NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT REMAINS IN FORCE: SEE [2018] NZDC 23200

NOTE: FAMILY COURT ORDERS PROHIBITING THE PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF CERTAIN OF THE PARTIES' LEGAL ADVISERS AND OF TWO DECEASED PERSONS (SEE [2015] NZFC 7137) REMAIN IN FORCE

IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

I TE KŌTI MATUA O AOTEAROA
TŪRANGANUI-A-KIWA ROHE

CIV-2015-416-40
[2023] NZHC 3491

BETWEEN	W Appellant
AND	W First Respondent
AND	MR W & MC TRUSTEES (NO.2) LIMITED as trustees of the MR W TRUST

Hearing:	31 July 2023–1 August 2023, further material received 4 and 8 August 2023, 4 and 8 September 2023
Counsel:	J Hosking and S Brown for Appellant First Respondent in Person K I Murray as counsel assisting
Judgment:	1 December 2023

JUDGMENT OF ELLIS J

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[1] Mr and Mrs W are embroiled in a long-standing relationship property dispute. So far, the dispute has cost Mrs W dearly. As well as having had two relationship property settlement agreements set aside in favour of Mr W by the Family Court,[1] Mrs W has had her home searched at least twice by Police at Mr W's behest, been prosecuted for assault,[2] been convicted of and served a sentence of 12 months' home detention for perjury (only to have the conviction later overturned on a second appeal),[3] had a quarter of a million dollars in costs awarded against her by the Family Court,[4] and has—effectively on Mr W's petition—been adjudicated bankrupt.

[2] On the heels of the quashing of the perjury conviction the previous year, in 2022 the Court of Appeal granted Mrs W leave to appeal the Family Court's 2015 relationship property decision out of time.[5]

[3] Mrs W's appeal is advanced on two separate—albeit intertwined—grounds: that the decision was wrong on the merits, but also that the hearing before Judge Callinicos was so unfair that the resulting decision is effectively a nullity. It was agreed that the question of unfairness should be determined first.

[4] The appeal is therefore a sensitive and important one. The finding Mrs W asks this Court to make—a finding of unfair conduct by a judge—carries a particular obligation to consider it with great care. For that reason, and also because Mr W was self-represented on the appeal, the Court appointed counsel to assist. I record my gratitude to Mr Murray for his help at the outset.

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1 *[W] v [W]* [2015] NZFC 4905.

2 Mrs W was discharged without conviction on this charge by Judge Adeane: *Police v* [*W*] DC Gisborne CRI 2007-065-59, 10 January 2008.

3 *R v [W]* [2018] NZDC 2543 [conviction decision] and *R v [W]* [2018] NZDC 22589 [sentencing]. Mrs W's sentence was reduced to nine months' home detention on first appeal in *W v R* [2019] NZHC 2740, but due to a combination of delays achieved no practical benefit from the reduced sentence. The Court of Appeal later quashed the perjury conviction in *W(CA641/2019) v R* [2020] NZCA 286.

4 *[W] v [W] [Costs]* [2015] NZFC 9395, [2016] NZFLR 13; the costs order was upheld on appeal in *[W] v [W]* [2016] NZHC 2212.

5 *W v W* [2022] NZCA 512, [2022] NZFLR 595 [*W v W* (CA)]; Mrs W had first applied to the High Court for leave to appeal the decision, but this was dismissed in *[W] v [W]* [2016] NZHC 941.

Preliminary matters

[5] On one level the question of unfairness is relatively straightforward; it largely turns on the record of the Family Court hearing itself. But in order to understand what happened at the hearing and to assess the Judge's conduct fairly, it is necessary to begin by saying something about the history of the proceedings. Most notably, the nature of the "perjury" allegation and how it arose and developed. That is because the proposition that Mrs W had committed perjury—which pervaded the hearing in the Family Court and the judgment under appeal—did not originate with the Judge, although he certainly adopted it.

[6] I also mention at the outset that some of the material before me was not before the Judge. All privilege over the parties' legal files has now effectively been waived.[6] That material enables a better (and fairer) contextual understanding of the perjury allegation.

New material

[7] The new material also at least arguably discloses that the Family Court Judge was misled on certain material matters. In a rare show of unity, both Mr and Mrs W agree that the Family Court was misled, although they disagree about its import.

[8] In particular, it is of some importance to Mr W that two of the grounds on which his counsel advanced his claim to set aside the second relationship property agreement, signed in 2011, were false. He is adamant that, contrary to the position advanced on his behalf at trial, he was not mentally unwell at the time of his entry into this agreement. He is similarly adamant that—contrary to his position at trial—he had received advice about the 2011 Agreement from a King's Counsel.[7]

[9] Because those matters are significant from Mr W's perspective it is important to record them here. But although they will undoubtedly be relevant to the next phase

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6 The question of privilege in the Family Court was a vexed one and undoubtedly led to unnecessarily complexity and unfairness.

7 Mr W nonetheless maintains that this advice was wrong and negligent. The strength of this belief is evidenced by the fact he issued proceedings against the KC and another of his legal advisors in the High Court in 2017.

of this proceeding, they are not directly relevant to the issue central to this judgment. On one analysis, they might be seen as compounding the unfairness in a global sense to Mrs W, but they do not directly go to the fairness of the conduct of the hearing by the Judge who was, of course, unaware of the matters now raised by Mr W. So they will not feature in this judgment further.

Suppression

[10] The suppression landscape in this case is also rather complex and, in light of the lengthy and varied history of this matter, continued suppression might well be seen as an exercise in futility. I nonetheless attempt to summarise the current position, below.

[11] Following the release of his substantive decision the Family Court Judge declined Mrs W's application to prohibit publication of the parties' names.[8] The Judge considered that, because the W children were over 18, their position did not meet the high threshold required to restrict publication.[9] He nonetheless ordered there be no publication of the name of Mrs W's former partner who had died (pseudonymously referred to by the Judge as Mr Hardy) or the name of her ACC counsellor (pseudonymously referred to by the Judge as Ms Neale) on the basis that they were "vulnerable people" who were unable to respond to the serious allegations she had levelled against them.[10] The Judge also rather unusually determined that three of the parties' legal advisors (pseudonymously referred to as Messrs Irvine, Green and Smallford) were also "vulnerable people" whose identities should be protected.[11] There was no appeal against that order and so it remains in force.

[12] Although Judge Callinicos had declined to suppress Mrs W's name, the Judge who convicted her of perjury in 2018, suppressed her name permanently, out of

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8 *[W] v [W][Publication]* [2015] NZFC 7137; [2015] NZFLR 5 at [20]. In his substantive judgment, Judge Callinicos afforded any person who felt affected by the decision the opportunity to provide their views on publication (*[W] v [W],* above n 1, at [368]).

9 *[W] v [W][Publication],* above n 8, at [24]–[25].

10 Pursuant to s 11D(i) of the Family Court Act 1980; *[W] v [W][Publication],* above n 8, at [29]–[30].

11 Also pursuant to s 11D(i) of the Family Court Act; *[W] v [W][Publication],* above n 8, at [31]–[34]. These lawyers do not feature in the present judgment.

concern for the suffering of Mr W and the children.[12] In its decisions overturning that conviction and granting Mrs W leave to appeal out of time the Court of Appeal has continued the District Court's prohibition on publication. That means Mr W's name is also effectively suppressed.[13]

[13] Because of the complexities around suppression in this case, and the possibility raised by Mr Murray that the names of the parties' more recent counsel should also be suppressed I issued an embargoed copy of this judgment to the parties for their comment prior to its public release. My own view—which was subsequently endorsed by the comments I received from the parties—is that there is no basis on which the names of the parties' lawyers at the time of the Family Court hearing should be suppressed and, accordingly, they are not suppressed in this judgment.

[14] Lastly, I have noted already that, in 2017, Mr W issued proceedings against the KC engaged to represent his family trust's interests in relation to the 2011 Agreement. Specific reference cannot be made to those proceedings (and thus the KC involved) without the risk of identifying Mr W and so I do not do so.

The relationship

[15] Mr W is from a well-known, well-established and well-connected Gisborne farming family. Mrs W was born in Hawke's Bay and worked as a teacher. Between 1984 and 1987 she was in a relationship with Mr Hardy.

[16] Mr W and Mrs W met in early 1989 and got engaged later that year. They married in March 1990. According to Mr W, Mrs W told him on their honeymoon she had been abused during her relationship with Mr Hardy. Mr and Mrs W had three daughters together, all of whom are now adults.

[17] Also in 1989, Mr W received a two-thirds share in X Station, near Gisborne, from a family trust. He and Mrs W farmed on the property during their marriage. In 2000, Mr W sold his interest in the Station to Mr and Mrs W's family trust (the WFT);

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12 Pursuant to s 200 of the Criminal Procedure Act 2011; *R v [W]* [2018] NZDC 23200.

13 See *W (CA641/2019) v R* [2020] NZCA 286; *W (CA301/2021)* [2021] NZCA 676; and *W v W* (CA), above n 5.

the beneficiaries of the WFT were Mr and Mrs W and their children. In time, the WFT bought the remaining one-third interest in the farm from Mr W's father.

[18] In 2001 the WFT purchased a section in W Street. The intention was that it would be used by the family and that Mr and Mrs W would live there when they retired.

[19] The marriage lasted for around 16 years, until 2006, although there had been at least intermittent difficulties between the couple before then.

[20] At the time the marriage broke down, the (potential) relationship property pool comprised the X Station homestead, the X Station property, the farming business, a property in B Road, a half-share in a property in T Street, various other chattels such as vehicles, and life insurance policies. W Street was also treated by the parties as relationship property. Mrs W further claimed that—as a result of the application of relationship property and her own efforts in the period before the transfer of the farm to the WFT—she was entitled to a share in the increase of the farm's property value from 1989 to 2006 (being the time that Mrs W says she farmed alongside Mr W).

The 2006 Agreement and Mrs W's application to set it aside

[21] Very soon after the demise of the relationship, the parties resolved property matters by agreement following a mediation in August 2006 (the 2006 Agreement). Mrs W was to receive property totalling $1,014,250, comprising mainly the interests in the T Street and B Road properties, and $600,000 in cash. The W Street property was to be transferred to a new trust, the PL Trust; Mr and Mrs W together with a mutual friend were the trustees and their children were the discretionary beneficiaries. Mr W received a life interest in W Street and Mrs W a life interest in it on his death. Improvements would be accounted for as a debt to the party undertaking them. Four specified chattels were stated to be Mr W's separate property with the balance to be divided between the pair. Mr W was to retain as his separate property all plant and motor vehicles, except for the new truck, which was to be the separate property of Mrs W.

