the definitions were in terms of the Australian Family Law Act 1975, that's been well-ventilated in terms of *Kennon v Spry* and at one point an argument was made, and this is at paragraph 109, that sort of the division of the songs and the separation of and the sale of the copyright in order to meet the wife's claim was like tearing his heart out or some analogy like that and the Court said, yes, that's a fair point but that interest needs to yield to the relationship property interest.

And then the final case is the, also Australian case, of *Pope v Pope* [2012] FamCA 204 and that is a member of a well-known entertainment group. Again, a few million Australian dollars at stake and again those rights had been monetised but they were identifiable as the monetised product of copyright and in that case, again, that case was the property, as defined in the Australian

legislation, was divided in the way that we say was the correct approach in this case.

The only visual artist's case, to my recollection, is *Rodrigue v Rodrigue* 218 F 3d 432 (5th Cir 2000), 55 F Supp 2d 534 (ED La 1999). That was referred to in the Court of Appeal and doubtless your Honours have had the opportunity to read that decision. I simply note that that decision did leave open the highest and best use point. They called it a fiduciary obligation of one spouse to maximise the earnings of the other spouse. That point was expressly left open by the Fifth Circuit in that case.

1440

Quebec and France is quite different. I have provided you with perhaps the most accessible Quebec decision because most of it is in English and also it's probably the most detailed of the Canadian decisions, detailing why in Quebec copyrights are not divided in accordance with as community property. The reference in that, in the Quebec case, the second of the French decisions *Janin c. Dame Canal* Cour d'appel de Paris, 28 février 1938, we do have a copy of the translation for *Cinquin v Lecocq* Cour. de cassation [Cass.] [Supreme Court for Judicial Matters] Judgment de 25 Juin 1902, Civ., 1903 Recueil Periodique Siery [D.P.] 1.5 (Fr.), I haven't translated for you the *Janin Canal* but you can get a flavour of that from the Quebec decision in English if need be. But I make the, emphasise the point that that is a different approach to relationship property in this context and has its own philosophical and judicial history.

In terms of Germany, my friend has made some references, both in his written submissions and his oral outline, to the German monist approach and to provide you both in original and translation the *Gesetz über Urheberrecht und verwandte Schutzrechte* (Urheberrechtsgesetz – UrhG) Pat 1 Divisions 1-5 which effectively forbids transfer of copyright except on death, or it does do that and the differences between Germany and in England are my friend's authority Andreas Rahmatian (2000) 11(5) Ent LR 95, at 98, I don't know if you pronounce it in a German way or not, but Rahmatian if it was German, I think his name is Andreas so it probably is German and that is I think tab 52 of my

friend's bundle at 701.0120, which sets out the very different German jurisdiction as opposed to the English jurisdiction and by analogy the New Zealand jurisdiction.

Also managed to find other European jurisdictions. Europe is not – does not speak with one voice about this. There are a number of different approaches, both to copyright and relationship property law and to the combination and they are summarised in the Boele-Woelki text as well.

In terms of the policy point, I do want to, again I won't take you to it because it's a long article, but the Tal Itkin "When Love Ends: The Division of Copyright Between Spouses" (2022) 26 Marquette IPILR 97 article is of assistance in that –

MILLER J:

For my part –

ELLEN FRANCE J:

Sorry.

MILLER J:

I'm finding it really hard to follow your submissions because you don't give us tab references or refer us to the paragraph of your submissions where these citations appear, so it's necessary to try to –

MR DAVIES:

Sorry, Sir, I thought the version that you have is all hyperlinked?

MILLER J:

Well, I can't be following your hyperlinks as quickly as you're going through them and –

MR DAVIES:

I apologise.

WILLIAMS J:

And mine isn't anyway.

MILLER J:

If you just tell us what paragraph you're at so we don't need – or otherwise give us a tab reference in your bundles would be helpful.

MR DAVIES:

Sure, so the Itkin decision is –

KÓS J:

I think it's an article, isn't it?

ELLEN FRANCE J:

An article.

MR DAVIES:

Oh, it's an article, sorry. I might – put page 23 of the PDF.

MILLER J:

I'm not requiring you to bring them all up, one after another, it's just so that when I'm making a note I'm clear which article we're referring to or which case.

MR DAVIES:

Yes. So I think, yes, it's just the paragraph which has disappeared off the top of the screen, so that's the Itkin "When Love Ends: The Division of Copyright Between Spouses" and that article –

ELLEN FRANCE J:

And sorry, that's in whose, which bundle?

MR DAVIES:

That's in our bundle, your Honour. I can find you the number, sorry, I –

ELLEN FRANCE J:

That's all right, I was just switching between them.

O'REGAN J:

13.2 of your bundle.

MR DAVIES:

I'm obliged, your Honour.

ELLEN FRANCE J:

Thanks.

1445

MR DAVIES:

So what this author does is look at the philosophical sources, not only from the perspective of copyright, but also from the perspective of the family and what those same sources say in respect of the family, recognising of course that an artist has as par – or a central part of an artist's creative process is their environment, and the family is often a central part of their environment in that context. And so each of the Locke, Hegel, Mill is reviewed not only from the perspective of what their approach is to copyright, but also what the approach is to the family. And the concluding paragraph, it's about 10 pages long, that section of the article is – does suggest that an approach which simply sees the creative spouse as in isolation from the family is not necessarily firstly consistent with the sources that he cites, and secondly, doesn't fairly reflect the creative process.

And I guess that's a partial response to my friend's policy argument around the creative process and the value of creation. Recognising the family as part of that is in my submission important, and this article to the point that I've identified does attempt to set that out by reference to both the philosophers to which he refers, but also the other academic literature on the question of creation and family.

ELLEN FRANCE J:

So in terms of our legislation, are you saying the sort of correlative or analogous aspect is contributions, is that where it would play out in terms of our legislation?

MR DAVIES:

Yes, so it would provide a philosophical justification for the idea that because the family has assisted even inferentially or by context to the creative process, when the family is to separate, it is morally justifiable for the family to share in the fruits of that creative product.

WILLIAMS J:

Which fruits are we talking about?

