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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 102/2019
[2020] NZSC Trans 2

BETWEEN **PETER DANIEL STAITE**
JEAN TANIRAU-CARSTON
LYNETTE KATHLEEN PALMER
CHYNELLE PICARD
(AS TRUSTEES OF THE WHAOA NO 1 LANDS TRUST)
Applicants

AND **ANDREW MARUTUEHU KUSABS**
DONALD MAIRANGI BENNETT
JULIAN KUMEROA KEEPA
WIREMU WAKA
(AS TRUSTEES OF THE TUMUNUI LANDS TRUST)
Respondents

Hearing: 5 February 2020

Coram: O'Regan J
Ellen France J

Appearances: D G Chesterman and J P Koning for the Applicants
M S McKechnie and A F S Vane for the Respondents

CIVIL ORAL LEAVE HEARING

MR CHESTERMAN:
May it please the Court, counsel's name is Chesterman, I appear for the applicants with my learned friend Mr Koning, and I'll also mention that Mr Staite of the Whaoa Trust is in the back of the Court.

O'REGAN J:
Thanks, Mr Chesterman.

MR McKECHNIE:
If it please Your Honours, McKechnie is my name, I am counsel for the Tumunui trustees and I am assisted by my learned instructing solicitor, Mr Vane.

O'REGAN J:
Thank you very much, Mr McKechnie. Go ahead, Mr Chesterman.

MR CHESTERMAN:
May it please the Court, you'll be aware that an application was filed yesterday. The reason for the lateness of that is that it was only during the preparation for this hearing that the awareness of the potential argument arose and that didn't happen until the night before the application was filed. I alerted Mr McKechnie by email at 9.40 am prior to filing the application, filed the application at 11.00. I understand Mr McKechnie's position yesterday was that he would oppose it. I asked Mr McKechnie about that again this morning and I'm unsure if that's still his position.

One practical approach which I suggested to Mr McKechnie and which may resolve any issues that his client or he has about any prejudice for late notice of the argument is I suggested that on that particular point, whether or not it's a matter related to the Treaty of Waitangi, that following this hearing he could

have 14 days to file any written reply he wanted and that Whaoa would not seek any right to reply to his written response, and that was my suggestion to deal with any prejudice in this issue. And I asked Mr McKechnie this morning about whether that would satisfy him but I haven't had a response on that other than it's for the Court to decide whether or not.

O'REGAN J:
I think you just address the point and we'll then put it to Mr McKechnie.

MR CHESTERMAN:
Thank you Your Honour. May it please the Court. The applicant is a ahu whenua trust, the Whaoa Trust, and it proved in a trial before Justice Heath that its chairman trustee, Mr Moke, had breached his duty of loyalty to the Trust and that this occurred in the context of a lease transaction with Tumunui. Tumunui had actual knowledge of the breaches and benefited from the breaches. The entire case was structured around breach of fiduciary duty and applied the leading authority from the Supreme Court, which is *Fenwick v Naera* [2015] NZSC 68. When it came to relief Whaoa had sought rescission as an initial remedy. Justice Heath then, following his findings on fiduciary duty, went through *Fenwick v Naera* and decided to exercise the Court's unique discretion with ahu whenua trusts not to order rescission but instead to order an alternative equitable remedy, His Honour selected rectification.

The matter then moved to the Court of Appeal, Tumunui appealed, and it's an important point to make at the outset that in my submission the scope of the appeal was primarily one, that Mr Moke's breaches were not sufficiently serious to warrant rescission, but that if they were, then rescission was the appropriate remedy, not rectification. So in my submission the issue squarely before the Court as set out in the grounds of the appellant were liability under *Fenwick v Naera* and what alternative remedy should be provided. The Court of Appeal, however, dealt with the matter by finding there was no common mistake, dismissing rectification. It decided not to deal with the

fiduciary duty issue or *Fenwick v Naera* and did not order alternative relief, although it gave no reason for why.

In my submission this appeal raises several important issues. The first relate to legal issues. The second, more importantly, relate to Māori and New Zealand. The legal issues this case raises was whether the denial of any remedy to Whaoa was contrary to the findings on reliability and relief against trustees of ahu whenua trusts set out in *Fenwick v Naera*. The secondary alternative legal issue is whether the Court was wrong to interfere with the factual findings of the High Court.

The issues in terms of New Zealand and Māori, in my submission, are first, that it is a matter of public importance for two reasons. One is that ahu whenua trusts are the primary vehicle through which Māori govern multiple ownership over their greatest asset, which is Māori freehold land, and for that reason it is essential that the duties of trustees of ahu whenua trusts are absolutely clear. Secondly, it is also a matter that is related to the Treaty of Waitangi because the preamble to Te Ture Whenua explains that that Act, and the mechanisms through which Māori land are managed under it, are a reaffirmation of the principles of the Treaty of Waitangi.

The further point as to why it's important to hear the appeal is that it's submitted there has been a substantial injustice for the reason that although Whaoa in my submission was completely successful against Tumunui, and no findings were overturned that entitled it to a remedy, it was left with none.

I'll approach this appeal by going through the following topics. The first is a basic background of facts. I'm going to summarise that very briefly because it is already in the –

O'REGAN J:
We have read all that.

MR CHESTERMAN:

Yes, read all that, so I plan to –

O'REGAN J:

Can I just, there seems to be a dispute between parties as to what the High Court Judge was doing.

MR CHESTERMAN:

Yes.

O'REGAN J:

I think your case is that the High Court Judge was giving a remedy for a breach of fiduciary duty.