[22] Mrs W did not leave the farm at X Station for some months following the separation, apparently because Mr W was unwell. As I understand it, she lived separately, in a cottage on the property. On 13 December 2006, when she returned from picking up their older daughters from boarding school, Mrs W was told she could no longer remain at the property. Mr W's family was present. The next day she was served with a trespass notice.

[23] Although there were intermittent indications of residual affection between the couple, there were escalating disputes over the implementation of the 2006 Agreement, particularly around the chattels. Mr and Mrs W each have different accounts of exactly what occurred—each account with apparent corroboration from independent third parties. There is, however, no dispute that:

(a) there was a physical altercation when Mr W and his sister dropped off a load of junk[14] at Mrs W's home on 4 March 2007 that resulted in Mrs W being charged with assaulting Mr W's sister, despite photographs indicating bruising around Mrs W's neck;

(b) in September 2007, Mr W went to Police alleging that Mrs W had stolen various things from the homestead, causing Police to search the home Mrs W was sharing with her new partner and their car; and

(c) in April 2008, again at the behest of Mr W, Police executed search warrants (in the company of Mr W) at Mrs W's home.

[24] So by the time the marriage was formally dissolved in December 2008, the relationship between Mr and Mrs W had deteriorated significantly, and in May 2009 Mrs W applied to set the 2006 Agreement aside. She said she had entered it under a misapprehension about the effect of the Agreement in relation to the W Street property, which was unworkable.[15] She also said she had entered it under duress and on the basis of inadequate legal advice (proper valuations and disclosure not having been obtained). Alternatively, she contended the Agreement was seriously unjust.

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14 "Junk" was the word used by Judge Adeane; *Police v [W],* above n 2, at [4].

15 Including because the property was held by the PL Trust of which Mr and Mrs W were both trustees.

The "perjured" ACC evidence

[25] Mrs W's allegation of duress was founded on what she deposed was her fragile mental state at the time she entered the 2006 Agreement. She said this was the result of abuse she had suffered at the hands of by Mr W during the marriage.

[26] Mr W filed an affidavit in which he denied any abuse. On 29 September 2009, Mrs W filed an affidavit in response, in which she said:

> 25. Clearly [Mr W]'s violence is a matter of credibility. Annexed hereto and marked "**H**" are· copies of my confidential ACC information relating to my claims and subsequent cover by ACC. These can be summarised as follows: -
>
> | | |
> |---|---|
> | 21 August 1995 | To local doctor and reported abuse (sexual/physical) by [Mr W]. |
> | 22 November 1995 | ACC approves counselling with [Ms Neale]. |
> | 28 August 2002 | ACC approves more counselling for abuse by [Mr W]. |
> | 8 March 2004 | ACC approves more counselling for abuse by [Mr W']. |
>
> 26. I refer to paragraph 12. Annexed hereto and marked "**I**" is a copy of [Ms Neale]'s report to ACC. It is self-explanatory.

[27] The documents comprising annexure "H" included:

(a) a claim form dated 4 August 1995, which was unaltered by Mrs W and recorded that:

(i) the nature of the injury to which the claim related was "sexual abuse"; and

(ii) the date of the injury was stated to be "80→";[16]

(b) the 28 August 2002 "Initiate Return to Counselling Report", which was unaltered by Mrs W and referred to abuse that had re-occurred two

[16] Meaning from 1980 onwards (1980 was, of course, well before Ms W's relationship with Mr W commenced).

years prior and was continuing by the "same perpetrator". In a section headed "Rehabilitation Requirements" the form recorded:

> To identify relationship dynamics + power + control issues. To continue safety + self work, rebuild self-esteem + empower. Boundary work. Build on positive differences from previous counselling and identify areas of deterioration.

(c) an unaltered ACC counselling progress/completion report of the same date which stated:

> Husband controlling and physical abuse with forced sex ie. fresh incidents of abuse occurring. Identified power + control dynamics and areas had slipped back since saw the last counsellor. Also identified areas where improvement from original counselling maintained. Client came to me "for a different perspective". It may have been enough confirming what she learnt with prior counselling. She has not returned although is aware assessment hours approved. No contact since.

(d) an unaltered 9 March 2004 "Initiate Return to Counselling Report" signed by Mrs W and which, under the headings "events that lead this claimant to return to counselling" and "Rehabilitation Requirements", recorded:

> Several sexual attacks by her husband have initiated a return to nightmares, flashbacks, fear, sexual dysfunction.
>
> …
>
> Counselling to determine how to end the sexual attacks and/or marriage.

[28] The documents comprising annexure "I" were a letter dated 14 February 1996 approving 20 further hours of counselling and a "20 hour report form" which described the "nature of the abuse" as "Frequently beaten and then raped". But there has never been any dispute that Mrs W had altered the 20 hour report form in the following respects:

(a) the ages at which the abuse occurred had been (clumsily) changed to read "31 – 35" rather than "19 – 25";

(b) the answer to "relationship of the perpetrator(s) to the claimant" had had the reference to Mrs W's former partner deleted, leaving only the reference to "Husband";[17] and

(c) four references to psychological issues suffered by Mrs W and some minor historical offending had been (very obviously) crossed out and signed by Mrs W, with a note written by her expressly stating "I censored (personal not relevant)".

[29] Rather inexplicably, one further "redaction" made to the original 20 hour form is that Mrs W changed the words "Is being sexually abused in current marriage" so they simply read "Is being sexually abused". In other she words, although she altered the document in some ways that supported her allegation of abuse within the marriage, she also altered it in another way that lessened that support.

[30] In her September 2009 affidavit Mrs W also deposed "I was never physically abused by my previous partner. [Mr W] is the only perpetrator of violence towards me".[18]

[31] It seems that on receipt of Mrs W's affidavit, Mr W recognised that the 20 hour report had been altered.[19] On 17 March 2010, Mr W's solicitor met with Mr W, and set out in a file note that Mr W had pointed out annexure "I" saying that Mrs W had altered it "in a way that is designed to suit her whole case". Mr W also said that Mrs W had changed her age at the time of the reported abuse to coincide with the period of the marriage and had deleted the references to her psychological issues. The file note goes on:

> So on the face of it if what he is saying is correct then she's committed not only perjury but has also falsely altered a document with the intent of misleading both the Court and anyone else relying on the document. So she has probably committed forgery, perjury and other criminal offences if this is correct.

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17 The alteration did not involve Mrs W adding the answer "Husband", just omitting the additional reference.

18 This statement is supportive of her explanation that she wished to protect her former partner and keep him out of it.

19 The ease with which he did so lends considerable support to the Court of Appeal's much later conclusion that the document "on its face plainly is not a true copy of the original and it cannot be suggested W was saying it was"; *W (CA641/2019) v R,* above n 3, at [39].

[32] The file note records that Mr W's lawyer told Mr W that he would look at Exhibit "I" closely because if what he had been told was correct then:

> … this really would shatter her credibility because she is relying on all this alleged sexual abuse to support a ground of duress that she was under duress when she signed the Relationship Property Agreement.

[33] The lawyer went on to posit the idea of getting the original document from the ACC file (noting that the ACC officer who had filled out the form had since died) and that "it's a real smoking gun if what he is saying is correct".

[34] On 25 June 2010, Mr W applied to strike out parts of Mrs W's evidence, including the ACC documents. Before that application could be heard, the parties agreed to engage in a further mediation.

[35] I will come back to the question of "perjury" and the significance of the altered document later.

The 2011 Agreement and Mr W's application to set it aside

[36] The further mediation took place in February 2011, before Margaret Casey KC. As a result, the parties entered into the 2011 Agreement. Mrs W discontinued her application to set aside the 2006 Agreement shortly afterwards.[20]

[37] Under the 2011 Agreement, Mr W gave up his life interest in W Street and agreed to transfer the property to the PT Trust, of which Mrs W and her then solicitor were the trustees. He also agreed to pay Mrs W a further $70,000 and hand over additional chattels.

[38] Mr W signed the handwritten agreement at the mediation but was immediately unhappy with it. Although he later signed the typed-up agreement as well, Mr W's mental state at this time, and the nature and author(s) of the legal advice he received both before, during and after the mediation, remain contested. As noted earlier, Mr W's change of position in both these respects is likely to assume some importance at the next stage of this proceeding.

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[20] The discontinuance was filed on 13 March 2011.

[39] A few months later, Mr W ran into Ms McCartney KC whose specialist area of practice was family law. She agreed to look at the matter, which she did. She formed the view that the advice Mr W said he had received from the KC involved in the 2011 mediation had been wrong, and that Mr W had grounds for challenging the 2011 Agreement. Mr W instructed Ms McCartney to act for him on this basis.

The decision to attack Mrs W's credibility

[40] It is clear from the files now made available by Mr W that Ms McCartney made the "perjury" central to her litigation strategy from the outset. In an email dated 13 March 2012 (written in the context of her application to obtain Mrs W's file from ACC) she said:[21]

> The most critical aspect is that [Mrs W] deliberately interfered with the 20 hour report form by changing the dates of the alleged abuse from 19-25 years to 31-35 years so that the period coincided with the marriage and she also deleted reference to the alleged abuser (see item 5b) so to convey that it was [Mr W] who frequently beat and then raped her rather than an earlier de facto partner (allegedly). It was this allegation that has caused [Mr W] so much distress. [Mrs W] repeated the allegations to many others and had friends of hers file affidavits in the first proceedings repeating the allegations. This resulted in [Mr W] becoming so ill that [Mrs W] and her advisers were able to take advantage of him at the 2011 mediation. But for this evidence, in my view [Mrs W] would not have got past the preliminary hurdle in setting aside the 2006 agreement in that she would not have been able to establish that she was at a disadvantage in the 2006 agreement because she was negotiating with a wife beater and rapist. This is a very important development as, if [Mr W] is successful in setting aside the 2011 agreement, [Mrs W] will have to make her application to set aside the 2006 agreement against evidence that she deliberately misled the court and committed perjury to provide a (false) factual basis to explain her acceptance of the agreement in 2006.

[41] Based on my assessment of the evidence, there were a number of matters referred to in this passage that were carried through to the Family Court hearing and, ultimately to the judgment under appeal. In my view, they were wrong and unfair. In particular:

(a) although it was true that Mrs W had altered the age at which the abuse was said to have occurred on the 20 hour form, the key allegation (that

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21 Emphasis in original.

she was being abused within her current marriage) was also recorded on that form (and others) and was not altered;

(b) there was no proper evidentiary basis for the suggestion that Mrs W had repeated her allegations to "many others";

(c) Mr W now adamantly denies that he was mentally debilitated or made unwell by the allegations; and

(d) the affidavits from Mrs W's friends did not simply "repeat" her allegations.