MR DAVIES:

Copyright, in the context of this case.

WILLIAMS J:

Including moral rights?

MR DAVIES:

We do not seek moral rights in the context of this case. Another case might seek to argue that moral rights are in fact claimable, but in our – on the facts of this case, we make a submission that the highest and best use by necessity does not violate the moral rights provided in the New Zealand legislation.

WILLIAMS J:

Well that's right. You couldn't – your highest and best use could never violate moral rights because that would be illegal.

MR DAVIES:

That's right.

WILLIAMS J:

Right. So the question comes down to in this case where's the line, doesn't it? You both seem to be in complete agreement?

MR DAVIES:

Yes, I think the area of disagreement is that my friend has quite an expansive view of what moral rights provided for the New Zealand legislation is.

WILLIAMS J:

Yes, and you said that was orthodox and uncontentious. Do you think that's not correct?

MR DAVIES:

In my submission, well I guess there's two allied points I wish to make. The first point I wish to make is that I think there is a – perhaps on a theoretical level a difference between my friend and I in terms of the nature and extent of moral rights in the New Zealand Copyright Act, but in the context, the particular practical context of this case, we do not see any – the highest and best use getting anywhere close to a breach of a moral right or and in fact as – and as my friend indicated, it is likely to be a continuation of the sorts of use of the copyright that occurred during the relationship, on the facts of the case.

WILLIAMS J:

Right. So no wish to copy intimate paintings of the respondent?

1450

MR DAVIES:

I don't – no, if it's, if for whatever reason it – my client doesn't have an interest to create harm, my client has an interest to ensure that –

WILLIAMS J:

Yes.

MR DAVIES:

– that there is some recompense for, well, that the community of property is divided, but –

WILLIAMS J:

Right, just yes or no is good, just yes or no.

MR DAVIES:

Well, look, if nudes are going to cause an offence, then the answer is no, I mean, I think at a blunt level. What would be unfortunate, of course, is if that concession was then taken and then in a subsequent act significant money was made from the distribution of those paintings. But look, that's to the extent that my client's not wanting to cause the sorts of harm in the way – and I think he says that in his evidence and I think in our written submissions we do refer to it.

WILLIAMS J:

Right.

ELLEN FRANCE J:

Well, could we look then at the five categories.

MR DAVIES:

Yes.

ELLEN FRANCE J:

So if we take the first one, incomplete, unsuitable, et cetera, well, what's the position in relation to those?

MR DAVIES:

I mean, it's –

ELLEN FRANCE J:

Would you say no value?

MR DAVIES:

In practical terms, no value. I think that's the short point. The question is, properly identifying what they are, which has been a struggle and I can address your Honours on, but –

WILLIAMS J:

Well, a Family Court judge, if worst comes to worst, can do the inspection.

MR DAVIES:

Precisely, yes, yes, but –

WILLIAMS J:

It would be better if you had someone else do it, but...

MR DAVIES:

No, well, I – again, if your Honours left an impression that we haven't been actively attempting to reach settlement, that wouldn't be right.

WILLIAMS J:

You're just not able to.

MR DAVIES:

We just haven't been able to, no.

WILLIAMS J:

Right, so it's going to end up with a Family Court judge looking at everything and categorising it?

MR DAVIES:

Well, of course, we will have another effort to see whether or not we can resolve things on a realistic basis.

WILLIAMS J:

Good.

MR DAVIES:

It's certainly not our intention to unnecessarily prolong things.

MILLER J:

Can we be clear about the basis –

O'REGAN J:

Is it really that hard to identify category 1? Surely not.

MR DAVIES:

It depends on what is incomplete and not. But look, it's obviously incomplete, it's obviously incomplete. I mean, there's, is probably, I mean, I think we are dealing with about 200 paintings here so, I mean, there's going to be a little bit of give and take. I mean, 200 actual physical objects.

ELLEN FRANCE J:

In total.

MR DAVIES:

In total. Now, some of those obviously do fall into that category and that's, I don't really have an issue.

MILLER J:

Well, you can't make her finish them and you must presumably accept that she would not have sold them in an unfinished state.

MR DAVIES:

Correct.

MILLER J:

Therefore, they have no value.

MR DAVIES:

Correct.

MILLER J:

Right.

WILLIAMS J:

So it's a question of fact as to whether they're unfinished?

MR DAVIES:
Correct.

WILLIAMS J:
And you may be able to agree that.

MR DAVIES:
Correct.

WILLIAMS J:
Or you may have to leave a couple of them for a Family Court judge to make his or her own conclusion on.

MR DAVIES:
Correct. Can I just say that that table of five different categories, we've seen that for the first time today, so –

ELLEN FRANCE J:
Well, that's, I understand that, but –

MR DAVIES:
But my client does acknowledge that there are paintings in that category and "zero value" seems to be an appropriate concession for him to make in that context.

ELLEN FRANCE J:
And the same then for what's under the private collection?

MR DAVIES:
Yes, to the, yes, again, subject to identifying which those are and which those aren't, but they should be reasonably obvious and, I mean, if there is a, you know, some sort of rationality test applied to that, a District Court – a Family Court judge could easily make a decision if called upon. Hopefully that's not required.

MILLER J:
What do you mean a “rationality test”?

MR DAVIES:
Well, one can't say that everything is in that category.

MILLER J:
It's a question of fact, isn't it?

MR DAVIES:
It is.

MILLER J:
If she says that “that falls into this category of a work that I would never have sold” and the judge believes her, that’s fine.

MR DAVIES:
Yes.

MILLER J:
You have no claim to it and the reason you have no claim to it is because it has no value, it was never going to be marketed as part and that’s the decision of the artist.

MR DAVIES:
Yes, so if, yes, so long as –

WILLIAMS J:
So long as you’re not getting played.

MR DAVIES:
That’s right.

MILLER J:
Yes.

MR DAVIES:

That's right.

WILLIAMS J:

Yes, so that's where the rationality point comes from.

MR DAVIES:

Thank you, your Honour.

WILLIAMS J:

And that's why the civil law countries apply that standard, so that there's no abuse of the protections involved in the idea.