MR CHESTERMAN:

Yes.

O'REGAN J:

And I think, as I understand it, Mr McKechnie's argument is the High Court Judge was giving a remedy for a common mistake. That there was a mistake in the way the contract was drafted which neither party intended.

MR CHESTERMAN:

Yes.

O'REGAN J:

And the rectification was a remedy for that.

MR CHESTERMAN:

Okay, well –

O'REGAN J:

Is, and I guess that calls into question whether rectification is an available remedy for a breach of fiduciary duty.

MR CHESTERMAN:

Well, it was the – so the first part of your question, what was the Judge doing in the case and how did he reach the remedy, common mistake and rectification was not pleaded. What was pleaded was breach of fiduciary duty by Mr Moke and knowledge of Tumunui, and the relief sought was, first, rescission and, second, alternatively equitable damages and, third, any other relief as the Court considered just or fit in the circumstances.

The way His Honour Justice Heath approached it was he went through all of the fiduciary duty findings, which were extensive, and then spent a significant part of the judgment assessing *Fenwick v Naera* and what he should do with remedy, because His Honour had made findings that Whaoa was entitled to relief and that His Honour also referred for example to the expert witnesses and their evidence that this rental clause was uncommercial and illogical and there was no sense in it and it resulted in, I suppose, "cheap rental" is one way to put it.

After going through all of that His Honour then went to the remedy of rescission, and the relevant paragraph is 204 of the High Court judgment, and there what His Honour said was, "I do not find the remedy of rescission to be insuperable despite the passage of time. However if I were to grant it it might give an inappropriate benefit unless there was also an order for a payment from Whaoa to Tumunui. He then referred to *Fenwick v Naera* and said, "But in the context of *Fenwick v Naera* I have a discretion to order what I consider to be a more appropriate alternative remedy to rescission," and then His Honour referred to the fact that he considered there had been a common mistake and he then made the finding that rectification was a remedy that in his view resolved any I suppose economic imbalance between the parties as a result of this rental clause.

So from my reading of the judgment and my submission is that yes, the relief was grounded in common mistake, but the entitlement to relief and the decision to, for example, not rescind but to use an alternative remedy, was entirely grounded in the Judge's discretion under *Fenwick v Naera,* and for

that reason in my submission the fiduciary findings in the case were absolutely essential, and in fact that was all that was pleaded.

I'm not sure if I've answered your question properly, Your Honour, or if there's anything else…

O'REGAN J:
Well, no, I think you've answered it, thanks. But as I see it, the Court of Appeal proceeded on the basis that the Judge dealt with the case as a case of common mistake and that it then found there wasn't a common mistake and that rectification was a remedy only for common mistake and couldn't be a remedy for anything else and therefore the Judge was wrong to allow rectification.

MR CHESTERMAN:
Yes, the Court of Appeal did do that, and in my submission what the Court – the decision actually took about 10 months to come out, and in my submission what occurred is that the Court of Appeal initially at paragraph 55 to 57 of the judgment accurately set out the scope of the appeal before them, but then at paragraph 61 of their judgment they unduly narrowed it and they misstated, in my submission, the judgment sought by the appellant. They said that the judgment sought by the appellant was that rectification be removed otherwise they, but, if not, the matter be remitted. But in fact when you look at the grounds of appeal – and that's why I've provided a bundle called CA documents – I've provided the notice of appeal and the statements of issues, and the notice of appeal as its first ground refers to rectification but just says the Judge was in error in making the order, it says nothing more. The ground then explains why the Judge was in error and it explains it was in error because the Judge was wrong in terms of *Fenwick v Naera* in assessing the seriousness of the fiduciary breach and should have considered rescission but did not do so.

The rest of the grounds then don't mention anything about common mistake but the first judgment sought by the appellant was at 2.1 and that judgment

was a finding that, “The breach of fiduciary duty by Mr Moke was not of a character to require a setting aside of the lease, and if it was, then the appropriate remedy was termination of the lease, not rectification.” So as a further judgment it then sought that there was no common mistake and that rectification was not appropriate. And when you look at the list of issues, which I provided also, and Tumunui’s are at page 38, Whaoa’s are at page 61, both list of issues both go to liability under *Fenwick v Naera* and if what is the alternative appropriate remedy if rectification is not appropriate, and that’s the way the argument proceeded in the Court of Appeal as well. So the argument was two days in length, and most of that I was on my feet. Mr McKechnie’s submissions lasted a couple of hours, and I spent the rest of the time responding to the Court. We went right through *Fenwick v Naera*. Right through the ability of the Court to order an alternative remedy and its powers to remit to the High Court, given that there were issues that Justice Heath had retired, or to retain the case in their Court, and at no stage during the hearing did either the Court or the appellant raise any issue that there was no cross-appeal so these were not issues before the Court. So I suppose this is a big part of the submission is to why the Court was in error because it was plainly before the Court on the appellant’s own case that the Court needed to consider *Fenwick v Naera* and an alternative remedy, and that was the approach of both parties in the Court, so when the judgment came out –

O’REGAN J:

Where does that take this Court? If we were to give leave what would you be expecting us to do?

MR CHESTERMAN:

If this Court was to grant leave to hear the appeal and then granted the appeal? Or what would be the orders sought?

O'REGAN J:

Exactly. Would you be expecting this Court to address whether equitable damages is an appropriate remedy, or would you be asking this Court to just send them back to some new High Court Judge to start again?

