IN THE SUPREME COURT OF NEW ZEALAND SC 62/2005

IN THE MATTER of a Civil Appeal

BETWEEN **R FELTON AND N I FELTON AND OTHERS**

Appellants

AND **AF JOHNSON**

Respondent

Hearing 24 February 2006

Coram Elias CJ
Blanchard J
Tipping J
Anderson J
Henry J

Counsel D Smith and JC Bassett for Appellants
DG Hurd and M J Allen for Respondent

CIVIL APPEAL

10.02 am

Elias CJ Thank you.

Smith May if please the Court, my name is Smith . I appear with my learned junior, Miss Bassett for the appellants.

Elias CJ Thank you Mr Smith, Miss Bassett.

Hurd May it please the Court Hurd with Miss Allen for the respondent.

Elias CJ Thank you Mr Hurd, Miss Allen. Yes Mr Smith.

Smith Thank you Ma'am. It's not my intention, unless the Court so wishes, to go through for want of a better word, grammatical analysis s.47(2). In my view the various approaches that are set out in the judgment by His Honour Justice Young and by the majority, together with such submissions that you have in writing, I think cover the matter and have attempted apparently manfully to cover the matter on a positive analysis, but at the end of the day I think it has to be acknowledged that whatever way one looks at it is a section which is fraught in terms of coming to an easy conclusion concerning the interpretation of it and for that reason it's my intention to deal with the matters which I think have to impinge upon what this section is supposed to be looking at. The major difference in my view between the appellants and the respondent is that the respondent is looking at the purpose of this legislation through to 2006's eyes, not 1976 eyes and that the second thing is that the respondent and in large part the majority of the Court of Appeal have focussed more largely on that situation where an agreement made the creditors even though the spouse is receiving only 50%, in other words by taking into account the terms of the protected interest which comes in under the Act, you can actually get an anomaly between 50% and the amount which is provided as a definite amount which the spouse is protected by. And in part also the majority decision overlooks the affect of s.47(3) which essentially removes from consideration those agreements which are met or entered into by parties who are separated or are in a battle concerning the matter under those areas under s.25(2) in terms of the Act. So essentially what s.47(2) is attacking are those agreements between as we have in this case a husband and wife who are happily married and so remain happily married by and large. If I can then come back to my first point which is the 2006 Act and the 1976 Act. The Court is well aware that the 1963 Act for Matrimonial Property was a radical change from the law that stood prior to that. For the first time we were able to consider contributions. Now in the documents which you have from both the appellants and respondent, you can see that one of the concerns that the legislator had was that in terms of dealing with the contributions it seemed that by and large spouses were not receiving what they intended to happen which was to get a proper acknowledgement of their contribution, albeit not in monetary terms and that a number of other decisions coming out were giving a minority interest to the spouse, and in those days by and large the wife. And the 1976 Act was actually just as radical a change because it removed that broad judicial and provided as Fisher says an elaborate and detailed code for classifying and dividing relationship property and it was based on the proprietary equality in marriage and that was really the first time that our legislation has enshrined that and at that time that was a radical move. We had the majority of situations where the property was in the husband's name, even allowing for the contribution of argument the situation that family lawyers would regard as standard which was to look at the matter as a 50-50 split was not in the psyche of lawyers and/or public at that time, and indeed it still hasn't got into the psyche of the public in total. It's an area I do some work in and I still think

that 20% of males still believe that what's in their name is theirs and have some difficulty understanding that concept even after 30-odd years. So in terms of what the legislator was doing was actually moving to put in a situation which made it quite clear that the wife or spouse as the case may be was entitled to a 50% share of the assets overall, putting aside the questions of separate property. In doing so that got stated intentions to not interfere with the rights of creditors in doing so and the steps which are set out in the Act in s.47 in particular, to provide some certainty to creditors that they're not going to be denied the ability to pursue their debtor. Now the situation is a little bit more complicated in the sense that I think the concept the legislator had as to who debtors were was really just a simple buyer seller type of debt as opposed to the situation that we have here where creditors have actually been caused by a tort and a judgment rather than by a.

Elias CJ What do you base that submission on?

Smith That statement Ma'm?

Elias CJ Yes.

Smith In the respondent's bundle of authorities at tab 4 page 30.

Elias CJ What I'm asking you is on what do you base the submission that Parliament contemplated some categories of creditors but not others?

Smith I don't think they did it in terms of the legislation, but in terms of the discussion that took place in the papers. There is a part here, and I will find it for you Ma'am, which I think is the report of the Special Committee where they are talking about creditors would be presumed to understand the effect of the Act and that they would therefore know that a wife or a spouse was able to access 50% of the property and that when they entered into relationship transactions with a debtor, they would be taking that into account in terms of making their assessment as to whether they were financially viable or not, and that's really basically giving credit in terms of an account or the like. And of course the definition of 'creditor' has been extended out in terms of the case law to people who include people such as the appellants in this case, and I don't know that the legislator actually even contemplated that at the time that it wrote those words. Now those are just the words of the Select Committee and in terms of the draftsman I can't make any comment but certainly the way they were approaching it seemed to be on a more simplistic level than perhaps we are here.

Tipping J Is there anything in the materials which you're at least implicitly referring which explains why it was chosen to have these sort of transactions as void as opposed to voidable?

Smith Not a word Your Honour.

Tipping J Not a word.

Smith Not a word.

Tipping J Thank you.

Smith And in my view then we are left with that word meaning what it means, and that's one of the difficulties I see about the situation that is proffered by the respondent in that in my submission it really requires that we are to be treated as voidable if we are required to commence proceedings to set aside the agreement before it can be deemed to be void but in the two year period then that really is a voidable situation as opposed to being void, and the legislature as Justice Young said in his decision clearly was aware of the differences and indeed does so in terms of the s.60 An Alienation of Property Legislation. And the point that I'm making then is that the intention of legislation at that time was because of the radical change that we had in terms of the way property was being dealt with between husband and wife. They sought to move towards the position that I think that probably mentally most people have got to today but at that time the concern was to ensure that creditors were not interfered with and on that basis there was an allowance made for creditors who were affected. No the point has been made in terms of how do we defeat creditors, particularly if you become a creditor after the two-year period and it's something I've tried to exercise or tried to consider and I have to say I find it a little bit difficult to understand how you would be defeated by an agreement which had occurred to your having any relationship with somebody, but be that as it may, I think that in my submission the length that the legislature went to, to ensure that creditors were not interfered with. The thrust of what I'm saying is that the Act gave to spouses rights which they did not previously have and the respondent is taking is on the basis that those rights are invalid and therefore working back they can't be interfered with. S.47 in my submission was actually to try and properly maintain the position for creditors so that they were not interfered by the concession if you want for a better word of being made to spouses. I mean there was nothing to stop a husband transferring property to his wife prior to this Act but of course it had to be for valuable consideration if it wasn't going to be opened to be impugned and this Act removes the question of valuable consideration provided you comply with terms of it, so it enables a wholesale transfer of property. Now one of the concerns in relation to as I have said is in relation to people who are in a genuine breakdown of marriage but they by and large are excluded by s.47(3) so that we are in a situation where the legislature by provision of s.47 and 47(2) in particular, are looking at those cases where it is really either an estate method of moving assets around or is one while being unable to prove it under 47(1) really does have an effect on the creditors per sé. The third point that I would like to make is that the references that are in the Insolvency Act sort of overlook the effect of s.54 to 57 of that Act. The Insolvency Act doesn't give creditors time to make their claims; in

fact it only comes into effect once you've got an Official Assignee who's been appointed. It sets the limit to which the Official Assignee can look back from the date of adjudication to attack certain transactions. S.47(2) of the Property Relationships Act however looks forward. So when spouses entered into the agreement, assuming that s.47(1) doesn't apply, they know that the agreement will only be able to be attacked by those who become accredited and are defeated by the agreement within the two years or the Official Assignee if appointed within two years. Now if the Official Assignee is appointed within the two year period any application under 47(2) would almost certainly have to be filed after the two year period has lapsed on a practical basis, otherwise the Official Assignee is going to have to be appointed pretty quickly after the agreement has been entered into from practical purposes for it to have any benefit at all and in fact I'm advised by the Official Assignee's office that it could take years before they actually have got around to actually finding out what's gone where in the case. So in that sense.

Tipping J They might have to lift their game.

Smith Well yes that is a consequence but whether they can lift their game sufficient if they're appointed one week at the end of the two year period or not.

Tipping J Well that's fair observation but I'm personally not all that impressed by the deleterious of the Official Assignee interpreting a Statute.

Smith Well I think there is a number of us that might feel the same way Your Honour but.

Tipping J Perhaps I shouldn't have used that word but you know the fact that it takes time surely I agree at the margins it could create some anomalies but it can't be a serious point in general terms can it?