MR DAVIES:

Yes, yes, thank you, your Honour.

O'REGAN J:

But I mean, again, why haven't you been able to agree this up until now? I just find this incredible. You're now in your fourth court hearing. You're now telling us that, in fact, there's only 200 works and you accept that the personal ones to her which are obviously incredibly important to her, you're not claiming them, so why haven't – why hasn't that been made clear at the Family Court?

1455

MR DAVIES:

Well in the Family Court we weren't able to have this argument because the Family Court ruled that copyright was out, so – I mean the other feature of this case, and again there's no criticism of anybody concerned, but the other feature of this case was that up until moments before the hearing before Judge Grace both parties were unrepresented, and as a consequence, you know, there was perhaps more heat and less light than had that situation not arisen, and by the time Mr Fletcher was involved there was a, you know, the matter was set down for a hearing and then obviously the respondent in that case was unsuccessful in respect to the question of copyright, appealed. There was no representation

by the appellant in this case before the High Court so obviously no opportunity to settle, and then from there we're in the Court of Appeal and then by leave in this Court, so…

WILLIAMS J:

It looks like more process than there has been, in fact.

MR DAVIES:

Yes.

WILLIAMS J:

That what – the procedural steps taken overstate the opportunities for engagement, that's your point?

MR DAVIES:

I think –

KÓS J:

Anyway, we're making progress. So the private collection, I don't understand what art career showcase is, so there's a bit of a wiggle room in that category, but…

MR DAVIES:

I think so. If it's truly private and it represents somebody's form or something like that, I can absolutely see that there's going to be a continuum between that and something which is eminently saleable and – but you're just being played, so there's a – that's a question of fact the judge can make.

KÓS J:

But coming back to – I think you accepted or at least Ms Tucker accepted the proposition that we're talking about exploitation on a basis that's predictable, consistent with the way in which it had been exploited before, and which in effect Ms – the – I can't even pronounce her name, sorry. Help me with that?

MR DAVIES:

(inaudible 14:57:27).

KÓS J:

Right, I'll go with the appellant.

MR DAVIES:

Appellant.

KÓS J:

The appellant effectively controlled exploitation during the relationship?

MR DAVIES:

It was a joint enterprise, and the evidence I think is consistent with a joint enterprise. There's correspondence backwards and forwards.

KÓS J:

Well she had veto – she obviously could veto?

MR DAVIES:

Well she – yes. I mean, she was the artist.

KÓS J:

So you accept for the purposes of valuation, which is what we're effectively talking about here, that the use that you'd be valuing it on, you talk about highest and best, but it's not actually going to be best, it's going to be highest and consistent?

MR DAVIES:

Yes, I –

KÓS J:

Is going to be consistent with what was done previously?

MR DAVIES:

I had a discussion with my client about this over the break obviously and previously. I mean they were making prints, they were – they had sort of ephemera sort of cards and other objects with the art on them. That was their business. Now the fact that – I mean one of the issues is, you know, whether or not they did that to their potential and there were reasons why they perhaps didn't do that, but again, that doesn't seem to be a – the point you're making, it's the – we don't see in this case that there's some magic amount of money for something radically different from what was being done during the relationship.

KÓS J:

Well I think –

MILLER J:

Could you answer Justice Kós' question though, please, which was not what you were doing in the relationship, but do you accept a standard where the use is valued on the highest and consistent with past practice basis? In other words, you're not proposing to do something different that will limit what you can claim by reference to the specific works or types of work that were commercialised?

MR DAVIES:

In a factual sense, that seems to be what has been proposed here. I don't see factually any other potential outcomes, so I guess the answer to that is yes. Sorry, your Honour.

MILLER J:

But you're –

WILLIAMS J:

The contention is over the facts, over what the level of exploitation was item by item, and then extrapolating going forward perhaps on items that haven't been otherwise sold.

1500

MR DAVIES:

Yes, and –

WILLIAMS J:

Which means this is all a question of fact.

MR DAVIES:

It's all in a question of accounting, effectively.

MILLER J:

Well, sorry, yes, no, I'm still not –

KÓS J:

And in fact it's actually got nothing to do with the artworks. At the end of the day, this is a question of leveraging, for your client, the allowance that will be given or have to be given by the appellant in relation to the value of the house which is the primary asset.

MR DAVIES:

Yes.

KÓS J:

That's really what this is about. It's actually about a house.

MR DAVIES:

Yes. I mean, that's the practical outcome, it's just mathematically the outcome, I don't want to say that it's some sort of, you know, deliberate play in that regard, but it's that that's the mathematical outcome.

KÓS J:

Well, it's clearly going to be, the artworks are clearly going to be vested in her.

MR DAVIES:

Yes.

KÓS J:
She will control them.

MR DAVIES:
Yes.

KÓS J:
And the question is how much she has to pay for them, effectively, for her half of it.

MR DAVIES:
Yes, yes. I mean, yes, in that context, I, I guess, the question of valuation hasn't been able to have arisen because, before the Family Court, we were precluded from obtaining that evidence because of the ruling by the Family Court that that wasn't property, or wasn't relationship property, sorry, and then obviously in the appellate process there's no opportunity to introduce further evidence and it's not desirable. It was purely the point of law is "is this property/this is not property" and that's, I guess, how we've got here. Simply by way of explanation as to why that evidence isn't before you.

I am conscious that valuers will often take multiple approaches to ensure that they get to the right answer, so I am conscious that and, I mean, in my submissions I do refer to some valuation exercises which have been done in other cases, but there's often multiple techniques being used to cross-check one against the other and I am, or I would be, concerned if a decision appeared to preclude some of those cross-checks being undertaken, but sort of concede that ultimately it's up to an actuarial or accounting exercise or both or value – and valuation, so there is probably three components were it done properly, were that needed. But of course, we can't obtain that evidence and spend the money to undertake that exercise while we've got a challenge to the idea that this is relationship property.

ELLEN FRANCE J:

In, just so we're clear, when you say you don't want to exclude some of those options, am I right though that you have accepted the general proposition of highest –

O'REGAN J:

And best use.

