

## Clarity and Certainty for Whom?

This lecture is about dealing with the ramifications of the Property Relationship Act 2001.

The Title “Clarity and Certainty for Who??” refers to a statement made in the house by the then Attorney-General and Associate Minister of Justice, **Margaret Wilson**, ...when passing this legislation back in 2001 She said that this bit of legislation would create clarity and certainty. After today, you may well join me in asking, “for who?”

For the lay person, the word JUSTICE means, *fairness: or reasonableness, especially in the way people are treated or decisions are made* .

What it can mean in a court of law is *PEDANTICS ie being too concerned with what are thought to be correct rules and details.*

I will illustrate this further a bit later on. It’s important that you grasp this before you enter into any contract.

This story is from a chap called Jack and his partner Jill. What I will talk about here is the outcome in practical terms of this ACT as it stands today. Beware of voices that say it is better now, or what you heard was an anomaly in the system. The experience of dealing with section 21 of the ACT cost Jack in excess of **six figures in legal expenses** and a number of years knocked of his life span through unbelievable stress I would think.

This lecture is not so much about understanding the PRA act, and opting out of it with a contract (prenuptial), as it about understanding lawyer’s responsibilities in relation to it, so you can therefore ensure you are indeed protected. It is also about misandry in both the ACT itself and the administration of law. Misandry is the antonym of misogyny. If you haven’t heard the word before it’s because it doesn’t exist in many dictionaries. It is the hatred of men. By this I refer to:

- The intention of the process that surrounds the PRA.
- How legal aid interprets its own rules to put you at a disadvantage.
- How the process of securing a valid contract from your partner’s solicitor, as required under the act, appears to be quite simple yet extremely complex depending on the amount of scrutiny it will come under in the future.

The second point of this lecture is to remind you that any contract can be challenged in any court of law. Therefore you must keep in mind what the costs could be to defend an attack.

Is it worth having one? Well listen carefully and you be the judge of that.

## **What is the PRA??**

### **The Property Relationship ACT was introduced in 1976**

It was amended in 2001 as it appears that the powers that be felt that many women appeared to be quite happy to live in a de facto relationship without the ACT “protecting” them, so the nanny *state* included into the ACT, “living together for more than 3 years.” The PRAct is designed to protect females.

### **Remember that you as a male are the target of the ACT.**

With that in mind, you will need to realise that opting out of it was cleverly designed so that even if your partner agrees to it in order to get what she wants at the time, downstream it can be a nightmare for you to defend it.

You may hear stories about females getting a raw deal under this ACT. Let me assure you that they are **collateral damage**.

Margret Wilson’s statement that it would create “Clarity and Certainty” Tells me that either she has a weird sense of humour or is a very clever Misandrist. Pre 2001 two adults could decide to opt out of the PRA simply by not getting married. So if you decided not entangle yourself in a legal bind by getting married, you just stayed unmarried. Now, simply put, after 3 yrs of a sexual relationship all relationship property is split 50/50 unless you have a legal binding agreement. This makes the legislation, in nature, coercive and covert.

### **Let me tell you Jacks story....**

**Jack met Jill in 1988 after his previous marriage broke down. He bought out his ex wife’s half share of the family home. When**

**he met Jill he continued to live in it with her. He would always tell Jill that he wanted to keep his house separate and Jill would always tell Jack that she would never want it anyway. It was easy for both Jack and Jill to know where they stood because so long as they never married the house would always be Jacks. Jill then went and purchased her own house and rented it out.....**

### **Why the law change?**

Because there are some things that matter more than the rational actions of consenting adults in private, like equity. Clause 1N of the Bill now states as a guiding principle -

**(a) the principle that men and women have equal status and their equality should be maintained and enhanced:**

It's a little hard to know how one can enhance an absolute value like equality, but it surely gives determined lawyers and progressive judges an excuse for just about any act of interpretative largesse.

