IN THE SUPREME COURT OF NEW ZEALAND SC 7/2008

IN THE MATTER of a Civil Appeal

BETWEEN **ELDERS NEW ZEALAND LIMITED**

Appellant

AND **PGG WRIGHTSON LIMITED**

Respondent

Hearing 12 August 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Gault J

Counsel D F Dugdale, K J Crossland and B Toy-Cronin for Appellant
P R Jagose and H M Northover for Respondent

CIVIL APPEAL

10.00am

Elias CJ Thank you.

Dugdale May it please the Court I appear with Mr Crossland and Miss Toy-Cronin for the appellant.

Elias CJ Thank you Mr Dugdale, Mr Crossland and Miss Toy-Cronin.

Jagose May it please the Court, Jagose for PGG Wrightson with Miss Northover.

Elias CJ Thank you Mr Jagose, Miss Northover. Yes Mr Dugdale.

Dugdale Thank you Ma'am. I propose to make my way through the set of submissions that has been filed. It is important to my argument that I should begin by emphasising the inherent imprecision of the word 'amalgamation'. This is essentially a case of statutory interpretation and the meaning of that word in this context matters. The word 'amalgamation' is not a term of art. It is at best a description of a commercial intention. The matter is stated by Mr Justice Buckley who of course was an expert in company law in the case of *South African Supply* which is to be found at tab 16, and if I could take Your Honours to page 281 of the report, at the foot he says 'the only question I have to determine is whether in the case of each of these two companies there has or has not been a winding-up for the purpose of reconstruction or amalgamation. Neither of these words, 'reconstruction' and 'amalgamation' has any definite legal meaning. Each is a commercial and not a legal term and even as a commercial term bears no exact definite meaning'. So really there are two distinct propositions that amalgamation is not a precise legal term, not a legal term of art, nor indeed is it a precise commercial term, and I note that Judges have been saying this since at least 1865, and I'm not inclined to inflict on you authorities that support that proposition, but if I could just take you for one moment to tab 3, which is a decision of the Australian High Court in a case called *Citizens and Graziers'* at page 455. Mr Justice Dixon says this 'much has been said of the vague and indefinite meaning of the word 'amalgamate' as a description of a transaction between companies. Lord Hatherley, Lord Lindley, Lord Davey and Lord Wrenbury has confessed their inability to define it', and he sets out the cases. 'The expression is figurative and is a commercial rather than a legal description', and he goes on to set out what he thinks is the general notion conveyed by amalgamation.

Elias CJ The reference to amalgamation in this case was in the company objects was it?

Dugdale Yes Ma'am.

Elias CJ It wasn't a statutory interpretation

Dugdale It wasn't a statutory use of the term

Elias CJ And what about in, and I'm sorry that I haven't read the case recently anyway, in the *South African Supply* case? Was that a

Dugdale I've forgotten.

Tipping J I think it was a statutory

Dugdale Yes I think it is statutory.

Tipping J It's talking about winding up for the purpose of

Dugdale That's right, it is statutory.

Elias CJ A winding up for the purpose of amalgamation.

Dugdale Indeed.

Elias CJ Yes, thank you.

Dugdale So it follows, and this is 1.2 of my synopsis, 'it follows in my submission from this that where a statute does employ the words amalgamate or amalgamation, the question of what precisely the statute means is not determined by the use of those words but will of course depend upon the words of the applicable statute'. And those last words are quoted from the judgment of Mr Justice Dixon in a case of *Black and Decker*, about which you'll probably need to hear more at tedious length, but I cite them there because they summarise what is my submission that the use of the word amalgamation by itself doesn't get you very far and you've got to go further and look at the terms of the applicable statute.

Tipping J I think I may have been wrong Mr Dugdale, just glancing back at *South African*, but I don't know if it matters a great deal.

Dugdale Well it was the Chief Justice that asked the question.

Tipping J Indeed.

Elias CJ Well sorry, is the answer then that it too is something from the object because of the company.

Tipping J I think it might have been from the company's constitution rather than from the statute.

Dugdale From the memorandum.

Tipping J Yes, I'm sorry.

Elias CJ You see it's strikes me that it may be quite significant because it lacks the statutory context we have here, so looking at those statements in isolation may not really take matters very far.

Dugdale Well that perhaps merely emphasises what is my submission, and that is that this is the term that is inherently imprecise whether used without definition in a statute or whether used without definition in a contract or constitutional document or something of that sort.

Elias CJ But in a contract it's likely that the term will be used only the once and it will not have any surrounding context beyond its invocation, whereas in the statute, one must read the whole statute to understand the sense in which the legislature is using the term.

Dugdale I don't think I would agree with that with respect

Elias CJ Well you can't really, I'm just flagging the point that seems to me to be critical.

Dugdale Alright, in a contract surely too you have interpret words in their context.

Elias CJ Yes.

Dugdale Which may indeed extend beyond the writing to the factual context, and really what I'm trying to emphasise is that this is not a magic word. Amalgamation is inherently woolly and so that you've got to go beyond that word which doesn't get you very far at all to the terms of the applicable statute. Those are the things that matter. And just bringing that back to the present case, it's the appellant's case

Elias CJ I'm sorry, just thinking, it's not that woolly is it, because it must carry the connotation of a merger of corporate entities. Your argument is more about what from of merger is in contemplation.

Dugdale Well except that the merger of corporate entities is an even more question-begging term because if you read the authorities which I had thought to spare you, they emphasise in the history of the matter before statutory processes existed, there were all sorts of ways of doing that, and one might be a share transfer, and one might be a transfer of undertaking from one company to the other and winding up the first company - it is not a precise term.

Elias CJ No but it's about corporate entities and how they come together. I'm just saying it's not wider than that, it's not fuzzier than that. Your argument is about the form in which they can come together within the contemplation of the statute.

Dugdale Except that it goes beyond form. You see I'm running ahead of my argument to the Court

Elias CJ I'm sorry, yes develop your argument as you wish.

Dugdale Alright, but in the end the argument in this case is whether the provision for fusion which is what's provided for in part 13, applies to part 15, which is in fact the part under which the application in this case was made. Now that's just not a matter of form. It is a matter of what the legislature meant by amalgamation in each of those two cases.

Blanchard J You accept it had a definite meaning in part 13?

Dugdale Yes, I don't

Blanchard J You'll have to explain to us then why they would have used the word 'amalgamation' in part 15 and intended a different meaning but provided no definition.

Dugdale Because of the inherently descriptive and imprecise nature of the word.

Blanchard J But it isn't inherently descriptive and imprecise in part 13.

Dugdale Exactly so.

Blanchard J Well why would they use the word without definition in part 15 in essentially the same area of the Companies Act and not define it? At least a negative definition to indicate that they weren't using it in the part 13 manner.

Dugdale Well I'm about I think to deal with what you're putting to me so could I

Blanchard J Well it seems to me that's the guts of the case.

Dugdale I think that's right. That is the essence of the thing, except that it puts an onus on the matter which with respect is mistaken, because the way you put it to me is that there is a sort of a priori assumption that the word will have the same meaning in the two parts, and it's my submission that there is no basis for that at all

McGrath J Can I say Mr Dugdale that I don't see the issue precisely in those terms. It seems to me to be rather whether the use in part 13 is part of the context in which part 15 is to be read, and that it's not a matter of whether the use in part 13 applies to part 15, but whether it clarifies the meaning in part 15.

Dugdale Well I don't know that I would agree that that's a precise statement of the issue either. It's really what was the effect of the sort of amalgamation that the legislature made provision for in part 15? And what I'm submitting is that it is not the same as the effect of the sort of amalgamation that provision was made for in part 13 and indeed I will be going on to submit that that is the plain effect of the words of the two parts when read and contrasted, but that is the point of the thing, and it makes me a little uneasy when Justice Blanchard for example puts questions which seem to accept what in my respectful submission is a mistake, that there is an assumption that the two parts were intended to operate in the same way and have the same effect.

Blanchard J Well you're presumably going to explain why that's a mistake?

Dugdale Yes Sir.

Elias CJ And isn't it orthodox statutory interpretation to read statutes as a whole Mr Dugdale, so you have to address that as well?