Smith Well that I think comes down to resources and also how straightforward the people are that they're dealing with but the reality is that it is not something that's not going to happen overnight so my point is in a sense s.47(2) can be seen to be consistent with the Insolvency Act Provisions. It sets the time limit for those who can qualify to apply but does not set a time limit on when those persons must file and serve their application. The other point of course is that if the Official Assignee is appointed during that period and later applies under s.47(2) then all creditors will benefit from any recovery that comes from that. Those are the major differences between the Official Assignee that is taken by my learned friend in his arguments. If I could just refer to some specific paragraphs in his submissions which follow on.

Tipping J Just before you go on I'm sorry to have to inform you that I haven't quite got a full graft of what your point is in relation to this 76 eyes and 06 eyes. Are you able to state it shortly and simply as you can?

Smith Yes I can Sir. If you have a look at page I think it's 133, paragraph.140 of the case which is the judgment of the Court of Appeal. The Court was talking about the effect of s.47 is that even agreements that are made to settle legitimate claims under the Property Relationship Act are subject to creditors' claims whether they are still together or separated and that's because the claims under the Property Relationship Act is not counted as fully adequate consideration. And then says "there seems no obvious reason why the interests of creditors should after reasonable periods have elapsed be favoured over a spousal partner who has received no more than his or her entitlement under the Act" and the same point is made down at the bottom of that page at p.144 where they said they agreed with my learned friend that there's no reason why a spousal partner who's received no more than his or her entitlement of the Act should be worse off than a person receiving a give, and the point I'm making is to make that statement you must be working on the basis that the entitlement is 50% in terms of what is available to creditors and that picks up what the intention of the Act was in terms of giving a spouse the right to obtain 50% but that was the concession and to the spouses made by the law and what the Act is doing back in 1976 is saying what's available to creditors is something greater than that, in other words it eats into, or may eat into, what the spouse's entitlement is and you have the whole concept of protected interests in terms of land with a set figure involved which actually means, particularly on today's property prices, you're going to have a much greater than a 50% share in the matrimonial home which may be available to creditors and that was.

Tipping J What makes you say that the majority in the Court of Appeal was using the expression "entitlement" under the Property Relationship Act as meaning 50% as opposed to the protected interest? Is it evident from somewhere else in the judgments that that's what they were meaning?

Smith Not it's not Your Honour, but that's the only way in which the interest of creditors could be favoured over a spouse or partner, unless the creditors are going to eat into the unprotected interest that's involved then in my submission the only way that that statement can stand is if they have in their mind that the spouse should walk away with the 50%. I'm not quite sure from Your Honour's response if I've actually answered your question.

Tipping J I am cogitating.

Elias CJ If they had been applying a 2006 lens what would they have said?

Smith That the spouse gets 50%, in other words it overlooks the whole provisions about unprotected interested. I mean the thrust of all the legislation is that's where we are heading for and I'd have to say from a personal practitioners point of view I find the whole protected interest thing really should be looked at again in that that if we really have moved that way the protected interest should be what the spouse's 50% share is, but that's not what the Act says. So that in 2006 the feeling of unfairness in my submission comes from the perception that anything more than 50% being taken on behalf of the husband's creditors is unfair.

Tipping J But doesn't this have a bearing more on whether or not it has the effect of defeating creditors rather than the two year point? I know you're seeking to roll them up but analytically I can understand the bearing of this point on the question of whether there is or is not in effect but where I'm still struggling is in relation, are you saying for policy reasons we should do everything we can to make it as good as possible for creditors. Is that the real guts of the argument?

Smith That is the real guts of the argument because the Act says that creditors' rights will not be interfered with and that's why I'm saying that this Act made some large steps forward in terms of what it gave to the spouse of a relationship.

Tipping J I understand the point now. It's just that it was no doubt my fault, a little elusive until I put it in that trenchant way.

Smith From that point the Court of Appeal has moved to see this creditors situation within the Insolvency Act context and as in p.143 which they said they thought that in the Insolvency Act a two year period is generally thought sufficient time for creditors to make their claims, but in fact that's not what the Insolvency Act says in those areas, it's actually what the period is for claw back in terms of the Official Assignee and the submission is in terms of creditors vis a vis, people in a marriage which still exists this is not part of Insolvency Law, although of course they may be insolvent which is why the Official Assignee is obviously referred to in s.47(2).

Tipping J The choice of two years though can't be coincidental. It is the traditional period which is allowed as being the appropriate period to go back into something that has occurred. Now it's not a direct analogy here but surely that's why the two years has been chosen.

Smith I agree that that probably was why the two years was chosen but in all those other examples you have matters which take place before hand. In other words the making of somebody bankrupt in terms of the Joint Family Homes Act. You have a whole registration in advertising process.

Blanchard J But that's looking backwards, here you're looking forwards. At the point when something has happened it really is exactly the same isn't it that this Act is saying there has to be something occurring within the next two years. In the Insolvency legislation it's the insolvency.

Smith Yes and in this Act it's saying it's the defeat of creditors and in my submission it is the Act that has to occur not the issue of the proceedings to prove that.

Tipping J Could I just follow up on that? Is not the analogy with the Insolvency Legislation with this parallel two years looking backwards and looking forwards, perhaps captured by the concept of vulnerability to impeachment and looking back you're vulnerable to impeachment if it's happened within the last two years, looking forward it's vulnerable to impeachment if something happens within the next two years. The key question perhaps is what has to happen?

Smith Correct. That's exactly the point that I was making Your Honour, and my submission is that what has to happen is that you are defeated by that agreement that has been entered into.

Elias CJ And it then inures only to the benefit of those creditors actually defeated? Is that part of your argument.

Smith That's correct, and only to the extent that they are. I mean it's interesting that in 2002 the only alteration to this section was made which I think was a response to His Honour Justice Blanchard's decision to bring in to the extent that has that effect and that the rest of it stood, but of course the argument we're having today hasn't been had before of any great extent. I mean **Neill** wasn't a case on point per sé and there's not really been any.

Elias CJ But before you get onto that because I think that's important, how do you reconcile with what you're saying with the fact that the Official Assignee is in there – the Official Assignee is in there?

Smith In the Section.

Elias CJ Yes, because the Official Assignee is there for all creditors.

Smith Yes they are but the Official Assignee must still establish that the creditors have been defeated so they have the same hurdle as the appellants in this particular case in having to prove that there has been a defeat. Now my learned friend made the submission which is possibly correct that if the Official Assignee manages to overturn it then whatever monies the Official Assignee garners is going to be for the benefit of all creditors whether those were defeated or not, that is in some sense similar to s.60 in terms of alienation of property but it still comes back to approving of the defeating of the creditors by the agreement.

Tipping J Don't you have to challenge it within the two years, because otherwise if the two years was simply definitional of creditors able to challenge there doesn't appear to be any time left and you'd be in the same position as if it was an intentional thing under subsection 1 and there seems to be at least on one view a studied difference between the open-endedness of subsection 1 and the time restriction in subsection 2.

Smith Well I think there is a studied difference and that, I'm sorry to keep going back to my original submission, but basically because of the rights which were given to the spouses that the legislature is limited to the extent which you can say you've been defeated by this agreement. In other words fraud defeats all in the sense of if somebody's defrauded you intentionally but where unintentionally they have caused creditors to be defeated then they have limited such creditors and it may well be that the defeat could carry on for a longer period than that.

Tipping J But could you find that someone as long as they qualified as a creditor coming into existence as such within two years on your submission that creditor might be able to wait indefinitely to challenge? They probably wouldn't but theoretically there's no time limit in relation to which the parties to the transaction can feel secure.

Smith Your Honour if we forget about marriages isn't that the situation in terms of disposition of property between two individuals?

Tipping J When there's intent but here we have seeming to me an intentional difference of some kind between intent and effect.

Smith Well I don't know that we do have that huge difference because if in fact you had two individual people there's going to have to be consideration for that disposition and if it was the other alternative which was a huge gift, in other words you passed over the entire mansion, then I would have thought that you were quite able to run an argument that in fact it wasn't a gift at all and it was in fact intent to defeat under the intention aspects because of the total disproportionality of the situation, so in the normal course of things if there's not valuable consideration then you're probably entitled to go back and say that this has been done with the intent to defeat creditors. I mean we've got the whole back up in.

Tipping J But you're not with respect addressing the issue. If you can show that you're in a different category. I'm concerned with cases where you can't show that but you can show that the minds were perfectly honest but for whatever reason it has the effect of defeating creditors. That seems to me to have been treated by Parliament as a discretely different category which has this two year business in it. Now if the two years was definitional only of creditors it would have the same open-endedness as to time as you have in relation to subsection 1,

which is understandable in the intent situation but not nearly so understandable in the effect innocent situation.