[42] As well, it is clear from this passage that—contrary to the position taken at the end of the Family Court hearing—it was never Mr W's intention to seek to have the 2006 Agreement set aside.

[43] The file makes it clear that over the next few months Ms McCartney continued to develop this "strategy". Her communications suggest that this involved:

(a) calling the alteration of the ACC document a criminal offence and a fraud, the intent and effect of which was to give Mrs W a financial advantage;

(b) raising the possibility of referring the matter to Police;

(c) developing the proposition (now denied by Mr W) that he had been affected mentally by Mrs W's allegations of abuse, and had suffered the disempowering effect of knowing that she had tried to cheat and defraud him; and

(d) developing the proposition (now denied by Mr W) that Mr W had not been properly advised at the time of the 2011 mediation.

[44] In September 2012, Ms McCartney filed an application to set aside the 2011 Agreement. The grounds advanced were that the Agreement was seriously unjust, the

result of an unsatisfactory process, that Mr W had not received adequate advice and, at the time of the mediation was suffering from a depressive illness. Mr W also applied under s 182 of the Family Proceedings Act 1980 (FPA) to vary the 2006 Agreement by:

(a) having Mrs W's life interest in W Street valued and paid out to her;

(b) removing Mrs W as a trustee of the PL Trust; and

(c) requiring her and any other person with a mortgage or charge against the title of the W Street property to remove it.

[45] Both Mr W's applications were filed well outside the statutory time limits and so he needed to seek an extension of time from the Family Court. In doing so, he relied on both his poor mental health at the time of the 2011 Agreement and the altered 20 hour form.

[46] In granting the extension at first instance, Judge Druce described the altered 20-hour form as "perjured evidence". In the course of his decision, he said:[22]

> Much is made of [Mrs W] having altered a copy of a document (being an ACC claim form in support of a sensitive claim) prior to then filing the altered document in her evidence in support of her 2009 application. The alteration she made, being a change of dates of alleged abuse suffered by her (from dates prior to the relationship to dates during the relationship), was plainly prejudicial to the husband. The alteration is admitted by [Mrs W] who seeks to explain it as her attempt to protect her previous partner. I am unable to accept this explanation. There was a plain and immediate implication arising from the evidence that she had been seriously abused by [Mr W]. The documentary evidence was falsified and her actions, in my view, are inexcusable and likely amount to perjury. Her behaviour appears to be unconscionable. It needs to also be kept in mind that she did not bring the falsehood to notice. It arose after [Mr W]'s current lawyers obtained third party discovery of the ACC records and compared the document she filed with the original.

[47] The Judge accepted that [Mr W] "subjectively likely felt morally demeaned by the allegation and [took] into account his belief that the allegation had been earlier spread about the community by [Mrs W]". The Judge concluded the "perjured

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22 *[W] v [W]* [2012] NZFC 8314 at [51].

evidence" was significant and placed "at least a 'taint'" over the fairness of the process on 4 February".[23]

[48] An appeal against this decision—based in part on the Judge's omission to refer to the fact that the ACC form *did* record that Mrs W had disclosed abuse in her current marriage—was dismissed by Dobson J on 12 July 2013.[24] He took a charitable view of the omission:[25]

> [58] It might be argued that the Judge overstated the effect of the fraudulent change to the form. The Judge characterised it as follows:
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> > The alteration she made, being a change of dates of alleged abuse suffered by her (from dates prior to the relationship to dates during the relationship), was plainly prejudicial to the husband.
>
> [59] As the effect of the change was explained to me, the words used by the Judge in parentheses might more accurately have been stated:
>
> > … (from dates prior to *and during* the relationship to dates *solely* during the relationship) … (emphasis added)
>
> That apparent overstatement in the scope of the change [Mrs W] made to the form might be seen to cast her in an even worse light in that she attributed to [Mr W] abuse that she had complained to ACC of suffering at the hands of another partner. The document was before the Judge and I incline to the view that it is infelicitous expression of his understanding, rather than a wrong understanding of the effect of the change.

The unfair trial appeal

[49] The relevant parts of Mrs W's amended notice of appeal pleads:

> 28. [Mrs W] was denied a fair trial as a result of conduct by the Judge in the Family Court that involved:
>
> a. Excessive and unjustified intervention in the giving of evidence;
>
> b. Pejorative, disrespectful, and demeaning commentary; and
>
> c. Conduct that was indicative, not only of apprehended, but actual bias.
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> 29. The Family Court Judge made general credibility findings in favour of [Mr W] and against [Mrs W] that were not justified on the evidence.

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23 At [53]–[54].
24 *[W] v [W]* [2013] NZHC 1755. Justice Dobson referred to the altered form as "apparent perjury".
25 Footnotes omitted.

30. The alteration of the ACC document was given disproportionate weight in assessing the credibility of the parties.

[50] It is useful to begin by saying something about the legal principles and authorities that govern a case where an unfair hearing or trial is alleged.

Unfair trials: the legal context

The Bangalore Principles

[51] The Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.[26]

[52] The International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[27]

[53] In July 2006, the United Nations Economic and Social Council (ECOSOC) adopted a resolution recognizing the Bangalore Principles as representing a further development of, and as being complementary to, the 1985 United Nations Basic Principles on the Independence of the Judiciary.[28] ECOSOC invited States to encourage their judiciaries to take into consideration the Bangalore Principles when reviewing or developing rules about judicial conduct.[29]

[54] The preambular clauses make the important provenance of the Bangalore Principles clear and suggest they will have significant persuasive force in common

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26 *Universal Declaration of Human Rights* GA Res 217A (1948), art 10.

27 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 14.

28 *Strengthening basic principles of judicial conduct* ESC Res 2006/23 (2006), annex (Bangalore Principles of Judicial Conduct) [Bangalore Principles]; *Basic Principles on the Independence of the Judiciary* GA Res 40/32 and 40/146 (1985).

29 Bangalore Principles, above n 28, art 1.

law jurisdictions.[30] The principles themselves are articulated as a series of "Values", the meaning of each of which is then elaborated.

[55] Value 2 of the Bangalore Principles is that of impartiality:

> Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

[56] Application of that Value is said to mean:

> 2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.
>
> 2.2 A judge shall ensure that his or her conduct, both in and out of Court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

[57] Value 3 is that of integrity:

> Integrity is essential to the proper discharge of the judicial office.

[58] Application of that Value is said to mean:

> 3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
>
> 3.2 The behaviour and conduct of a judge must reaffirm the peoples' faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

[59] At a domestic level, the Guidelines for Judicial Conduct 2019 are intended to reflect the Bangalore Principles.[31] Although the Guidelines post-date the hearing in this case, they are nonetheless indicative of the position as it was before and how the Bangalore Principles are seen as applying here. Section F of the Guidelines describes the standards of behaviour to be observed by judges in Court. The relevant extracts are as follows:

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30 The Bangalore Principles have been frequently cited in New Zealand and overseas Courts. Mr Murray referred me in particular to *Gleason-Beard v R* [2018] NZCA 349, [2018] 3 NZLR 699 where the Judge made persistent and inappropriate interventions with counsel on the morning of a criminal trial amounting to a miscarriage of justice and quashing of the conviction.

31 *Guidelines for Judicial Conduct* (Courts of New Zealand, November 2019).

> 29. The primary obligation of a judge is to determine the case before him or her according to law without being deflected from that obligation by desire for popularity or fear of criticism.
>
> 30. The judge must hear a case in accordance with the principles of natural justice and on the evidence in the case…
>
> 31. It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants, and the public in general, in the ability, integrity, impartiality and independence of the judge.
>
> 32. It is therefore necessary to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour…
>
> 33. Nevertheless, the entitlement of everyone who comes to court, whether counsel, litigants or witnesses, is to be treated in a way that respects their dignity. Bullying by the judge is unacceptable. Judges must conduct themselves with courtesy to all and must require similar courtesy from those appearing in court … The absence of any intention to offend does not lessen the impact on counsel, witnesses or litigants.
>
> 34. A judge must be firm in maintaining proper conduct during a hearing. Intervention is appropriate but should be moderate. It is important a judge does not appear from interventions to have reached a conclusion prematurely …

The decision in Serafin

[60] Although counsel referred me to a number of cases dealing with apparent and actual judicial bias or partiality, in my view the most useful authority is the recent decision of the United Kingdom Supreme Court (the UKSC) in *Serafin v Malkiewicz*.[32] The Court expressly drew a distinction between a case involving apparent bias on the part of a Judge and an unfair trial case.

[61] *Serafin* was a defamation case involving a self-represented claimant in which both the Court of Appeal of England and Wales (the EWCA) and the UKSC found the tone and nature of the trial Judge's interventions had rendered the trial unfair. Lord Wilson, speaking for the UKSC undertook a comprehensive review of the English authorities which reads relevantly as follows:

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[32] *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455. Other relevant authorities have been usefully and recently summarised by Cull J in *Rongotai Investments Ltd v Land Valuation Tribunal* [2022] NZHC 1669.

> 40. The leading authority on inquiry into the unfairness of a trial remains the judgment of the Court of Appeal, delivered on its behalf by Denning LJ, in *Jones v National Coal Board* [1957] 2 QB 55. There, unusually, both sides complained that the extent of the judge's interventions had prevented them from properly putting their cases. The court upheld their complaints. At p 65 it stressed in particular that "interventions should be as infrequent as possible when the witness is under cross-examination" because "the very gist of cross-examination lies in the unbroken sequence of question and answer" and because the cross-examiner is "at a grave disadvantage if he is prevented from following a preconceived line of inquiry".
>
> 41. In *London Borough of Southwark v Kofi-Adu* [2006] EWCA Civ 281, Jonathan Parker LJ, giving the judgment of the Court of Appeal, suggested at paras 145 and 146 that trial judges nowadays tended to be much more proactive and interventionist than when the *Jones* case was decided and that the observations of Denning LJ should be read in that context; but that their interventions during oral evidence (as opposed to during final submissions) continued to generate a risk of their descent into the arena, which should be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by whether it rendered the trial unfair.
>
> 42. In *Michel v The Queen* [2009] UKPC 41, [2010] 1 WLR 879, it was a criminal conviction which had to be set aside because, by his numerous interventions, a commissioner in Jersey had himself cross-examined the witnesses and made obvious his profound disbelief in the validity of the defence case. Lord Brown of Eaton-under-Heywood, delivering the judgment of the Privy Council, observed at para 31:
>
> > The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials.
>
> 43. The distinction, drawn expressly or impliedly in all three of the cases last cited, between interventions during the evidence and those during final submissions was stressed by Hildyard J in para 223 of his judgment in the *M & P Enterprises (London) Ltd* case, …. He suggested at para 225 that, upon entry into final submissions, the trial had in effect entered the adjudication stage.