Dugdale Well I will be invoking statutory interpretation which will urge that when you consider the history of the wording of part 15 and how it came into existence and the context in which it came into existence, orthodox statutory interpretation leads to a result different from the ones arrived at in the Courts below, and indeed when you come to think about it, what we're really arguing about is

whether s.219, which is in part 13, and talks about the effect of amalgamation, it is a runway to word a statute if you have two distinct parts with two procedures to achieve a particular objective, and you don't repeat or otherwise make it clear if that's the legislature's intention that s.219 applies to the later part, so that I would myself have thought, or it's my submission that the cannons of confliction really favour the approach which I will be urging on you rather than some of the points that you've been putting to me. So that I think deals adequately with what I wanted to say about the inherent imprecision of the word 'amalgamation', and the first is the word gets you not very far and you look at what the statute provides precisely is the effect of the amalgamation referred to, and secondly that there is no assumption in advance that the word is used in the same way in both parts. And that's part 1 of my submissions. I now turn to part 2, which deals with the legislative history of the part, and I start off in 2.1 by reminding Your Honours that assuming that the Articles of Association so provided, it was always at common law for the commercial intention of amalgamating two companies to be achieved, and I refer to the various means they included one company transferring its undertaking to another, or both transferring their undertakings to a third company, or the use of share transfers, and I mention that there were all sorts of practical difficulties about all those ways. The tiresomeness of having to wind up a company; the problems in companies that weren't closely held of obtaining shareholder consent; the absence of a legal means of assigning obligations as distinct from assets; the large amount of paper work; delay through the inability to dissolve the old company until all its liabilities were sorted out, and the important fiscal problem of ad valorem stamp duties. It was against that background that in 1929 the United Kingdom in ss.153 and 54 of the Companies Act 1929 provided statutory machinery to facilitate amalgamations, and indeed that machinery still exists in the United Kingdom and I give the reference. As was then the custom, the United Kingdom provisions were sedulously followed in New Zealand and in 2.3 I give the reference of the succession of New Zealand cases which followed faithfully the English statute, and I make the point that the later ones of these were subsequent to the decision of the House of Lords in a case called *Nokes v Doncaster Amalgamated Collieries Ltd* which was a decision of the House of Lords, and that case, which is to be found at tab 7, pointed up the limitations of the English legislation. The precise point held in *Nokes* was that nothing in the relevant provisions of the English Companies Act permitted the transfer of non-assignable contracts, and perhaps the

neatest statement of that point, if I could just take you to page 1033 of the transcript. It's from the judgment of Lord Atkin and it's near the bottom of the righthand column. 'I cannot think that this departure' – he's talking about the assignable of un-assignable property – 'I cannot think that this departure from observing the ordinary rights of property of third persons is even suggested, much less expressed in clear and unambiguous language. Indeed when I consider that the Court gets no power until it sanctions an arrangement under s.53, which must rest on agreement and that there is plainly no right in the parties to agree to transfer what they have no right to transfer, and that such agreement can give no legal or equitable rights to anyone, I am still further confirmed in my view'.

Elias CJ Where's the text of the statutory provision to be found?

Dugdale It is to be found, sorry, the statutory provision that Lord Atkin is talking about?

Elias CJ Yes.

Blanchard J It's on page 1014.

Elias CJ Thank you, oh yes.

Blanchard J It's the equivalent of s.207 in the 1955 New Zealand Companies Act I think.

Dugdale Exactly Sir.

Tipping J That is the Court ratifying an agreement in effect isn't it?

Dugdale Yes.

Tipping J It's not the Court creating the outcome by order.

Dugdale Yes. Like part 15, and I don't want to run ahead of myself, but like part 15, what we have in the provision considered in *Nokes* is the Court ratifying an agreement made by the parties.

Tipping J I was only trying to identify the distinction. I wasn't necessarily suggesting Mr Dugdale that I saw any difference in it. I'm neutral on that at the moment.

Dugdale I wasn't trying to bring you prematurely to my side at all Sir, but it will be important to keep in mind because I will need to move on to discuss the different procedures of the two parts that the procedure of part 15, the history of which is in the English legislation, is of a process in which the Court approves an agreement made by the parties, and what the Court is clearly saying in *Nokes* if the parties can't do it then under this legislation the Court can't approve it, and that brings us logically to this Court that since the only way in New Zealand law that you can get fusion is under part 13 of the Companies Act, then the argument for the appellant is if the parties can't do it contractually then it can't be endorsed by the Court under part 15. But I'm foolishly running ahead of my argument in making that point.

Tipping J As opposed to the proposed to the proposition that part 15 was put in expressly for the purpose of assisting when the parties couldn't do it contractually. That must be the opposite side of your coin.

Dugdale Well I'll be talking about the mystery of why part 15 was put in at all further on in my argument.

Tipping J Yes, but those must be the competing propositions presumably.

Dugdale Well it's not quite clear, but if that is so, could I make that point in an orderly fashion and I will be coming to it?

Tipping J Yes of course, I just wanted to understand where the differences were said to lie.

Dugdale Yes.

Elias CJ Because the compromise or reconstruction may be presented as a matter of agreement, but the parties may not be wishing to follow the full procedure specified in part 13, and therefore seek the approval of the Court, so there are more than two circumstances in which you might

Tipping J Yes, indeed, yes.

Dugdale Alright. Well that's 2.4 of my written submissions which draws attention to the decision in *Nokes* and the limitations of what might be called the English process that was adopted in the pre-1993 New Zealand Statutes.

Elias CJ Are you going to come back to *Nokes* or is this it, because I have a question relating to it?

Dugdale Yes Ma'am.

Elias CJ Well in *Nokes*, in the passage that you've taken us to at 1033, Lord Atkin is talking about the lack of capacity of the parties to contract as they propose dealing with the rights of third parties, but in our case arguably part 13 provides that right, so the approval of the Court comes in that context.

Dugdale Well I understand what Your Honour is putting to me, but it really comes down to the question of whether s.219 of the current New Zealand Statute applies to part 15 amalgamations, and of course one answer to that is well if that's what the legislature meant, why did it not directly say so, but it certainly hasn't done that.

Elias CJ Well I understand that you have that argument. My point was rather directed at the continued relevance of this statement from Lord Atkin in *Nokes*, because it falls now in an entirely different context where there is a statutory power in the parties to do what Lord Atkin was saying there was no power to do in that case.

Dugdale Well I will come to this in more detail, but the history of the matter is that the Bill as introduced in New Zealand contained only the equivalent of part 13, in the course of which passage part 15 was introduced. Part 15 clearly and apparently deliberately employs the language of the old law. It quite clearly adopts the same process as had been the only process before the 1993 Statute, and that is the context in the appellant's submission in which you should turn your mind as to just what it was that the legislature intended.

McGrath J So you're really saying that we cannot read, as the Chief Justice has put it, the Statute as a whole, and in particular we can't read part 15 in light of the context in part 13?

Dugdale Well nobody is denying the Court's right to read the statute as a whole, but reading the statute as a whole requires in my submission the Court to note that s.219 is there in part 13 and that there is absolutely no equivalent in part 15. I mean that's the effect in my submission of reading the statute as a whole.

McGrath J Yes, but you seem to be denying approaches of contextual interpretation insofar as the context consists of other parts of the

statute. What you want to do is to take us back to the legal history and say that's the context that you should be looking at. I mean that's pretty fundamental criticism of your argument to my mind because it's denying modern approaches to statutory interpretation, and I'd just like to know where you stand on it.

Dugdale Well I can't say anything helpfully on generalisations about approaching the interpretation of statutes, but really it is clear that there are two distinct ways of amalgamating provided by the statute. There is available to somebody seeking amalgamation a menu of possibilities. He can have nothing to do with the statute and do it in the admittedly more inconvenient ways that it was done before the statute ever existed, or he can adopt the part 13 process, or at his sole election, and that was what the judgment Your Honour delivered in *Walters* says, he can choose to adopt the process in part 15. It is a menu of methods available to him, but it doesn't follow from that. It's like any sort of menu at all - food, but you don't expect them all to taste the same. You've really got to examine the details of each method before deciding what its effect and requirements are.

Blanchard J But why would the legislature have wanted the final effect as opposed to the detail of the process by which he'd get to the final position, why would the final effect be wanted to be different as between the two parts? Part 15 looks like an add-on to what's gone before.

Dugdale Well historically it's perfectly clear that it is – well it depends what you mean by an add-on – it was inserted in the course of the Bill's passage and I'm coming to give you chapter and verse on that, but they

Blanchard J But before one gets to the history of the Bill's passage one reads the statute and it looks like a supplementary provision.