Blanchard J Because we have open-endedness as to time for the Official Assignee under the Insolvency Legislation and for a Liquidator under the Companies Act in the parallel provision but would it have been intended to have open-endedness for creditors rather than the Official Assignee who could perhaps against the odds be expected to move fast.

Smith Well it depends Your Honour as to how much importance you place on the statement that this Act is not to interfere with the rights of creditors and if I could come back to His Honour Justice Tipping's point in terms of that. I have a real difficulty because I've sort of tried to cogitate the point you've said before, a real difficulty of thinking of an instance such as you postulate in real terms.

Tipping J You mean the difference between intent and effect

Smith In terms of if you have two people who have an agreement which has the effect of defeating creditors how can that occur unless there has been no proper consideration and where can that occur?

Tipping J Well if it's for full value it's unlikely to have that effect, so there will necessarily be an inadequacy in value, but there may not at the time of the transactions been put into effect have been any creditors at all and no-one was thinking that you're doing this to defeat creditors purposefully but it so happens that as events later full out that it does have that effect. With great respect I would have thought that was a classically simple and obvious situation. I mean you might be doing it perfectly innocently as between husband and wife, everyone's fine, no financial trouble at all, but either the husband's about to embark upon some hugely risky venture or just through bad luck he goes bust within the two years, well then you can claw it back but if he goes bust within the three years can you?

Smith Well that really comes back to the comment that I made to the Court before which was I have some difficulty in understanding how you could actually be defeated if you became a creditor in most cases afterwards.

Tipping J Because there would be less money there than if there would have been if the transaction hadn't taken place.

Smith Yes I suppose that's right.

Elias CJ Well it may be and I meant to check and haven't, the relationship between this legislation and the Insolvency Act. I don't know whether there is any direct reference in this legislation to the Insolvency Act is there? But on one view it might be that if there's no insolvency this provision benefits the creditors who are defeated during the two-year

period. If there is an insolvency three years down the track the Official Assignee can collect in the additional assets to the extent that creditors during that two-year period were defeated. So it may operate slightly differently as between the creditors and the Official Assignee.

Smith Well I think it probably does and I think that's been highlighted to some extent by some of the discussion that's in the papers that you have. I'm not for a moment contending to this Court that the legislation is perfect, I think my starting point is that it is imperfect and that we need to consider what the intent was because of that imperfection.

Blanchard J In any competition for the worst drafted piece of legislation this one would be on the short list.

Smith Your Honour has struggled with it before and what amazes me is that the only change that was made in response to **Prowse** was the addition that we've got to s.47(2) and not a proper look at the rest of it.

Blanchard J Unfortunately this case hadn't come up then and perhaps the drafters whose minds are on other things because they were doing a major revamp really didn't think their way through the problem.

Tipping J Well for one thing the concept of devoidness but only to a certain extent is shall we say a little bit interesting jurisprudentially.

Smith I have difficulty with the concept. It's actually an oxymoron or something and it doesn't make sense and that's why in my submission the appellant's point of view actually fits better with the use of the word void rather than that contended for by the majority and by my learned friend.

Henry J Mr Smith the practical consequence of the argument would seem to be that qualifying creditors would never bother about subsection 1 and always turn to subsection 2.

Smith Well no, this is a classic case in point Sir as to why that's not the case. This matter was then trialed before Justice Venning was won on both 1 and 2. The difference between the amounts was some 50%. If we had voided the agreement in total the amount that was available from that was something in excess of $775,000, but by the limitation under s.47(2) as to the extent to which it occurs that was cut back to the $552,000 that the judgment was given for. And I would imagine also that there may be some cases where setting aside an agreement on the intentional basis rather than s.47(2) was applicable because of the type of properties because of the type of properties that were involved and the difficulties of tracing and soforth rather than an extent to which they were dispossessed. Ma'am, you wanted me to come on to **Neill**.

Elias CJ Well I think it probably does need to be addressed. You said that we're not in that situation.

Smith Well only in the sense that if I can just find it, tab 4 in the appellants bundle of authorities. In that situation the Official Assignee was appointed 18 months after the agreement concerning the matrimonial home and soforth was entered into and so the question of whether they were inside time or not was not really at issue because clearly they were in that two year period.

Blanchard J Did the Official Assignee take any action within the two year period or was he merely appointed?

Smith Well the issues before the Court were reading from the headnote firstly that the time that the effect of the agreement must be determined and secondly whether the agreement had the effect of defeating the bankrupt's creditors, so the discussions which you have from His Honour as he was then Justice Richardson dealing with **Official Assignee** against **Whitehead** which was the decision of Justice Thorp and that's at page 17 of the case or 332 of the decision, is where he read the section in two steps, declares a n infringing agreement shall be void and the second step is to fix the duration of the voiding effect as two years after its making, the effect is assessed at the making which is the concern that they had in this case and if the impact adversely affects creditors during the two-year period, the agreement is void, and then goes on to make the statement that where the agreement is voided during the two-year period its status in that regard is not affected by failure to commence proceedings within that period. Now on the face of it that's at odds with what Justice McKay came to in the same case.

Henry J I'm not quite sure that it is Mr Smith. When you read it that passage is dealing with the issue of when the effect of the agreement is to be determined and that's what you see on the preceding page under the heading to that effect and it seemed to me that the Judge was doing no more than saying that because the adjudication in fact had devoiding effect, there was no need for anything further to be done and I'm not at the moment reading that as the general statement which is in conflict with what Justice McKay said.

Smith Well it's interesting Your Honour because that's in fact the statement which **Fisher** and the other authorities picked up on and have of course been referred to including Justice Venning in terms of subsequent cases.

Henry J I would have found it surprising too that there would be conflicting statements on a matter of principle which neither Judge seems to have bothered to refer to the other view on.

Tipping J And the third Judge agreed with both.

Henry J I'm just wondering whether people are not reading too much into that passage in Justice Richardson's judgment which is concentrating on the position of the Official Assignee and the effect of adjudication as bringing into effect his rights under s.47(2).

Smith Well if I could come back to the question that was asked before, and I've forgotten which one of Your Honours had asked it in terms of did the Official Assignee actually take some steps, and if you look at the part which Justice McKay refers to which is 327 of that case, his situation was once the two-year period has lapsed without an insolvency, so His Honour was indicating the appointment of the Official Assignee per sé was sufficient other than issuing to set aside this agreement and then puts that as correct the Official Assignee in a better position than creditors who are defeated otherwise and that would in my submission seem to be inconsistent if they are both dumped into s.47(2) together, why should it be that the Official Assignee has a better run at this than the creditors.

Henry J Was the Court wrong to hold that the Official Assignee did not need to commence proceedings to rely on s.47(2)?

Smith In my submission, no, and in fact the point is that the agreement being void then the steps they take to put it aside you take.

Henry J But the Court there seemed to treat adjudication as the trigger to voiding the agreement. What would trigger it for a creditor?

Smith I come back to my submission and in my submission it triggers it when the effect takes place.

Elias CJ If it's within two years, yes.

Smith Within the two year period, yes absolutely Ma'am. I guess at the bottom of all this is that I have a concern that if the majority's position stands we end up with a piece of legislation and it may well be that we'd have to go back to Parliament but we end up with a piece of legislation which is in the majority of cases unworkable and that's purely because, and I've dealt with this in my written submissions, how do we know somebody's done a Relationship Property Agreement. It's not registered, there's no public notification of it and so the only way in which you get to that situation is after you've done exactly what's happened here is that you've gone off and got judgment against them and then start to take some steps to try and enforce it. Now in this particular case these proceedings were actually started before the judgment became but that was a matter of fortuitousness because of other proceedings which had been taken against the **Johnsons**, but in 99% of the cases the section is completely worthless for creditors per sé. The situation is that you have to kick off within the two year period

Tipping J Could I just take you back to Justice Richardson in **Neill's** case and at the very bottom of page 322 of the report His Honour says in such a case, that is the type of case he's just been referring to, and as Justice Smellie concluded "the second limb brings about a voiding against the Official Assignee on occurrence of bankruptcy without the intervention of the Court. What His Honour is there saying as I read his is that the voiding takes place by force of the Statute not by any order of the Court and it's in that context the potentially problematic next sentence that we've been focusing on is said. I agree that the last sentence is apt to mislead but I'm inclined to think and I put this to you because it's a very important aspect of the case that the context demonstrates that that can't be what His Honour meant. He's focusing very much on the spontaneous avoiding if you like. That's the consequence of it being void as opposed to voidable. It doesn't need any action by the Court or anyone else, the Statute makes it void.

Smith Can I ask Your Honour which Statute you're referring to?