[62] The UKSC went on to observe that an unfair trial is not cured by an apparently fair and well-reasoned judgment:[33]

> In *In re G (Child)* [2015] EWCA Civ 834 counsel for the father, who was responding to the mother's contention that the conduct of the trial had been unfair, sought to rely on the judge's reserved judgment, which he suggested was balanced and had in no way represented a wholesale acceptance of his case. So too, before us, the defendants commend the quality of the judge's

[33] At [44].

> reserved judgment. It is on any view a remarkable document. The judge distributed it to the parties only 16 days after the end of the hearing. It runs to 355 paragraphs spread over 70 pages. It is intricately constructed and beautifully written. In it, as will already be clear, the judge in no way accepted all the defendants' arguments although his acceptance of their defence of public interest ultimately swept the claim into overall dismissal. Following a reading of this judgment, but of nothing else, many might ask "how could that trial have been unfair?" As it happens, Miss Page QC on behalf of the claimant does question whether the judgment, even on its face, is fair. In particular she criticises the alleged poverty of the reasoning in support of the judge's conclusion, pursuant to section 4(1)(b) of the [Defamation Act 2013 (UK)], that the defendants reasonably believed that publication of the article was in the public interest. But this part of the inquiry does not relate to the judge's judgment and it is not affected by its ostensible quality. For, as Black LJ said in the *G* case, at para 52:
>
> > "the careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent … of prejudicing the exploration of the evidence."

[63] And then there was discussion about whether—in an appeal where the Court had not heard from the Judge in question—there was a natural justice problem. After noting an observation to that effect in the *G* case, the Court rejected any such concerns, saying:[34]

> The observation precipitated a discussion at the hearing before us about the merits or otherwise of an invitation by an appellate court to the trial judge to comment on an allegation such as the present. In relation to a hearing which has not been recorded and so cannot be made the subject of a transcript, … it may well be appropriate to invite the judge to comment in writing and perhaps to provide his or her own note of the hearing: *Sarabjeet Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492, [2016] 4 WLR 183, para 53. But where, as in the present case, there is a full transcript of the relevant part of the proceedings, it is less likely to be appropriate to invite the judge to comment. On the one hand, as I know from personal experience, the anxiety of a trial judge may be profound if he considers that what he perceives to be the baselessness of criticisms of him in a forthcoming appeal is likely to go unexposed. On the other hand, unlike a disciplinary inquiry into his conduct, the focus of the appeal is not - directly – upon him. It is upon the alleged breach of the appellant's right to a fair trial both at common law and under article 6 of the [European Convention on Human Rights]. Most appeals involve criticism of trial judges in one way or another and no doubt most judges would welcome an opportunity to respond to it. Where would the line be drawn and, if the appellant were to take issue with the judge's responses, would resolution of the appeal be even more problematical? The observation of Black LJ in the *G* case therefore raises a difficult issue. All that need here be said is that, where a transcript exists, it is not the present practice of appellate courts to invite the judge to comment; but that the absence of his ability to comment places upon them a requirement to analyse the evidence punctiliously. In the present case we should draw confidence from the fact that

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[34] At [45].

> it was Mr Metzer, counsel for the defendants at the trial and therefore intimately acquainted with the course that it took, who was able to place before us a detailed and energetic response to the contention that the trial had been unfair.

[64] So it is relevant that in the present case there is not only a transcript, but an audio recording of the hearing in the Family Court. Not only does the audio recording contain some interjections by the Judge that were not transcribed, it also enables the listener to hear the tone (and sometimes distress) of the witness and the tone of the judicial interventions. And although I did not have the assistance of counsel who were present during the trial, I did have the assistance of Mr Murray who brought an experienced and objective eye to the issues.

[65] As already noted, both the EWCA and the UKSC in *Serafin* found that the nature and tone of the Judge's interventions had rendered the trial unfair. The EWCA did not, however, address the consequences of the unfairness.[35] But the UKSC found that a judgment that is the product of an unfair trial is, in effect, a nullity:[36]

> What order should flow from a conclusion that a trial was unfair? In logic the order has to be for a complete retrial. As Denning LJ said in the *Jones* case, cited in para 40 above, at p 67,
>
> > "No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it."
> >
> > Lord Reed observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them. That is why, whatever its precise meaning, it is so hard to understand the Court of Appeal's unexplained order that all issues of liability had, in one way or another, been concluded. Had the Court of Appeal first addressed the issue of whether the trial had been unfair, it would have been more likely to recognise that the only proper order was for a retrial. It is no doubt highly desirable that, prior to any retrial, the parties should seek to limit the issues. It is possible that, in the light of what has transpired in the litigation to date, the claimant will agree to narrow the ambit of his claim and/or that the defendants will agree to narrow the ambit of their defences. But that is a matter for them. Conscious of how the justice system has failed both sides, this court, with deep regret, must order a full retrial.

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35 *Serafin v Malkiewicz* [2019] EWCA Civ 852.

36 *Serafin v Malkiewicz,* above n 32, at [49].

The hearing in the Family Court

[66] Before turning to consider what happened in the Family Court it is relevant to set out certain matters of context. Any assessment of the fairness of the hearing must necessarily be made in light of those matters.

General matters

[67] At a general level, I note:

(a) Mr W was represented at the hearing by Ms McCartney and a junior;

(b) Mrs W's counsel (Anne Hinton KC) had had to withdraw shortly before the hearing, due to her appointment to the High Court bench;

(c) Mrs W was instead represented by Mr Allen who, it seems, had had some peripheral involvement with the file previously;

(d) hearings in the Family Court are private and so the opportunity for public scrutiny to operate as a check on judicial conduct is more limited than in other hearings;

(e) the case was in the Family Court and not a Court exercising criminal jurisdiction—Mrs W was not on trial;

(f) the main applications before the Court were made by Mr W; Mrs W was (largely) the respondent;

(g) both parties had raised issues about their mental health being exacerbated by the stress of the relationship property dispute;

(h) Mrs W would, in any ordinary setting, have been regarded as a vulnerable person (a person who had reported being sexually abused by both a former partner and her husband, and who had been accepted for ACC funded counselling on that basis);

(i) Mrs W was (on my reading of the evidence) genuinely conflicted in her feelings about Mr W, despite her allegations of abuse;

(j) there was a power imbalance between Mrs W and Mr W, both in terms of their respective statuses in the community and their former and ongoing relationship; and

(k) due to the protracted history of the proceedings Mrs W was being cross-examined about:

(i) affidavits she had sworn up to six years before; and

(ii) interactions with ACC (including the interaction that was recorded in the "perjured" form) that had occurred up to twenty years previously.

The perjury question

[68] As will be evident shortly, there can be little doubt that the Judge's view that Mrs W had committed perjury, and the evidential weight he attached to the altered ACC form, were central to his assessment of Mrs W's credibility, his approach to her evidence and to the trial overall.[37] That the Judge was wrong about those things adds force to the submission the hearing was unfair. The error diminishes the strength of any argument that a particularly stern or robust judicial approach to Mrs W's evidence was justified.

[69] In terms of the first aspect of the error, the Court of Appeal's view was that the elements of a charge of perjury were simply not made out on the facts here. The Court explained:[38]

> [26] In order for W to be guilty of perjury, she needed to make an assertion as to a matter of fact which she knew to be false, and in doing so intend to mislead the Court. The wilful falsity is said to be the swearing of the affidavit as a true statement when she knew it to contain an altered exhibit. The

[37] This point was explicitly made by Judge Cathcart in his decision following the perjury trial (*R v [W],* above n 3, at [83]).

[38] *W (CA641/2019) v R*, above n 3 (citations omitted).

> necessary inference is that in so swearing the affidavit as true, W was swearing that the exhibits attached were "true copies" of the original documents and therein lies the falsity.
>
> [27] Neither the wording of the oath on the affidavit, nor the form of words used by the officer witnessing the affidavit, refer to the exhibits. That W was swearing that the copies were "true copies" of the originals can only be a matter of inference. Normally that inference might not be difficult to draw but here the relevant exhibit had been written over by the deponent, and obviously so. It carried a statement to that effect:
>
> > I censored. Personal not relevant.
>
> [28] What then was the oath being attributed to W? It could only be "exhibit I is a copy of the original which has been altered by me in the ways that are obvious but has not otherwise been amended". That is not a normal understanding of what is being attested to, and was not the focus of the prosecution case or the evidence. It is, however, what had to be proved.
>
> [29] The inference to be drawn as to what W was attesting to is a question of fact, but we consider there must have been a reasonable doubt as to whether W was swearing that exhibit I was a true copy of the original ACC form or, alternatively, to the modified proposition identified above. The first, normal, inference would be readily drawn if all the alterations were hidden, but the presence of obvious alterations on the document and a plain acknowledgment by her on the face of the document that she had altered it means the normal and obvious inference is displaced.

[70] But the fact that there was no perjury in a technical sense did not of course change the undisputed fact that the 20 hour form was deliberately altered by Mrs W for the purposes of the proceeding. The question therefore becomes: what evidential significance—in terms of weight and of any assessment of Mrs W's credibility as a witness—could properly have been attributed to that?

[71] That was also answered by the Court of Appeal:[39]

> [19] The context for all this was that there had been a settlement of the matrimonial property dispute which W was seeking to reopen on the basis that there had been duress. The allegations of physical and sexual abuse were to support the duress rationale. Judge Cathcart variously described the document as of central importance to the Family Court case, and of persuasive force as an independent source of W's claim. *We consider this wrongly assesses the document's probative value. This in turn can lead to incorrect inferences as to W's motivations. As the probative value of the document decreases, the likelihood of such carefully planned deceit diminishes.*
>
> [20] The document is not independent evidence. It is merely a report, in very abbreviated form, of what W said to the counsellor. Its admissibility lies

[39] Citations omitted, emphasis added.

> in the old concept of recent complaint, it being a prior consistent statement, albeit in hearsay form in a business record. It is one of numerous similar items of evidence that were available to the decision maker, and is far from the best of them. There were, for example, photographs of injuries, written admissions by W's husband of violence, and witnesses giving direct evidence of psychological abuse. Seen in this light, one might wonder why someone would go to such length to alter what was at best low level support.

[72] To this list of other "similar items" could be added the several other ACC forms put in evidence at the hearing (including one that was not annexed to Mrs W's affidavit but obtained from her file and put to her in cross-examination) that also recorded she had told her counsellor about abuse in her marriage to Mr W.