MR CHESTERMAN:

I would be asking as a first port of call for this Court to address remedy, and indeed I believe it is necessary and appropriate because –

O'REGAN J:

But we wouldn't have the benefit of the views of the Court of Appeal because they haven't dealt with it.

MR CHESTERMAN:

I'm unsure whether that would –

O'REGAN J:

I mean that would mean in effect we'd be dealing with it as a sort of first and last call wouldn't we?

MR CHESTERMAN:

I suppose you would except you have the findings of, not as the first court, but this Court would have all of the findings of the High Court and what is relevant in this case –

O'REGAN J:

But if equitable damages was really the right remedy, would this Court be in a position to assess what the equitable damages should be?

MR CHESTERMAN:

I believe it is, it would be. I believe it has the jurisdiction to do so. To, from my reading of the Court's constitution and jurisdiction it has the power to give any remedy that might have been given by a lower court.

ELLEN FRANCE J:

For myself I don't see it as a matter of jurisdiction, but whether that's something that's appropriate for us to be doing, effectively as a court of first instance. I mean would further evidence be required, for example?

MR CHESTERMAN:

In my submission, no it wouldn't, because Whaoa's case in the Court of Appeal included expert evidence from two valuation experts as to precisely what the difference between the lease rental as it was and market value was in the case. So the Court would have that evidence. I understand my friend would make the submission, and did so in the Court of Appeal, that further evidence is required, but in my submission it wouldn't be. But if the Court – I believe I'm right in that because the case was specifically pleaded in equitable, the alternative remedy of equitable damages was pleaded as the difference between market rental and the rental available under the lease, and then the evidence was led on that topic and Tumunui had its expert valuers and they responded and –

ELLEN FRANCE J:

But there had been no findings in relation to that evidence, in the sense of an assessment of equitable damages?

MR CHESTERMAN:

The, no the Judge made findings that he accepted the evidence that it was below market rental, and accepted the evidence of the valuers, but when it came to assessing whether or not equitable damages was appropriate, that was just within the one paragraph regarding the hurdle to rescission is not insuperable and His Honour decided to order rectification instead of rescission or equitable damages. So there are no findings on why or why not the judge considered equitable – well his considerations were on equitable damages.

O'REGAN J:

So we would be the first court to make an assessment of the difference between the rental that would have been done but for the breach of fiduciary duty, and the actual rental?

MR CHESTERMAN:

As a remedy of equitable damages, yes, it would be.

O'REGAN J:

I'm just wondering, had you considered seeking a recall of the judgment in the Court of Appeal, on the basis that something which ought to have been dealt with, hasn't been dealt with? I mean on your case the Court has basically not answered one of the live points before it.

MR CHESTERMAN:

No, we didn't consider a recall of the judgment because in the judgment the Court said that it had not considered the issue of liability because of the lack of a cross-appeal, and I suppose perhaps we could have given further consideration to that.

O'REGAN J:

I see. So you're saying the Court has dealt with it in the sense that it's said it's refusing to do so.

MR CHESTERMAN:

The Court said that it was refusing to address the issue of liability and therefore did not need, and because there was no cross-appeal against the failure or, or the refusal of the Court to grant rescission, that it did not need to consider that issue.

ELLEN FRANCE J:

But you're not seeking rescission, are you, anymore?

MR CHESTERMAN:

We're seeking an alternative equitable remedy to – a remedy, whether it's rescission or equitable damages.

O'REGAN J:

So you are still seeking rescission –

MR CHESTERMAN:

Yes.

O'REGAN J:

– as a possibility?

MR CHESTERMAN:

It's an issue that I ran through with the Court of Appeal that what they were doing was interfering with the exercise of an equitable discretion as to relief, and that the way in which the Judge reached this relief was to balance the equities of the case and decide on the best equitable remedy, and my submission in the Court of Appeal was that if the Court removes rectification, what will then have to happen is there will need to be either a hearing in the Court of Appeal, or a remission to the High Court to balance the equities of the case and determine what is the appropriate remedy, and I said in the Court of Appeal that that could be rescission or it could be equitable damages.

O'REGAN J:

The Court effectively found there wasn't any legal basis to make an order for rectification. That the only basis on which rectification can be made is if there's a common mistake, and there wasn't, and so that just was not an available remedy as a matter of law. There was nothing wrong with the Court making that decision, that wasn't interfering with a discretion, it was saying it was not a legally available remedy.

MR CHESTERMAN:

I understand that Your Honour but, and I suppose that moves into the alternative point, that in making that finding they did interfere with the factual findings and completely ignored that this was –

O'REGAN J:

They're entitled to interfere with factual findings. They're an appeal court. Everything is up for grabs in an appeal.

MR CHESTERMAN:

It was an appeal court, Your Honour, that completely ignored the fact that this was a breach of fiduciary duty by a trustee in conflict and that, according to *Fenwick v Naera*, when that occurs what happens is the trustee –

O'REGAN J:

Well that's why I'm saying to you, if they did completely ignore that, why didn't you go back to them and say, you've ignored something and you need to deal with it?

MR CHESTERMAN:

We consider that the appeal was the appropriate avenue Your Honour. The other issue we faced, Your Honour, was during the oral argument Justice Williams expressed quite clear disagreement with *Fenwick v Naera* and his particular disagreement related to the fact that there were a crossover between beneficiaries of one trust, with beneficiaries of the other trust through marriage, and His Honour had concerns as to how this fitted with the scheme of the Act and the realities of multiple Māori ownership. Now in the judgment that was not reflected in any of the findings but it was in obiter, and those are at paragraphs 115 to 117 where the Court ameliorated the actions of the trustee by saying they were in good faith, supported by trustees, and there was no financial motivation. But those obiter comments in effect expressed some of the disquiet that Justice Williams had with the case *Fenwick v Naera.* So I suppose, Your Honour, perhaps part of the reason for coming to the, or maybe part of the reason for not considering a re-call, might have been also

that it was a case more appropriate for the Supreme Court to determine these issues.

