

CHAIR



Simon Jefferson QC, Trinity Chambers, Auckland

Simon has had more than 37 years' legal experience specialising almost exclusively in family law since 1983. After 20 years as a partner with Shieff England (where he led a family law team renowned for its ability and from which has emerged many leading family law practitioners), he left to practice at the independent bar in June 2006. He was elevated to the status of Queen's Counsel in 2013. Simon has appeared in the Family Court, the High Court and the Court of Appeal.

SPEAKERS



John Billington QC, Shortland Chambers, Auckland

John has a very wide experience in all forms of litigation, and in particular, in trial work where he has acted as senior counsel in a number of nationally significant cases. He first commenced practice in a mid-sized litigation firm in Wellington where he later became the Senior Common Law Partner. John joined the independent Bar in 1989 and took silk in 1996.



Jennie Hawker, Haigh Lyon, Auckland

Jennie is a partner at Haigh Lyon and leads the firm's thriving and specialist family law team together with Amanda Donovan. Jennie has experience in all family law matters but now focuses her practice on relationship property matters. She is a contributing author to the Westlaw commentary on the Property (Relationships) Act 1976 and family law procedure.



Jo Hosking, Lakes Chambers, Rotorua

Jo has been in family law practice since 1999. Her work includes cases involving relationship property, deceased estates, PPPR and child law, including as Lawyer for Child.



Stephanie Marsden, Canterbury Chambers, Christchurch

Stephanie acts in relationship and trust property disputes involving complex asset ownership structures, and estate claims.

SPEAKERS



Stephen McCarthy QC, Barrister, Auckland

Stephen practises in family and civil litigation. He has a particular interest in property and estate disputes. Stephen has practised as a barrister since early 2006 and prior to that was a litigation partner in a Manukau City firm for over 20 years. He was convener of the ADLS Mental Health and Disability Law Committee 1991-1995 and Family Law Committee 2001-2003. Stephen has presented NZLS CLE seminars and conference papers on mental health, family and property law topics.



Jan McCartney QC, Barrister, Auckland

Jan has a practice in the areas of deception in commercial relationships, trust law and relationship property. She was counsel in a number of leading cases in these areas in the Supreme Court, Court of Appeal and High Court.



Johan Niemand, Niemand Peebles Hoult, Hamilton

Johan has practised predominantly in family law since his admission in 2005. He has particular interest in Family Court practice and procedure and is on the Executive Committee of the NZLS Family Law Section.



Tim Rainey, FortyEight Shortland Barristers, Auckland

Tim is an experienced commercial litigator who has a significant practice advising and representing parties and trust disputes, relationship property and related issues in the Family Court, High Court, and Court of Appeal.

CONTENTS

In session order

Section 182 cases

Working backwards – running cases under s 182 Family Proceedings Act in light of <i>Preston</i>	1
<i>Stephanie Marsden</i>	

Law Commission's proposal to replace s 15 with FISAs

FISAs – for better or worse?	23
<i>Jo Hosking</i>	

Remember when Parliament enacted s 26?

Remember when Parliament enacted s 26?	39
<i>Johan Niemand</i>	

Setting aside agreements – still too easy?

Setting aside agreements – still too easy?	55
<i>Jennie Hawker</i>	

Relationship property and contract law

Relationship property and contract law.....	91
<i>Tim Rainey</i>	

Discovery, interlocutory applications and use of without notice procedures

Discovery, interlocutory applications and use of without notice procedures	113
<i>Stephen McCarthy QC</i>	

Two perspectives on *Regal Castings*

Section 44 of the Property (Relationships) Act 1976 and <i>Regal Castings Ltd</i> <i>v Lightbody</i>	129
<i>John Billington QC</i>	

A second perspective on <i>Regal Castings</i>	151
<i>Jan McCartney QC</i>	

CONTENTS

Alphabetical by author/presenter

Author		Title	Page
Billington QC	John	Section 44 of the Property (Relationships) Act 1976 and <i>Regal Castings Ltd v Lightbody</i> <i>Joint paper with Hannah Short</i>	129
Hawker	Jennie	Setting aside agreements – still too easy?	55
Hosking	Jo	FISAs – for better or worse?	23
Marsden	Stephanie	Working backwards – running cases under s 182 family proceedings act in light of <i>Preston</i>	1
McCarthy QC	Stephen	Discovery, interlocutory applications and use of without notice procedures	113
McCartney QC	Jan	A second perspective on <i>Regal Castings</i>	151
Niemand	Johan	Remember when Parliament enacted s 26?	39
Rainey	Tim	Relationship property and contract law	91
Short	Hannah	Section 44 of the Property (Relationships) Act 1976 and <i>Regal Castings Ltd v Lightbody</i> <i>Joint paper with John Billington QC</i>	129