However the ACT states--

(2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following 10 matters that are relevant in a particular case:

You might now breathe a sigh of relief to see that the wish of the parties for certainty makes it into the court's considerations. But don't get over-excited because remember, that over-arching guiding principle is "maintaining and enhancing equality". Who knows what exhilarating convictions will overwhelm the boring old desire for certainty?

After all, you could argue that the progressive slant of the legislation is to remove the ability of people to use power, property and the law to stand in the way of equality

### **Why Contract out???**

There are a myriad of reasons It is quite probable that you have your own children and have been married previously. What ever the reason you would think that you have the

right to protect your personal wealth for yourself or your children should the relationship end after 3 years right?

## **Well back to Jack's story**

**.....Jack and Jill eventually bought a farm together and decided to live on it. Jill's half share of the deposit came from the sale of her home with Jack putting up cash for his. He then rented out his house. The mortgage for the farm was taken over his own property so that they would pay non commercial interest rates. The farm was run as a business and Jack and Jill owned 50% each of the shares. In 1997 Jack decided to get a prenuptial to ensure that all was covered should he marry Jill and return to live in his own home with her. Over the next 18 months Jill's lawyer, a Mark Burns, and Jack's lawyer went back and forth with proposals. The contract put forward was a standard type called a "Fisher" based contract named after Judge Fisher who devised it. It is considered to be a fair document within the legal fraternity.....**

## **The mine field**

"All I have to do is get a contract to escape the ACT", you say, "that's bloody easy what are we worrying about?", you may say. Well that's true, as section 21 provides for just that. The only snag is that females just might not know their minds as well as they thought they did. And just in case they didn't, section 21J rides to their rescue

Section 21J provides as follows:

### ***Court may set agreement aside if would cause serious injustice***

*(1) Even though an agreement satisfies the requirements of section 21F the court may set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.*

*(2) The court may exercise the power in subsection (1) in the course of any proceedings under this or on application made for the*

purpose,

(3 } This .Section does not limit or affect any enactment or rule of law or of equity that makes a contract void, avoidable or unenforceable on any other ground.

**(4) In deciding, under this section, whether giving effect to an agreement made under section 21 or section 21A or section 21B would cause serious injustice, the Court must have regard to -**

(a) the provisions of the agreement:

(b) the length of time since the agreement was made

(c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made:

(d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made

(whether or not those changes were foreseen by the parties):

(e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:

(f) any other matters that the Court considers relevant.

(5) In deciding, under this section, whether giving effect to an agreement made under section 21B would cause serious injustice, the Court must. also have regard to whether the estate of the deceased spouse or de facto partner has been wholly or partly distributed.[]

"(a) the provisions of the agreement:

"(b) the length of time since the agreement was made:

"(c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made:

"(d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):

"(e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:

"(f) any other matters that the Court considers relevant.

## **Will she attack the Contract if the relationship ends??**

The question to ask yourself would be....if you could get out of your mortgage with your bank and have a debt free home why wouldn't you?.

Well, your answer might be that you wouldn't do that to your Bank Manager with whom you have a good relationship. You have too much integrity!!

Well, let's assume your bank has just divorced you and made you angry. Dam to integrity!!.

Well then you might consider the costs of litigation in balance with the chance of success. On that basis you probably wouldn't proceed.

Well, what if the law provided many tools for you to attack with and you wouldn't have to pay the costs involved even if you lost.

Hey! "I'm in", you say!!!