Your Honour, if I could just have a minute, I wasn't expecting to respond to questions, so I just want to have a quick look through what I've gone through…

O'REGAN J:
Sure, no problem.

MR CHESTERMAN:
Just one point on the judgment of Justice Heath – and I'm sure Your Honours have already picked up on this – is that there was a re-call judgment, judgment number 3, and there His Honour I suppose explains his theory of damages and how he arrived at the relief, and I would refer Your Honours to that.

O'REGAN J:
Where he makes it pretty clear that rectification on his view of the case was a remedy for breach of fiduciary duty, not a remedy for common mistake.

MR CHESTERMAN:
Yes.

It appears, it was as if the common mistake was a lever towards a remedy for breach of fiduciary duty. In my submission the Judge was saying in his judgment that he is exercising this unique discretion under *Fenwick v Naera*, typically rescission would have been automatic, but *Fenwick v Naera* gave him this unique discretion, and His Honour was attempting his best to balance the equities and reach what he considered to be an equitable result between the parties, and that is why I say that the relief was linked and was all part of the breach of fiduciary duty.

Is there any benefit in my referring Your Honours to the relevant passages of *Fenwick v Naera* or have you read through the case?

O'REGAN J:

I think I'm probably aware of them, I don't think you need to – I mean, we're certainly aware of the scope of what your argument is there. The difficulty I think is that the rectification was probably a rather odd choice of remedy in the circumstances, and that's led the Court of Appeal to conclude the case was about a mistake rather than about breach of fiduciary duty.

MR CHESTERMAN:

It was, because in my submission His Honour could equally have provided the same remedy through equitable damages, because the effect of the rectification was simply a backdating of the lease to remove the benefits that went to Tumunui through the rental clause, and that would have involved a payment to Whaoa, and I understand the backdated rent might have been in the region of two million dollars. So in my submission on the basis of *Fenwick v Naera* His Honour could equally have ordered equitable damages.

O'REGAN J:

Well, probably we wouldn't be here now if he had, but there you go.

MR CHESTERMAN:

To briefly summarise just *Fenwick v Naera*, the passages in my submission which are important are at paragraph 61 to 65 which confirm the prophylactic approach applies to fiduciary law, applies equally to trustees of Māori trusts, and at paragraphs 113 to 127 are the paragraphs that Justice Heath referred to when deciding His Honour had a discretion to order an alternative remedy. And one of the points which comes out of paragraph 127 is the reference to "innocent parties" and it says, "If for any reason, including the existence of innocent parties, rescission is not thought appropriate, the Court should consider whether any other remedy should be available." My submission is that *Fenwick v Naera* – and the point comes up quite a lot through the case about innocent third parties, and it remits the case back to the Māori Land

Court to consider the issue of innocent third parties, and what we have here in a way in Staite is a move on from *Fenwick v Naera* where the Supreme Court will have before it a third party that's not innocent, where the remedy of rectification is of rescission, is definitely appropriate, at least on the reasoning of *Fenwick v Naera*, and that raises a new issue for the Court which is in the context of a third party with actual knowledge, a non-innocent party to a contract, if the Court does not order rescission because of this unique discretion under *Fenwick v Naera* then should it order an alternative remedy against that party because they benefitted from that transaction with knowledge of the breach? And that's not really gone into in *Fenwick v Naera* because they couldn't, because in that case there was no pleading of rescission before the Court, there was an incomplete set of facts, and although it provides excellent guidance and an excellent starting point, it is at this juncture in time the only Supreme Court case on fiduciary duties of trustees of ahu whenua trusts and an excellent starting point. But for reasons that were no fault of the Court it had no ability to make those final conclusions on points which are extremely important to Māori and New Zealand, which is how does this liability sheet home to the third party? Because quite often in these conflict situations it would not be uncommon in conflict situations for a third party to be benefiting from the conflict.

ELLEN FRANCE J:

If you are still pursuing rescission why didn't you have to cross-appeal in relation to that?

MR CHESTERMAN:

Because it was already put before the Court by the appellant as the first judgment that they sought. At 2.1 of the notice of appeal, which is page 9 of the bundle I provided, the first judgment sought an assessment of the seriousness of the breach and, if the breach was serious enough to warrant rescission, then the judgment sought was rescission instead of rectification. And also at the statement of issues for Tumunui, issue number 4 put before the Court what alternative remedy to rectification and Whaoa also put that in as their second issue. So that is the reason.

I understand it's 12.13 and I understand the Court's quite strict as to time. Could you let me know, does my time finish at 12.15 or…

O'REGAN J:
Yes, but we're not going to be picky about it if you want another five minutes.

MR CHESTERMAN:
Once again, Your Honours, I'm just skipping through to see what material we've covered.

