Clayton, the Supreme Court, and the rule of law

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The Supreme Court's decision in *Clayton* [2016] NZSC 30 (which for the purposes of this article I will call "*Clayton 30*") is of interest not just because of the way the Court has described how typical family trusts can be eviscerated, but also for what it says about the rule of law.

The term "rule of law" is supposed to encapsulate the principle that our laws are identifiable and that all people – regardless of their status – are bound to comply with them.

Clayton 30 was concerned with the interpretation of section 182 of the *Family Proceedings Act*, a section that had its origin in 1867 and which has been re-enacted in various forms since then.

Although the section has been embedded in our law for about 150 years, it was virtually unknown to the members of Parliament who enacted the *Matrimonial Property Act* in 1976, and to those who amended it in 2001.

They were pressed to give the courts power to extract assets from trusts that derived from relationship property, but they refused to do this.

The people we elected to make the laws that should govern our destiny said that judges should *not* have the powers to do what the Supreme Court has said in *Clayton 30* they have had perhaps since 1867.

Following the Parliamentary debates in 2001, section 182 began to become known in the legal profession and its boundaries were tested – most notably in *Ward* in 2009 – when the Supreme Court gave it a relatively benign interpretation.

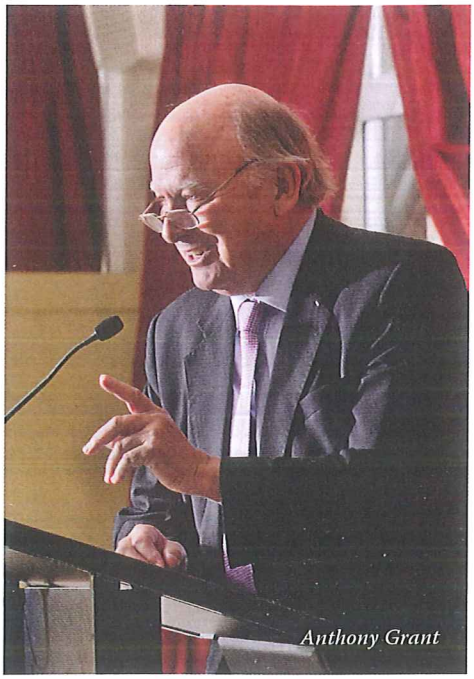
But in *Clayton 30* the Supreme Court overruled the *Ward* decision. It did so in footnote 100, where four of the five judges said that, "Contrary to what was said in this Court in *Ward* we do not see [s 182] as supporting the interpretation" [that the Court had given to it in *Ward*].

Only one of the judges who gave the *Ward* decision sat on the *Clayton 30* appeal – the Chief Justice.

In a separate decision in *Clayton 30,* her Honour said that although the *Ward* decision could be "taken to suggest" that section 182 was to have a particular interpretation, such an approach would be wrong.

The other four judges were more direct. As I read footnote 100, they said *Ward* had not been misinterpreted. It was simply wrong.

This was not the first occasion when the judges in our highest Court have said that one of its decisions was wrong. For example, in *Paper Reclaim Limited v Aotearoa* [2006] SC 25, the Chief Justice renounced a decision she had delivered not more than six months earlier, in *Chirnside v Fay* [2007] 1 NZLR 433.



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Her Honour had said in *Chirnside* that "[j]oint venturers owe each other fiduciary duties of loyalty", but when that paragraph was cited to her with favour by an appellant she said: "Well I'm certainly, repent me of that one ..."

She told Counsel: "... if you look at my paragraph 14 I indicate what's meant by that."

In paragraph 14 she had said: "Where parties join together in a venture with a view to sharing the profit obtained, their relationship is inherently fiduciary ..."

When counsel for the appellant referred to that passage with approval, the Chief Justice renounced it as well, saying: "Oh don't. Move on to the majority reasons, if you must."

The Supreme Court's decision in *Chirnside v Fay* was one of its more significant decisions in 2006. It concerned the nature of fiduciary relationships and associated equitable remedies. Its importance was reflected in the fact that it had taken the Court ten months to deliver its decision.

What does all this say about the rule of law in New Zealand?

If the Chief Justice can renounce a decision that she had made six months earlier and if the Supreme Court can renounce the decision in *Ward* that it had made nine years earlier, what confidence can New Zealanders have that the law, as pronounced by our highest Court, is reliable?

I do not have an answer to this question.

And what about the doctrine of precedent? When judges give a new interpretation to a statute, their decision is retrospective, back to the time when the statute came into effect.

So, in the case of *Clayton 30*, the new interpretation which the Court gave this year is retrospective back to the time when section 182 was enacted – or perhaps even to the time when its predecessor sections were enacted, which is right back to 1867!

Subject to the Statute of Limitations, all of the people who have entered into relationship property settlements that involve family trusts may be at risk of their settlements being set aside on the basis that the parties to those agreements were mistaken as they never understood that section 182 had the momentous power to destroy trusts that the Supreme Court now says it has.

So *Clayton 30* has four important consequences:

a) It enables typical family Trusts to be taken apart and redistributed to the parties.

b) It operates retrospectively, as far back in time as the Statute of Limitations will allow.

c) It teaches us that the rule of law in New Zealand is a rule of considerable flexibility. What our Judges say today may be renounced in a few years' time.

d) It compounds the uncertainty and unpredictability of the court system and is likely to cause more people to seek to resolve their disputes in ways that avoid the courts.

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