ELLEN FRANCE J:

– and best, but with some link back to past practice?

MR DAVIES:

Yes, highest and best use, past practice being a guide to that. Yes.

MILLER J:

So that's a slightly different standard.

KÓS J:

That's, coming from valuation perspective, that's two inconsistent propositions. Highest and best is not going to be consistent with past practice if you have under-exploited. That's the kiwifruit, potential kiwifruit orchard example given before.

WILLIAMS J:

Unless moral rights –

KÓS J:

Yes.

WILLIAMS J:

– sets your ceiling, which I took you to be accepting? So, we seem to be slipping around in these ideas.

MR DAVIES:

Well, it's unlawful to act contrary to moral rights, so short point, as long as we have a joint understanding of what moral rights are and whether or not they are expansive or not expansive and, again, I haven't gone here, but in the documents before you, you do have discussions and I can't pinpoint it now, but you do have discussions as to the nature of those moral rights. I'm pretty sure the Eagles article –

WILLIAMS J:

Yes.

MR DAVIES:

– does at a fairly detailed level indicate that. You've got a District Court decision which does indicate, a New Zealand District Court decision, again, it's in my friend's authority and I can't pinpoint it for you, but that does seem to suggest that moral rights have some economic application in New Zealand, at least on a strike-out basis. But, you know, the fundamental point from the respondent's point is that he doesn't wish to create harm, he doesn't want to – apologies, your Honour, adopting your language, he doesn't want to be played, and I guess that's the – but yes, moral rights are a constraint.

1505

WILLIAMS J:

And you say that is – that proposition is coextensive with consistent past practice?

MR DAVIES:

I think in practice –

WILLIAMS J:

In practice that's the case, in this case?

MR DAVIES:

In practice in this case, it's likely to be consistent with past practice. Maybe done more efficiently or done in a better way, and again that's something for a – for, if need be, expert evidence to call us, call upon.

MILLER J:

That cannot guide our decision though, can it, we have no evidential basis for accepting what you say. I accept it's a genuine prediction as to how things will play out. What we've been trying to pin you down on is the standard. It seems to me there's a question of fact for the Family Court Judge into which of these categories these things fit. Is it unfinished, is it a private collection, is it a one-off painting which would never be the subject of copying, or does it fall into the last category, and your consistent response has been essentially that except for unfinished works, it all falls into the last category.

As a matter of fact, and what I'm suggesting to you, is that we have to approach it in a more disciplined way when we're looking at a standard, and one begins by finding as a matter of fact which category these fall into and how she dealt with them during the relationship.

MR DAVIES:

Yes. The –

MILLER J:

And that sets your highest and consistent value.

MR DAVIES:

So if we take them – so unfinished, I think we've dealt with. If we can take the next which is –

ELLEN FRANCE J:

Private.

MR DAVIES:

Private, again subject to the question of fact, subject not being played, that's accepted. Next is if there's some contractual or –

MILLER J:

And let's be clear, that involves a finding of fact that she as the artist had decided she would never sell those items.

WILLIAMS J:

Without being played.

MR DAVIES:

Without being played, yes.

KÓS J:

Yes, so in other words –

ELLEN FRANCE J:

What –

MILLER J:

Yes. It's a question of fact. If the Judge believes her, then that's the end of it.

MR DAVIES:

Yes, yes, a ques – that's a question of fact.

MILLER J:

Yes.

MR DAVIES:

And then if there's a contractual or – well if there's a contractual obligation not to copy, then that's a contract – that's a question of fact. And then the fourth is saleable, copyable. Now –

MILLER J:

Sorry, with respect to that third category, it's a question of saying where a painting that's now in the District Court at Blenheim will fall. In other words, because we're talking here by definition about works which have not yet been sold?

MR DAVIES:

As I understand the third category, and I may have misunderstood my friend, but as I understood the third category, that also concerns works which have been sold but subject to a contractual obligation not to reproduce.

MILLER J:

I think he was just describing a category of works, and so we're now – what we're now looking at is a category, is a class of unsold paintings and I'm proposing to you that some of them fall into this third category and that will be a decision that has to be made, may already have been made, but hasn't been actioned by the artist.

ELLEN FRANCE J:

Yes, I must say I had understood that third category to relate to ones that had been sold, but…

MR DAVIES:

That was my understanding.

KÓS J:

That's why we talked about five categories, the fifth one being a – the unsold works which then have to be allocated to the first four categories as part of this exercise. Does that make sense?

MR DAVIES:

Yes, yes.

ELLEN FRANCE J:

Or a –

WILLIAMS J:

Or a fifth category where IP hasn't been constrained. So one-off, unique paintings where there's no contractual obligation not to –

MILLER J:

Yes, but they're going to fall – the question is are they going to fall into this category.

ELLEN FRANCE J:

Yes, yes.

KÓS J:

Exactly.

MR DAVIES:

Yes, so a decision could be made to sell the art, the artwork on the basis that it is exclusive, it will not be subject to making prints, and it might therefore have a higher value, but that's –

MILLER J:

I'm just asking you who makes that decision?

1510

MR DAVIES:

In my submission, the artwork would be valued on a standard basis, the copyright would be valued on the standard basis and mathematically those two sums should equal the value of the exclusive artwork. So I think that's –

MILLER J:

Right, because you'd only put it in that category if you're going to get sufficient value from it.

MR DAVIES:
That's right. You don't agree not to take prints unless –

MILLER J:
Yes.

MR DAVIES:
– to do so is better than your next best use which is to sell it subject to retaining the ability to make prints.

MILLER J:
All right.

O'REGAN J:
Well, that's an economic judgement but it's not a creative or artistic one.

MR DAVIES:
Yes, for, yes, it is an economic judgement. So, I guess there, because in my submission, doing so would be not to violate any moral rights and therefore absent any moral rights argument it is then the highest and best use.

And then the fourth or fourth and fifth category are the copyright and works which have been sold but where the artist has retained copyright and that could be used to create prints or other works.

KÓS J:
But might not, because she might be concerned about flooding the market to the derogation of her reputation, so some of the works may well be sold on the basis that she retains the right to copy but wouldn't copy, so don't fall into category 3 or 4.