[73] The other point to be made here is that, even in its unaltered state, the 20 hour form referred to abuse by Mrs W's current husband. So the alteration hardly involved the creation of some new and relevantly different (false) narrative. As just noted, the narrative of abuse in the marriage was consistent with all the other ACC reports. Moreover, the alterations to the 20 hour form are, themselves, perplexingly inconsistent because Mrs W also removed words that were *prejudicial* to Mr W.[40]

[74] To the extent that the changes made to the form were capable of rational explanation, the explanation given by Mrs W at trial seems as close as it could get. She said:

(a) she deleted the references to her historic bulimia and shoplifting (and clearly indicated she had done so on the form) because she was ashamed about those things and believed they were not relevant to the Family Court proceedings; and

(b) she changed her age on the form to reflect her age at the time of her relationship with Mr W because that was not inconsistent with the relevant part of the rest of the form (which recorded that she had reported abuse during their marriage to the ACC counsellor) and she

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[40] As noted earlier, Mrs W altered a sentence that read "Is being sexually abused in current marriage" to read "Is being sexually abused".

also believed the more historic abuse involving her previous partner (who had since died) was irrelevant.[41]

The conduct of the hearing

[75] As noted earlier, the Family Court hearing took place over eight days in December 2014 and late March 2015.[42] As also noted earlier, I have both a written transcript and the audio recording of the hearing. The audio recording reveals the content of some judicial interventions that were not transcribed, although these are relatively minor.

[76] During the six hours and 15 minutes of Mrs W's cross-examination (calculated as excluding the breaks), her answers were interrupted by Judge Callinicos at least 20 times. On one occasion, there were eight interruptions within a single hour. Sometimes his questions span several pages of transcript. The Judge also intervened pejoratively and at some length while Mrs W's friends were under cross-examination.

[77] I also note at the outset that, from listening to the audio recording, it is apparent that Mrs W is at times audibly distressed and in tears (including, on at least occasion, while she is being questioned by the Judge). This prompts her to comment more than once that she feels she is not being heard.

[78] By contrast with some of the cases referred to in *Serafin*, however, the interventions were not unfair because they interrupted or undermined the cross-examination conducted by Ms McCartney. On the contrary, they had the effect of building on counsel's efforts to undermine and belittle Mrs W. On reading the transcript it is difficult not to be left with the impression that Ms McCartney and the Judge effectively teamed up against Mrs W.

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41 It must be acknowledged that, on my reading of the evidence, Mrs W denied during the trial that there had been any abuse by her former partner at all (apart from on one occasion when he had hit her). To the extent this denial was dishonest (as opposed to being driven by a possibly misguided attempt to the protect the reputation of a man who had since died) it was not relevantly so. Whether or not she had been abused in a previous relationship was a peripheral issue at best.

42 Only five days had initially been allocated.

[79] I have attempted to include the more egregious parts of the questions and interventions in chronological order below. It needs to be borne in mind that there were significantly more interruptions than this. And while it is arguable that they speak for themselves, I attempt at the end to extrapolate just what they demonstrate in terms of:

(a) the impact of the shared, but wrong, view that Mrs W had committed perjury; and

(b) the nature and extent of the unfair questioning that Mrs W faced.

Relevant transcript excerpts: cross-examination of Mrs W

[80] Mrs W's cross-examination began at around 10.30 am on 25 March 2015. There are brief interruptions by the Judge at 10.32 am, 10.42 am, 10.52 am, and 11.00 am. By 11.07 am Mrs W is being persistently asked about why she included certain things in one of her 2009 affidavits, and she suggests that her previous lawyers would have obtained that information through discovery.[43] The Judge then interrupts the cross-examination. On the audio recording Mrs W can be heard crying. There is then the following exchange:

Q. I'll just stop you there, [Mrs W]. These are affidavits, okay?

A. Yep.

Q. Do you know what an affidavit is?

A. I do but, I mean I don't know what she's trying to –

Q. No, no do you know what an affidavit is?

A. Yes.

Q. So when you are seeing a lawyer and you are asked to swear an affidavit – so all these affidavits here, you've already confirmed to Mr Allen that all these affidavits, he referred you to all of them, were true and correct. Okay. As a starting point do you accept that?

A. Yes.

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[43] The matters referred to in her affidavit were matters Mr W in fact agreed with, so there was no need for the repetitive questioning.

Q. And you accept that you've re-read them generally a few days ago, okay? Do you remember saying that?

A. Yes.

Q. So when you were going to swear each of these affidavits – and just try and think back – did the lawyer get you to read through the document first before you signed them?

A. Yes but –

Q. No, no, no. I don't want ifs and buts. These are yes/no answers. So your lawyer asked you to read through them first?

A. Yes.

Q. Did your lawyers say things to you like, "If there's anything that's not right in your documents, let me know and we'll discuss it" or anything like that?

A. Yes.

Q. So before you put pen to paper, and more importantly before you swore these documents to be true, you had read them and had an opportunity of correcting anything. Is that right or not?

A. Yes.

Q. So you have to accept that once you swear a document to be true – and we do have some issues about some aspects of that – that you have to then accept that you can't keep palming them off to your lawyers as an explanation or as an excuse –

A. I just –

Q. These are your sworn statements of fact. Okay?

A. Yes.

Q. So just dispense with referring any views of doubt onto lawyers okay?

A. It's just –

Q. It's your statements.

A. The reality is like [Mr W] said – they arrive in the courier at 4 o'clock, you've got to get them signed and back on the courier, I mean – it isn't, I know it doesn't seem –

Q. It's all right. These affidavits had nothing to do with [Mr W], about these affidavits –

A. No, but he said the same thing. You read through and quickly, you know, sometimes, I know, it doesn't sound –

Q. If you want to I will get some of these lawyers called back to Court. Think carefully before you say things.

A. I'm not sure what I've said, what I've done, I mean –

Q. Never mind. You have said that you have gone to the lawyers; there has been these documents there. [T]he lawyers have said to you, read through the documents. You have read through the documents. The lawyers have asked you whether there is anything you need to change in those documents and then they've gone either to a lawyer or to a Court and they have got you to say, "Do you swear by almighty God that the contents of this, this is your signature, the contents of this your affidavit are true and correct," and you have gone, "Yes." And you have signed them, is that correct?

A. Yes.

[81] The tendency attributed to Mrs W here—to hide behind her lawyers when trying to explain some of the contents of her affidavits—is a recurring theme of the cross-examination and judicial interventions. It is therefore relevant to note that in the later perjury appeal, the Court of Appeal said:[44]

> In evidence and in the judgment there are criticisms of W hiding behind her lawyer and tending to blame others. Our reading of the evidence leads us to the view that this was not merited in this context. It is not an uncommon answer for a witness to observe that the drafting of an affidavit was done by the lawyer. That of course does not make the deponent not responsible for the content, but some of the propositions put to her in evidence were not fair. Indeed, that is a general observation we make of the cross examination. …

[82] Although that observation was directed to Mrs W's cross-examination during the perjury trial, the same point can fairly be made here.

[83] Returning to the narrative of Mrs W's cross-examination, at 11.12 am on 25 March 2015 (just a few minutes after the lengthy exchange above), Mrs W was indicating she did not agree with the proposition put to her by Ms McCartney that Mr W was a "very good saver". The Judge interrupts saying "I'm going to get very, very tired of this tactic [Mrs W]. That is a yes/no answer. Now please do not test my patience here … listen to the question and then answer that question". There is a further series of questions from the Judge at 11.27 am and a "just listen to the question" at 12.15 pm.

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44 *W (CA641/2019) v R,* above n 3, at [40] (citation omitted).

[84] There is a further interjection at 12.38 pm and at 12.43 pm the Judge is audibly annoyed, interrupting with a series of questions about the circumstances in which Mrs W signing the 2006 Agreement. There is a similar interruption after the lunch adjournment, at 2.41 pm. And at 2.47 pm, when Mrs W is saying that she wanted another of her former lawyers to give evidence in the proceedings, there is the following interruption by the Judge:

> Q. Mrs [W], I, I –
>
> A. I find it sad that Mr Sharp can't have just provided the evidence when I asked him.
>
> Q. Listen, would you stop going on about that. I have explained to you that you have had all this opportunity, as has Mr [W], since whatever year this started and – it's either 2011 or 2012, to get whatever evidence you want. You can issue summonses for people. How many lawyers have you had now?
>
> A. My lawyers I asked, they wrote to Mr Sharp –
>
> Q. How many lawyers have you had now?
>
> A. I've had three I think.
>
> Q. Three, you think?
>
> A. Three, four, yeah.
>
> Q. Three lawyers okay. So any one of those lawyers; you've got Mr Allen who is vastly experienced. You have had I think, Ms Gravatt, who I assume is a reasonably experienced lawyer? Do you know if she's an experienced lawyer?
>
> A. I've approached all my lawyers about this matter –
>
> Q . No do you know if Ms – don't change the subject on me. You can try and devote [sic] attention to Ms McCartney and I have noted you have quite a pattern of trying to do that. It does not wear any credibility with me, so do not try it on with me. Do you glean that Ms Gravatt was probably an experienced lawyer or not?
>
> A. Yes.
>
> Q. Okay, so any experienced lawyer would know that if a client requires certain evidence from someone who is not prepared to give it, they issue what is called a "witness summons" and they can be summonsed to Court. So I am not going to hear, I don't want you to mention this again. You've had your opportunities, okay? Turning to the agreement and I really struggle and I just do not know whether you are being deliberately obstructive on this matter or you simply do not understand, but let us just take a look at. Go to that page 489, okay?

And really just listen and try and follow this, okay? Are you looking at page 489?

A. Yes.

Q. Okay. Now see and go – you've raised actually a very handy point here which helps to answer as well. Paragraph 21, you mentioned about the LIM report and Dave Sharp had said there should be LIM report.

A. He did say that at that meeting we should get one.

Q. And is that the meeting where you say that –

A. But –

Q. No, actually look at it before you answer 'cos I don't want your glib answers without looking at things? Is that your signature under there?

A. Yes it is.

Q. And there's an initial, is that [Mr W's] initial or not?

A. I don't know. No, I don't think so.

Q. Well you were married to him a fair while so does it look like his initial?

A. No.

…

Q. *Well [Mr W] wasn't there was he? He's not there. So you're just adding to this evidence as you're going aren't you?*

A. No I'm not because I'm saying –

Q. *Well you are, [Mrs W], because you've said – I just put it to you before – that when that was, was that the meeting that [Mr W] was at, and you said, "yes" but he clearly wasn't there?*

[85] At 3.10 pm, when Mrs W tries to ask Ms McCartney a question, the Judge says "don't go off on another tangent". Similar irritation is expressed at 3.17 pm.