Tipping J This particular section, section 47.

Smith Because what I had understood it as saying was that when you are appointed as Official Assignee on bankruptcy you've got that two years going back to avoid disposition.

Tipping J Yes well that's in under the Insolvency Act.

Smith Yes that's correct.

Elias CJ And it may be an additional power.

Tipping J Yes, yes.

Elias CJ I think this helps your argument and that's what I've been considering whether it's an additional power and that the enactment of the consequence as being that the agreement is void is quite deliberate.

Smith Yes and as I have said before, I'm sorry I don't mean to get repetitive, I think they use the word intentionally and it's.

Elias CJ And in that case you just cast back on the Limitation Act for creditors provided the effect was within the two year period.

Blanchard J So on that argument it's self-executing as soon as you have creditors who are defeated for example there is a voidness as against them provided it was within the two year period. In the case of the Official Assignee it's postponed until there is an adjudication because until there is an adjudication there is no Official Assignee.

Smith That's correct, and I think that really is the nub of all this.

Elias CJ Yes.

Smith And I don't know whether saying any more is going to change the nub of all this but that really is where I see this Court has to make the determination. Is there any other?

Tipping J So you could call it a statutory avoidance which occurs if an when there is a defeating effect within the two years. So it's not so much definitional of creditors, it's definitional of when the defeating effect must take place incidentally limiting the class of creditors. Is that fair?

Smith I'm more than comfortable with that analysis Sir.

Henry J You've got a different test as between creditors and the Official Assignee.

Blanchard J No that would be inevitable because the Official Assignee doesn't become the Official Assignee of the transferor until afterwards.

Elias CJ There is a difference in that the Official Assignee presumably would collect in the assets which defeated creditors within the two year period and hold them to the benefit of the creditors at the time of the insolvency, whereas if it's enforced by the creditors they're the direct beneficiaries of the protection.

Blanchard J I suppose you could have a situation in which the Official Assignee either never gets appointed or doesn't get appointed until after the two years and then the voidance would simply be against the creditors who have been defeated and they would be the beneficiaries. I'm not sure how that's affected by adjudication outside the two years. Within the two years however presumably the intention is that the Official Assignee rarely takes over and if there are other creditors they share in the recovery.

Smith Yes well this is the classic example, the Official Assignee was appointed well outside the two year period and in fact as I say judgment wasn't even given well beyond the two year period so there was absolutely no way the Official Assignee could be appointed inside that two year period on the basis of these creditors and I guess it's carrying out an official function. It would be strange if the Official Assignee couldn't take advantage of this provision and had to rely purely upon the other ones if this was sitting there for creditors, and in that sense that is the connection in terms of insolvency law, vis a vis this Act, but in my submission to that extent.

Tipping J Could I just ask one thing in that there's been reference to sort of general limitation rules as a kind of backstop, is there actually anything in the Limitation Act that would create a backstop in this situation or would it effectively be open-ended?

Smith In terms of enforcement of.

Tipping J What I'm saying is if the defeating effect occurs within the two years, on your argument the creditors and the Official Assignee have an unlimited time to put in place the machinery of the Court to implement the effect or the benefit if you like of that defeating effect for the creditor.

Smith Wouldn't the defeating in terms of your move to set aside this agreement be the basis of your course of action?

Tipping J You don't have to move to set it aside, it's already void.

Smith Well in terms of .

Elias CJ Enforcing the obligation.

Tipping J Yes.

Elias CJ Well then wouldn't you cast back on the Limitation Act.

Smith Which is 12 years in terms of enforcement of a judgement.

Blanchard J What provision of the Limitation Act?

Smith Well I was trying to think in terms of enforcing a judgment, you've got I think it is 12 years.

Blanchard J But there's no judgment.

Smith No there's not.

Tipping J That's why I asked you what provision in the Limitation Act.

Blanchard J The Limitation Act doesn't cover everything and it may just be that there is no limitation period for this kind of thing.

Elias It may be a purely contractual debt.

Tipping J You have to get your hands on assets which ex hypothesi are actually in the hands of someone other than your debtor. That's the thing about it. You see this judgment that was entered in the High Court against the other party, we're not here to debate that but prima facie I would have thought that was very strange because she didn't owe them money. What she did was she was obliged to act on the voidness of the transaction so as to restore the property to its owner in accordance with that voidness, but anyway we're not here to debate that, I just signal, I think that's very curious.

Blanchard J Well there are lots of various curious things about this. If void means void what's the position of any innocent third party who might deal with the transferee. That's all very unsatisfactory.

Tipping J Don't we have to construe this because of the potential for settled transactions which have been innocently entered into to be upset long after the event by a qualifying creditor who can show a defeating effect according to you within the two years. Don't we have to construe this with some degree of caution and conservatism and leave it to Parliament to sort out what it really wants to do about it?

Smith Your Honour if I can take a slightly different approach to answer that. When a Matrimonial Relationship Property Agreement is entered into there is a requirement for there to be a certificate from a lawyer that the effects of the Act and the situation concerns of the assets of the parties have been properly explained. Now if the lawyers are doing their job properly and particularly following **Harrison and Harrison** they're going to have to do them even more properly I would suggest than they have in the past, there would be very few lawyers who would be doing a s.21 agreement without ensuring that the full assets and liabilities of the parties are not only known but their values are known, and if they're doing their job properly the disparity between what would be the entitlement and what is the reality would be well-known to the spouse and so the sense of being unable to impugn it is against the person who has or should have knowledge of the fact that this is going to be exactly one of those agreements which would be open to attack from creditors.

Tipping J I understand.

Henry J Mr Smith can you help me on one other point which we were discussing earlier and it was the triggering which we were discussing which I understood you to say for creditors occurred when the adverse effect took place. But doesn't **Neill** tell us in fairly certain terms that that question has to be determined at the date of the disposition?

Smith It does and I think that that must be right which comes back to the point that I made before. I have some difficulty in seeing how, and I'm sure it can be in terms of how the effect carries on except in very limited cases for that two year period.

Henry J But the triggering point must be the date of the agreement or the disposition under **Neill**.

Smith Yes, in terms of whether it had that effect. That's right, you must look at the situation in terms of the assets and what's been moved by that agreement because the point's been made but of course if you transfer over a beach home and the property plummets afterwards, it's not the agreement which has had the effect of defeating it, it's the subsequent effect to say that the value, which I think was the argument that was

going on when these comments were made in one of the cases was that you've got to look at what the situation is in terms of disposition on the values that were there at that time.

Henry J Yes. That means you have a triggering point with the Official Assignee any point of time within the two years by way of adjudication but you've got a single point of time for the creditors which is when the agreement was made.

Smith In terms of the Official Assignee using this section, he or she still has to prove that the agreement had the effect of defeating and they'd still have to look at it.

Henry J But then fraud to be operative so far as the Official Assignee's concerned there has to be an adjudication within the two year period.

Smith That's correct.

Henry J But so far as the creditors are concerned nothing has to happen.

Smith That's correct.

Tipping J Are you trying to suggest Mr Smith just to help apropos my brother's question that the effect of which **Neill** speaks is what you might call a general effect but when it bites on a particular creditor crystallises if you like apropos of that creditor, it's that which is your triggering effect. I'm not necessarily agreeing with you, I'm just trying to isolate how you're seeking to get round what appeared on the fact of it to be in a point of some force. I'm not saying that's my view, but is it the difference between the general effect of which **Neill** was speaking and a particular effect on a particular creditor that you're trying to draw a distinction, because otherwise there is a problem?

Smith Well I think so if I understand your question correctly. The approach, if we come back to the facts in terms of this particular case.

Tipping J I don't want you to elaborate unless you feel that would be helpful, I just wanted to see if I could understand how you were endeavouring to overcome my brother's suggested difficulty, and it is basically as I have suggested.

Smith Yes Your Honour. Ma'am is there anything else that the Court would like me to deal with.

Elias CJ No thank you Mr Smith. Yes Mr Hurd.

Hurd May it please the Court as I think I probably anticipated might occur it seems to me that what we're now at is a rather different point than we were at at the time I certainly made my written submissions and the question as it's now really being articulated is somewhat different. By

that I mean that as the matter was originally presented by my friend and in the Court below, the issue was whether these qualifying words, if I can call them that, qualify who the creditors were or qualified the period of time for which the agreement was void. Now I think we've actually moved past that now. I think what we've moved to now is an argument which says it does in someway qualify the period for which the agreement is void rather than against whom it's void but the question is how that all works as a matter of practice in terms of the Act. Now I'm content to deal with the matter on that basis but if the Court thinks that I could give it any assistance on the original real issue.