Dugdale With respect Sir, it is nothing of the sort, because there is such a different procedure. The part 13 procedure says that without any involvement of the Court, provided the proponents jump through the right hoops, then the amalgamation takes place, and the Courts have got nothing to do with it. Then there was in the course of the passage of the Act introduced part 15, and part 15 reverted and presumably deliberately it didn't have anything to do with the part 13 process, it reverted to the former English procedure of an agreement in interlocutory application providing about

advertisements and notification and so on, and then a tick or otherwise by the Court to the scheme that was put forward.

Blanchard J Well you say that produces a different result.

Dugdale Because

Blanchard J Why would the legislature have wanted a different result?

Dugdale There are possible reasons, but you see what the legislature has done is carefully employed a procedure and words that ended up with the *Nokes* result which is not a fusion result, and the real question is if that was not what the legislature meant, why on earth did they choose the procedure in part 15 which they did?

Blanchard J Well they obviously approved the part 13 procedure and result. Why would they have wanted a different result in part 15?

Dugdale One reason is that part 15 the word 'company' has a different meaning in part 15 from the meaning that it has in part 13, because part 13 simply talks about companies which as defined in s.2 of the Statute, is confined to companies registered or re-registered under their Act, but if I could just take you to part 15 which is at tab 29 and in s.235 there is an entirely different meaning of the word 'company', and it says 'that company means a company within the s.2 definition; an overseas company; or an association that may be put into liquidation under s.17A of the Judicature Act 1908', and I have brought Madam Registrar some copies of s.17A which sets out the non-companies that may be wound up under the Companies Act, so that you simply have a position

Elias CJ That's to do with application of part 15.

Dugdale Yes well

Elias CJ It's a wider application, but of course it's a wider application because it applies to arrangements and compromises as well.

Dugdale I forget the question from the Bench that prompted me

Elias CJ It probably wasn't a very good question.

Dugdale To raise this point out of order.

Blanchard J The question was why the legislature would have wanted a different result?

Dugdale Well it's really

Blanchard J Why wouldn't they have wanted fusion as the end result of an amalgamation under part 15?

Dugdale Well because we're talking about different sorts of companies under part 15 than under part 13. You see if we come back to s.219 which is the key provision, 'two or more companies may amalgamate and

Elias CJ Sorry, which section?

Dugdale 219 Ma'am.

Elias CJ Oh yes.

Dugdale 'Two or more companies may amalgamate and continue as one company which may be one of the amalgamating companies or may be a new company" and that works perfectly well within the meaning of company as used in part 13', because that's registered under the Act, or re-registered, but that definition, sorry, that provision is not apt when the company in respect of which part 15 applies, can be all sorts of other odd things. Take a Credit Union, which is under the Credit Union.

Elias CJ They're not going to be amalgamating.

Dugdale I'm sorry?

Elias CJ Well they're not going to be amalgamating. An association that may be put into liquidation under s.17A or an overseas company registered on the overseas register, is not going to be amalgamating.

Dugdale Well with respect, the meaning of s.235 is that it provides a machinery for amalgamation of companies.

Elias CJ It provides machinery for Court approval of amalgamations, compromises, and arrangements.

Dugdale Yes, but if we could just talk about amalgamations, which is what the case is about,

Elias CJ Well how is an overseas company going to be amalgamating through a New Zealand process, and how is an association that may be put into liquidation under S.17A going to be amalgamating under part 15?

Dugdale Well because that's what it says, and if we think about a Credit Union, which is a sort of incorporation which under its Act has its own winding up proceedings, what the definition of company in 235 means is that a Credit Union and an ordinary company may amalgamate under these procedures. And so coming back to Justice Blanchard's question to me, why have something different? Part of the answer surely is that part 15 is applying to different sorts of companies than part 13

Blanchard J I can understand that as an answer relating to the process, but not as an answer relating to the end result.

Dugdale Well let's think about that Sir. Let's suppose it's an overseas company and a New Zealand company and you want to apply s.219, which contemplates

Blanchard J Well you can't, and the legislature has very wisely stopped that, but it's said that you can have an amalgamation under the supervision and control of the Court, and I understand that. It may be that there are all sorts of safeguards that need to be put in place, the Court needs to make sure that what is being done is actually workable and appropriate, but I don't follow why there is a problem with the end result of fusion.

Dugdale Well, let us consider the case of a Credit Union and an ordinary company amalgamating. Is the new entity a Credit Union or is it not? If it's a foreign company fusing with an ordinary New Zealand company, is the new entity a foreign company or is it not? The s.219 approach, which is admirable for ordinary companies registered under the Act, simply doesn't work when you introduce these other sorts of

Blanchard J But the real question surely would be is an amalgamation appropriate? If an amalgamation is appropriate, it's hard to see that fusion wouldn't be. The problems come earlier than the result.

Dugdale Well it's – I wouldn't submit that's mistaken – I don't think that you can divorce the consequences in how you get there.

Blanchard J Well one of the things you have to do is choose your end vehicle. That's what you've got to get right, but once you've done that then subject to perhaps leaving assets out, which is done by the scheme that is put before the Court, the end result of fusion is not going to be a problem.

Dugdale Well a New Zealand company and an overseas company fusing is this

Blanchard J Well a New Zealand company and an overseas company amalgamating is the problem.

Dugdale Amalgamating, yes.

Blanchard J Because in an amalgamation you always end up with one vehicle – the amalgamated company.

Dugdale I accept that, but the reason that s.219 doesn't work in the fake position that I posited is that it provides no answer to whether this sort of Greek mythological thing that you've created if there are two different sorts of corporations, is it a Credit Union; is it an overseas company – what is it?

Blanchard J Well that depends upon which vehicle is used as the recipient of all the assets. I can well understand you wouldn't want to do it under part 13.

Dugdale No.

Blanchard J Part 13 wouldn't cope necessarily with all the problems, but the problems are what you encounter on the way. Once you have got to a point where the assets are all in the one vehicle, I can't see that fusion is ever likely to be a problem.

Dugdale Well I suppose I come back to the answer that I started off with, is that if it was as clear as the legislature as it is to Your Honour, one would have expected the statute part 15 to say so.

Dugdale Mr Dugdale on that point, although it is not as direct as you're looking for, I wondered what bearing s.238(a) has on the matter

that's been the subject of debate? It's saying that you can do it under part 15, even though you could do it under part 13

Dugdale And vice versa.

Tipping J And vice versa. Now that suggests to me some illogic in contending that a different end result is achieved under the two mechanisms.

Dugdale I think that s.238 is explicable by the history of the legislation which I am running hopelessly ahead of, having been provoked by Your Honours, but the initial proposal as I will be pointing out at a later stage, was to provide a machinery that was available if part 13 or part 14 didn't fit and s.238

Tipping J Well this makes it quite clear that it's not so confined.

Dugdale Section 238 is really designed to negative that and was presumably put in there to put that beyond argument.

Tipping J Well that may well be so, but it would seem to me that this reinforces if anything the difficulty in suggesting that the two routes cause different outcomes from the fusion point of view.

Dugdale But the approach that various of Your Honours are approaching seems in my respectful submission to suffer from what I tried to establish was the threshold fallacy because it assumes that there is only one sort of amalgamation.

Tipping J But doesn't mean, 238(a), that the word 'amalgamation' means in the same in both parts?

Dugdale No.

Tipping J It would be a very odd piece of drafting if it didn't.

Dugdale No, you've got to read it altogether. My argument is that you can't just amalgamation, you've got to have regard to the part under which it is effected.

Tipping J Well that's the point I'm having difficulty with and maybe we should let you develop the statutory history because it's going to have to be pretty strong to suggest that they set up such an illogical situation, at least as far as I'm concerned. But what is it in the

statutory history in essence that supports the view that Parliament was trying to achieve different outcomes from the point of view of this fusion point?

Dugdale The deliberate choice of the historical English process which was clearly held in *Nokes* to have that different outcome is the first point, and the second point is the failure to repeat in part 15 the words of section....

Tipping J Well that's not statutory history, that's just a contextual point for part 15.

Dugdale Well yes

Tipping J But the statutory history the key points are *Nokes,* and what else?

Dugdale Well that is the main point that they carefully chose a procedure which had been held by the House of Lords to have a non-fusion consequence.

Blanchard J Where do you say they chose that? Which sections of part 15 are you looking at?

Dugdale Well I'm sorry if I'm waffling, but if you compare s.237 for example, but that's where it is clearest, with the s.207 of the Companies Act 1955, which is at tab 26

Gault J Is there a difference Mr Dugdale in this respect, its over here.

Dugdale Sorry.