There is an issue regarding the Court's finding on common mistake which I think I've already raised but I made it in the written submission, and that is in a situation of breach of fiduciary duty where you've got a tainted trustee, a tainted transaction – and *Fenwick v Naera* has said at paragraph 64 the situations are very difficult to deal with. Because what happens at trial is you're asking witnesses to reconstruct a decision-making process in which they may well have been influenced, if not consciously then subconsciously, so there's a distortion of the facts that the Court is hearing by recreating this decision-making process, and that is the reason why these rules are prophylactic with no room for movement. And I raise that in the context of these, the Court of Appeal's, the decision to ignore the whole fiduciary background to this case, because when the Court was assessing the particular evidence they did to substitute their view on the facts they did so without considering that issue of the evidence they heard or the documents they read being in effect tainted by the conflict.

If Your Honours will allow me – it's 12.15 – I will take a further five minutes just to run through the final topic, which is the criteria for grounds on appeal?

O'REGAN J:
Sure.

MR CHESTERMAN:

The first, which I've mentioned is substantial injustice, because in my submission Whaoa was entirely successful but was left with no remedy against Tumunui, and my submission is that is unjust.

But in terms of this matter being of general, commercial and public importance, I've provided the Court with figures that were taken from a Te Puni Kōkiri report about the number of ahu whenua trusts, five and a half thousand, governing 800,000 hectares of Māori freehold land and billions of dollars of assets. So these are, the ahu whenua trusts under Te Ture Whenua are the main vehicle through which the primary Māori asset is being managed and looked after and held for Māori, and so it is important that the duties of the people that look after those trusts are spelled out clearly to them.

The other issue is that these trusts are extremely vulnerable to conflict because of the frequent amount of crossover between beneficial status between trusts and family relationships and so conflict is particularly prevalent in these types of trusts, and for that reason there's even more need for New Zealand to have a clearl analysis of these duties that apply to them and this case, *Staite v Kusabs,* was, in my submission, a perfect precedent and example to apply *Fenwick v Naera*, but rather than doing that what the precedent has left us with is a potential conflict between a Court of Appeal judgment and the Supreme Court, and I say there's a conflict because when you look over the statements at 115 to 118 of the Court of Appeal judgment to ameliorate the actions of Mr Moke, the Court of Appeal should then have said, "But these are irrelevant and do not excuse the breach," but they didn't, and so those statements are left there. The other aspect of the judgment is that it leads Whaoa, in my submission a deserving litigant, with nothing.

It's further submitted that this case deals with the third party issue in a way that *Fenwick v Naera* didn't, and in terms of the Treaty of Waitangi the preamble of the Act refers to the Treaty as establishing the special relationship between the Crown and Māori and described the Act itself as a re-affirmation of that bargain, that bargain being an exchange by Māori of

governorship and then from the Crown giving protection of their rangatiratanga, their chieftainship, and mainly and the first taonga to which it relates is land, that's a taonga of special significance to Māori, and the primary way in which this is managed is through these ahu whenua trusts. There are different types of trusts, there are about five of them listed in Part 12 of the Act, but the main vehicle by far are ahu whenua trusts, and for that reason it is even more important for the Court to provide a clear set of consistent and clear directions to Māori as to how to govern those trusts, and that is not just something that's good for the public of New Zealand and for Māori, but it is also necessary in furtherance of the Crown obligations under the Treaty of Waitangi.

Thank you for that extension to my time, Your Honours.

O'REGAN J:
You're welcome, thank you. Mr McKechnie.

MR McKECHNIE:
If the Court pleases, I received the amended application by email at 11 o'clock yesterday morning. As I shall seek to explain, what the amended application seeks to do is to widen the proposed grounds of appeal and to have this Court undertake an analysis, what I have described in my earlier submissions as a *Fenwick v Naera* analysis, when *Fenwick v Naera* and the consideration that applied in that case were not the foundation for the judgment in the High Court nor was it considered by the Court of Appeal, and for reasons which I think are perfectly understandable.

O'REGAN J:
Well, I don't think that's, that's certainly not how I read the High Court judgment. It seemed to me to be pretty clear the High Court judgment was in fact dealing with a case of breach of fiduciary duty, trying to find a remedy for it, and deciding, perhaps inappropriate, that rectification was the right remedy.

MR McKECHNIE:

Well, that's, with respect, Your Honour, I don't disagree with that. The foundation for the judgment at first instance was not because of a breach of fiduciary duty, it was because the Judge found a common mistake, that's what he rested the decision upon.

O'REGAN J:

Well, I don't think I agree with that. I think he thought he was giving a remedy for the breach of fiduciary duty, and he thought in order to give that remedy he had to make a finding that there was a common mistake. But he wasn't dealing with a common mistake as it wasn't pleaded, he was dealing with a breach of fiduciary duty case.

MR McKECHNIE:

Well, the common mistake idea, with all due respect to the Judge, was his own idea. What had been pleaded and what was at the forefront of the case for Whaoa was that this was a disqualifying conflict of interest by the late Edie Moke and that it should lead to rescission, that was at the forefront of the Whaoa case. Whaoa never suggested that there was anything wrong with the rental-fixing formula, they had advanced that argument earlier in front of the Land Valuation Tribunal and it had been rejected because of the very, what I submit are unequivocal terms of the document. But with all due respect to Justice Heath, I think he was looking for a compromise, and instead of founding that compromise on the conduct of Edie Moke he found, erroneously as the Court of Appeal determined, that there had been a common mistake in the rent-fixing formula and by changing that rent-fixing formula, as the judgment at first instance did, that would bring about some sort of compromise between the parties. Now you will see, Sir, Your Honours, that in the submissions filed for Whaoa one of the reasons that they give for not having cross-appealed from the High Court – and I think this is the critical problem they face – they say that they were content with the judgment in the High Court. That is because after the judgment of the High Court the valuers made calculations. Justice Heath did not require any evidence as to what the consequences of his ruling and re-making of the rental formula would be, but

when the valuers got together post the hearing, before Justice Heath, it became apparent that Whaoa were going to receive a significant sum both in respect of past rent and going forward in the event that Tumunui were to renew the lease from time to time. Now –

O'REGAN J:

I think, as Mr Chesterman said, that could easily have been a finding in equitable damages, couldn't it? Which would have been a more appropriate way of going it. But the Judge obviously thought there should be a remedy for the breach of fiduciary duty. He probably didn't make a good choice of remedy but he certainly thought there should be a transfer of wealth from one party to the other in one form or another, and he chose to achieve that by way of rectification.