CONTENTS

WORKING BACKWARDS – RUNNING CASES UNDER S 182 FAMILY PROCEEDINGS ACT IN LIGHT OF <i>PRESTON</i>	1
INTRODUCTION	3
KEY THEMES	3
CASES MAY NOT BE AS STRAIGHTFORWARD AS THEY APPEAR	4
FACTS AND AWARD IN <i>PRESTON</i>	5
THE AWARD IN <i>PRESTON</i>	6
A THREE-STAGE TEST	6
PRINCIPLES ARISING FROM OR REVISITED IN <i>PRESTON</i>	7
PRACTICAL CONSIDERATIONS MAY WELL INFLUENCE THE COURT IN EXERCISE OF ITS DISCRETION	10
A WARNING TO TAKE TAX ADVICE AND SPECIALIST TRUST LAW ADVICE	10
A CASE STUDY IN EXERCISE OF STEPS TWO AND THREE – MEASURING THE GAP AND EXERCISE OF THE DISCRETION	12
HOW RELEVANT IS ANY SETTLEMENT OF RELATIONSHIP PROPERTY?	14
ARE ALL OF THE ASSETS OF A TRUST TAKEN INTO ACCOUNT?	15
ISSUING PROCEEDINGS	15
WHO ARE THE PARTIES AND WHO SHOULD BE SERVED?	17
WHAT EVIDENCE SHOULD BE FILED IN RESPECT OF A S 182 CLAIM	17
A PRACTICAL STRATEGY IN DEFENCE OF A CLAIM	19
ORDERS	19
DOES <i>PRESTON</i> OPEN THE DOORS TO CLAIMS THAT MIGHT NOT OTHERWISE HAVE BEEN PURSUED?	21
FISAS – FOR BETTER OR WORSE?	23
INTRODUCTION – WHY THE NEED FOR CHANGE?	25
<i>SCOTT V WILLIAMS</i>	27
REFORM	29
FISAS – OPTION 3 (THE PREFERRED APPROACH)	30
THE PROPOSALS	30
THRESHOLD ENTITLEMENTS	32
MECHANICS	32
INCOME	33
DURATION OF A FISA	33
DISCOUNT FOR CONTINGENCIES	34
APPLICATIONS TO COURT FOR ADJUSTMENT	34
ENFORCEMENT	35
DEATH	35
CONTRACTING OUT	35
WHEN ARE THE REFORMS LIKELY TO BE MADE INTO LEGISLATION?	35
HOW WOULD FISA ADDRESS FACT SCENARIOS IN S 15 CASES DECIDED?	36
ADVANTAGES	38
DISADVANTAGES:	38
CONCLUSION	38
REMEMBER WHEN PARLIAMENT ENACTED S 26?	39
INTRODUCTION	41
A BRIEF HISTORY	42
WHY IS THIS IMPORTANT?	43
PRACTICAL APPLICATION IN RECENT AND NOT-SO-RECENT TIMES	44
CASE LAW EXAMPLES	45
HONOURABLE MENTIONS OF OTHER PROVISIONS, VIEWED THROUGH A DIFFERENT LENS	49
CONCLUDING REMARKS	53
SETTING ASIDE AGREEMENTS – STILL TOO EASY?	55
INTRODUCTION	57
PROCEDURAL REQUIREMENTS	58
SECTION 21F – COMPLIANCE WITH FORMALITIES	59
DUTY OF CARE	67
SECTION 21H – VALIDATION	70

SETTING ASIDE AGREEMENTS – s 21J	77
CONTRACTUAL REMEDIES	84
RELATIONSHIP PROPERTY AND CONTRACT LAW	91
CONTRACTING OUT AGREEMENTS UNDER THE PRA	93
COMMON LAW REQUIREMENTS FOR A VALID CONTRACT	95
STATUTORY AND COMMON LAW RULES AFFECTING THE VALIDITY OF CONTRACTS.....	95
THE LAW OF MISTAKE	96
NON EST FACTUM AND RECTIFICATION	98
MISREPRESENTATION.....	101
DURESS, UNDUE INFLUENCE AND UNCONSCIONABLE BARGAIN.....	105
CONTRACT INTERPRETATION PRINCIPLES.....	110
DISCOVERY, INTERLOCUTORY APPLICATIONS AND THE USE OF WITHOUT NOTICE PROCEDURES	113
INTRODUCTION	115
DISCOVERY	116
INTERROGATORIES AND NOTICES TO ADMIT FACTS	124
INTERLOCUTORY APPLICATIONS	125
WITHOUT NOTICE PROCEDURES	126
FURTHER PARTICULARS	127
UNLESS ORDERS.....	127
SECTION 44 OF THE PROPERTY (RELATIONSHIPS) ACT 1976 AND <i>REGAL CASTINGS LTD V LIGHTBODY</i>	129
INTRODUCTION	131
THE ORIGINS OF s 44(1)	132
THE INTERPRETATION OF “IN ORDER TO DEFEAT” OVER THE YEARS.....	135
APPLICATION OF <i>REGAL CASTINGS</i> TO S 44 CASES	141
THE PROBLEMS <i>REGAL CASTINGS</i> POSE FOR FAMILY LAW	148
A SECOND PERSPECTIVE ON <i>REGAL CASTINGS</i>.....	151
INTRODUCTION	153
THE ORIGINS OF S 44 PRA.....	153
APPLICATION OF <i>REGAL</i> IN S 44 CASES	157
THE CONTEMPORARY DOMESTIC RELATIONSHIP AND DIVISION OF PROPERTY – BORRIN SURVEY AND LAW COMMISSION REPORT ON PRA.....	159