Elias CJ I'm sorry I just wonder whether that is putting it quite accurately. I would have thought that the discussion was whether the two year period identifies that the transaction is void rather than whether it qualifies the period. In other words if the effect is not achieved during the two year period there is no question of voidness. If it is then it's void and then the issue is whether you have to take steps in reliance on that during the two year period or whether the Act, having said that the transaction is void during that period, you take your steps to overcome the disadvantage after that if need be.

Hurd Yes, I understand that, but what I'm saying is that I don't understand the argument to now be that through my friend that in fact these words qualify creditors.

Tipping J They qualify creditors only incidentally by limiting the class of creditors necessarily on the approach to those who come into being within two years.

Blanchard J Consequential.

Elias CJ Yes.

Hurd Well Your Honour I'm happy to deal with it on that basis. Can I say something first of all about creditors and what this legislation in my submission must have been intended to achieve and how it must have been intended to work. There's been some discussion already about would spouses or partners who enter into one of these agreements have been aware of who their creditors were and my friend a few moments ago referred to the obligations to get independent advice and to make sure that one knows all the details and soforth before one advises these people, but the reality is in my submission that creditors means anybody on the authorities who has a cause of action. Now that could include people one is not even aware of at the time one enters the agreement. Let me give an example close to some of our hearts. The partner in the large law firm. Down the corridor somewhere one of his partners is about to do something which constitutes negligence. The particular spouse/partner doesn't know of anything about this and in good faith enters into the agreement completely unaware that there are

even what will subsequently be held to be a creditor. Now that's the sort of context in which we need to try in my submission to give this section sensible effect.

Elias CJ Well what's the problem with that, because there won't be an intent so you won't be under subsection 1 but if it has the effect what's the problem.

Hurd Well the problem Your Honour is that in the meantime that particular spouse, and his other spousal partner presumably, have ordered their affairs; it may have gone on indefinitely; there's no certainty for anybody in that situation. What we're saying is that anybody who enters into an agreement under this Act, whether a contracting out agreement or a compromise agreement is vulnerable at any time in the future without limitation at the instance of somebody who emerges out of the woodwork at some point and is able to demonstrate that they were a creditor. Now in my submission that is an extraordinary position to place parties in and it's especially extraordinary as a result of a piece of legislation which was actually designed to try to regulate the affairs and assist parties to regulate their own affairs under this legislation. The effect of the legislation is then to say well you can do that but you and those who acquire rights from you in the future have the capacity without limit, for all of that to be taken away in my submission is not something that should lightly imputed to Parliament.

Blanchard J Well what's so dreadful about the proposition that where one spouse is transferring property to another in terms of this legislation. If that spouse in fact becomes insolvent, whether or not they actually become bankrupt they become insolvent unable to pay creditors as the debts fall due within a two year period that those creditors are not to be defeated by the transaction and its void against them.

Hurd Well Your Honour what I would say about that is I don't disagree with that proposition except that I say as a matter of practicality you can't leave that and Parliament can't have been intended to have left that to the unlimited circumstances what I say is that this section on its ordinary construction means if you've got an agreement which has the effect of defeating creditors then it's void for a period of two years and I'll talk shortly about whether that's a conceptual nonsense or not but that's the way the section reads and so what that means as one of Your Honours said right at the outset of my friend's submissions the key question becomes 'what is the thing that has to have happened within the two years to bring that result about' and the thing that has to happen in my submission is something which in the words of Justice Richardson in **Neill**, demonstrates an actual adverse impact on creditors within that period. In other words if I and my spouse decide to make an agreement which may favour her on a 50/50 basis, if one uses that as the yard stick, but I still have plenty of assets to meet all my creditors, then there is no impact on anybody at that stage, it's only when one gets down to the hard point which is there is an insufficiency

of assets, and that's the actual impact, and that in my submission is why as **Neill** says in a case of insolvency there is nothing more required than the adjudication and bankruptcy because at that stage one has a determination that there aren't enough assets to go around, so at that point there is an actual adverse impact. The question in my submission is outside of that what is there that can demonstrate that actual adverse impact and how do you do it.

Tipping J So do you accept that if the bankruptcy actually occurs within the two years the Official Assignee can take whatever mechanical steps outside the two years.

Hurd Yes I do and that in my submission is exactly what **Neill** says and I've never sought to dispute that.

Blanchard J On you analysis how would you defeat creditors other than by going bankrupt.

Hurd Well you could defeat creditors presumably by getting to a point where you were insolvent. The question is whether that insolvency is determined in the context of an adjudication and bankruptcy when there is no question about it, you're insolvent, or whether somebody has to commence proceedings to show that there effectively is an insolvency. And that's the position for the creditors outside the adjudication and bankruptcy, and in my submission what would have to happen is a creditor would have to demonstrate that within the two year period that position had been reached.

Blanchard J Why should the creditor have to demonstrate that within the period if it is a fact that there has been a defeating of creditors?

Hurd Sorry I didn't express my proposition quite accurately. The creditor would have to demonstrate that within two years there has been an insolvency.

Tipping J That could be shown on proceedings taken outside the two years.

Hurd No, I would say then though that to give effect to the section and to make it workable the only way you can make it workable is that the proceedings would have to be brought within that period, because under this section if it means nothing else it must surely mean, it would have been intended to mean that people will know, everybody will know, the spouses and partners, the creditors will know with certainty and simplicity whether in fact the two years has come and gone without a voiding impact or a voiding effect.

Blanchard J If it was necessary for the creditors to take some action within the period wouldn't it be required that they actually get a declaration from the Court that there had been a defeating?

Hurd It seems to me that at a theoretical level one can argue that quite cogently. What I say is that as with many parts of this legislation you can't at the end of the day construe it in a perfectly theoretical way anymore than void or voidable.

Blanchard J I think we're agreed on that.

Hurd And so what you have got to do is you've got to say how can we achieve the certainty for everybody that Parliament must have intended and yes it would be theoretically open to say well you have to **abort? 11.17.41** your proceedings and demonstrate that this effect has occurred. But one could imagine justifiably howls of outrage by litigants who would say well, good heavens the Court system may not even be able to give us a fixture within two years, that's hardly fair. So I say even though that theoretically Your Honours position would be justifiable that couldn't have been Parliament's intention because it puts people in a position of losing rights because of a process and the delays in a process which are beyond their control. The one thing that is within their control is to commence proceedings and so I say that that is what s.47(2) requires, either we've got an actual adverse impact demonstrated in the case of a bankruptcy and it's void and that why you don't need to bring proceedings at that point or it's open to a creditor within that two years to commence the proceedings saying I believe that this agreement has defeated my rights as a creditor or my position as a creditor.

Elias CJ Why is commencing proceedings sufficient?

Hurd Well simply Your Honour because it would be unreasonable to require the only further thing that one could require which is that you actually have not only commenced but got a conclusion because that is really putting a litigant in a position where his rights are going to be lost but for not only commencing but actually a process over which he doesn't have complete control.

Blanchard J The commencing doesn't bring certainty does it?

Elias CJ No.

Hurd Well it does bring certainty in this sense that the creditor knows that by commencing he is still in a position to successfully challenge if he can make out the ground. The spouses or partners have certainty because they know good heavens we've got a challenge so we have to bear in mind that now we have a continuing vulnerability until that proceeding is determined, so it does give certainty for both, what it doesn't give I accept, is it doesn't give you a final point at which you will know come, excuse the expression, hell or high water you will have a decision, but it doesn't mean that the parties to the agreement and the creditors and the parties who rely on entering transactions with the

parties to the agreement do have this degree of certainty that at the end of two years they can say 'whew that's okay', or.

Tipping J They'd be more likely to say 'whew' if they were under subsection 1.

Hurd Oh yes, they certainly would, they certainly would, but thankfully we're not and that under this one then what one ends up with is yes they can say with certainty 'we're okay, or no, we're not okay'. At that stage they may not be able to say with certainty yes the agreement's void because that may still have to be determined by the Court, but the point is everybody knows that the agreement is vulnerable to that challenge. Now that in my submission is the process one ends up going through if the section is given its ordinary meaning, that is we submit that the words qualify the period during which it's void and we would submit that it would follow from that that that's the practical outcome you would check.

Tipping J You're putting in the ability to commence proceedings within the two years as potentially locking in the voidness just as a pure concession to pragmatism which is entirely appropriate I think but strictly the section on your view means that at the end of two years it's not void, but I understand entirely.

Hurd Your Honour the one thing I think that everybody here agrees about this section has more than its share of difficulties, both conceptual and just in terms of terminology and I approach it Your Honours from the point of view of saying what does the section mean, is it a matter of proper construction, using the ordinary approach to construction viewed in the context of the Act and having got to that point, what is the practical consequence of that construction and in my submission the practical consequence and the appropriate consequence is the one that I'm urging on Your Honours.