ANTICIPATE THAT SHE WILL ATTACK

**.....Eventually Jack and Jill tired of the farm life. They put the Farm on the market and returned to live in Jack's home. They decided to marry and Jack kept asking Jill to complete the prenuptial before the wedding. Jill kept saying she would but never could find time to get to the lawyers. A few weeks before the wedding Jack made a succinct statement to Jill "forward the contract signed to my lawyer or I will not be able to get married" Three days before the wedding day Jack received confirmation from his lawyer that Mark Burns had forwarded the signed contract all completed and his home was now safely preserved for himself and his child from a previous marriage. Jack read the contract and observed that indeed it had been signed by Jill and certified by her solicitor Mark burns that she understood both the effect of the contract and the implications of such.**

**Now Jack was sure he had  
clarity and certainty.....**

**Was it necessary for Jill to have a Lawyer?**

Section 21F provides as follows:

**Agreement void unless complies with certain requirements**

*(1) Subject to section 21H an agreement entered into under section 21 or section 21A or section 21B is void unless the requirements set out in subsections (2) to (5) are complied with.*

*(2) The agreement must be in writing and signed by both parties. Each party to the agreement must have independent legal advice before signing the agreement.*

*(4) The signature of each party to the agreement must be witnessed by a Lawyer*

***(5) The lawyer who witnessed the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.***

Does it become obvious for you what could go wrong here?? I didn't to me at first glance, however the devil is in the detail.

As I will show later, this piece of inept legislation has a hole in it the size Margret Wilson mouth.

**What if Jill's lawyer makes a mistake or fails to perform his job professionally under the ACT?**

How in God's name would you ever know if your partner has been advised adequately? Well the legal profession will tell you not to worry about that as you can claim from the other party's solicitor if they make a mistake. This is lame advice. What they won't tell you is that it could take 10yrs to get the case heard due to the lawyer's insurance company knowing they can defeat you by stealth. I will show an example of this later. Also the case will be heard by a different Judge with a different opinion on Section 21(j) This in effect means a long uncertain wait, eating at you every day like a rat eating you from the inside out..

**Now back to Jack**

**.....Jack and Jill lived happily on that hill for the next 3years and 6days. They had a baby that they both loved and cherished. Jack worked from home so he use to bottle feed and burp the baby every day. One morning and a few weeks before xmas Jack was on his computer when Jill came up to him with baby in arms and gave him a kiss goodbye. "See you later" she said and left. A few hours later the door bell rang and Jack answered it to find a few policemen at the door. They had a thick wad of papers and advised him that he was required to leave his home. Stunned, Jack asked why. The police explained that an exparte protection order had been commissioned by the court and that he was to leave the home, furthermore he was not to approach either his wife or his child. ....**

### **How much will an attack cost you???**

Here the question not only is in monetary terms but in emotional physical and psychological terms and the answer is AN UNACCEPTABLE AMOUNT

In order to smash you into submission the enemy will pound you with artillery. If you have children then get ready for them to be at the battle front. Your partner will more than likely have chosen a female lawyer to represent her. Many of these have no ethics when it comes to looking after their clients. Remember that it's not just a job for them it's God's mission they are carrying out. It's not about law and fairness it's really about the gender war and equality. All is fair when misandry is at work.

Expect Exparte Protection orders to be the first attack. These are court orders that you cannot defend before they are executed. They are called temporary but are none the less draconian. Remember the PRA provides for violence as a major reason for ripping up the contract so the best one for the enemy to use is a protection order. Oh! you say, I would never get one of those against me as I am not violent, I have never hit my lady or anyone else for that matter. Oh! Are you in for a surprise. The threshold for handing these out can be very low..This order, you see, gets you out of the family home or relationship home as they call it. Next salvo is to get a court order so you can't see your kids either. Yep your own kids who you love without reservation are now protected from

you the violent bastard. At this point you feel you have been hit over the head with a base ball bat.. You don't know who or where you are at this point. You feel sure there's been a big mistake. Oh no mate, no mistake, this has been a mine waiting for you step on . Now you're so much in shock that you doubting the validity of the law to protect you from a crazed woman.

These temporary exparte protection orders are one of the most devastating things for any decent man to have to experience. The Police come to your home in force, up to two squad cars and 6 cops (some men go into shock and attempt to defend their property) This is humiliating for anyone who is law abiding, as all the neighbours consider that you must have done something pretty bad to your partner. I was once told not to be upset about it as it was only temporary. Well I would like to ram a broom stick up a judges rectum, in public, temporarily, and then ask what's so upsetting as its only temporary. Under our human rights there can be no justification for the giving of these orders without a very high threshold.