[86] At this point Ms McCartney begins cross-examining Mrs W about her history of "stealing", and then moves onto the topic of her engagement with ACC and her allegations of abuse. At 3.27 pm Mrs W is, again, audibly crying. After a slightly digressive answer, the Judge tells her twice to listen to the question and not to divert onto other matters.

[87] In the last sitting hour of 25 March, things deteriorate further. Mrs W is being cross-examined about her "perjury" and, more specifically on the alteration of her age on the 20 hour report. After Mrs W accepts that the original age range recorded on the form was outside the marriage, she seems to dispute that she spoke to the ACC counsellor about the abuse by her former partner, despite that being recorded on the form. At 4.06 pm the Judge interrupts and there is the following exchange:

> Q. Just on that point, [Mrs W], so I understand and can get clarity on what you're saying, you're saying that [Ms Neale] asked you about your earlier de facto partner but you hadn't told her about that?
>
> A. No I wondered why she was asking me and then it wasn't until I saw that document –
>
> Q. Okay, well just, that's exactly what I'm asking you. Are you saying that she asked you about a partner that you hadn't mentioned to her?
>
> A. Yes.
>
> Q. So how are you suggesting she would be asking about an earlier partner if you had never told her about it?
>
> A. 'Cos I put it on the original form at the local doctor, because I didn't want to put my marriage time because I didn't want them to know what [Mr W] was doing. It was –
>
> Q. I've already heard that excuse. So when you say you put it on the earlier form, what form is that?
>
> A. The one at the local Doctor Fookes at Te Puia.
>
> Q. Yes well I can't see anything on the form that you –
>
> A. It's a 1980 with an arrow, the first, the first 1980 –
>
> Q. Yes it doesn't mention anything about any partner on there?
>
> A. No I didn't say a partner but she knew I'd been married –
>
> Q. Yes well hang on. On that form all it says is, "Sexual abuse" this is Dr Fookes' form. "Sexual abuse 1980 ►" meaning onwards. So if that form doesn't mention any perpetrator, how would have [Ms Neale] suddenly got it into her head that it was possible abuse by a partner if it wasn't on the form that she'd seen.
>
> A. Because I remember she asked me when we got married, we talked about the marriage, we talked about what [Mr W] did and she kept asking about a previous partner.
>
> Q. Yes well you made it more emphatic than that. You said that she was asking you about a former partner. So I'm suggesting to you that

[Ms Neale] has had that implanted in her from somewhere, and if it's not from that form, then –

A. Well I didn't –

Q. – it's either from some other mysterious person or from you, isn't it?

A. I didn't understand why she was doing it until I saw that I had put that on the original thing.

Q. Yes well I suspect that she heard it from you.

[88] At 4.12 pm Ms McCartney is still rather peripherally asking Mrs W about her interactions with the ACC counsellor, Ms Neale, and whether Mrs W told Ms Neale that her bulimia was caused by the earlier sexual abuse. Mrs W maintained the bulimia was precipitated by something else and predated the abuse. To the extent the information on one of the ACC forms suggested otherwise, Mrs W suggested that Ms Neale had recorded their conversation wrongly.

[89] At around 4.15 pm on 25 March, Mrs W is being asked about another ACC form filled out by her counsellor on 23 August 1995, six years into Mrs W's marriage to Mr W. Mrs W had not annexed this "cover report form" to her affidavit but it was consistent with those which she had. Under the heading "The brief circumstances of the abuse" the counsellor has written "Age 19 – 25 – Havelock North. De facto husband. Under the heading "The nature of the abusive act" the counsellor has written "Frequently beaten and then raped. Is being sexually abused in current marriage". And under the heading "Effects of the abuse" the counsellor had written "Client became bulimic, depressed and suicidal. Unable to respond sexually in current marriage had no self-confidence or self-esteem and is totally isolated from other people". The counsellor then records her confirmation (by ticking a box) that she considers Mrs W has been the victim of some form of sexual abuse.

[90] The exchange begins with Ms McCartney rather confusingly asking her about Mrs W's interactions with the ACC counsellor and whether her bulimia was caused by the earlier sexual abuse (which Mrs W denied). There is then the following lengthy and abrasive intervention by the Judge.

Q. I am really lost, are you suggesting this person suddenly, coincidentally just dreamt this all up?

A. No I'm not.

Q. So what's your explanation for it?

A. Well what does [Ms Neale]'s, you know one thing I've noticed is some of the health professionals, some of the things they put, they write these reports, they don't show you, them to say is this what you mean, you see them like years later and you think well that's not right, you know they're saying that, their counselling has helped me to overcome things which I haven't had for years

Q. You are not really getting it, what I am saying. There are incredible coincidences here aren't there that Ms [Neale], whose report you are challenging, you're suggesting that it's all wrong and yet, and yet it just so happens that you have accepted that you had bulimia, you accepted you were shoplifting and stealing –

A. Just can I explain that?

Q. Sorry?

A. Oh it doesn't matter.

Q. Well stealing is shoplifting isn't it?

A. I stole food when I was on a binge and I talked to her about that.

Q. Okay, so you have been, what I am saying is you have accepted you were stealing, you have accepted you have shoplifted, and you have accepted you have had bulimia, is that correct or not?

A. Yes.

Q. Okay. And does it seem incredibly coincidental that Ms [Neale] records exactly those things in her report and yet you're sort of saying that Ms [Neale]'s report was somehow wrong, I'm really lost on this.

A. Did Ms [Neale] –

Q. Just, is it just a sheer fluke that Ms [Neale]'s got all her report wrong but happens to touch upon all the things that you are also separately saying has happened to you?

A. I talked to Ms [Neale] about my bulimia.

Q. And the theft and the shoplifting?

A. Yes I did, yes.

Q. Okay. So she has put those things into the –

A. Yes but –

Q. – into her report?

A. – she's just got the context wrong in terms of I didn't get, there was no sexual abuse before.

Q. No sexual abuse at all from anyone?

A. Well I wasn't in Havelock North in 1980 and I wasn't in the same place, you know for those years, are wrong.

Q. Right so she's got that wrong?

A. Well it was based on the original confusion came from me putting 1980 because I was trying to protect [Mr W's], and our family's reputation. I didn't want the local, it was the first time I'd actually told anyone what was happening and that's why when I was given the form to fill out, I didn't want to put down –

Q. So you –

A. – it's not an easy to actually come and talk to someone to get help.

Q. No, so you fabricated a form to obtain an effective monetary benefit from ACC by them paying for your counsellor?

A. No because –

Q. Well hang on –

A. – the abuse was –

Q. – that's what you've done –

A. I didn't.

Q. Well did you pay for the counselling yourself?

A. I went to the couns – I went to them because I was being abused in my marriage.

Q. Did you pay for the counselling yourself?

A. No.

Q. Who paid for the counselling?

A. Well ACC paid for the counselling.

Q. Yes, and part of your claim to get the counselling was based upon a false statement.

A. I had been sexually abused.

Q. Or a part of it, don't play games with me, part of it was based upon a false statement because now you're saying to me and this is the problem I have with you [Mrs W], and this is just the start imagine of a lot of issues, is which parts of your story am I to believe and which parts can't I believe?

A. Well I'm sorry I just –

Q. 'Cos you're just saying here 1980 was a falsehood.

A. I'm sorry it was, I should have put my husband is raping me in my current marriage and that's what I should have put but I didn't.

Q. Okay, and somehow Ms [Neale] just dreamt it up the rest of it and –

A. No she didn't. She could see I put a date from previous and so she started questioning me about previous relationships.

Q. Yes, and so she just got it all wrong.

[91] The points being so vigorously explored here by the Judge (whether or not Mrs W told Ms Neale about being abused by her former partner and whether she was living in Havelock North at the time of that relationship) were of marginal relevance at best. Like all the other ACC forms, the form in question recorded that she was alleging abuse in her current marriage. Moreover, Mrs W did not, of course, create the form herself and so could not possibly have fabricated it.[45] So it is difficult to see in this exchange any foundation for the entirely new and surprising suggestion made here by the Judge that Mrs W had not only lied to the Court but had also perpetrated a fraud on ACC.

[92] At 4.44 pm Ms McCartney was questioning Mrs W about that part of her first (May 2009) affidavit in which she deposed that she had reported the sexual violence to Police in Tolaga Bay (at para 11.3). In answer to one of the questions asked by Mr W's senior counsel, Mrs W had denied reporting the abuse to Police. The Judge then intervened:

Q. So is 11.3 just another situation where yet again another lawyer has incorrectly stated your words? Is that what it is? What is your explanation?

A. Well that's what I told her –

Q. Well what is your explanation?

A. Well I told her –

Q. Listen to these words, "I reported the sexual violence to the police in Tolaga Bay –

[45] There had been no alteration to this form, either.

A. Well that's how my lawyer has written what I told them about –

Q. Yes so that's what I'm saying and I guess you blame your lawyer because your lawyers seem to feature more for a lot of explanations but you were put a very clear question by Ms McCartney, which was, did you report any of these matters of the alleged sexual violence to the police? And you said emphatically, no, and yet here is yet again another sworn statement by you that in 2005, "I reported the sexual violence."

A. But that was how, to me, I didn't go to the police and report it, he rang up –

Q. Why, why didn't you say that in 11.3?

A. Because that's what my lawyer put in, that's how they word it. I told her the situation I'm in –

Q. Oh okay, so yet again let us go through the exercise, when you swore this document –

A. All right, I did swo –

Q. When you swore the document –

A. If that's reporting it to the police, I did.

Q. Did you read the document before you put your signature to it?

A. Yes. But –

Q. Yes or no.

A. Yes I did.

Q. You either read it or you didn't.

A. I mean it wasn't, I thought reporting it to the police was when you –

Q. No, no, no, no, no, no –

A. – make a complaint and you want something to happen –

Q. No, did you read this document before you swore it?

A. Yes I did.

Q. Good, thank you.

A. May I just explain about it?

Q. No.

[93] It is apparent from this exchange that Mrs W's position was that she had told Police about the abuse when talking to them about another matter, rather than directly

or proactively reporting it at the time it occurred. The Judge nonetheless rejects this explanation (which is not obviously implausible) and concludes her evidence means she has (again) lied in an affidavit.