MR McKECHNIE:

Well, with respect, Sir, the judgment does not say that the equitable remedy of rectification is based upon the breach of fiduciary duty, he –

O'REGAN J:

Well, if you read his judgment number 3 it says that in words of one syllable.

MR McKECHNIE:

Yes, well, I think with all –

ELLEN FRANCE J:

But he only gets to the point where he's considering a remedy, and a remedy other than rescission, because he's found a breach of fiduciary duty.

MR McKECHNIE:

Well, what I've had difficulty with, with all due respect, is if there was a definitive finding of breach of fiduciary duty why was it necessary to go and, for want of a better expression, look for the common mistake? Mr Moke had nothing to do with the rental-fixing formula, and it would have been, it would seem a foundation for some sort of equitable remedy to have determined that the position of Edie Moke was of such character that that would give rise to

some remedy. But that's not the foundation the Judge chose, and I acknowledge, Justice France, that the judgment number 3 seeks, with all due respect, to put some sort of gloss upon what is said in judgment number 1. There are some serious mistake in judgment number 3. The Judge at paragraph 26 in trying to assess the financial consequences talks about, "Mr Avon McLaughlin, a valuer of 25 years' experience, called for the Tumunui Trust while disagreeing with the evidence from Mr Larmer." That's completely erroneous. Mr McLaughlin and Mr Larmer were both call for Whaoa. The two valuers who were called for Tumunui, Mr Tizard and Mr Craven, are nowhere referred to in any of the three judgments. So the Judge was in some serious mistaken view of things when he speaks as he does in paragraph 26 of judgment 3.

O'REGAN J:

But basically the Judge found there was a breach of fiduciary duty by Mr Moke, and he also found that the Tumunui Trust knew about that, and he also found that the Tumunui Trust got an undue benefit from the lease. And so he then turned to remedy, one possibility was rescission, another possibility was equitable damages, another possibility was to say it's a trivial breach and there should be no remedy. I mean, all of those were open. He chose a fourth one, which may not have been that apt, but that's what he chose, but he clearly intended that the breach of fiduciary duty should involve some benefit to Whaoa to compensate for that breach.

MR McKECHNIE:

I don't take issue with that, Your Honour. The difficulty that the applicant has here is that the judgment in the High Court was founded upon the common mistake finding. That was the issue which the Court of Appeal had to consider. The difficulty –

O'REGAN J:

Well, that may be so, but it then left the case hanging, didn't it? Once it decided that wasn't an appropriate remedy for breach of fiduciary duty didn't it

then have to go on and say, well, what was the appropriate remedy or should there have even been one?

MR McKECHNIE:

Well, with respect, the foundation for the remedy in the High Court was the common mistake. Now once that –

O'REGAN J:

Well, I know you keep saying that, but we don't accept that. It was pretty clear, the Judge said, "The reason I'm doing this is because Mr Moke breaches fiduciary duty."

MR McKECHNIE:

Well, the position –

O'REGAN J:

"I am fashioning a remedy in the manner that *Fenwick v Naera* requires me or allows me to," that's what he thought he was doing. Now I know you say – and I accept you may well be correct – that it wasn't the right remedy because it's a remedy for common mistake and it's not a remedy for breach of fiduciary duty.

MR McKECHNIE:

And what the Court of Appeal said, with respect, is that, "We can't go to the *Fenwick v Naera* analysis because there's been no cross-appeal from Whaoa." And Whaoa say they didn't cross-appeal because they were content with the remedy from Justice Heath and they also say somewhere in there –

O'REGAN J:

Well, it was clearly a live issue before the Court of Appeal whether rescission was the right remedy, wasn't it? And they just didn't address it.

MR McKECHNIE:

Well, with respect, I think what the Court of Appeal said, Sir, is that rescission was based upon the common mistake finding, which was erroneous.

ELLEN FRANCE J:

Rescission?

O'REGAN J:

Rectification was based on common mistake, rescission wasn't. Rescission was clearly a remedy for breach of fiduciary duty. And your notice of appeal said, "Look, this is a breach of fiduciary duty case, it was either rescission or nothing, we say it should be nothing, but it definitely shouldn't be rectification." So it seems to me the Court of Appeal had before it a submission that said, "Rectification's wrong, the remedies should either be rescission or nothing, and we say it should be nothing." But that definitely left open the fact that rescission was a possibility that had to be addressed.

MR McKECHNIE:

Well, it could only be addressed if the issue of the breach of fiduciary duty was before the Court of Appeal, and essentially it wasn't. That's because Whaoa hadn't brought it to the Court of Appeal.

O'REGAN J:

Well, Mr Chesterman's point is that your appeal said rectification is an inappropriate remedy, the remedy should either be rescission or nothing.

MR McKECHNIE:

Yes.