Gault J If you look at 236 in part 15, it deals with the power of the Court to make an order that the amalgamation is binding on the company and the parties designated. S.237 begins 'without limiting s.236', so it seems to me that the procedural steps provided for in 237 are not necessarily part of the Court approval, and whereas under 207 in the historical provisions which talked in terms of the Court on application making orders for transcript, etc, it seems to me that it could be said that s.236 simply gives the Court power to approve an amalgamation as set out in the particular documents to which the application relates, and it does not need to invoke the optional provision in 236.

Dugdale Well one of the differences, and I think I'm really going to have to start insisting on going back to my sequence because it would be better if I dealt with this in its proper place.

Gault J Well please do so if you prefer to do that.

Dugdale But while it is troubling Your Honours, one of the differences between part 13 and part 15 is that the assignment of assets and liabilities to the new company is automatic. It's the result of the fusion, and it is a mark that fusion was not intended under part 15 that s.237(1)(a) provides for the transfer of property which is inconsistent with the notion of fusion and would not be necessary if the legislature had thought that under part 15, it was providing for fusion.

Tipping J But fusion doesn't mean automatic vesting does it?

Dugdale Well if I could take you to 225 Sir

Tipping J Well it might do Mr Dugdale. If you can show then your point takes on greater legs.

Dugdale Thank you, I'm obliged Your Honours. Section 225 under (d) and (e), and you will remember that this is a process that doesn't require a Court order. It's just filing in the Company's office a certificate that you've done all the right things. (d) 'The amalgamated company succeeds to all the property rights, powers and privileges of each of the amalgamating companies, and the amalgamated succeeds to all the liabilities'. So there is an automatic process as part of the part 13 process as distinct from the requirement of transfer which is to be found in s.237.

Tipping J Is that optional, as my brother Gault pointed out, because the documents that the Court is giving its imprimatur to, actually achieve that in their own right, or is that really antithetical to what part 15 is all about?

Dugdale Well, even if it is optional – even if there are cases where a transfer may not be necessary, the fact that what is the antithesis is between any provision for transfer and the provision for automatic vesting to be found in s.225 of part 13.

Tipping J I understand the force of the point Mr Dugdale.

Dugdale Can I come back to my much trodden over prepared submissions? In 2.5 to 2.9 I set out the history of the Canadian legislation, and I don't think that I need to go into that in detail except that it is quite clear that it provides for fusion that is the effect of the Supreme Court's decision of Mr Justice Dixon in the *Black & Decker* case, and he too was a company law expert, and that is still the law in Canada, and in 2.9 I refer to the devastatingly brief judgment in a case called *British Columbia*, in which the Supreme Court upheld in a sentence the dissenting judgment in the Court below, that judgment have preceded on *Black & Decker* lines which the majority judgment had not. So *Black & Decker* provides for fusion and is the effect of the Canadian legislation. It is more helpful to move on to the next bit which talks about the New Zealand reforms, when in 1989 the New Zealand Commission embarked on its consideration of the Companies legislation it made clear its reliance on the Canadian reforms, and part 13 is essentially what the Commission recommended. The Commission's draft bill did not include provisions replicating ss.205 and 207 of the 1955 Act, and it's important to note that the words of s.219 adopt the very words of a section that the reference to which I give at the end of 21(10) of the Canada Corporations Act. So that in my submission it can hardly be doubted that in the case of part 13 amalgamations the intention of the legislature was to override *Nokes* and to adopt fusion as the method of amalgamation under that part, and this is what the New Zealand Court of Appeal held in the case of *Carter Holt Harvey*, in which three of Your Honours took part, and there's no doubt in my respectful submission that *Carter Holt Harvey* was correctly decided *Carter Holt* was a part 13 case, and Your Honours may well think, important to note that it is in its terms carefully limited to part 13, and if I could take you to *Carter Holt*, which is at tab 2, and what the Court said at page 410, at line 44, is 'Part 5A which is part 13 commences with a general conceptual statement in s.209A – 219 now. Two or more companies are to be permitted under the part to amalgamate. But they will continue as one company. It can be one of the continuing companies, or it may be a new company incorporated under the Companies Act 1993', but the emphasis is on that I want to make in that passage is the words *under the part*. If the Court is only talking about the

Tipping J Are you not suggesting we were hinting it was different in part 15 Mr Dugdale? We were just being extremely careful not to express a view either way.

Dugdale Well I have seen my friend's synopsis of argument and he rejects the notion that *Carter Holt* was confined in its terms I think

Tipping J Well he'll have a hard road to hoe as far as I'm concerned on that point.

Dugdale But could I also take you to the next page, which is page 411 at line 4, the paragraph which says 'continuance is of the corporate entities, not of the undertakings and operations of those entities. They merge', and then it refers to the provision for succession in the statute. It is an important part of the Court's reasoning that part 13 provides for succession and as I discussed earlier with Justice Tipping, in fact part 15 contains no such provision, and then at page 414, at line 31, again we have the Court confining itself to part 13. 'Fortunately New Zealand Courts are not bound by *Nokes* and as we have indicated, the concept of amalgamations under the New Zealand companies legislation is very different. Rather than there being any transfer or assignment of rights and liabilities to the amalgamated company, it is as the continuing entity to succeed to them. A study of the legislation reveals a clear Parliamentary purpose of simplifying the process of amalgamation. That being so, it cannot have been intended to expose those using the process prescribed in part 5A and in Part 13 of the 1993 Act to the perils which would flow from the narrow interpretation contended for by the respondents. As the example of *Nokes* demonstrates there would also be pitfalls for third parties, not can it have been intended to create the complications and attendant investigatory expense for users to which Mr Galbraith referred in his argument'. Again the Court very properly in my submission is confining its reasoning to part 13.

Tipping J Did part 15 actually exist at the time that this *Carter Holt* was

Dugdale It did.

Tipping J It did.

Dugdale It did Sir, yes. And then I go on to submit that part 15 provides an alternative method of giving effect to amalgamations. It was inserted into the statute in the course of the Bill passing through Parliament on the recommendations of the Select Committee. The history is referred to in *Weatherston v Waltus* 2.13 – beyond the words 'a new part 13A is to be added dealing solely with Court approval of amalgamation and compromises, the Select Committee

proffers no explanation of part 15 or its wording. So that stuff's in the case on appeal but it doesn't get us very far. What I do need to spend a little time on is a letter from the Justice Department to the Select Committee, which is to be found at tab 36.

Elias CJ Why can we look at this material?

Dugdale Well the answer I think is this. If I could take you to the next tab, which is the report of the Select Committee

McGrath J Tab number?

Dugdale It is 37, and it refers at page 22, that's right at the back, to reports prepared by the advisers from the Department of Justice, and

Tipping J You were going to take us to the Select Committee first are you, rather than the letter from the advisers?

Dugdale No, but I thought that the Chief Justice was demurring as to why we should be looking at the letter.

Elias CJ Well I am. We should look at, if you want to take us to it, at the report.

Dugdale Well if you look down the list to DJ20 – this is at page 22 of the Select Committee report – there is a reference – right at the back and it simply lists amalgamations and compromises with creditors, and it is that report which is to be found at tab 36.

Elias CJ What does the report itself - does it refer to it; does it incorporate it; does it make it

Dugdale No, what I had tried to convey Ma'am was that the report proffered no explanation of part 15 or its wording, and indeed it appears from the context that part 15 didn't exist at that stage. The appearances of a time problem when it probably was drafted after the Select Committee reported. But the Select Committee does refer to this Justice Department report

Elias CJ Well it lists it.

McGrath J But only in that schedule.

Elias CJ Yes.

Dugdale Only in that schedule.

McGrath J So why should we depart from our usual course to look at a departmental report to a Select Committee, when even just in the last week we have refused to do that when invited to do so?

Dugdale On the authorities, it is a matter entirely at the discretion of the Court, and if you are uneasy

Blanchard J I don't think this Court has yet looked at such material, and the problem with them is you don't know often whether the Select Committee accepted what the department was saying. If the Select Committee report, as it sometimes does, refers to a particular suggestion made by the department, then it may be possible to look at it, if it's clear from the report that what the department is urging is being adopted, but there are real difficulties I think in looking at this kind of material in the absence of that indication, because you just don't know what the Select Committee's reaction was.

Dugdale I wouldn't quarrel with any of that, and this would merely produce in a spirit of helpfulness

Tipping J They always are.

Dugdale Of course, but in this case there is an indication of the sort that Justice Blanchard referred to, not in the report of the Select Committee, but in the wording of part 15 itself, because the point that is, and I don't want to seem to be insolently trying to get in material that you've doubted that whether I can.