MR DAVIES:
Yes, so the valuation process would also value the consequences of over-exposure. So there would be a judgment to be made there, you know,

one could flood the market with very cheap, or with relatively – I mean, it's the same with any –

KÓS J:

Well, that's right, but –

O'REGAN J:

Honestly, this is just going to be the most ridiculously complicated, well, surely it's just not worth this fight, is it?

MR DAVIES:

Well, no –

O'REGAN J:

It's just crazy. I mean, you, honestly, it is just completely crazy.

MR DAVIES:

Well, our preferred approach will be to obtain a global settlement where these matters are all sort of dealt with on a knock-for-knock basis and we reach a pragmatic outcome. I mean, that – but we can't have that argument while we're faced with a contention that we're not even able to get a foot in the door because there is no, there's just no, this is not property, this is not relationship property. So, clearing that issue away, will then enable parties to resolve matters, I suspect.

O'REGAN J:

So what's your position on whether the Court should give some guidance about valuation principles?

MR DAVIES:

In my submission, valuation is an intensely factual exercise. Having said that, the discussion that we've had is a useful framework. Whether or not it would provide guidance for future cases is a matter really for your Honours. In my submission, I mean, the danger of doing so obviously is to have this case be

picked up as a template and applied in circumstances where an alternative process is better done. My written submissions, I submit that this is a factual exercise and should be left to the Family Court, bearing in mind that the Family Court often deal with hard to value property, they often deal with matters for which no, you know, valuation is easily obtainable and often just get on with it and it is a jurisdiction where, you know, the valuing of land and of, well, land often you have a land valuer, but when you've got plant and machinery and it's complicated and it's – or a business good will, or all those sorts of things, I mean, that is – those are problematic, hard to value items, the value of – we haven't got patents, but – or is there other entitlements, you know, they're all –

KÓS J:

Well, sometimes there are business judgements in those sorts of valuation exercises, but this is quite unusual because it adds a business assessment and an aesthetic assessment and so highest and best use is traditionally seen as an economic evaluation but in this case it may well be that the proper approach to take a valuation reflecting the aesthetic limitations is something well below best, if it's not maximising the value, because that will be inconsistent with the practice of the parties during their, during the relationship when they didn't do so then.

1515

MR DAVIES:

Yes, I – from a factual perspective, I mean it may arise and we don't anticipate that issue to arise here. The parties did produce prints, they did produce other ephemera. They sold those and, you know, subject to, you know, making appropriate judgements which probably I would do – I would still categorise them as economic because I mean the – one would get to an outcome. I mean, you know, it's just the same decision that one makes when deciding whether or not to value on a file sale basis or on an orderly disposal basis or on an in situ basis. I mean those sorts of judgements are made by valuers in this context. Yes, this is a specialised valuation area, but ultimately similar principles would apply, in my submission.

ELLEN FRANCE J:

Where is the best place to see in terms of the evidence about the production of other ephemera?

MR DAVIES:

So 301.0087 is close.

ELLEN FRANCE J:

That's fine.

MR DAVIES:

So that is the price sheet.

ELLEN FRANCE J:

Right, right.

MR DAVIES:

So it had original works and then prints of various description. It doesn't have cards and other things.

KÓS J:

Yes, but none of that gives us a sense of the proportion. I mean what, how did they allocate across the four categories? All that tells us is what prices were put on category 4, but a proportionality analysis across her whole oeuvre, we don't have.

MR DAVIES:

My instructions are that my client would've liked to have obtained that information, but was unable to.

KÓS J:

All right. Well we won't look. That's all right.

ELLEN FRANCE J:

All right. No, no, that's fine.

MR DAVIES:

And then it didn't become relevant in terms of the –

ELLEN FRANCE J:

Yes.

MR DAVIES:

– in terms of how the Family Court dealt with matters, so. I mean, obviously it has been pursued, but there is insufficient evidence on categories or on – I mean the evidential record, it was prepared by the parties themselves and as I indicated previously, heat and light.

WILLIAMS J:

So the essence of your response to these attempts to set a ceiling on what's allowable and what's not is that there's contention over the historical pattern, and once that's established it should be easy to work out what's in and what's out of the various categories?

MR DAVIES:

Yes, the – yes, I mean there's a number of – yes. I mean it should be easy or it is the work that the Family Court does on a routine basis. So it might be slightly more complicated because we're dealing with art and not businesses, but we call the evidence, we get an answer, and ultimately the Family Court is going to make a factual judgment.

MILLER J:

It seems to me it is potentially complicated because it's clear there is an argument going on here about a house, and it is clearly in your client's interests to have all of the intellectual property assigned to the appellant and to maximise its value. It may be, though, that she would prefer to sell most of the artworks that are in the District Court on the basis of category 3, and say: "We'll share that value as relationship property." Do you accept it will be her prerogative to do that?

MR DAVIES:

Yes, if she – yes. One way of valuing something is to auction it or sell it, yes.

MILLER J:

Right.

MR DAVIES:

And I expect that is her intention. The question will be, and it's partly artistic but primarily an economic judgement, is to, you know, the basis upon which that occurs.

KÓS J:

Yes, that doesn't solve the problem though, because she's not selling the copyright?

1520

MR DAVIES:

No and, yes, that, you're right, it doesn't solve the problem. It doesn't solve that particular problem. I mean, I –

MILLER J:

Well, if she puts them in category 3, yes.

MR DAVIES:

I mean, my hope and I can only put it that far, is that once we have addressed the issue of property and relationship property, the question of valuation, the path towards obtaining a mediated solution will become apparent, or negotiated outcome, it doesn't have to be mediated.

WILLIAMS J:

Right, I take you to be saying that the history of reproduction of this art is not as constrained as has been suggested and that therefore there will be room to move if one looks back at the past patterns and applies it to present or expected assets.

MR DAVIES:

Yes, certainly there is, there was a – and it is that reference that I drew the Court's attention to, 301.0087. That is, you know, there is evidence that that works.