O'REGAN J:

So he didn't need to bring rescission to the Court because it was already before it under your appeal.

ELLEN FRANCE J:

And if you look at your amended notice of appeal the judgment sought from the Court is a finding that the breach of duty was not of a character to require the setting aside and, if it was, then the appropriate remedy was termination and not rectification. So that is the issue.

MR McKECHNIE:

Well, the way it developed in the Court of Appeal – and my learned friend made some reference to this earlier – there was significant exchanges between Bench and bar in relation to whether or not the conduct of Mr Moke reached a level that was disqualifying. And my friend was quoting extensive classical English jurisprudence and there were a number of responses from Justice Williams pointing out that the position in Māoridom was quite different and there had to be a recognition of that. And here we have a situation where Mr Moke was a beneficiary of both trusts, a trustee of both trusts, it was all out in the open, and if one looks at the parties to the current proceedings the first-named applicant, Peter Staite, he is a beneficiary of both the Whaoa Trust and Tumunui Trust, and there are, on my instructions, literally dozens of people who are beneficiaries of both of the trusts. These people –

O'REGAN J:

Yes, but they're not all intimately involved in the negotiation of the lease though.

MR McKECHNIE:

Oh, I accept that, Sir. But the evidence before Justice Heath established that Mr Moke had a limited role in negotiating the terms of the lease. Indeed, the trustees of both trusts were ad idem about the terms of the lease and these parties had a cordial relationship for nearly 20 years until Whaoa issued proceedings in 2007 in the Māori Land Court without any prior notice to Tumunui and then issued these proceedings in 2009, they've been going on for more than 10 years. It might be the reflection of one particular individual's personality.

O'REGAN J:

Well, that may be so, but that doesn't absolve the Court from having to deal with the issues before it.

MR McKECHNIE:

No, no, I understand that. But the considerations which this Court has to consider and whether or not it should grant leave or not, one of those is timing issues and bringing an end to litigation, and I've drawn attention to that in the written material which I filed in opposition to the application dated the 18th of November.

Now if I might just address, Sir, a question that Justice O'Regan asked of my friend when he was making his submissions? If leave were granted, how can this Court deal with an issue which was not considered in the comprehensive judgment of the Court of Appeal, namely, to undertake an analysis, a *Fenwick v Naera* analysis, as I have described it? Because the sort of considerations that might lead to a definitive finding in that regard, not just the finding but what would be the correct remedy, can't in my submission be determined by this Court when it hasn't been considered at all by the Court of Appeal. And the Court of Appeal says quite emphatically that they can't consider that because there's been no cross-appeal in that regard. That's, with all due respect, that's the greatest difficulty Whaoa's got. They liked the judgment they got in the High Court, now they don't like it and they want to go back and argue about something that they could have put before the Court of Appeal but chose not to.

ELLEN FRANCE J:

Well, the Court of Appeal simply says it's not necessary to go on to that. That leaves open – they say it's unnecessary to engage with the further issue, and then there's no cross-appeal against the refusal to grant rescission. But that doesn't deal with the possibility of, say, another remedy such as equitable damages and why isn't that still left open if rectification goes?

MR McKECHNIE:

Well, the evidence about equitable damages that was placed before the High Court was very limited. Indeed the Judge, Justice Heath, recognised that because after the judgment he required the valuers or requested the valuers to get together, he didn't make any formal order in that regard, but that

valuers were requested to get together, they did, they produced the joint paper which demonstrated that they were a very significant distance apart, that was the subject of discussion between counsel, His Honour was told about it, but my recollection is that the joint paper was never actually submitted to the Judge and, in any event, I think it was common ground that by that stage the Judge wasn't in a position to make orders in that regard because he'd already made a decision as to how he'd determined the case by reference to the common mistake finding. So if there were to be an appeal here and equitable damages might be a possibility, there would have to be evidence, and whether that evidence should be given in this Court is questionable, or whether it would have to be remitted back, and if it went back it would have to go, I would have thought, to the High Court, at least in the first instance, it can't go to Justice Heath of course because of his retirement. This has gone on, the hearing was 11 days before Justice Heath. If we have to go back and start all over again, goodness.

O'REGAN J:

Well, I think this Court could determine whether a remedy is apt at all, whether the breach is simply insufficiently serious to justify any remedy, that issue, or whether rescission. I mean, rescission is a yes or no answer, isn't it? So it would only be in the event that the Court decided that a remedy was required and that rescission was not the right remedy that that issue would arise. But I agree with you, at that point the Court would have to send it back to another Court, this Court wouldn't be in a position to deal with it.

MR McKECHNIE:

Responding to what you've said, Sir, and what Justice France said a moment ago, although there was no finding by the Court of Appeal in relation to whether there had been a disqualifying breach by Mr Moke there is clearly comment, albeit strictly speaking obiter dicta, in relation to Mr Moke at paragraphs 113 and following where it's remarked upon that Mr Moke had no part in the rental-fixing formula, his beneficial interests in the trusts were very small, and that there's no suggestion that he was motivated by any personal gain. And one of the other thing's that's occurred to me, Your Honours, is that

if the question of equitable damages were to arise, there could be issues around laches, delay, those sort of consideration can come to play when equitable remedies are under consideration.

O'REGAN J:
When the transaction was first done it was meant to an assignment of the lease of the previous landholder –

MR McKECHNIE:
Yes, Sir.

O'REGAN J:
– which would have carried with it the rental calculation in that lease that allowed for improvements made by that leaseholder.