Next thing up for you is to find that blackmail is an OK thing

Blackmail is quite legal in the courts in fact it is part of the court process So, the first thing you get is a ransom note from her solicitor." Pay us big bucks or we go to court"

This is a critical point. You ask your solicitor what are the chances of winning and at what cost?

You are told that there will first be mediation where you may come to an agreement out of court and save a lot of money. You go to this mediation and find that what you thought was a solid contract is verbally watered down by a Judge who wants a compromise out of you. Some call this "judicial activism" You realise that the system is not working for you but the enemy. You ask yourself "is there any chance I could win in this uneven playing field?

It is said that 95% of these types of cases never get to court...I can tell you why!!.  
Justice is being denied in our system: through intimidation, blackmail and unpunished abuse of the system.

### **What will it cost her???**

Well thanks to legal aid she will not have to pay a cent initially and if she eventually is deemed to have assets, so she can pay down stream, she will have received counsel at a fraction of a cost of yours. Oh! Remember the reason why most people don't litigate? 'IF THEY ARE NOT SUCCESSFUL THEY HAVE TO PAY THE COSTS OF THE

RESPONDENT' . Well if your partner gets Legal Aid they are protected. Yep! you won't get costs awarded even if you win.

**If her case is flimsy how could she get funding??**

Good question as legal aid has strict rules regarding funding.

***When legal aid may be granted: civil matters***

*(4) The Agency may refuse to grant legal aid to an applicant in any of the following circumstances:*

- *(d) in the case of original proceedings,—*
  - ***(i) the applicant's prospects of success are not sufficient to justify the grant of legal aid;***
  -

I will show later how low the threshold is for this agency in granting funding for cases that are weaker than American beer.

**Lets go back to Jack's story.....**

**.....Jack explained to the policeman that he ran his business from home. How was he expected to work? The policeman was sympathetic and suggested that he ring his solicitor. Jack's solicitor was angry that the order had been issued as under the rules the applicant must state all relevant detail on a form to be put before the judge. One of those points is to state where the respondent works. This had not been done.**

**The solicitor tried to get an urgent hearing in the court but before Christmas he was not successful and Jack was told he would have to remove himself within 24hrs.**

**Jack was to discover that his prenuptial contract was under attack. The litigating solicitor for his ex wife was a Lynda Kearns of Auckland. He was also to discover that he was being accused of threatening to kill his wife and attempting to kill his child by suffocation. Without a chance to defend he was found**

**guilty 'temporarily'. Without a history of violence Jack couldn't work out how they had decided that he was indeed capable of these acts.**

**It took Jack months to get back into his home and he was asked to give Jill a lump of money before he could so she could survive. Jack found this strange as the farm they owned had sold recently and he knew she had more than \$150,000 in cash on her. But there it was written in her affidavit (I need the home as I have no other way of surviving) He also found she was on Legal Aid and again he found that hard to phantom out how she had qualified. He was even more stunned when he further read why Jill felt she should have a large hunk of his home. You see, Jill had never understood that Jack's home would belong only to him. She claimed Mark Burns never told her Also, and unbelievably Mark Burns had made a statement to Lynda Kearns that he felt he didn't explain the contract in full to Jill.as he thought Jack and Jill were living on the farm you see!!! Hang on, thought Jack, I have seen a fax sent to Jill by Mr Burns written a few weeks before the wedding where he outlines and red flags that**

***".....In this regard I note that the property at 3 top of the hill Ave, Mt Albert is specifically classified as Jacks' separate property. Therefore, notwithstanding that you may live in it as your matrimonial home, it will remain as his separate property***

**Remember the late date of the signing of the contract because Jill never attended to it? Well now she claimed that Jack threw the prenuptial on her at the last minute and forced her to sign.**