ELLEN FRANCE J:

Well, I was going to ask you about that because that doesn't extend to what I understood you to mean in terms of ephemera.

MR DAVIES:

No.

ELLEN FRANCE J:

It covers, yes, it covers prints of two different types, but it doesn't suggest you're into cards, et cetera.

MR DAVIES:

No, it did, I think it's an agreed point that there was sale of other items, I'm not sure –

MR ELLIOTT KC:

It's not agreed.

MR DAVIES:

It's not agreed, okay.

ELLEN FRANCE J:

Well, that was my impression that it wasn't agreed.

MR DAVIES:

Right.

ELLEN FRANCE J:

Which is partly why I was asking, well, is this basically still something that has yet to be tested?

MR DAVIES:

Then that is, then if it is not agreed, then that is to be tested. Having said that, I mean, obviously the Court's entitled to take judicial notice that a card is not as valuable as a print which is not as valuable as an original work. So, you know, one has to sell many more cards in order to make the same amount of money for prints and then again for original works.

ELLEN FRANCE J:

All right, so where does that get us to?

MR DAVIES:

Well, I think, I think we have covered everything other than costs.

ELLEN FRANCE J:

Just one question I have, what do you say to Mr Elliott's argument about paragraph 42 of the Court of Appeal judgment?

MR DAVIES:

So, that's the attach –

ELLEN FRANCE J:

That's the attachment?

MR DAVIES:

The attachment point. I interpret paragraph 42 of the Court of Appeal's judgment as consistent with the *Copinger* decision that he's also cited, so the word "attached" perhaps could have been slightly better framed in that it is a right that's created at the same time as the work is created. It is separate from the work itself but obviously associated with it because the copyright reflects the original and I think the attachment is perhaps, if I can make the submission, the word "attach" in that context is a – it's a notion of being related to or being linked to rather than being part of but, in my submission, that doesn't change the rest of the Court of Appeal's decision. The rest of the Court of Appeal's decision clearly understood that there were separate – that the work itself was

separate from the copyright which again was separate from moral rights and they could, all three, could be dealt with independently.

ELLEN FRANCE J:

And was there something further you wanted to say in relation to costs in addition to your paragraph?

MR DAVIES:

Well, just in respect of the events a couple of days ago, we were provided with additional material and just to signal that it was probably about three hours reading in that material, so or six for both counsel, and I mean, I guess, if it had been provided in a timely manner we might have arranged ourselves slightly more efficiently.

KÓS J:

You mean you would have read it faster?

MR DAVIES:

I'm not quite sure how or what I would have done, but the – it was late in the piece, it did require additional work over and above that which we had already planned in order to prepare for today and the quantum of that was approximately three hours per counsel.

1525

ELLEN FRANCE J:

All right, anyone have anything else? Thank you.

MR DAVIES:

As the Court pleases.

ELLEN FRANCE J:

Mr Elliott.

MR ELLIOTT KC:

Your Honours, in reply, just I'll start and deal with the points in the order they were made. The first one was that in terms of past practice that the parties had the ability under section 21 to reach an agreement about the issues we are now arguing about and while that certainly is so, it does assume that there's equality of arms and equality of motivation to do so and the evidence that Ms Alalääkkölä has given is that she has felt under extreme pressure and has felt still under pressure in terms of the way that the copyright issue is being used not solely to increase what Mr Palmer gets out of it but also to control her and that's her evidence.

KÓS J:

I thought the point of this was that the arrangement could have been made and artists, essentially, it was a caution that artists should make such arrangements, given the complexity of the issues we deal with.

MR ELLIOTT KC:

I accept that, your Honour, but that's a contextual point, is that it assumes that she was able and in a position to do so and her evidence is that she was feeling aggrieved about the control that was exercised over her, so I'm saying but was there equality of arms in the relationship.

But I think the second point is that, until this case, no artist would have thought of this as an option. It has simply never arisen in New Zealand which is why this case has actually attracted so much attention. It is genuinely novel and the question is would any author in New Zealand have thought of this and the answer must be no.

The next point was, in terms of *Z v Z* –

KÓS J:

Which is strange, because lots of property developers think of exactly this point, something they often think of when, you know, the rosebuds of May fade into their mind.

MR ELLIOTT KC:

Well –

KÓS J:

Pre-nup.

MR ELLIOTT KC:

Well, perhaps so, Sir, but I think if you'd asked a copyright lawyer does your spouse or would you claim copyright if your wife was an artist, they would be horrified, so no.

WILLIAMS J:

Well, that might be why they're copyright lawyers and not family lawyers, Mr Elliott.

MR ELLIOTT KC:

Well, family lawyers would disagree. I accept that there are basically two schools of thought on this.

WILLIAMS J:

Exactly.

MR ELLIOTT KC:

And never the twain shall meet. But so in *Z v Z* the question about whether there is this distinction between earning power and artistic ability, we say that both of them have to be harnessed and we say that the harnessing is either done through a partnership agreement or deed and in the case of copyright it is harnessed through the painting, putting paint to a canvas. So, there is no distinction between the two.

I was taken by the analogy or the metaphor about the coin, about moral rights, that they are two coins in the same hand. I would, with respect, say it's one coin and it's the two sides, the economic rights and the moral rights, they are both part of the same piece of legislation and they both provide authors with

rights. It's the same coin, in my submission, if a metaphor is to be adopted and then –

WILLIAMS J:
And that cuts both ways, doesn't it, Mr Elliott?

MR ELLIOTT KC:
It does cut both ways but this is a – two forms of protection that authors have under the same regime. I would say it's one coin, not two.

WILLIAMS J:
Yes, as a, well, as a matter of copyright law, that's certainly so. But if the economic aspects of copyrights are property under the PRA, on your analysis the moral rights go there too.

MR ELLIOTT KC:
There is that risk. There is that risk and we accept that but what we say is the other side of that argument is it should go in the other direction, which is –

WILLIAMS J:
And that's why, you say, yes.
1530

MR ELLIOTT KC:
So that shows the – how close the correlation is. And I think that when you actually look at the difference between economic and moral rights, the point that is always made is that, well, you can't alienate moral rights but you can waive them and you can grant an exclusive licence to someone to use your rights, which on analysis, and I think this is what one of the papers in our bundle says, it means the difference between those two is minute in legal terms.