Elias CJ Well you don't know what use we can put it to. We don't know what use it was put to by the Select Committee. It isn't really helpful.

Dugdale Except with respect that it appears that from this letter that the purpose, well one of the purposes anyway, of the part was to fill in the gap that was filled by the extended definition of company in part 15 so that the indication that Justice Blanchard thought was necessary is to be found in the statute itself, and that really is why I thought it could be of assistance to this Court because, I don't know I don't really understand where the limits for this extraneous material lie, but

Tipping J Well as far as I'm concerned I think this is going too far. I think the Select Committee should be encouraged to refer to material in their reports if they have used them and this saying well they might or they might not of I just don't like it speaking for myself. I think that we've gone far enough with the Select Committee report. That may not be music to your present ears Mr Dugdale as opposed to your more general ears.

Dugdale It's music to my more general ears. I'm a purist in this matter. Well I thought that perhaps I was saving some Judge's clerk a bit of researching by producing this.

Blanchard J Well we wouldn't ask a Judge's Clerk to look at something that was inadmissible.

Dugdale It would be very wrong of me to suggest to the contrary Sir.

Tipping J Like suggest we look at the text of the legislation in the text of the Select Committee report. There doesn't seem to be anything helpful.

Dugdale The text of the Select Committee report doesn't say anything helpful because it appears that at the time of the report that was prepared, they hadn't really grappled with the contents of what became part 15, and that is why it seemed

Blanchard J Well they would have had to of because they would be reporting back with that part drafted surely.

Dugdale Oddly not. I agree of course that that is the usual thing, but in fact if you look at this report it doesn't include a new draft Bill at all, it just includes the rather cursory segment which I have referred to

Blanchard J Well when did part 15 go into the Bill?

Dugdale After the Select Committee report, presumably there was a supplementary order paper.

Blanchard J At the Committee of the whole house stage.

Dugdale I assume.

Tipping J Mr Dugdale for me the two points you've made of weight are the non-bringing forward of 219 into part 15 and the succession point.

Dugdale Yes Sir.

Tipping J Now is there anything else that you can put your finger on that's got the same sort of

Dugdale Oomph.

Tipping J Oomph, exactly, thank you?

Dugdale I think those are the strongest points, but it is in my submission on an application of the normal rules of statutory interpretation, the oomph of the points is not to be under-rated.

Tipping J You really say that the starting point is not against you but for you, and that these oomphy points back that up rather than having to fight against a tide that's already setting against you. That is your sort of frame-work point

Dugdale Indeed.

Tipping J Then you've got these two oomphy points.

Dugdale Yes, and of course it's a matter of chance that the first case before a Superior Court was a part 13 case, but that doesn't warrant subsequent decision sort of trying in some procrustean way to amend part 15 to make it fit part 13, which in my submission it does not. I will immediately skip 2.14, and could I just pass over to part 2.15 and pick up my submissions. Part 15 contains the equivalent of s.219, a comparison of part 15 with sections 205 and 207 of the 1955 Act make it plain that these sections provide the model for part 15, which is thus descended from the 1929 UK statute. The only difference of substance is the addition of the words 'other person who appears to the Court to be interested, which doesn't alter the weight of that, so that – and this is 216 – it is the appellant's case that an application of the ordinary rules of construction compels the conclusion that Parliament intended to provide for modes of amalgamation, and one part 13 on the basis of fusion, and the other adopting the traditional mode provided by part 15. And of course apart from that there were the already existing non-statutory modes that provide the menu of processes to which I have already referred. I want now to move onto part 3

which refers to the protection of third parties supplies the context of this litigation and it makes the points that amalgamation can be on just the third parties. This can be so where the practical effective amalgamation is to assign a contract not in its own nature assignable, which is the position in *Nokes* – that was a contract of service – or where the practical effect of amalgamation is to assign a contractual interest that the parties to the contract have agreed is not assignable, which was a fact situation also addressed in *Nokes*. It can be unjust when a third party has agreed to be answerable for the debts of a small company that amalgamates with one much larger, which might have been it was not the factual position in *Carter Holt*, or confers a benefit for example a licence to use property on a small company that amalgamates with a larger and there are two American cases that illustrate that factual situation. There is

Elias CJ Sorry, is your submission that there aren't powers to protect third parties in part 15?

Dugdale That?

Elias CJ That there are not powers to protect third parties.

Dugdale My submission is this, that in construing the two parts, the Court needs to take into account the likelihood that third parties are likely to be effective by an amalgamation that a progressive modern statute will contain provisions for the protection of third parties.

Elias CJ But doesn't it?

Dugdale Well it didn't work

Tipping J Well it didn't work here you say, but it does in general provide the same sort of protections as in parts of it here. They both looked to see what is necessary to protect third parties.

Dugdale No Sir with respect, part 13 provides for advertisement.

Tipping J Yes.

Dugdale So that if there are third parties likely to be influenced they have a better chance of knowing about it and can come along to the Court and say hey, stop this thing happening, and the Court has clear

powers either to vary what is proposed or to forbid it, so that there's no doubt that under part 13, third parties are protected.

Tipping J You say they're better protected than under 15, but 15 still has third parties in mind.

Dugdale Except that the only provision for the protection of third parties in part 15 is the obligation of the applicants when making the procedural application to notify the interests of third parties.

Elias CJ No, any third party affected can apply to be heard.

Dugdale If he hears about it.

Elias CJ Well everyone knew surely of the merger of these two public companies.

Dugdale Well but everybody didn't know that somebody had made an application which was going to be dealt with on the papers by an Associate Judge without any more publicity than that. That's the point. Suppose I read in the Business Press or something or another that some company is going to amalgamate, what do I do? Run along to the High Court every day and see if some papers have been filed, or

Elias CJ If you want to protect your interests perhaps you do, but the statute provides a mechanism for you to do that.

Dugdale Well the only mechanism for the protection of third parties in fact is contained in the High Court rules, and is part of the normal ex parte application obligation of disclosure. The relevant rules are set out at

Tipping J But if the system works properly, and I'm not suggesting that it did or it didn't here, I'm just saying if the system works properly, surely there's as much protection under the Court route as there is under the consensual route, if the system works as it's intended to work.

Dugdale Well the part 15 process is dependent on disclosure by the party who may not place the weight on the matter that the other party does.

Tipping J Well that may be so Mr Dugdale, but what I cannot accept, at least for the moment, is that the outcome should be driven by the

possibility that the Court system might not work as well as your client would have wished it, or anyone else might have wished it.

Dugdale Well, I'm suffering from letting myself be distracted from my sequence, but

Tipping J Well we are very near the end of your part 3 Mr Dugdale so I couldn't restrain myself any longer.

Dugdale The thrust of much of what has been put to me this morning is well it's amalgamations whether under part 13 or 15, so why on earth should they have different incidents. What I have been trying to persuade you of is that really that we're talking about two entirely different animals and the fact that this beast bares the name of amalgamation doesn't really get you anywhere. One beast is the Canadian one used in part 13 with its provision for automatic fusion, and the other is the traditional English beast which is plainly what was intended, though we don't know why, in part 15. The context in which this is important includes the effect on third parties of that amalgamation either part can have.

Elias CJ It's a separate argument isn't it? It's a policy argument as to why the part 15 amalgamations are to different effect than amalgamations under part 13.

Dugdale It's part of the totality of the situation. I was about to launch into part 4. I don't know what time

Elias CJ Yes, it's half past, we'll take the adjournment now thank you.

11.33am Court Adjourned
11.50am Court Resumed

Dugdale I now move on to part 4 of my submissions may it please the Court. What I want to do is to examine the mechanics provided by parts 13 and 15, focusing in particular the protection provided for third parties. The position is this. Part 13 prescribes mandatory steps which if duly followed makes that amalgamation effective without Court interference. Unless a third party seeks protection under s.226, those steps include provision for a public notice of the proposed amalgamation, and since there are other procedures for notifying shareholders and secure creditors, it's clearly intended to

notify any person to whom an amalgamating company is under an obligation. Such a person may apply to the High Court which has wide powers to forbid, modify, or require reconsideration of the proposal. S.219 provides for the first time in New Zealand for a particular type of amalgamation fusion, but it's a type of amalgamation that must be earned in my submission by the proponents through the hoops laid down by part 13. The evidence is that one of the hoops that this proponent wanted to avoid was the minority buy-out obligation. Under part 15 the process if entirely different. Part 15 contemplates an initial application for a procedural order which may define which persons are to receive what notice of the application and may appear and be heard on the application under 236(2) in addition to a shareholder or creditor. Any other person who appears to the Court to be interested may also seek a procedural order, but in practice this does not help interested parties who are simply unaware that a part 15 application has been made. There's no provision in part 15 as there is in part 13 for public advertising of the proposed amalgamation. In practice therefore protection for third parties depends on compliance by applicants of their obligation under the rules of High Court to which I refer.