[94] At 4.52 pm Mrs W is resisting the proposition put by Ms McCartney that she had told a number of people "in the community" that Mr W was sexually abusing her. Mrs W says (and it was not in fact disputed) that she only told three close friends, the Police, her doctor and a counsellor. Ms McCartney retorts that her three friends "were in the community". Mrs W then said:

> I didn't say, you know you're saying I didn't, I always tried to, um, I wouldn't have gone and tried to run [Mr W], I wouldn't have said anything about being a rapist or a wife-beater. There's no way I would have said that.

[95] The Judge then intervenes:

> Q. Sorry, to who? To anyone?
>
> A. No it's not something I would have done.
>
> Q. So how many people, and you think carefully before you answer, how many people did you tell that [Mr W] was physically and sexually violent to you? How many people?
>
> A. I don't even know if I would have told them. I would have asked them if they could write about incidents. But I remember with [a friend, Ms M] –
>
> Q. Just think really carefully about this – so I want you to be really precise. I don't want one of your sort of wishy-washy-vague answers. I'm putting it to you really clearly here – how many people precisely did you tell that Mr [W] physically, was physically and sexually violent to you?
>
> A. Probably, um, I wouldn't have put it in those words. I'd say he gets stressed and he'd sometimes lose his control, I mean –
>
> Q. Okay, so you just [tell] me what words you would have put it in?
>
> A. Well I would have said that you know [Mr W], how he'd get stressed and I'd feel he'd sort of get a build-up of stress and then he'd take it out on me and that's how I would have put it, you know, yes.
>
> Q. Go to bundle 1, have you got bundle 1 in front of you? Bundle number 1, page 10 and tell me when you've got page 10 –
>
> …
>
> A. Yeah.

Q. You'll see four paragraphs numbered, 11.1, 11.2, 11.3, 11.4. See those?

A. Yeah.

Q. Now that, to paraphrase the first two, the first event you allege of being hit and suffering a ruptured eardrum, secondly you had counselling because of ongoing sexual attacks by Mr [W] on you. The next one that you reported the sexual violence to the police. And then that you also raised issues of his verbal, sexual and physical attacks again at mediation. But then you say there, "Later in my marriage, I told three close friends about the abuse."

A. Yes.

Q. So that statement, again sworn by you, is telling the reader that you told three close friends about the abuse, namely the four matters that you've just referred to?

A. Yes.

Q. So you've just told me that you didn't tell anyone about the physical and sexual abuse. You've just gone on that you would have said it in words like, "Oh, he got stressed out and reacted". So –

A. Well no –

Q. – which of the two stories is true? Which of the two sworn statements?

A. I mean this is hard to remember that long back. It was a long time ago. But I would have discussed you know, I know was, one of them was, um, a chance meeting in Tolaga and she brought it up and then remember admitting it to her.

Q. Okay, brought it up, and what did – well I'm not going to get into what you said 'cos you've already given me one sworn statement about what you said. But is it fair for me to say that your memory of what you would have said to people is more likely to have been accurate on the 4th of May 2009 than it is today?

A. Yes.

Q. So if I'm going to pick between varying sworn statements, I could safely conclude that it is more likely than not that the 4th of May 2009 statement that you did tell close friends about the physical and sexual abuse is more likely what happened than your evidence today –

A. We would have discussed it probably yes, but I mean it's – I've kept to myself the last few years –

Q. Yes okay, well I've –

A. – I don't see anybody –

Q. – heard that part.

[96] A fair reading of this exchange is not that Mrs W is denying the gist of what she said in her affidavit(s) but rather focusing on the words used by the Judge when he asked whether she had said Mr W was "physically and sexually violent." It is a theme throughout her oral evidence, that she did not like using the word "rape" to describe the alleged abuse (in part because she thinks it is an inapt word to use in the context of marriage) and that she shies away from using any explicit language when speaking in Court about it.[46] Rather, it is Mr W and his counsel who often described Mrs W's allegations of abuse as allegations that she had been "raped and beaten" or that Mr W was a "rapist" and a "wife beater".

[97] Ms McCartney then very briefly resumes the cross-examination with the following exchange:

> Q. So these three friends lived in the community –
>
> A. Sorry I can't, you know I just feel like whatever [I] say is just not going to be –

[98] The Judge then intervenes again:

> Q. I'm sorry, [Mrs W] –
>
> A. No I do feel that.
>
> Q. – I'm going to put very clearly to you and plainly to you. When a person fabricates documents for various purposes, attaches them to an affidavit, stating she's attaching them to an affidavit to attack, to refute the matter and you actually state it as being there as a credibility issue, and the irony is for you gain superior credibility over Mr [W], then this is a real irony – you fabricate a document in a Court process to do it, then you can expect a robust experience in Court. I make no apology for that and this is all on the record. And you're just going to have to cope with that. Okay?
>
> A: I'd just like it known that I haven't actually seen my friends for about six years. I keep to myself. I don't socialise. I don't talk about [Mr W] –
>
> Q. Sorry, what's that got to do with your sworn statement?
>
> A. Well you're trying to make out that I'm spreading this in the community and –

---

[46] She did, however, use the word "rape" to describe the abuse in one of her affidavits.

Q. No Ms McCartney had put it to you that you declined that you had, and yet here's this sworn statement that you told three close friends about the abuse –

A. That's not the community –

Q. – and yet you had denied you had done that.

A. But –

Q. You've emphatically –

A. I protected my husband's reputation –

Q. No sorry, you emphatically –

A. – that's what I did –

Q. You emphatically denied the questions put to you by Ms McCartney precisely that. You said you hadn't done that. And here's another sworn statement by you which says you had.

A. I mean I'm just, it's hard, like you're saying about, I just, I just can't win. I mean I can't, I mean (inaudible 16:58:23)

Q. Well you're going to have a difficulty winning if occasions when you are on oath, as you are now, you are giving different answers in Court today to sworn statements on oath –

A. I know –

Q. – in other documents.

A. I just –

Q. These are very clear statements. They're not vague statements.

A. But I know I protected his reputation for so long and that's all I remember about that period. It was such a long time ago and I know I did protect his reputation –

Q. You've hardly protected his reputation, have you, when you launch into this, fabricate documents and bring about in a large part the very predicament that you and your husband are in today. Because by fabricating documents, it exacerbates the dispute and you're hardly protecting his – from your perspective – his reputation by doing that when you've already told close friends about it in a small community about it.

A. I kept quiet for much of my marriage and now I just feel like I'm being, you know. I was so isolated, to talk to three friends is not –

Q. And what do you feel like today? What are you trying to say? What do you feel like today? That you are being punished for it in some way?

A. I'm just, knowing what I know, about how I behaved and I just feel like the Court's being really quite, um –

Q. What? Tough on you?

A. Because I know –

Q. Because you fabricate documents and swear false affidavits? What did you remotely expect –

A. I just also know that Mr [W] has lied –

Q. What? No.

A. – under oath.

Q. You stop here. What did you remotely expect of a Court? Do you think I treat this job with frivolity? That people can come into it and fabricate documents? It is a criminal offence putting false documents or statements to ACC to gain counselling and payment, it's a criminal offence.

A. I was protecting –

Q. Do you grasp any of this, the enormity of it?

A. I do but the thing is I was doing that to protect my husband and it's been turned around to make out –

Q. Well I simply –

A. – that I was fabricating –

Q. – do not accept –

A. – a document.

Q. – a word of what you're saying.

A. Exactly and –

Q. I think it's –

A. – that's my point.

Q. - completely false on your part. It is yet another manipulation of your evidence. But we'll move on from that tomorrow because – but you're just going to have to accept if you fabricate documents and you make false statements in your affidavits and completely contradict ones then you are going to find a robust response. If you don't want that, then tell the truth on everything. You can reflect on that overnight and we'll see how you go in the morning.

[99] Mrs W's resistance to the suggestion that by telling three friends about the abuse she had spread the allegations around the community was completely understandable. In fact, the only relevant evidence about this was:

(a) Mrs W's mother's evidence that she had been told by one of Mr and Mrs W's daughters that Mr W had hit Mrs W and, when she asked about it, Mrs W merely said she was seeing a counsellor and things were under control.

(b) Ms M's evidence that she had seen bruises on Mrs W's neck when they were at a café together and, when asked about it, Mrs W had told her that Mr W sometimes hit her.

(c) Another friend, 'Ms B', gave evidence that she had never witnessed Mr W being violent to Mrs W but on one occasion Mrs W had told her they had had an "altercation", and on another that Mr W had been "aggressive towards her", which had caused her to sleep in the car;[47]

(d) The evidence that Mrs W had told police, her doctor and a psychologist about the abuse.[48]

[100] Soon after the resumption of cross-examination on 26 March Mrs W was asked a series of questions by Ms McCartney:

> Q. Just putting [Mr and Mrs W's daughter] to one side, you understand don't you, [Mrs W], that … in coming back to [M] Farm is something that [Mr W and his new partner] find very scary and intimidating?
>
> A. I have never come back. I don't come out. When they come and drop the kids off outside the house, I stay inside. I don't intimidate them you know. I've said hello to them at the end of the road and they just glare at them. You know I've tried to be polite. I've tried to be neutral. refute all the evidence about me doing that. It's just not true.
>
> Q. Can you hear yourself?
>
> A. Yes I can.

---

47 The third friend ('Ms S') did not refer to Mrs W making allegations of abuse at all.

48 Ms McCartney later expressly put it to Mrs W that "The police, the doctor, three close friends and Hewitson [the psychologist]; it's in the community, isn't it?".

Q. You try to be polite after making an allegation that [Mr W] is a rapist and child-beater [sic], who wants you to be polite? They don't want to see or hear of you again, [Mrs W]. Do you not understand that? Do you not understand that?

A. I just would like to have a civil relationship for the sake of the, especially when dropping the kids off at the end of the road, I'd just like to have a civil relationship, like, "Hello, hello", you know that's all I was wanting. It wasn't like, I just, you know, it's embarrassing for the children, the hostility from [Mr W] is really hard. I don't like that. I'd like to have a respectful relationship. I'd like to be able to sit down and have a cup of tea with the kids you know, I just ...

Q. Well it's in your dreams, [Mrs W], because by your conduct you've made sure that's never going to happen, don't you agree?