**This can be sorted out easily thought Jack. Surely a Solicitor can't sign that he has explained the implications of the ACT, renege on that later and have me pay for the defence of such? Unfortunately Jack was naive, one of those stupid Kiwi guys who believes in justice. Boy! was he to learn a lesson!!!**

**Jack was to discover that mediation was to be the first step. This would be with the Judge who had issued the ex parte protection order, a Judge D Clarkson. He was feeling pretty nervous as you could imagine.**

**Judge Clarkson stunned Jack by asking the question “Are you the type of person that thinks an agreement should be honoured” He was stunned because he thought that the courts were there to ensure that contracts are indeed honoured. She then got a white board out and commenced working out how much Jacks house had gone up in value since the marriage. At the end she said she would leave them alone to come up with a solution so no court action would be necessary. Jacks Lawyer pushed him hard to compromise so reluctantly he offered a six figure sum to settle. However Jill wanted more than twice this amount. No agreement was made.**

**It was more than a year before the case got to court. A month before the case was to be heard Jack ended up in Hospital. He was unable to stop vomiting because of his lack of equilibrium. He constantly felt like he was out at sea in a terrific storm. The doctors said it was cause by his inner ear being attacked by a virus. This is often brought on by stress. He was in hospital for a week and was still ill when he entered court.**

**Presiding in court was Judge Kendall. He had been on the bench for many years and was well respected by the fraternity.**

**What was the main reason for the attack on the contract? Well, ..Ms Kearns makes clear in her submissions to the court that Mr Burns (due to his evidence) is at the heart of their attack;  
PRA {21f**

**Section 21F** The lawyer who witnessed the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement

**She stated that at the heart of the attack was 21f**

**Jill was on the stand first. Her statements about not understanding the ACT were rebutted by evidence that Jill worked with Contracts as a part of her job. Her desire to look naive about contracts was juxtaposed by her strong understanding of taking a case against her employer to court. Her lies could not stand up against the evidence.**

**Next up was her solicitor Mr Burns. He was forced to recant on his affidavit that he had not adequately advised on the provisions of the ACT**

**Transcript - Burns being cross examined**

And given the fact that Jill was happy for the property to be separate property and the provisions of the agreement - there's no other advice you could have given her than what you actually gave her - is there?...BURNS . I don't believe so - no.

. And what then followed was it seems, doesn't it, if you look at your fees' account, that the meeting you had had where Jill executed the agreement and you witnessed it, must have been somewhere between the 29th of September and the 1st of October '99. Would that be right? Because you've referred there to attending on execution?...BURNS ... Yes.

I think my calendar shows me that's a couple of weekdays. At some stage then you would have had a half-hour meeting with her, would you?..... Yes. And you weren't at all concerned about her demeanour or comfort levels with the agreement, were you?....BURNS. No. She appeared to be an intelligent person who fully- understood what she was doing - did she not?...BURNS... Yes she did.

And given the fact that the agreement was all about On the Hill Avenue being Jack's separate property, you saw no signs to indicate that she was under any unfair pressure in agreeing to that provision, did you?...BURNS.. No, I didn't. So you did advise her and red flag the possibility of living in his home didn't you? ...BURNS yes

**On the second day of proceedings at lunch time Judge Kendall called a halt to the proceedings before Jack was called to the stand. Lynda Kearnes was livid and screamed, like a spoilt child, that she would appeal.**

**In his judgment Judge Kendal wrote**

*"The view I have is, and is clear in law, that this is a case where the onus is on the applicant to make out a case. I note that essentially, apart from the question of financial contribution, she does not assert conduct against the respondent requiring him to answer or requiring the applicant to establish it as part of the case that she puts to have the agreement declared void or set aside. This is not a case either where it is asserted that the respondent has behaved in a way that says that the applicant was forced into signing the agreement."*

**The appeal was based on the applicant not receiving "Natural Justice" Lynda Kearns felt that Jack should have been put on the stand and dissected even though it could never have produced one iota of difference to the weak case bought before the court.**

**Jack was to wait another six months for the high court case of appeal. Presiding was Judge Keane. Within a few minutes of the proceedings' it became evident to Jack that Judge Keane want to argue the pedantic's of law and at \$1,000 an hour for his counsel Jack felt devastated by this. Jacks Lawyer advised him not to contest as they could well spend a day in legal argument. He admitted defeat and the case was returned to the Family Court for another 3 day hearing.**

**Jack could see clearly that one Judge honoured Justice and one pedantics.**

Lets go over what Kendal said in his judgment!!!!