Tipping J Would your argument be assisted to some extent anyway if one read instead of the word 'void' a quasi-legal term if they had said well perhaps to say 'shall have no effect against such creditors during the period of two years after it is made'. It has no effect against the Official Assignee if he comes into being within the two years. It has no effect against the creditors if they come into being during that two years but all they have to do is to put their oar in by way of commencement of Court proceedings so as to be able to practically lock in the voidness but if they don't do anything then it has effect against them.

Hurd The use of the term 'void' in this section one can debate forever in a day in my submission because I think one of Your Honours commented earlier and we've certainly said in our written submissions, yes it is odd conceptually to talk about something being void for two years but it's at least equally odd to say it's void but only to a particular extent or it's void but only against you guys over there.

Elias CJ Well that's the way it's expressed. It's expressed as void against creditors and the Official Assignee. You want to say it's void against creditors and the Official Assignee for a period of two years.

Hurd That's with respect in my submission exactly what the section says. One has to give a sensible meaning to the two years. In my submission if you look at the two subsections 47 (1) and 47(2) it's clear that Parliament rightly or wrongly saw two distinct situations. Section 47(1) was an analygist provision to s.60 of the Property Law Act. If you defraud your creditors, intentionally defraud your creditors you're not going to get any sympathy and you're exposed for all time. That's perfectly simple and consistent. Then in introduces a new concept. You didn't intend to but you do and it has that effect and at that stage Parliament clearly sought to treat that differently and in my submission from a policy point of view the only sensible view is that Parliament must have intended agreements within s.47(2) to be less vulnerable that those within s.47(1) because in a sense from a moral culpability point of view they're in a different category.

Blanchard J Less vulnerable or vulnerable for a shorter period?

Hurd I would say that the two actually get to the same point, but vulnerable for a shorter period is where.

Blanchard J I suppose less vulnerable if you look at the last few words that are now subsection 2.

Hurd I'm sorry, yes. Now Your Honours I'm not sure whether this is a good time to take the adjournment or whether you wish me to continue in the meantime.

Elias CJ Yes, we'll take the adjournment now, thank you.

Adjourned 11.26am

11.49am

Elias CJ Thank you.

Hurd Your Honours in the written submission I referred briefly to something of the historical context of s.47. I don't want to labour that because I suspect Your Honours are well familiar with what's being said about that but in my submission it is important in two respects. The first is the paper tabled by the then Minister of Justice, Dr Finlay, which is referred to in our materials, in which in my submission there's little doubt that rightly or wrongly the Honourable Minister should I say had a particular view about what he thought the Government was seeking to achieve her and that appears in the materials under tab 3, it's at page 17, that's the paginated numbering, where after traversing in

reasonably brief form the position as it was before the Act he then went on to say what the Bill was now doing, as the Bill as it then was doing for creditors and in relation to what is obviously now s.47 in my submission what he says is quite clear appearing about half way down page 12 as it is of the left hand column of that paginated 17.

Elias CJ I'm sorry, what divider are we looking at?

Hurd We're looking at tab 3 of the respondent's materials, the pagination number is 17 and we're looking at the left hand column and we're looking at the paragraph beginning 'moreover'.

Elias CJ Yes, thank you.

Blanchard J Does that really take the argument any further? It's as ambiguous as the section.

Hurd Well in my submission what it does tell us Your Honour is that the Minister believed that what he was setting out to achieve was a regime which in the case of agreements now within 47(2) were to be void for a limited period of time. We can say that at least I think from what the Minister is saying. Not against whom but for a limited period of time which of course was the central issue that we originally debated in the written submissions. Now we can say that much about it in my submission and then it comes down to how one gives practical effect of that in terms of the word 'section'. My friend hasn't addressed you on the section and I don't want to take up any particular time doing so either except to say that in my submission it would be reading that we seek to place on the section is the one that follows most naturally from a section which we however all accept is not ideally drafted. Your Honour Justice Henry asked my friend at one point during his submissions whether on his submission what would be the point of creditors seeking to challenge under s.47(1) as opposed to s.47(2) and his answer is as I recall it was 'well the point would be that the outcome in value terms and financial consequence would be greater under 47(1) than under 47(2), but in my submission that only arises as a result of the belated amendment made to s.47(2)'. Those are the words at the end but only to the extent that it has that effect. Now of course that was only an amendment made with effect from February 2002. It certainly wasn't in my submission the position as at the time this legislation containing the words we're concerned with was adopted, so in my submission His Honour Justice Henry's question is absolutely apt. There would have been no point if it had the meaning that my friend urges on Your Honours.

Elias CJ Well except that it identifies the creditors. It puts a limit on who will be a creditor for the purposes of subsection 2 which isn't present in terms of subsection 1.

Hurd Well, Your Honour firstly.

Elias CJ So that for example if you're going to enter into a very speculative venture and you intend to keep the risk of that from the creditors who will be financing it under subsection 1 you're not limited to incurring those creditors within the two year period but under subsection 2 you are.

Hurd Well Your Honour I understand that point but that of course raises some other points about the proper meaning of creditors within 47(1) and 47(2) and I've covered that in my submissions and the majority in the Court of Appeal made some comments about it too. In my some submission there is some difficulty in construing creditors within 47(1) as extending beyond present creditors to creditors that may arise in the future, because one is talking about forming an intent to defeat somebody. Can it sensibly be said that if I enter into an agreement today I did so intending to defeat, for example creditors who didn't exist and might not exist for some time in the future and who I might have no reason to believe would exist and the difficulty about all of that then comes through to subsection 2 because if in fact the correct view is that creditors in 47(1) means those who exist then goodness me 47(2) actually increases the degree of vulnerability on my friend's submission because it now extends it from current creditors to those who come into existence within two years. Tougher on 47(2) than on 47(1).

Elias CJ Sorry, are you saying that 47(1) is limited to current creditors at the time of the transaction?

Hurd In my submission there is a very good argument for saying that it is and the Court of Appeal also expressed in their judgment some concerns whether it was.

Blanchard J Is s.60 of the Property Law Act limited to existing creditors?

Hurd Well the difficulty about s.60 of the Property Law Act as I recall it Your Honour is that the wording used has a significant difference which is that it allows challenge by people who are described as thereby prejudiced. It doesn't require the person making the challenge to be the person whom it was intended to defeat. Section 47(1), whatever else we say about these sections clearly is talking about the same people making the challenge as those who it was intended to defeat.

Blanchard J But s.60 is talking about intent to defraud creditors. Section 47(1) is talking about intended to defeat creditors. It's a very similar thing that is being spoken of allowing for the rather old fashioned language of s.60. My question was under s.60 are you limited to looking at existing creditors?

Hurd As I understand s.60 what you're limited to doing is looking at existing creditors in terms of determining whether there is the necessary intent established but there is some authority under s.60 that advantage of the section can then be taken by subsequent creditors to challenge it, so that's why I say it's important that there doesn't have to be an identity in s.60 between those you intend to defeat and those who can make the challenge, whereas there has to be no such distinction under s.60. All that you need to make a challenge is that you are somebody there by prejudice, and the point also assumes some significance because of the decision of the Court of Appeal in the **Williams** case which is included in my friend's case book and is referred to in the submissions. It appears in my friend's case book under tab 6 beginning at page 27 and Your Honour Justice Tipping may recall this.

Tipping J Unhappily not very vividly Mr Hurd.

Hurd That's a relief. Now what in fact happened in the **Williams** case seems to have been somewhat odd that the case got all the way to the Court of Appeal and the Court of Appeal for the first time said 'what are you all talking about the Insolvency Act for, you ought to be talking about what's now the Property Relationships Act and so the case was then determined by applying s.47 of the Property Relationships Act and in particular s.47(2), and what the Court decided in the end was the agreement wasn't void under s.47(2) because there had been no evidence placed before the Court that there were in fact any creditors at the date of the agreement. Now I think the Court of Appeal uses the term that at least it's an inference from that or that view is at least consistent the concept that creditors in 47(1) is actually referring to those who exist at the date of the agreement and that's why if there aren't any you fail.

Tipping J Did we refer that in **Neill's** case? It looks like a commendably short judgment.