Elias CJ And under the Judge's ability to require advertisement or some form of notification.

Dugdale If anyone has told him of the problem of the third party rights. I mean that's really the triggering point. Obviously the Associate Judge in this case who dealt with this matter on the papers, knew nothing about Elders' position. Equally obviously we may surmise that if it had been disclosed and notice had been given to Elders, they would have come along to Court and sought to be heard in relation to the application but none of this happened, and that is why Elders are reduced to approaching the matter in the way that they have in these proceedings, which is the only one available to them. 4.4

Elias CJ Is that the 7 October 2005 order? Do we have the order that the Associate Judge made?

Dugdale I'm sure we do Ma'am, yes.

Elias CJ That's alright, don't take time, I'll find it later.

Dugdale Alright, it's under s.(c) of the index of the case. It's page 63 of the case Ma'am.

Elias CJ Were there any interlocutory directions given before the order was made?

Dugdale Yes, because that is the procedure, but that has not been included in the case. The other interesting document there is the memorandum of counsel at page 76 of the case on appeal which sets out what was and what was not disclosed to the Court when the procedural order was sought, and that a reference to minority buy-outs at page 85 of the case, and there is no reference to the interest of Elders which was just not disclosed.

McGrath J I suppose in this particular case though that if your argument is right, in the end Elders can take advantage of their rights under the clause and we note that there is in this case no ultimate disadvantage to Elders as through not having been noticed. It's rights haven't been effected in any way if in fact the pre-emptive obligation has been triggered.

Dugdale That's probably a perfectly valid point that you have put to me but on the other hand it is easy to think of situations where non-disclosure of a third party interest would not be so easily solved.

McGrath J Yes, but that's a risk I suppose in other matters that come before the Court in the field of trusts and wills where there is a preliminary procedure usually to decide who needs to be served, and if that procedure doesn't work the problems will subsequently have to be addressed. It's what one hopes are the first of rules will be adequate, and you've made some reference to that, and secondly that the process is conscientiously followed through by counsel involved and the Judge in the High Court, or Associate Judge who is dealing with the matter.

Dugdale And everything will be for the best.

McGrath J But that's really where these things are worked out rather than in – because I think you're really of course inviting us to use this material to interpret part 15 in some way, and what I'm really suggesting is that it's usually dealt with at a more pragmatic level by laws and through counsel discharging your obligations.

Dugdale The matter was dealt with in the way it has been in this case because it was agreed by both counsel, and this is at page 43 of the case, that answering the question posed is likely to be decisive on the issues proceeding between the parties. This is the memorandum of Justice Harrison, who made the procedural order for a pre-trial examination and you will note para.3 'I record both counsel's agreement that determination of this question is likely to be decisive on the issues between them in this proceeding', and he goes further and says that 'there can be a right to appeal as a right' which indeed was invoked.

Elias CJ The correspondence at page 93 precedes the making of the order. I understand that you're putting the thing on a more general matter than the particular knowledge and dealings here.

Dugdale You're putting to me that Elders in fact had actual knowledge of the

Elias CJ Yes.

Dugdale Of the betrothal of these two companies

Elias CJ Yes, and was dealing with the ownership agreement.

Dugdale I'm sorry, could I just talk to Mr Crossland who understands these things better than I do?

Elias CJ Yes.

Dugdale I'm not certain that it's accepted that what is talked about here is the precise proposal that subsequently went ahead, but I can't help Your Honours any more about that.

Elias CJ Thank you.

Dugdale 4.4 if I may. In my submission the sort of amalgamation that may be ordered under part 15 is not the fusion that may be ordered under part 13 with the consequences indicated in ss.219 and 225. Fusion as provided for by a part 13 is a novel and stand-alone concept to the extent that the parties themselves can propound a scheme for approval by the Court under part 15. They can use only concepts known to the common law which will inevitably involve dispositions of ownership whether legal or equitable. If you recollect the passage from Lord Atkin that I read to you from page

1033 of *Nokes*, that was his reasoning under the procedure that he was considering, which is the one adopted in part 15, that the parties can only agree on something that is legally possible, and that there needs to be some sort of express provision before the law can make an order that is not contemplated, that is not something that can be done under the general law. There's no provision for fusion under the general law to the extent that the Court

Elias CJ What is the general law, because companies are entirely creatures of statute

Dugdale Yes.

Elias CJ So the respondents too have referred I think to the common law and it just seems a bit odd to see in this connection.

Dugdale Well except that there is room for the application of common law rules such as that liabilities as distinct from assets are not transferable.

Elias CJ Yes, yes.

Dugdale And that must be a necessary element to fusion one would have thought.

Elias CJ Yes but in terms of what the company has the capacity to do, one would have thought that isn't a matter of general law, it's a matter of statute.

Dugdale Well a company has no power to assign its liabilities any more than any other person does unless it's expressly permitted to do so by statute

Elias CJ Yes.

Dugdale So we go around in a circle because the only express statutory power is in s.219, so we come back to the question of whether this applies despite the way the statute is organised to part 15 amalgamations. I'm now at the bottom of 4.4 on that page 'to the extent that the Court makes its own orders, the relevant power is s.237(1)(a), which again invokes the concept of transfer. Before statute mandate of the concept of fusion it was understood that the figurative concept amalgamation in law necessarily implicated

transfers, but the real point is that in respect to its obligations under pre-emptive provisions, transfers were simply something that Wrightson itself was unable to do contractually. Wrightson and the appellant had agreed to the pre-emptive obligations to ensure co-ownership and use of their various sale yards. But there was no power for Wrightson unilaterally to retreat from that unless it is expressly provided by the statute which in my submission it was not. In para.4.5 I refer to matters that we've already talked about. The failure to adhere to the obligation of disclosure, and I don't need to go over it again. But I need to clear out of the way a heresy, or what I submit as a heresy that is contained in para.40 of the Court of Appeal's judgment, which is at page 24 of the case, where the Court says 'if an arrangement approved by the Court under part 15 incorporates an amalgamation, that amalgamation is itself necessarily approved of, referring to a first instance Canadian authority. Whether this is so in this case comes down to an issue of interpretation. Because the final order approved the scheme as recorded in the merger plan, that interpretation issue turns on the meaning to be ascribed to the merger plan as a whole, given that the merger plan provides in 2.11 that PGG & Wrightson will amalgamate and describes the effects of this in a way which correlates to the effects of an amalgamation under part 13. We conclude that it effected an amalgamation in the s.219 sense'. In my submission the reasoning of that paragraph is entirely wrong. Section 225, which I've already discussed with Justice Tipping, and in particular ss.(d) and (e), provide that succession is the ipsofacto consequence of jumping through the part 13 hoops. While under part 15 the powers of the Court set out in ss.236(1) and (2) make no provision for fusion, but contemplate transfer or vesting. These are different concepts from the concept of succession or fusion. The first instance decision of the British Columbia Supreme Court relied on by the Court of Appeal does not support its conclusion. At issue there was whether certain amalgamations were effected under ss.247 to 251 of the Company Act within the meaning of those words in a taxing statute. The relevant Company Act sections are set out in appendix 2 to that judgment. It is correct that para.57(a) of that judgment includes the words 'relied on by the Court of Appeal', but the Canadian case did not call for the analysis of the powers of the approving Court, which the present case requires. If the reasoning of the Court of Appeal is carried to its logical conclusion, it would mean that a provision in a merger agreement approved under part 15 that the merger shall have the same effect as if it had employed the part 13 process would be effective, but in my submission this would be absurd because New

Zealand law does nor permit fusion by contract, or by any means other than following the procedure set out for a part 13 amalgamation. So in relation to the precise grounds of appeal permitted, the appellant's position then is that a part 15 amalgamation does not have the same effect as a part 13 amalgamation, that in particular the final order made in the instant case did not result in such a fusion as s.219 provides in the case of part 13 amalgamations, but necessitates express orders for transfer or vesting. If this is correct, there has been a triggering disposition, that is to say a consensual arrangement subsequently approved by the Court, and the appeal should be allowed and the relief sought in the statement of claim granted, and I've already referred you to Justice Harrison's minute which seemed to accept that that was the understanding between the parties when the interlocutory order was made.