## **Legal Aid**

**Owing to Mark Burns recanting on his affidavit under cross examination Jack was sure that Jill would realise that she could not possibly win in another round. He asked Jill to have a coffee with him and told her that he would pay her a six figure sum to end the fighting and focus on their little child. Jill could see sense in that too and agreed. Jack got his solicitor to write up a "Calderbank offer". Jack got a shock when Kearns replied with a new figure to settle that had more than doubled. No deal was struck**

**Jack figured that if Legal Aid was not available for Jill maybe she would not proceed and risk her own money with such a small chance of success. Also Jack had looked up the rules of obtaining funding from this source and Jill's case seemed to fall well short of them. So he wrote a letter to them....**

Legal Aid Agency

Dear sir/madam

I am writing to enquire if the applicant, Jill Hill, in the above litigation is continuing to obtain Legal Aid? Should the answer be affirmative I wish to submit the following.

The only Judge, (Kendall) to have heard all the evidence has stated that there is no case to be heard. A high court judge (Keane) has awarded a new hearing based on natural justice i.e. the applicant's right to put me on the stand and dissect me?

For the upcoming hearing the applicant has put great weight on the high court decision of Harrison Vs Harrison. As you will be aware the Appeal Court has overturned this decision and reiterated Judge Kendall's Judgment in my case. If you take the time to view my file you will discover that almost every affidavit presented by the applicant contains accusations that have later been retracted or proven false under cross examination. The juxtaposition of Mr Burns' statements and the facts brought out in court illustrate that he did indeed advise his client well but appears to suffer from a bad memory.

The issue of compensation for any contributions made to the property in question are clearly made out in the “contracting out agreement” and this is the appropriate action that both I and Judge Kendall have urged the applicant to take.

To continue with this case would, in my view, fail to fulfil the requirements of the legal services Act 2000 section 26.2 (c) & (d) I therefore request that you review this case and reject the applicants funding for the upcoming hearing.

Sincerely

**Jack was stunned when The legal Aid Office said they had reviewed her case and were going ahead with funding.**

**One year later the case went ahead with Judge MacAloon presiding. Jack felt sick going over the same stupid questions and the apparent stupidity of Mark Burns as he once again recanted on his affidavit and admitted that he did indeed advise his client well.**

**Transcript- Burns under cross examination**

The agreement - the memo that you sent to her and I asked you about extensively?..... Yes, yes.

Specifically contemplated as did the grammative (sic) clause 7., the fact that they might live there in the future?.....: Yes it did.

And she and you were both comfortable with the agreement on that basis?..... Yes we were.-

And it follows doesn't it that her reaction and the fairness of the agreement didn't change by virtue of the fact that they were going to live there in the future because you had already

pointed out what would happen if they did live there in the future. Isn't that right?..... That's correct.

So I do suggest to you that her reaction wouldn't have changed and indeed your advice in the end wouldn't have changed in its substance, whether you knew that they were going to live there permanently or not, because you had already covered it off. That's correct isn't it?..... It was partly correct. I would have flagged the matter of whether they were intending to make that the matrimonial home, I would have flagged that even more so than I did, I think, if she had said that we were living there, I would have.

But you had flagged it, hadn't you?..... Yes, I had. I had. I'm just saying as a matter of emphasis.

As a matter of emphasis?..... Yes. No further questions.