Hurd Commendably short judgment and looks as if there was no reference. The other important thing about the judgment Your Honour in the present context is in my submission if my friend's view of 47(2) is correct then it's difficult to regard the judgment is correctly decided and the reason for that is that in this particular case there had been a bankruptcy within I think it was about 17 months of the agreement being entered into. Now obviously if there's a bankruptcy there are creditors so therefore by definition there were creditors who came into existence at least within 17 months of the date of the agreement. On my friend's argument that would be enough because it obviously defeated their interest. There was an actual insolvency but the challenge was unsuccessful. Now I refer to it though at the moment particularly in the context of who are creditors within 47 months because that takes us to the next intriguing bit in the puzzle which is 47(2) because, and this is something we submit is of some significance, 47(2) adopts the definition of creditors from 47(1). That's why it uses

the term 'such'. And two things flow from that we submit; the first is well if you've already defined them why do you need to limit them again and the second is if you do limit them again you're actually producing a result where the creditors who are being referred to under 47(2) are in fact not the same creditors as under 47(1), they are a subset of them. Either a subset if 47(1) can include future creditors or if it's limited to current creditors at the time of the agreement it actually increases, it's a new category.

Blanchard J Why should there be a difference between 1 and 2? Either both would include future creditors or both wouldn't and where included of course they have to be creditors within the two year period under subsection 2.

Elias CJ But not under subsection 1, is that your point?

Hurd Yes well what I'm saying is 47(1) either includes future creditors or it doesn't. If it doesn't include future creditors, and in my submission there's a good argument for saying it doesn't because how could you intend to actually defeat people who don't even exist at that stage and whose rights don't exist, then you have what I've described in my submissions as a perverse outcome but the effect of my friend's interpretation of 47(2) is actually void against more parties, a greater category and a different category than 47(1).

Blanchard J I don't follow that.

Hurd Well if 47(1) is limited to those who are creditors at the date of the agreement.

Blanchard J Yes, then 47(2) would be as well.

Hurd But on my friend's argument it's not. It includes.

Blanchard J On the argument he's making today it doesn't have to.

Hurd Well I'm not sure that is right because one has to still give a meaning for the two year.

Blanchard J Well the meaning that Mr Smith's argument today gives to it is that it limits the trigger of the creditors, and lets assume for the moment there have got to be creditors at the time of the agreement, being defeated.

Hurd For the two years.

Blanchard J Yes.

Hurd Well if that's the case one still has the position as I understand his argument where he would include not only creditors at the time of the agreement but creditors subsequently.

Blanchard J But does that make any difference? It certainly doesn't make any difference in this case.

Hurd I understand that but it may make a difference in terms of the proper interpretation of the section.

Blanchard J On a point which we don't need to determine on Mr Smith's argument.

Hurd Well on his argument as it's evolved I suppose I have to accept what Your Honour is saying is correct.

Blanchard J Well that's the argument you're answering I think.

Hurd Yes it is because that's the argument that we've ended up with. But certainly in my submission and for the reasons I advanced to Your Honours earlier before the adjournment, there are all sorts of problems I would submit with Mr Smith's latest argument, that is that one has to simply show something as defeated within the period.

Tipping J I have conceptually, I don't know but Mr Smith may be able to help in his reply but say it has no defeating effect at the time the agreement is entered into the hypothesis is that if it does have that defeating effect then the two year trigger point is the same as the date of the agreement. If it doesn't have that effect date of date of agreement the hypothesis is that it can have that effect at some later time between the agreement and the two year expiry and I'm having difficulty quite getting my head around that.

Hurd Well Your Honour's not alone in that, although I suppose in fairness to Mr Smith one would have to accept that that is in effect being addressed, or attempted to be addressed by the Judges in **Neill** and that seems to be where they talk about the impact actually impacting.

Tipping J It seems to suggest that if it has no effect on existing creditors and that would mean you'd fall, well it depends, say it has no effect on existing creditors, can it logically have an effect on future creditors if it has no effect on existing creditors.

Blanchard J It can have an effect on existing creditors once you have future creditors competing with them.

Tipping J That's true, that's a good point.

Hurd I would accept that one can have a situation because it's consistent with something I said to Your Honours before the adjournment, that is that at the end of the day it's not the mere fact that there are creditors that's important, it's the fact that there is an insufficiency of assets, so if I put that proposition I suppose I have to accept that there's a certain logic in the point that His Honour Justice Blanchard made but in my submission that still leaves completely unresolved what it is that has to

happen within two years to demonstrate the impact and therein lies the problem and I felt that I was trying to beat my way into not quite a gale but some head wind before the adjournment about the idea that one would read the section and would have been satisfied by the bringing of proceedings.

Blanchard J I would have thought that the more accurate description would be cross winds.

Hurd They can still be dangerous. I suppose the other point I need to make on that beyond what I said earlier about it is at least I would like to think I am in good company, obviously His Honour Justice McKay in **Neill** was quite clear in his comments that in his view 'absent within two years either insolvency or a commencement of proceedings it was too late to do anything' so His Honour obviously read it in that way so that may be.

Tipping J Obviously it was implicit in what he said the absent insolvency. Did he say exactly what you've just said because I'd like to be referred to the passage if that's exactly what he said.

Hurd I won't claim it's an absolute accurate quotation.

Tipping J No, but in substance.

Blanchard J And they weren't deciding this point.

Hurd Here we are. My friend's bundle, tab 4, pagination number 19.

Tipping J Line 51?

Hurd "The two year period referred to in the section does not define the period within which creditors may be defeated but the period during which such a defeat will avoid the transaction. Once the two year period has elapsed without an insolvency or a legal challenge to the transaction, it will be too late to impugn".

Blanchard J He was reading in what you want us to read in, or a legal challenge to the transaction.

Hurd As I would put it slightly differently than that. I would be saying.

Blanchard J I wasn't intending it to be a pejorative. One probably needs to read something in whichever way one goes.

Hurd Yes, call it reading something in, I'm saying making the section work.

Blanchard J Yes

Tipping J Some strength in your argument comes from the need I suppose to have a clear decisive event like the appointment of the Official Assignee marking clear insolvency to act as some sort of trigger or cut off for the defeating event, vis a vis, creditors generally, otherwise it is a bit elusive. Does this action mean you to say look back at that five years later and say well actually we can now discern retrospectively a defeating event within the two years, but it's tricky isn't it.

Blanchard J It's of course very unlikely that a lengthy period like that would actually elapse as a practical matter because either you're insolvent and you go under or you're insolvent and you somehow scramble out of it, and usually that happens one way or the other fairly swiftly, particularly given in line we've already got a two year period.

Hurd Well this case might be an interesting example in fact because of the agreements entered into and I think its October 1993 insolvency doesn't in fact occur until 2001, seven years, so it.

Blanchard J Insolvency or adjudication?

Hurd Adjudication, I'm sorry. But a demonstrated insolvency being adjudication doesn't appear until then, so in my submission while they might think that Your Honour Justice Blanchard's proposition would be correct, I don't think it necessarily follows. I think this case is an example of that among a lot of other things. One of the other things I should just mention that it's also an example of is my friend has sought to make something of a suggested difficulty if the section means what we say it does for creditors because how would they ever know there was an agreement in existence. Well what we submit about that is that first of all there's nothing in principle different than that triggering effect and for example the making of a gift which would trigger s.54 of the Insolvency Act, one wouldn't know in either case, but the point is we submit that sensible creditors or claimed creditors before they get on and issue proceedings make two inquiries basically. One is have they got a case and the second is, is the debtor worth powder and shot, and it's a pretty brave or foolish claimed creditor who simply proceeds without making inquiries. Inquiries in a case where there is a significant transfer of assets under one of these agreements will reveal it in exactly the way it seems to have revealed it here because although what seems to have happened in this case is that in 1997 the creditors commenced proceedings to recover for their claim and a little later in the same year they were in a position to issue proceedings seeking to challenge the agreement, so in practical terms that isn't a major obstacle. People who want to find out will find out.

Tipping J Is there anything that might assist your argument in the thought that amongst all the things that can be disputed under this regime that may be a dispute as to whether or not someone is in fact the creditor and unless you assert that you are a creditor within a certain length of time

there's a capacity for something to come up quite a long time after the event.

Hurd Yes, in my submission it is and there is I think a related point made by the majority in the judgment that there are all sorts of practical issues that one can imagine arising about all of this. Do you have to show that they were a creditor at that point, at that point, do you have to show that the same amount was involved all through the period and soforth. There are all sorts of practical difficulties you get into but yes there can be real issues about who's a creditor and this case is a perfect example. **Mr Johnson** in the end was subject to a judgment finding deceit. One might in one sense say one shouldn't have any sympathy for that but obviously it was a hard fought argument, it may or may not ultimately have resulted in that and one wouldn't have known that for years. Your Honours my friend touched early in his submissions on s.47(3) of the Act and I should just say something quickly about that I think because as I understood his argument it was no doubt trying to head off some of the strength of the Court of Appeal's judgment that what I understood him to be really saying that the effect of subsection 3 was to mean that subsection 2 now could only be concerned really with what I'll call 'contracting out agreements' as opposed to "compromise agreements". In my submission that's not what s.47(3) means. The issue under 47(2) must be one of adequacy of consideration at the end of the day. Section 47(3) simply provides that an agreement entered into in a compromised situation is deemed to have been made for valuable considerable. There's a difference between valuable consideration, ie, some consideration, an adequate consideration. In my submission it doesn't render 47(2) inapplicable to both forms of agreement at all. It continues to be applicable to both.