Elias CJ So your response to the respondent's point that on the case stated procedure that's been used here, whatever the outcome, it would have to go back to the Court of Appeal to determine, is what?

Dugdale That that was not the understanding recorded by Justice Harrison on which the interlocutory order was made. The concession of counsel that Justice Harrison records is a little qualified, but that is the essence of the position. But in any event the position is plain. There is a suggestion foreshadowed in my friend's submissions that if it was desired by Elders to exclude amalgamation as a triggering event, they should have ensured that the document said so, but the authorities from North America are entirely opposed to that and the case of *PPG Industries* which is included in the case on appeal at tab 10 makes it quite clear that in the view of that Court on the contrary the onus is on a party wanting to exclude from a generally worded triggering position. To exclude amalgamation it must say so expressly, so it's the appellant's position that if I am right in my submissions then the position is clear enough and the relief sought in the statement of claims should be granted.

Elias CJ But there's no argument or potential argument as to the interpretation of the pre-emptive right provision, which I haven't looked at?

Dugdale Well apart from the point I've just referred to which appears for the first time in my friend's synopsis which he may want to enlarge upon. The understanding is the one that Justice Harrison records

that really the question posed was intended to put an end to the matter.

Tipping J Just before you conclude Mr Dugdale, can I just ask you something apropos of your last substantive paragraph where you're making the point that New Zealand law does not permit fusion by contract etc, I rather read 236(1) – that's s.236(1) in part 15 – as allowing the Court to bind people to what they cannot consensually bid themselves to. At least that may be one of its functions. Do you accept that or not? Because there's a rather striking lack of reference to anything contractual in 236. I mean obviously the ordinary case – the thing will be consensually set up, but I just think the language might be indicative of a policy that allows the Court to achieve something which the parties could not have achieved by contract, thereby getting around the *Nokes* difficulty.

Dugdale Well I think what I need to refer Your Honour to is tab 20 which sets out the English provisions which are the ancestor of the ones we're talking about in part 15, and certainly on that wording Lord Atkin

Tipping J This is s.153

Dugdale Yes Sir

Tipping J Of the 29 Act in England.

Dugdale Yes.

Tipping J What particular wording are you invoking?

Dugdale Well if you look at the second part of ss.2. 'The compromise or arrangement shall if sanctioned by the Court, be binding on all the creditors or the class of creditors or on the members or class of members as the case may be and also on the company' and so on. And it was in relation to that provision that the House of Lords in *Nokes* held that the terms of the compromise or arrangement must relate to matters which the parties could do contractually.

Blanchard J Well we're not of course bound by *Nokes*, and I haven't really gone back and acquainted myself with it, but I recall looking at it at the time of *Carter Holt Harvey*, and being rather more impressed by the dissenting judgment than I was by Lord Atkin.

Dugdale No Lord Atkin was part of the majority. It's Lord Rimmer who was the dissenter.

Blanchard J No, that's what I said.

Dugdale Oh I'm sorry, yes.

Tipping J Well I may be perhaps in view of that historical correlation if you like Mr Dugdale, it's possible that I'm making too much out of the words of 236(1), but I must say that that would be the way in which my mind, without the benefit of the reference you've just given, would be inclined to go, but thank you that's most helpful.

Dugdale Well the words 'shall be binding on' and so on are

Tipping J It's the same, yes, I appreciate the point, it's not as stark perhaps as it would be if it had come in completely anew.

Dugdale It would be odd

Tipping J It would.

Dugdale If in this context legislature chose to follow the (inaudible) more or less of

Tipping J Of that section.

Dugdale Of that section, but meant something else is the point.

Tipping J No, I understand that's a fair point.

Dugdale Those are my submissions.

Elias CJ Yes thank you Mr Dugdale. Yes Mr Jagose.

Jagose I apprehend that most of the points that I wish to take the Court to, the Court already has well under control. I'm not inferring that Your Honours support me, but I don't propose to go through the submissions in that respect. I would like to pick up on the two points raised by His Honour Justice Tipping in relation to the oomph points if I might. The first is the proposition about whether s.219 is drawn forward into part 15, and there was a brief discussion earlier this morning about what s.238(a) might mean if that was not to be the case. With respect it seems to me that it is not feasible to give

s.238(a) any meaning if amalgamation is to have a different meaning in part 15. It seems quite plain that if an amalgamation is the fusion concept that my friend has spoken of under part 13, then that is what is being effected under part 13. For that amalgamation to be approved under part 15 would mean that it's approving something else. Something that is not of a nature of fusion. So on my friend's interpretation, where part 15 is the traditional amalgamation and part 13 is the fusion amalgamation, s.238(a) can have no meaning at all, because it would not be possible for the Court to approve the very thing that could be affected under part 13, and that in the statute with respect is the single strongest point that says s.219 is to be drawn forward as to be understood as being informing the concept of amalgamation under part 15. To the extent that there's any doubt about that, then the Select Committee report gives us the merest his that that's correct and in the introduction to part 5 where they're talking about the amendments and additions to the Bill, they say that those amendments and additions do not represent major changes in the policies set out in the Bill, and if I can just take the Court to that particular point. It sits at page – this is tab 37 of the bundle, at page 16 – I'm sorry, at page 17, para.15. The recommendation from the Committee was 'that the parts dealing with amalgamations and compromises be recast. That part 12 will deal with amalgamations and 13 compromises. A new part 1A is to be added, dealing solely with Court approval of amalgamations and compromises'. But if Your Honours were to look at page 15, the heading 5, *further recommendations*, 5.1 'the committee wishes to draw attention to a number of other recommendations it has made. These do not represent major changes in the policy expressed in the Bill'. Now with respect, when the policy expressed in the Bill without part 13A as it was proposed at that time, is for the fusion conception of amalgamation and it is said that part 13A is now to introduce something entirely different that with respect is a very major change to the policy expressed in the Bill. And it's to be remembered that that policy is drawn from the amendments to the 1955 legislation which only incorporated part 13, and so when Justice Tipping asked whether part 15 was in force at the time of *Carter Holt Harvey*, of course it was at the time that the judgments were being made, but in fact the case was about s.209 or 7 of the 1955 Act, which didn't incorporate the part 13A proposed change, now 15.

Tipping J Yes, that's as I recalled it thank you.

Blanchard J When it says 'a new part 13A is to be added', who was it being added by?

Jagose I imagine, and I say this with great lightness because I don't know, it's simply Parliamentary drafts-people between the writing of this Bill and its presentation to

Blanchard J Yes, but is it being driven by the Select Committee or is it being done independently of the Select Committee at a later stage?

Jagose I simply don't know, I'm sorry Sir. Part 15 has come in for some criticism, both judicial and in the text – *Morrison's* in particular, saying that it is not playing what it's intended to achieve. We saw in the Court of Appeal, the Court of Appeal in this case having some difficulty with the propositions in the way it was worded and the way it was meant to connect, and certainly it's an unhappy mixture of the objectives of part 13 and in an attempt to add in belatedly by somebody with whose motivation it is not presently known, some attempt to be able to get to the Court in circumstances in which part 13 for these particular purposes, or 14, are not able to be done without some added assistance, and this case indeed is one of those cases as I shall show in a moment.

Blanchard J Was there a supplementary order paper, and did it have an explanatory note?

Jagose I can't assist Your Honour but my expectation is yes. Can I just have one moment Sir? I'm sorry I can't take that further Sir. The second point I wanted to raise is that I wished to urge upon the Court a resistance to characterisation of part 3 as fusion, notwithstanding that I've simply used those words just now. And I say that because the precision of language of language in this Act is extraordinarily important. What s.219 talks about is continuance, and so if amalgamations under part 13 are to have some descriptive quality, that descriptive quality is continuance.

Tipping J Continue as one.

Jagose Exactly, and that's very important because of again the point Your Honour raised in relation to, well there's this automatic vesting. With respect that's not the case, and the extracts in *Carter Holt Harvey* that I've made out in my submissions at page 3 make that quite clear that one isn't to look at references to succession in part 13 as to be read as requiring that there be a predecessor and a

successor, so page 3 of my submissions, para.3.1, I explain that the core concept is of continuance and I cite there from *Carter Holt Harvey* 'continuance is of the corporate entities. They merge into one corporation which is to be regarded as their equivalent or more loosely, their successor, but as the parent continues and is not deemed to be dissolved, it is clear that succeeds is not to be read as requiring that there be a predecessor and successor'. And the point is then made in the following section where those references to succession and other steps are merely procedural. They're mechanical steps says the Court of Appeal. The certificate – that's the certificate of amalgamation – does not affect or impinge upon the continuance of all corporate identities in the amalgamated company, and there the Court emphasises again 'the conception is that rather than there being a transfer of rights and liabilities to the amalgamated company – which is the point that I'm just checking against Your Honour's reference to automatic vesting – it is as the continuing entity to succeed to them'. And there is a final point at 3.3 where there is a citation to *Black & Decker* from the Court of Appeal 'the effect of the statute on a proper construction is to have the amalgamating companies continue without subtraction'. That is to say that Wrightson and Pine Gould Guinness each continue to exist in the form of PGG Wrightson Limited.