## **The case was once again found in Jacks favour.**

## **What went horrible wrong with Burns??**

### **Dissodence**

#### *Dissonance*

This is the feeling of uncomfortable tension which comes from holding two conflicting thoughts in the mind at the same time.

Counterfactual means, literally, contrary to the facts. The term counterfactual thinking refers to a set of cognitions involving the simulation of alternatives to past or present factual events or circumstances.

Expressing what might have happened: expressing what has not actually happened but might have happened in other circumstances

Sometimes regret and counterfactual thinking are used as synonymous terms. They are related and similar, but certainly not the same thing. The most basic distinction is that regrets are feelings and counterfactuals are thoughts - i.e., the distinction straddles the one between affect and cognition. In addition, the term counterfactual is broad, embracing many different types of "if only" thoughts. Regret refers to a more

circumscribed feeling, cantering on one's own (as opposed to other's) actions, and focuses on how things might have been better (as opposed to worse). This would suggest that counterfactual is the more general umbrella category, of which regrets constitute one subset.

***How to use it-:***

Cause tension by highlighting something about the other person that will cause dissonance, then offer a new thought that can replace the uncomfortable thought. Encourage them to accept the new thought. A neat form is 'What if you had...'

**Did Kearns create dissonance in Burn by beguiling him when she first made contact?**

(Supposition) "Hello Mr Burns, Linda Kearns here, Jack & Jill have separated and she has now been robbed of her rights under the Act by signing the contract.....Oh! it's so terrible. Did you know they were living in Top of the hill Ave??? **Wouldn't you have given different advice if you had known???**"

This may have created Burns counterfactual statement that he would have "given different advice" had he known that they were living in Top of the hill ave.

Cognitive Dissonance in action.....

Burns was suffering with dissonance under cross examination as he was shown clearly that he had indeed given good advice, admitted as such but couldn't seem to accept the irony of his conflicting statement.

## **Jacks' attempts to gets costs**

Jack first wrote a letter to Burns

*Dear Mr Burns*

*As a legal representative of a prenuptial contract signed by my now ex wife, Jill and myself, you did between 2002 and 2004 give counterfactual evidence, initially by phone then in writing, to Jills' counsel, Lynda Kearns that initiated a sustained attack on that contract.*

*In a letter to Ms Kearns dated 13<sup>th</sup> August 2003 you reiterated in writing that;*

***“.....Had I known that Jill and her partner were residing or intending to reside in the Top of the Hill Ave property then I would have advised Jill of the effects of the provisions of the Matrimonial Property Act in relation to that property”***

*Conversely, in a faxed letter to Jill in 1999, outlining the meaning and 'red flagging' of the contract, you specifically and succinctly stated;*

***“.....In this regard I note that the property at 3 top of the hill Ave, Mt Albert is specifically classified as Jacks' separate property. Therefore, notwithstanding that you may live in it as your matrimonial home, it will remain as his separate property.”***

*Both Judges in hearing this case found your advice to be sound, thorough and clear, specifically in relation to my property. Upon reading the court transcripts on this case it becomes evident that you were **negligent** in responding to Ms Kearns initial consultation before completing due diligence on Jills' file.*

***Clearly therefore, if you had given Ms Kearns a statement in line with the facts Jill would not have deemed she had a case to overturn the contract.***

*Hence, this 'Fisher' based contract was weakened and brought into disrepute by your dissonance and I consider it fair and reasonable for you to be held liable for my incurred legal costs.*

***As you would be well aware, in case law a principle is that a party to an earlier proceeding may recover legal costs incurred therein where such parties' involvement in` the proceeding was due to the negligence of another. (As to these***

*principles see the commentary on damages in Halsbury's Laws of England (4th ed), volume 12 (1), at para 827)*

*Sincerely*

**Burns sent it to his' insurance company and they replied they could not see a case against their client. Jack wrote back to them.**

*Phillips Fox*

*Attention Grant Macdonald*

*Dear Grant,*

*Thank you for your letter of 22<sup>nd</sup> December. I have not commissioned a solicitor at this time. I am seeking to achieve settlement of my legal costs without resorting to court action resulting in further costs to your client.*