Tipping J Is that simply then designed to head off any argument that if it qualifies under subsection 3 that there's a gift involved?

Hurd I assume it must be.

Tipping J Because this difference between valuable consideration and adequate consideration I understand entirely what you're saying but if that is true then it's saying you can't assert it as a gift but what about a protanto gift, I mean again it's another example of some fairly loose thinking.

Hurd Yes it is. One of the things we attempted to do but I can't say with any degree of success was actually find if we could what the explanation was for the introduction of 47(3) but we've been unsuccessful and I don't know whether my friend found anything but we didn't.

Tipping J It suggested that you see 4 as dealing with gifts and I think they were sort of sliding into the gift concept at 3 and they sort of got that in full.

Hurd You get there in the end. Well the concept of gift may mean it's an appropriate stage just to mention sections 54 onwards of the Insolvency

Act which of course we also submit are irrelevant consideration for the Court and of course what we say and what the majority accepted is that the effect of the construction really being urged by my friends, would appear to be that transactions that fall foul of s.47(2) are more vulnerable to attack than gifts and that seems an odd state of affairs policy-wise, you've got a gift, ie, no consideration, being more sturdy as it were against creditors than a transaction entered into for some but inadequate consideration and in our submission that really I suppose takes us back to a comment that Your Honour Justice Blanchard made much earlier in the day, that is that there is a certain logic about when one looks at this two year period saying that's the sort of period that's being used elsewhere including in the Insolvency Legislation and what we're talking about is what has to have happened within a two year period and whether that whatever it is has occurred in that period rather than anything else. Now we may be at that position anyway given the way the argument of my friend has moved but that seems to me to be demonstrably the position. My friend, in answer to a proposition from one of Your Honours accepted that really his position was that under 47(2) it had to be read in a way which gave the maximum possible protection to creditors.

Tipping J Oh that was just me I'm afraid.

Hurd But I think my friend actually accepted that that was the position. In my submission that with respect can't be right. S.47 is a classic, classic balancing of interest provision. It's balancing on the one hand the interest and entitlements of people which have already been recognised in the Act to organise their affairs and reliance on it on the one hand and creditors on the other, and at the end of the day I'm afraid Your Honours' task is to decide where in terms of cases falling within 47(2), that balance has to be struck, but in my submission there's absolutely nothing to suggest in this Act that it's to be struck at a level which provides the maximum protection to creditors. This is an Act actually about spouses and being able to deal with their property. It incidentally deals with consequences that that may give rise to for creditors, and I suppose on the same point my friend, although I didn't understand him to place great reliance in the submissions today, referred to s.20(A) of the Act and that is the provision which provides that secured and unsecured creditors of the spouse or de facto partner have the same rights against that spouse or de facto partner and against property owned by the spouse or de facto partner as if the Act had not been passed, and that's where Your Honours may recall from the submission when we got into a debate about what the position was before the Act. Certainly it's my submission that there's absolutely nothing in 20(A), even if it is applicable, and I would say it actually is applying to a particular situation, but there's absolutely nothing in 20(A) which dictates the particular conclusion on 47(2), especially since even if the two could be read as in any respect and conflict. If Your Honours will bear with me for a moment. Your Honours will have seen what the Court of Appeal majority said about the inter-

relationship between this section and the insolvency regime and in our submission that is significant. In our submission one does get into all sorts of complications with the insolvency regime if one treats the section as meaning other than what we submit it does and this case is a bit of an example of that I suppose, where one ends up with an insolvency occurring, with creditors who are proving creditors in the insolvency going off and being able to do their own thing but the poor old Official Assignee who is supposed to represent everybody can't and then you get issues about who received the benefits, of an action they take. One gets into issues about s.32 of the Insolvency Act and the ability to proceed without leave anyway and then one gets to what on earth happens about a discharge from bankruptcy. What is the effect of a discharge that's given to somebody in this situation where at an indeterminable future time one of these creditors can pop out of the woodwork again and say "ah ha, we think we can show that we were a creditor within two years and that it had an impact on us within two years so we think this agreement ought to be set aside". The discharge provided in those circumstances is really worthless. In our submission that's a most unlikely intended event from Parliament. Nor of course do we accept what my friend said in his written submissions on that, that is that the fact that this Act is a code means one should disregard the Insolvency Act. In our submission that simply isn't permissible and nor is it likely that Parliament would have intended legislation to work in this area which obviously can involve insolvency, hence of course the references to the Official Assignee in s.47 in a way which really causes major complications for the insolvency regime. I suppose the only other thing I really need to mention finally Your Honours is that one does get into a bit of an oddity with creditors on the one hand and the Official Assignee on the other on this construction because by definition if you've got an insolvency then you've got creditors but you've got one lot of rights for creditors outside the insolvency, another lot of rights for the Official Assignee, more restrictions on one than the other, and in my submissions seems inherently unlikely and it shouldn't be lightly accepted, but of course in our submission if the approach we take to perception is adopted one faces none of those difficulties but most important of all one ensures that, if I can put it bluntly, everybody knows where they are and that in our submission is if nothing else it must have been the intention of Parliament should most certainly be regarded as its intention especially in an area of the law that involves such a number of people as this does and all sorts of problems with creditors coming out of the woodwork etc. Now unless Your Honours I'm sorry I've hopped around but I've attempted to try to deal with things as they've developed. Unless any of Your Honours has any questions for me I intend to leave it there.

Elias CJ No, thank you Mr Hurd. Yes, do you wish to be heard in reply Mr Smith.

Smith Just very briefly Ma'am, if I may, just a couple of minor points really. My learned friend referred the Court to **Official Assignee against**

Williams and as I understood what he was saying was that they'd established that you needed to have creditors as at the time of the agreement and my submission is that that's not the case because what had happened was that **Williams** went bankrupt because he was caught up in some guarantees of his company. At the time that he entered into the Matrimonial Property Agreement he had no creditors whatsoever and it was quite clear that in fact what he was being called on weren't creditors of the spouse, but in fact a call up on terms of the guarantee, in other words your contingent liability, so that the whole case fell over because there was no creditors at all of the spouse, these were creditors of his company which he had and so consequently the Court felt as I read it that s.47 didn't come into play whatsoever. The other point that my friend made was that you can't see that in terms of s.47(1) that creditors could be beyond the time of entering into the agreement, in other words the intention to defeat. With respect to my learned friend it probably places him in a better position than I because I would have thought that the criminal mind was sufficiently nimble to actually consider that they were going into ripping off, eg **Mr Johnson** selling franchises or whatever the case may be and that this may well put themselves at some risk if it all comes apart, and to take those steps beforehand. Now how you prove that intention of course would be with some evidential difficulty perhaps but it certainly is a distinct possibility for somebody to go about their ordinary affairs knowing that they were going to place themselves at some risk.

Blanchard J If it's any comfort to you the Draft Property Law Act s.60 makes that explicit.

Smith I'm very pleased to hear it and I hope Your Honour can stay with us and deal with section 47.

Blanchard J Oh I'll be long dead by that time.

Smith And I pick up the point from His Honour Justice Tipping about s.47(3) in terms of valuable and adequate, in terms of consideration. My view is that really the only sensible reading in terms of s.47(3) is that it has to mean adequate because the practical effect of just saying it's for valuable consideration goes where? It wouldn't have the effect which I submit it should be heading to.

Tipping J It doesn't make the clear distinction in all the contract books between valuable on the one hand and adequate on the other but never mind. Thank you for that assistance.

Blanchard J I think there might be some insolvency cases where that same difficulty has come up.

Tipping J Anyway thank you for that but I think it's very much a side show that particular point.

Smith Yes so do I and a similar side show I would make the point that s.47(4) which is about gifts has got a limitation on it which wasn't talked about by my learned friend in that it has to be within reasonable means and liabilities so we're in to a different sort of area there in other words.

Tipping J But it is a bit odd isn't it Mr Smith that the Official Assignee limited to five years back for a gift in any circumstances under the Insolvency Act but on your construction of this you could seek to reclaim a gift between spouses in the form of a Matrimonial Property Agreement open-endedly?

Smith Yes that's correct. I accept that there is incongruities and whichever way you go in this particular matter I wish you well as it were.

Tipping J I think we should close now.

Elias CJ Was there anything else you wanted to add.

Smith No Ma'am unless Yours Honours have any questions.

Elias CJ Counsel thank you for your assistance and thank you for your good wishes with this piece of legislation. We will reserve our decision.