MR McKECHNIE:
And the predecessor.

O'REGAN J:
And the predecessor, until 2000 and, I think, 11. So if the transaction had taken place as it was meant to, that's what would have been the outcome, isn't it? And then there was a determination that it needed to be a new lease, so even though a payment was made to the old leaseholder, the old lease –

MR McKECHNIE:
The former lessee.

O'REGAN J:
– which was only, would be a payment effectively for assignment, in effect that became a payment for agreeing to have the lease terminated and replaced by a new one granted to somebody else…

MR McKECHNIE:
Well, the previous lessee, Mill, was paid $180,000. The relationship between Tumunui and Whaoa at that stage was entirely cordial. They had some

discussion and through their legal advisors, and they both had senior legal advisors, Mr Ross Burton of the Davys Burton firm and the late John Chadwick, and Tumunui, everybody knew that Tumunui was going to turn this rundown drystock property into a dairy farm. The judgment of the Court of Appeal gives a technical explanation of where it is, but if you're driving north from Taupō to Rotorua immediately you get past the Reporoa dairy factory it's the first property on your left and it runs up to the left in a westerly direction and it runs right to the skyline. The farm goes up to near the skyline and then the highest part is this reservation, the Māori reservation where there was a mistake made with the boundary long before Tumunui came upon the scene, but that's an unresolved issue the parties have still got to sort out. Now when it was understood that Tumunui were going to spent hundreds of thousands of dollars building a dairy shed and improving pasture and so on and so forth, the parties agreed on a new lease, but remarkably that wasn't signed off until 1994, by which time – and His Honour Justice Heath got the dates of that wrong – but the parties had been or Tumunui had been in occupation since I think 1988 or 1989. It was agreed on all sides that there needed to be this lease for this term if they were going to undertake that capital expenditure, and that's remarked upon the Honourable Barry Paterson in his arbitration award.

The other thing that's demonstrated by the evidence of the valuers and by the valuations undertaken by the Government Valuation Office is that the value of this property, not just in terms of the capital improvements to buildings and so but the actual increase in the pasture, has been very, very significant. Now unsurprisingly, in accordance with conventional practice, there is no compensation for improvements at the surrender or end of the lease, but the situation now is that there's uncertainty about the future, there's been a long-term sharemilker on the property but Tumunui have not been able to renew that because they don't know where this is leading to and sharemilkers want terms for two or three years before they will commit to the expenditure that's involved there.

So, answering Your Honour's question, there was complete consensus amongst the parties that there should be this new lease and there was agreement about the terms, including the rental-fixing formula.

O'REGAN J:
Well, my point was that if there'd been an assignment the formula allowing the compensation to include previous improvements would have continued until 2011, but because it was a new lease that now continues to 2033 or whatever it is, 2032 I think, and yet nobody seems to have discussed that what seemed to be a significant transfer of value from one party to the other by virtue of that change and the nature of the transaction.

MR McKECHNIE:
I follow what you're saying, Sir. My own view, for what it's worth, is that nobody turned their minds to that –

O'REGAN J:
That's what I thought.

MR McKECHNIE:
Well, I think Your Honour's right. I don't think the trustees, many of whom were not sophisticated in business matters, but more significantly the legal people didn't turn their minds to that, and the Court of Appeal judgment remarks upon the fact, or doesn't remark upon, it in some detail analyses the subsequent position of the parties, which was not gone into by Justice Heath at first instance, and the Court of Appeal judgment points out that when a government valuation came out in 1993, by which time the parties had been in business for quite some time and which included reference to the Mills and Blackler improvements, Whaoa didn't have any complaint about that, indeed there was evidence that they were quite pleased with it because it was at such a figure that, given the rental formula at 5% of the capital value, this was going significantly increase the rental which they had hitherto anticipated. So I think, Sir, nobody turned their minds to it at the time and nor did they turn their minds to it subsequently.

O'REGAN J:

Well, it's not surprising they didn't turn their minds to it, that nobody saw it as exceptional that the previous lessees improvements were part of the formula, because on an assignment that's what would have happened and that's what the transaction initially was mean to be, an assignment. But my point is that by changing it from an assignment into a new lease the credit for previous lessees' improvements now applied for an extra 21 years and nobody seemed to realise that that was the case, because that would not have otherwise been the case, would it? At the end of the assigned lease there would have been a new lease and the only improvements that would have been compensated from then on would have been new ones.

MR McKECHNIE:

Well, one can't speculate on what the position would have been had the lease not been drawn in the way it was, or the rent-fixing formula, if there had been no reference to the previous lessees. And it doesn't just talk about lessees, the clause which is highlighted in the judgment actually fixes the date. If that hadn't been done that way it's impossible to know after all of this time whether the parties would still have continued in business or not. For my part, for what it's worth, I rather suspect they might have, but we'll never know.

O'REGAN J:

Okay, that's fine.

MR McKECHNIE:

And had that been the case, we may or may not still have been here. It seems to me that under the present governance of Whaoa we probably would have been here anyway, if it wasn't the rental formula it would have been the duration of the lease or something else they would have found to try and claim back this property before the lease runs its term, that's what they're trying to do.

Thank you, Your Honours.

O'REGAN J:

Thank you, Mr McKechnie. Is there anything you want to say in reply, Mr Chesterman?

MR CHESTERMAN:

No, Your Honour.

O'REGAN J:

Thank you, both counsel, we'll reserve our decision and release it in writing in due course and we'll now adjourn.

COURT ADJOURNS: 12.49 PM