*I acknowledge that this case is unique and contains incongruity in that your client admitted fault in his quality of advice when in fact he gave good advice. However, had he been correct in his statement he would have been liable for my costs and damages. I believe that as this case was built on Mr Burn's statement it must follow that he is subsequently at fault in giving counterfactual evidence directly leading to the undermining of the agreement. Under law he had an obligation to consider my care (to give good advice) when he was initially involved with the contract and I fail to see in law where there is a sunset clause on this responsibility.*

*In your letter you state that you are unable to discern any legal basis for my claim. I believe that a strong legal case built around Negligence, Proximity and Causation will deliver a Judgment against your client.*

1. **Proximity** and scope of duty will be established from case law, **Preston v Russell**. Burn's response (advice) to the question put to him by Kearns regarding the legitimacy of the contract would have the ability to protect or destroy its integrity. To give negligent advice in either the initial or subsequent consultations delivers the same result, that being, through proximity his negligent statement directly brought me into litigation creating unnecessary costs of defence to prove, ironically, that he himself was wrong. It is my view that the principle used in *Preston v Russell* can also be also applied here.

2. **Negligence** is evident from the transcripts of this case where my counsel, Raynor Asher, had Mr Burns recant on his affidavit that he would have given “.....different advise” Whilst Burns was not negligent in his original dealing, his ‘mea culpa’ statement most certainly was. Judge McAloon (see below) also appears to indicate he is incompetent.
  
3. **Causation.** Ms Kearns makes clear in her submissions to the court that Mr Burns (due to his evidence) is at the heart of their attack; PRA {21f (5)} *The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.*

*By telephone Mr Burns revealed his position to Ms Kearns well before litigation commenced. The claimant has stated that without Burn’s statement litigation would not have been considered. His statement is without doubt the catalyst, and potent motivation for commencement of litigation. Litigation became inevitable upon confession of negligence. As stated previously, without his counterfactual evidence this case had no substance to it. In sharp contrast it can be shown that the evidence (advice) he should have provided would have defused the situation.*

*In his rejection of costs against Mrs xxxxx (19 January 2006) Judge McAloon points his finger clearly at Mr Burns by stating;*

***“In this particular case there was some substratum for the applicant to bring the action under consideration. I refer particularly to the evidence of the solicitor, Mr Mark Burns, which was referred to me quite extensively in the course of judgment. It became apparent during the course of cross-examination that Mr Burns was not fully in possession of the factual situation at the time he gave advice to the applicant. In fact he conceded that had he known that the Top of the hill property was the relationship home, he would have advised the applicant not to sign the agreement. There was a further error in the time limit advised to the applicant by Mr Burns.”***

However, Jack never heard back from Fox and owing to his fight to keep contact with his child, who was taken from his city to another without his consent, he was exhausted

and disillusioned with the system. To avoid falling into depression, he moved on with his life.

### **Lessons learnt:**

- Understand the politics around the contractual law you are getting into. Relationship property law is built around feminist ideals where you, as the male, are the target.
- Don't let her consult with one lawyer to sign the contract, insist that it is discussed and signed by two lawyers from two different offices and ask to see the invoice from the solicitors where it should clearly state that at least 45 mins of time is charged for. It may be double the cost but sure is better than what Jack went through.
- Build as many firewalls as you can. Create a family trust **BEFORE** you meet your next partner. Make sure 1 trustee is at arm's length of you. Make sure the beneficiaries' are defined and fairly allocated. Don't set it up yourself; instruct a lawyer who deals specifically with family trusts.
- If you don't want to involve the legal process then live in her place or any place but your own. Never take her to your place, even to view it. Later she will say that she redesigned it all for you and created the entire garden.
- Not all women are as greedy or vicious as Jill, but if you see that your partner shows signs of emotional instability at any time you should then be prepared for the worse if your relationship comes to an end.