Tipping J And it's that mechanism that brings forward the assets and the liabilities into the new unitary successor.

Jagose The assets and, yes that's correct, the assets and the liabilities continue, each without subtraction in that single unit. That's absolutely right, and that's just the core concept here. That's the whole point of amalgamation under part 13 and in our submission holds absolutely for part 15. There couldn't be a reason to walk away from it in part 15, and part 15 can't be read as calling in some alternative concept. It would require a reading out of part of the Act which is not on all fours with basic cannons of statutory interpretation. I did say I would go to the memorandum to the Court in support of the application. This is the case at page 76. Where I really wanted to take the Court is to page 83 of the case which explains the reasons for invoking part 15 jurisdiction in this case. I suppose I might start back a little actually and just point out that the scheme which starts at page 80 involves a series of successive steps. So you will see at para.22 the sequence. A declaration in payment of dividend; the issue of bonus; acquisition of shares by PGG from Wrightson; PGG's entry as holder of those shares - cessation of domestic and overseas – there's two different

categories of shareholders, being allotted then shares in PGG, and the particular words PGG and Wrightson will amalgamate. And then to make the point that what we're talking about here is amalgamation as it is expressed in part 13, then part 13's mechanical provisions are replicated here. So if I can go back then to 83, or forward to 83 I'm sorry. First an acknowledgement that there was an intention for the scheme to be approved by necessary majorities at relevant meetings. That there was at the top of 84 a so-called friendly amalgamation. At 30.3, the steps being taken desirably in a prescribed order, and then the need also to deal with Securities Act issues that might otherwise arise. In essence all the complications that come from driving a significant transaction like this by self-help remedies rather than through the Court.

Tipping J I would have thought 30.3 was pretty significant, because you wouldn't want as it were have any room for doubt as to what the fiscal

Jagose Quite. It was a critical aspect, that and the Securities liabilities – the potential Securities liabilities were critical aspects of getting this very large transaction between two of the companies largest rural providers sorted out. The following section talks about shareholders' interests being protected, recognising that the scheme could have been affected otherwise than via part 15. Proposing broadly that those who could be affected are well looked after, and I would take you to 32.4 and following on page 85, dealing with the minority buy-outs proposition that there would be no right for dissenting minorities to require their shares to be acquired. And that is largely because PGG and Wrightson as the President recognised, are two major listed companies. The value of shares in the companies are dictated by what they sell for; trade for on the NZX. And then 32.6 - although Mr Smith's affidavit is not in the case, the memorandum records him explaining that it has been widely reported for some months now that the applicants have been discussing and have agreed to form an amalgamated entity. Now that takes me back to the President's point that third parties had individual rights not reliant on the commencement of an amalgamation proceeding, simply under s.236(2)(e), to make their application themselves to say in the event of any amalgamation application I wish to be heard, and if the Court consider that that was appropriate in the circumstances those orders could be made. But we say in fact on any proper understanding of amalgamation, there is no room for there to be affected third parties beyond the shareholders and the companies.

Tipping J Is the shortest possible way of putting your point that pursuant to the correct interpretation of this legislation there was no transfer, there was succession?

Jagose There was simply continuance.

Tipping J Yes.

Jagose Yes Sir. It's a song I've been singing throughout that there really is no issue here, and when one comes back a step and says well what are we talking about here, we're talking about pre-emptive rights. Those are creatures of contract they are capable of being ring-fenced in whatever manner is most appropriate. All of those pre-emptive rights are contained in agreements that post-date the availability of amalgamation under the Companies Acts. It was open for the contracting parties to make allowance. Have a change of circumstance; change of control provision in the pre-emptive right provisions. They didn't do that. What's being urged on the Court now is that there ought to be a different interpretation to part 15 for the purposes of allowing relief for a contract which failed to make allowance for something which was always in prospect. My friend's would have no cavil they say with part 13, and yet an amalgamation under part 13 would have the same continuance consequence, and it is only if they can cross the threshold to being unfairly prejudiced in terms of s.232 of part 13

Tipping J It's really a case where the pre-emptive rights continue. They are not adventitiously triggered.

Jagose Correct, and that's what makes the idea that to trigger them we need to have a new interpretation – a different interpretation – from that which we say is palpably evident on the face of the statute as intending a single meaning, a unified meaning of amalgamation, precisely because it is seen that from the Canadians it is a desirable corporate re-organisation tool. Unless there is anything I can assist Your Honours with, those are our submissions.

Elias CJ No, thank you Mr Jagose.

Jagose Thank you Ma'am.

Dugdale Now my friend's first point related to s.238(a), and he said that really this was the strongest point in support of his argument as to

the effect of the statute and he refers to the fact that s.238 provides that the Court may approve an amalgamation under s.236 of this Act -that's in part 15 – even though the amalgamation could be effected under part 13, but in my submission that is not conclusive of anything, least of all what my friend would have you believe. If we come back to s.219, it is necessary to understand the permissive terms in which it is worded. Two or more companies may amalgamate and continue as one company which may be one of the amalgamating companies or may be a new company, so that certainly s.219 gives permission for an amalgamation with that consequence, but it is not a necessary consequence of a part 13 amalgamation. It would be possible to have a part 13 amalgamation that did not take advantage of the permission contained in s.219, so that my friend's argument that s.219 must apply to part 15 amalgamations because otherwise s.238(a) would not make sense, in my submission is quite mistaken. It just isn't correct. Section 238(a) is to stop any smarty pants saying well no you can't proceed under this part because you could have proceeded under the other part, but it has in my submission, no more profound significance than that.

Elias CJ Aren't you making that submission?

Dugdale No, I'm not making that submission at all. What I'm saying is that there are various beasts that are given this vague and imprecise title of amalgamation and the fundamental fallacy of what the respondent says and what indeed the Courts below said is to treat them all as one beast whereas on a proper view, amalgamation being the inherently imprecise term that it is, that on the correct view there are all sorts of amalgamations and the two statutory ones are those in part 13 and part 15 which are different beasts.

Elias CJ Yes, so aren't you making the submission that you should have proceeded under part 13 if you wanted this effect.

Dugdale Oh if you wanted that effect, yes.

Elias CJ Yes.

Dugdale Yes, surely, I didn't properly understand what Your Honour was putting to me.

Elias CJ I was just thinking of the smarty pants.

Dugdale Well I was thinking of somebody setting up procedural hurdles to an application and the point of s.238(a) is simply to say well that's not available. That's all I want to say on the point which my learned friend placed such enormous weight. The other point is his argument that what part 13 provides for is continuance not succession, and of course there are references to continuing in s.219

Elias CJ Wasn't it that it's succession through continuance, not succession through transfer.

Tipping J Correct.

Elias CJ It's sequential rather than transactional I suppose.

Dugdale Well if that was my friend's point I'm not quite clear that it's worth making. I mean if there is continuance then that is the end of the matter. If my friend is right and that s.219 applies in this case, that is the end I apprehend of the appellant's case, but

Elias CJ He was responding to the emphasis you placed on succession and indicating that succession does not have to follow transfer, and in this context doesn't.

Dugdale Yes, well except you see that the legislation in relation to part 13 isn't in fact content to leave it at what it says in s.219 about continuance, but in fact makes provision in s.225(d) and (e) for succession, so whatever.

Blanchard J But isn't that just spelling it out so as to avoid any suggestion in particular that liabilities and obligations somehow remain behind?

Dugdale Quite so, but it remains the case that the provision for transfer or vesting in s.237(1)(a), which is the part 15 corresponding provision, is antithetical to continuance or succession and really is entirely consistent in my submission with the meaning in particular having regard to the history of the meaning that should be attributed to its terms. That's really all that I wanted to say by way of reply to my friend.

Elias CJ Yes thank you. Thank you counsel. We will take time to consider our decision in this matter. Thank you for your assistance.

Dugdale As the Court pleases.

12.47pm Court Adjourned