A. I don't agree. I don't think my con – I don't think my conduct, I've told the truth about things that happened in the marriage and I'm sorry that [Mr W] has portrayed himself as a victim and made this into me, because it's not true. I've just –

[101] The Judge then cuts her off, saying:

Q. [Mrs W], I appreciate discussion around wider conduct, but look at it this way – if you just take the fact that you went to the extreme – I've never seen this in a Court case before where a person who is a party to the case actually fabricates a document for the very purpose of heightening the level of allegation against the other party, which is undeniably what you did. I know you package it up in other explanations. But the fact that you said in the affidavit, "I'm putting this is because this is a credibility issue" shows you did that. That's extreme behaviour, it's criminal behaviour. So can you see this 'cos step from your shoes into the shoes of [Mr W] and the people around him. Now if you were the recipient, if he had done that to you, if he'd fabricated a Court document, attached it to an affidavit to heighten his allegations against you, it's just almost naive and child-like to then think that somehow all is forgiven and let's get back to being amicable and civil. It's like – let's pretend it didn't happen. Do you really think that's – I really need a fix of where you're coming from because that –

A. He has done that to me by denying the abuse.

Q. No, no, no. Let's focus –

A. Yes.

Q. — on your, let's focus upon your criminality. Can you really expect any rational operating human being to suddenly say, "Oh, well let's just forget about that." Really is that how you genuinely think or is it just sort of another glib comment from you? Do you actually – and I mean do you actually believe that because if you do that's quite concerning as to what's operating within your –

A. I don't feel any hostility to [Mr W] for what he did to me. I just want no conflict for the sake of our family. I would like to just be able to put all of this you know behind us and just try and rebuild. I mean, to him –

Q. That's fine. I've heard you. I can see that you, that's the way you feel and nothing is going to change that.

[102] At 11.15 am the Judge can be heard saying "Stop this tactic of diverting your answers it's doing your credibility no good whatsoever".

[103] The transcript also discloses a number of questions by Ms McCartney that, in the context noted above, I consider were unacceptable (improper or unfair) in terms of s 85 of the Evidence Act 2006 and should have been disallowed by the Judge. I include in that the exchange set out at [100] above. But by way of further example, I refer to:

(a) questions that were unnecessarily pejorative, such as:

You keep going back to the property don't you, sneaking around like a common thief and taking stuff don't you?

(b) the use of sarcasm in questions about sensitive matters:

Q. And, and what was the nature of the sexual and physical abuse?

A. In terms of [Mr W]?

Q. Yeah?

A. Well just holding my throat for sex, I'd hide in a cupboard, he'd grab at my crutch, he'd hold his butcher's knife, chase me up the road and he'd hold his knife to my throat and once your breathing is compromised, sure I wasn't fighting and that because I couldn't breathe, I mean you do just lay there and ...

Q. And what?

A. Oh you let them have sex with you because –

Q. Well how distressing that would be and you'd go and see the police about that wouldn't you?

(c) numerous questions containing references to Mrs W's "perjury" or "perjured evidence": and

Q. You make false allegations, [Mrs W], and bolster them with perjured evidence which [you] then in Court [try] to deflect when you are cross examined about them. That was false what you said about [Mr W], wasn't it?

(d) simple discourtesy:

A. I didn't want more. I just wanted my belongings back, my chattels, my horses.

Q. For God's sake. Next go to February 2011.

[104] Lastly, the repeated insistence on Mrs W answering just "yes or no" and not permitting her to elaborate made it impossible for her to answer some of the loaded questions she was asked. One example involves Ms McCartney putting to Mrs W a hearsay (and in my view unreliable and inadmissible) statement from Mr W's evidence about a conversation he had allegedly had with Mrs W's former partner, Mr Malcolm Hardy, just prior to his death.

Q. So in the last few months with knowledge that that was the position as conveyed by [Mr W], you went and tried to pester [Mr Hardy]'s wife to provide evidence to support you, didn't you?

A. I had already –

Q . No the answer is yes or no.

A. I had, I did, yes.

[105] As subsequently becomes clear all Mrs W was accepting here was that she had visited Mr Hardy's wife after his death.

Relevant transcript excerpts: cross-examination of Mrs W's friends

[106] At 12.37 pm on 26 March 2015, during the cross-examination of Ms B, the Judge interrupts to suggest that Ms B should not have believed what Mrs W told her:

Q. I think what Ms McCartney, what she's trying to say to you and may be speaking across purposes was that against a background of, in part acceptances by [Mrs W], and quite clear evidence and acceptance by her that she fabricated a document in these proceedings in the earlier stage of it. Fabricated a document and attached it to an affidavit –

A. Mhm.

Q. Deliberately to attack Mr [W]'s credibility. If you'd known about those sort of things, would you perhaps have had such a strong faith in other things that she may have told you?

A. Perhaps not. I don't know.

Q. And again, it's sad that you are all in this predicament, but there are often other sides to stories.

A. Exactly.

Q. At least in a Court environment, especially one taking six to eight days of evidence.

A. Mhm.

Q. These things are unravelled –

A. Indeed.

Q. – and it appears that in the clearest light of day and so you have been sadly drawn into that as well, okay?

[107] Similarly, at 1.11 pm on 26 March during the cross-examination of 'Ms M', the Judge interrupts to say:

Q. [Ms M], I know that it's always awkward for people to become involved in these matters, but there's an inherent danger in letting a mere friendship guide the objectivity of swearing documents to be true with all the manifest ramifications that carries in terms of leading to cases like this. And so much of what's in there is just drawn from one side and it may be helpful for you today that in addition to theft and shoplifting, [Mrs W] has fabricated a document in these Court proceedings and has accepted she did that, and attached it to an affidavit, a fabricated document, to attack Mr [W's] credibility. Were you aware of that?

A. No Sir.

Q. So it just shows the inherent dangers of taking a person and being guided by the friendship rather than the objectivity. And I'm not being critical of you. It's just a handy word of advice that this is a case of far more than another side to the story and sadly, by people being drawn into it. Using friendship as a guise, it has helped her expand the case beyond what it ever needed being, okay.

A. Yes Sir.

Q. But thank you for your time and I have a sympathy for you and the other people who have been used in that way. So you are free to go, thank you.

The 2015 decision

[108] It is unnecessary, and I do not intend to go into the decision in any detail here; the focus of this judgment is on the conduct of the hearing. But it is worth noting that—by contrast with the anodyne judgment in *Serafin*, the Judge's view of Mrs W in this case is made very clear; his belief that she had committed perjury pervades the decision. He referred to Mrs W's "perjury" as if it had been established, saying that:[49]

> … the circumstances in which the respondent fabricated evidence serves to demonstrate the depth of her dishonesty, the devious manner in which she functions and the degree to which she will put aside the obligation to be truthful in order to achieve her desired outcome.

[109] And in its extension of time decision the Court of Appeal said:[50]

> The Family Court decision canvassed, in detail, the most personal aspects of the parties' characters and relationship. The resultant credibility findings against Ms W could only be described as excoriating. Few litigants face criticism of this kind. …

Unfairness is the inescapable conclusion here

[110] Ultimately, the number and nature of the Judge's interventions (and the absence of intervention in the face of unfair questioning by counsel) speak for themselves. Overall, their tone, nature and frequency are indicative of him "entering the fray". And by the end of the first day at latest of Mrs W's cross-examination, he was making "obvious his profound disbelief in the validity of [Mrs W's] case".[51] All of this suffices to render the hearing unfair.

[111] There can in my view be little doubt that it was the mistaken belief that Mrs W had committed perjury that was the primary cause of the unfairness; that belief pervaded and tainted the hearing. The most extreme example of the tainting effect was the view (which is evident from the interventions) that:

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49 [*W*] *v* [*W*], above n 1, at [48]. At the end of the judgment, the Judge referred the matter "by way of formal complaint against Ms [W]" to Police for further investigation (at [371]).

50 *W v W* (CA), above n 5, at [43].

51 This is the phrase from *Michel v R* [2009] UKPC 41, [2010] 1 WLR 879 at [31], cited by the UKSC in *Serafin v Malkiewicz,* above n 32, at [42].

(a) she had (11 years before the end of the marriage and subsequently) fabricated her claim to ACC fraudulently to obtain the "benefit" of free counselling for the (made up) abuse;

(b) she had fraudulently repeated these documented (but fraudulent) allegations of abuse to obtain an advantage in the Family Court proceedings; and

(c) she had deliberately lied to her friends about the abuse (and thereby blackened Mr W's name "in the community") so they would give evidence to support her in the Family Court proceeding.

[112] This view was reached even though:

(a) in its unaltered state, the 20 hour form did disclose a report of abuse within the marriage; and

(b) there was other corroborating evidence of abuse, including:

(i) the evidence of her friend seeing bruising on Mrs W's neck;

(ii) other prior consistent statements, including those recorded by ACC on other forms about Mrs W's reports of abuse during the marriage; and

(iii) the fact that her sensitive claim had been accepted by ACC.

[113] The mistaken belief that Mrs W had committed perjury also made it too easy to jump to the conclusion that other minor inconsistencies in her evidence were lies. Similarly, it made it too easy to reject those parts of her evidence where she was confused, could not remember or was otherwise reluctant to answer certain personal questions, on the basis that she was being evasive or manipulative. As well, and in the face of Mrs W's obvious moments of distress during the hearing, the belief that she had committed perjury was used by the Court as justification for her "robust experience" in the courtroom.

What happens next?

[114] As the earlier discussion of *Serafin* demonstrates, the effect of an unfair hearing is that any resulting judgment cannot stand, and I set it aside accordingly. The costs judgment must also fall, and I set that aside as well.

[115] So in a sense, the parties are very much back to square one. Given the tortuous history of this matter that is extremely regrettable.

[116] The orthodox course would be to send the matter back to the Family Court for a rehearing before a different Judge. That is not, however, what the parties want. They would prefer for the appeal to be determined on its merits by this Court.

[117] I am not sure, however, that this is jurisdictionally possible. The only way this Court could determine the matter is if there were to be a formal transfer of the file from the Family Court to this one for the purposes of a complete rehearing. The obvious and most desirable course would be for the parties to try again to settle their relationship property issues out of Court. That is, of course, a matter for them.

[118] It may be, however, that I am missing something. For that reason, Mrs W's counsel, counsel assisting, and Mr W may file further brief submissions on the point if they wish. Any such submissions are to be no longer than two pages. So too with the question of costs, if they cannot be agreed: memoranda may be filed no longer than two pages.

Last word

[119] It is necessary to conclude by noting that the Family Court Judge's conclusion in his 2015 judgment that there was no abuse in the marriage cannot stand,[52] because the decision itself cannot. But it needs to be made clear that I am not, in this judgment, to be taken as making a positive finding that abuse *did* occur. To make such a finding would not be possible or right in the present context; it would be well beyond the ambit of this judgment.

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[52] *[W] v [W],* above n 1, at [59].

[120] I also record that a continued focus on whether abuse occurred or whether it did not seems to be an unproductive way of progressing the underlying relationship property dispute. While acknowledging the importance of the issue to the parties personally, it is only of peripheral relevance to the proceedings going forward and I would encourage the parties to leave it behind, if they can.

Rebecca Ellis J