WILLIAMS J:
Well in practical terms, not in legal terms.

MR ELLIOTT KC:

Yes, well – yes. And I think that was – I can't remember which paper it is, but it was – and I think that that must be right.

The next point that was made about that there's no conflict between the PRA and the Copyright Act, well there isn't in terms of them both relating to property, but whether it's relationship property, that's where there is conflict, and because what it means is taking a valuable right off an artist which right has been recognised under another piece of legislation, and that's where the conflict is.

The – in terms of the argument that was made about the ribbon and the body of work being different before Ms Alalääkkölä came to New Zealand and that her art changed, well that's a matter which there's no evidence on, but even if that was the case, if her artistic style had changed from Finland to New Zealand and had taken on a New Zealand character, well that doesn't mean it's not based on fine art training in Finland, it means that it's been adapted and that's what artists do, but we say it's still part of the same continuum.

The next point I just wanted to pick up on is this question of the business, and I think the point was stressed, well, this was actually an art business rather than simply an artist continuing in her artistic pursuits, and to some extent that's right, but we do take issue with the evidence that was given from the bar about how it had been exploited. There's no evidence we're aware of of fridge magnets – sorry, of mugs, tea towels. Fridge magnets perhaps, but whether those were actually sold or gifted, there's no evidence of that. So we are concerned about this suggestion that there is this widespread commercialisation and we say there's certainly evidence of prints, but more than that, the evidence is simply not there.

The next point that was made was that the Copyright Act is not a code, and that was based on this Court's finding that the Crimes Act doesn't override – sorry, that the Crimes Act is not excluded by the Copyright Act, and that must be right because the Crimes Act and the Copyright Act both have criminal provisions in

them. So clearly the Copyright Act is not going to override the Crimes Act, but we say it is a code in terms of authorship rights.

And the – if I can just quote from a passage in the *World TV Ltd v Best TV Ltd* [Claim] [2005] 11 TCLR 247 case which is in our supplementary bundle, which is a decision of his Honour Justice Baragwanath. It's item – sorry, item 4 in our supplementary bundle. I'm quoting from paragraph 48. His Honour said that the Copyright Act is 181 pages of, and I quote at this point, yes: "Of meticulously specific text contained in the statute book, is to provide a legislative code dealing exhaustively with the subject of copyright of which its enforcement is a vital component." And I think that that's quite a profound statement in the context of this because what it is saying, it is meticulously specific and its focus is on enforcement and we say that both economic and moral rights are used to enforce the provisions of the code, and we say that the way his Honour saw that was really – it was a fully-encompassed statutory instrument designed to enforce copyright. And so I would suggest that that is a highly relevant observation in this area.
1535

I don't intend to deal in detail with the overseas cases. They – I don't think they really get us very far at all, and if anything, all it shows is that these various rock artists were monetising their artistic achievements and getting royalties for it, and, you know, we – and those royalties would have included in the case of *G v T* for example at paragraph 7, they were mechanical royalties paid by the record company. So the artist had basically relinquished their copyright and been rewarded for it and we have no argument against that, it's the same as if the appellant in this case had assigned her copyright and someone else was able to exploit it. So it's quite a different situation here.

In terms of the – I'm not sure if it's Itkin or Atkin paper that my friend referred to but if I could invite the Court to look at page 121 of that paper, because the author there does talk about this concept of equitability which has become important in the family context and in terms of relationship property, and the – what he refers to as distribution according to discretion and also the embracing

of what he called the "partnership metaphor", and that language is often used in our cases in New Zealand where the parties in a relationship are referred to as being in a partnership, and –

ELLEN FRANCE J:

Sorry Mr Elliott, what page was that at?

MR ELLIOTT KC:

That's page 121.

ELLEN FRANCE J:

121, sorry.

MR ELLIOTT KC:

And so – yes, so you can see about halfway down it talks about: "This trend has led to the development of the 'partnership metaphor.'"

ELLEN FRANCE J:

Right, thanks.

MR ELLIOTT KC:

So I think this, if anything, this is consistent with the point that we are making, because he goes on to talk about in that paragraph: "It supports property settlements based on two essential foundations: the first contractual, according to which the shared allocation expresses the intention of the sides," which is my past conduct argument, and the second is the normative test, which is basically assessed – you assess it in a sense of fairness and equity. So I think that what the author says there is actually entirely consistent with the position that we are putting forward, but to the extent it's relevant, because these – I think he's talking about Israeli law and I'm not sure how similar it is to ours.

And then I'll just finish off with some points on the question of the five categories, and I'm not sure that the position is entirely clear in my mind as to where my learned friend landed on that, but I think that the concern that I

have is that he really resisted even accepting that the private collection was the private collection, whereas Ms Alalääkkölä has given evidence that she kept paintings aside every year and that was a decision that she made herself and that was never challenged, there's no evidence that there was any dispute about that. So I can't see how the private collection could even be in issue, because we – if she is the sole creator of the art and the Court has accepted that she should control the copyright, which the Court of Appeal has accepted, and that is at 78 of the Court of Appeal decision where the Court said that Ms Alalääkkölä should "be able to choose if, and when and how to commercialise the Copyrights associated with them", and that's, ie, the paintings.

1540

So if that's what the Court of Appeal has found, there's no cross-appeal on that, I don't see how my learned friend can say: "Well, no, she shouldn't be able to choose, this is really a commercial business and we need to get valuers in, we need to get actuaries and accountants in."

WILLIAMS J:

Well, what he said was he doesn't want to get played.

MR ELLIOTT KC:

Well, I can accept that, your Honour, but you –

WILLIAMS J:

So, just need someone independent to go in and check.

MR ELLIOTT KC:

Well, I –

WILLIAMS J:

Sounds fair, doesn't it?

MR ELLIOTT KC:

No one wants to be played, your Honour, but I would submit that it's not Mr Palmer who is being played.

WILLIAMS J:

You would and the other side says the opposite and that's why you need someone independent to go in.

MR ELLIOTT KC:

Yes, so that's why we need courts at the end of the day, your Honour.

WILLIAMS J:

Don't you.

MR ELLIOTT KC:

Yes, unfortunately. So but what I'm saying is that if you look, there are two findings that I think are important and the first is the Family Court's finding, the finding of fact at paragraph 23 of the Family Court decision, that the appellant was the sole creator of the art. So, Mr Palmer had nothing to do with the creation of the art, he might have helped in buying canvases and maybe dropping paintings off, but he wasn't the creator of the art. So that's the first finding.

The second one is the one I have just taken you to, the Court of Appeal saying that the appellant should be able to choose if, when and how to commercialise and, in my submission, that is the basis upon which we are saying that this Court can put this matter to rest in terms of these parties but also in terms of defining, in this type of situation, how intellectual property is dealt with.

KÓS J:

You're accepting that this case is really about a house instead of 200 paintings? Your client is incentivised to minimise the value of the artworks and therefore to say that none would be commercialised and the respondent is incentivised

to say that everything should be put on the block and also we should reproduce as much as possible.

MR ELLIOTT KC:
Yes.

KÓS J:
So between that, there has to be lie some kind of principled medium.

MR ELLIOTT KC:
I accept that.

KÓS J:
And we've been suggesting in the course of this that it depends on a combination of, well, really a pattern of predictable use –

MR ELLIOTT KC:
Yes.

KÓS J:
– based on what occurred during the relationship and I think you're encouraging us to take that view?

MR ELLIOTT KC:
Yes Sir.

KÓS J:
Which means that there will be some things which your client will have to accept ought to be valued on an exploitable basis.

MR ELLIOTT KC:
Yes Sir.

KÓS J:
And others which will not be.

MR ELLIOTT KC:

Exactly, and –

KÓS J:

And how we work out how, or sorry, or how the Family Court works out whether to put things into category 3 with the restriction on self-reproduction.

MR ELLIOTT KC:

Yes.

KÓS J:

Or category 4 or 5 which would be 4 is multiple reproduction and 5 is –

MR ELLIOTT KC:

Yes.

KÓS J:

– simply sale of a block with a retention of the reproduction rights, goodness knows, but it would probably affect the past patterns of behaviour.

MR ELLIOTT KC:

Yes, yes, and I think if a Family Court judge was given very clear guidance that these are the categories, these are the areas where there might be some discretionary issues, I think that what we would have is really a resolution of the issue that is really bedevilling this case which is, first, it was about copyright, ownership, control, and now it's about valuation and I'm just concerned that if we allow this matter to go back to the Family Court on an open basis we're not going to resolve things and when we talk about we hear evidence of actuaries and expert evidence, I shudder to think of what is going to happen at the next level.

WILLIAMS J:

What choices are there?

MR ELLIOTT KC:

I think, your Honour, with respect, that if this Court gives a clear direction, the parties will have to go away and sort themselves out based on that direction, if they're told that's what's going to happen.

WILLIAMS J:

It depends on what the direction is, doesn't it.

1545

MR ELLIOTT KC:

Well, yes, yes, to an extent, your Honour, but I think that – I think the approach that we've put forward is a principled one. It is based on what the parties themselves have chosen to do. It's consistent with the principles of the Act to have an outcome which is fair, equitable and expeditious and affordable. That is the –

WILLIAMS J:

It's hard for me to see this scenario producing anything other than the requirement for an expert valuation on the net present value of future exploitation of exploitable artworks. That the content of which, in each category, is going to be a matter of contention, even before the valuer gets there.

MR ELLIOTT KC:

I don't think it will, your Honour, because I think that – I don't think there should be any debate about some of the areas, like whether the painting is complete or not, because that should be the artist's sole prerogative and, likewise, in terms of whether something would be sold as a one-off piece or as prints we have past practice. We can say: "Well, look, we did it on one or two occasions, it was only a certain type of painting, or it was," you know, we've got – and the artist owner controller would need to say: "Well, this is what we did before." She can't make up scenarios and say: "Well, only if." So, she's stuck with what happened before.

WILLIAMS J:
As long as that pattern is clear enough –

MR ELLIOTT KC:
Yes.

WILLIAMS J:
– for there to be no doubt between the contestants now about its effect on the current position.

MR ELLIOTT KC:
I accept that, your Honour, but all we can do is the best we can do to actually give the parties, you know, guidelines or guardrails to sort it out.

KÓS J:
But responsibly and very commendably, counsel for the respondents have accepted that there, it's not going to be highest and best use.

MR ELLIOTT KC:
Yes.

KÓS J:
But does have that qualification and that's important.

MR ELLIOTT KC:
Yes.

KÓS J:
And a very sensible concession to make.

MR ELLIOTT KC:
Yes Sir, yes, it is a sensible concession and I'm not being critical at all of my friends, they've been very responsible about their approach.

In terms of paragraph 42 of the Court of Appeal decision, I don't believe that to try and gloss over and say: "Well 'attached' means associated with," I think it goes more than that because it actually is a philosophical question of where the artistic abilities sit in this equation or in this continuum and, in my submission, the Court of Appeal got it wrong on that score, with respect, and I don't think it can be glossed over.

On the issue of costs, we resist that request. We say the supplementary bundle was large but it was also large because we had included decisions in there which we felt may – on issues which may come up based on questions from the Court and we wanted to have that available if we needed to go to it. We did tell our friends not to read three of the documents, if they chose to do so, well, we can't help that, and we also gave them all the page numbers the day before, so I think that's really –

KÓS J:
Very commendable.

MR ELLIOTT KC:
So, unless your Honours have any questions.

O'REGAN J:
But do you otherwise accept that costs just follow the event?

MR ELLIOTT KC:
Yes, your Honour.

ELLEN FRANCE J:
Right, thank you, Mr Elliott.

MR ELLIOTT KC:
Thank you, your Honours.

ELLEN FRANCE J:

Thank you, counsel. We'll reserve our judgment and deliver it in writing in the usual way. Thank you, we'll retire.

COURT ADJOURNS: 3.49 PM