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

SC 106/2022

BETWEEN	**A, B** and **C** Appellants
AND	**D** and **E LIMITED** a duly incorporated company as Trustees of the **Z TRUST** Respondents

---

SUBMISSIONS OF APPELLANTS IN SUPPORT OF APPEAL

Dated this 8th day of March 2023

Solicitors
Vicki Ammundsen Trust Law Limited
Solicitor acting: Mike Phillipps
Level 7, VA Trust Law Building
38 Wyndham Street, Auckland 1010
PO Box 106-551, Auckland 1143
T: (09) 303 4704
E: mike@vatl.nz

Counsel acting
Lady Deborah Chambers KC
Bankside Chambers
L22, Lumley Centre
88 Shortland Street
Auckland
T: (09) 307 8777
E: debchambers@bankside.co.nz

Contents

SUBMISSIONS OF APPELLANTS IN SUPPORT OF APPEAL

MAY IT PLEASE THE COURT:

INTRODUCTION

1. Robert had four children – Alice, Barry, Cliff and Greg.[1] During their childhood Robert repeatedly physically, mentally and emotionally abused them. Robert also raped and repeatedly sexually assaulted Alice. In doing so, they suffered incalculable damage that rendered them particularly vulnerable. Their particular vulnerability continued into adulthood. Robert then took deliberate steps to denude himself of all of his modest assets to ensure that his children could never make any claim against his property. He did so by transferring virtually all of his assets to a trust he settled on 22 December 2014 (**Trust**) and forgiving all debt owed by the trust to him. His children are not beneficiaries of this trust.

2. The appellants say that Robert owed his children fiduciary duties at the time he transferred his assets into Trust and that the transfer of his assets into Trust to prevent his children from being able to make a claim against those assets was a breach of those duties. They are entitled to equitable relief arising from the breach of those duties. The High Court was satisfied that Robert did owe his adult children fiduciary duties at the time he transferred his assets to the Trust and that this transfer was in breach of those duties.[2] The majority of the Court of Appeal did not agree and allowed the respondent's appeal.[3] The appellants say that the Court of Appeal was incorrect to allow the appeal.

BACKGROUND – ROBERT'S ABUSE

Alice

3. Alice's evidence is that Robert started to rape her when she was seven. He would lie on top of her, hold a pillow tightly around her head, and partly smother her. At eight years old Robert threatened that if she ever told anyone about what he was doing to her, he would kill her and her mother. Alice described herself as helpless and powerless to stop the abuse.[4]

4. At age nine Alice was frequently soiling herself and suffering from urinary tract infections. At age 11 she attempted suicide. She wanted to end her life as it was

---

[1] These submissions use the names adopted by the Court of Appeal.
[2] *A, B and C v D and E Limited as Trustees of the Z Trust* [2021] NZHC 2997 (**HC decision**).
[3] *D and E Limited as Trustees of the Z Trust v A, B and C* [2022] NZCA 430 (**CA decision**).
[4] **CB201.0006** at [22].

the only way she felt she could be free of her father. Robert's sexual abuse continued until Alice was 13, when a lock on her bedroom in their new house prevented him from being able to enter her room at night. The psychological abuse did not end. Robert would look through her window at night while he smoked cigarettes outside and stand outside the bathroom door when she was using the bath.[5]

5. Alice's evidence was that her and her siblings were taught from early on not to say anything about the abuse they were suffering or to be "too emotional about it" and that all of the children were terrified of Robert.[6] Alice's evidence is that Robert continued to control and abuse the family after he stopped living with them full-time in 1981.[7]

6. At age 18 Alice moved out of home for tertiary education. Her evidence was that even after living in a different home as her father she continued to suffer emotionally and physically from his influence in her life, suffering from bulimia and depression.[8] Alice had a child in 1996 and largely relied on social welfare to support herself and her child. Her evidence is that Robert was aware of her child and her financial and emotional struggles.[9]

7. Alice has lived a transient life, beginning new roles and quickly feeling overwhelmed, depressed, suicidal and then need to get away. She has been, for most of her life, socially isolated. She has self-medicated with drugs and alcohol. She has ongoing battles with self-image, feeling unloveable and ugly.[10] Alice continued to suffer depression and suicidal thoughts throughout her adult life and attributes this to Robert's abuse. As the High Court accepted, there is a real likelihood that she will remain unable to form a meaningful and lasting relationship with an intimate partner and the profound emotional damage has impacted directly on her ability to earn a living. As a consequence she finds herself in effect homeless and without the means to acquire a home.[11] She says that she can still smell her father on her.[12] She said that disclosing what her father had done to her has always been difficult and until the day he died she believed her father was capable of killing her family. This was always at the back

---

[5] **CB201.0006** at [24] and [26], **CB201.0008** at [33]-[35].
[6] **CB201.0004** at [16].
[7] **CB201.0010** at [43].
[8] **CB201.0009** at [37]-[38].
[9] **CB201.0016** at [69] and [71].
[10] **CB201.0011-12** at [49]-[51].
[11] HC decision, above n 2, at **CB101.0116** at [92].
[12] **CB201.0018** at [79].

of her mind when she thought about disclosing what she had suffered at her father's hands.[13]

Barry

8. Barry's evidence in the High Court was that Robert beat him "repeatedly and sadistically" with the buckle end of the belt for the most minor things and that his childhood "revolved around abuse" by Robert. Barry developed a tremor which required medical care at around 11 or 12, which he thinks was a psychological problem as a result of living in fear of his father.[14] Barry did not do well at school and attributes this to the abuse of his father. Barry left home in 1980 at age 16 after defending himself against physical abuse from his father for the first time. He punched Robert in the face. Robert told Barry to leave the house and he did. Barry never saw his father again and his father never tried to help him in any way. Barry was unable to complete School Certificate despite his desire to attend university.[15] He was the victim of an attempted murder at age 17 when he was stabbed by a gang member. His father did not visit him in hospital. At age 18 he moved to Australia with his partner and they had a baby. Barry could not cope with this responsibility and abandoned his partner and child, resorting to a transient lifestyle.

9. Barry says that his father's abuse had a huge impact on him and has left emotional scars that will never disappear In particular in adulthood he refers to the difficulty he had coming to terms with the abuse he suffered at his father's hands and the negative ability it had on his ability to be a father to his eldest child. He considers that the negative impact the abuse had on his education has resulted in a lower earning potential for him now. He says that he is generally distrustful of people, including his family.[16]

10. Barry's evidence was also that Robert was aware of the effect his abuse had on his children as this information was passed on to him by other family members during his life.[17]

---

[13] **CB201.0003** at [8] and **CB201.0018** at [76].
[14] **CB201.0038** at [8].
[15] **CB201.0039** at [13]-[14]; **CB201.0040** at [15]-[18].
[16] **CB201.0043** at [29]-[31] and [33]-[37].
[17] **CB201.0045** at [40].

Cliff

11. Cliff also suffered from Robert's physical and emotional abuse. He also witnessed Robert verbally and physically abuse his mother. He recalls fleeing from the family home with his mother to take shelter from his father.[18]

12. Cliff turned to drugs and alcohol from the age of 13 to find comfort and has suffered from depression since he was 14. When he was 15 Robert sent Cliff to live in Australia. Cliff ran away after four weeks and he was missing in Australia for several months before Alice went to Australia to find him. Cliff has suffered from severe and prolonged drug addiction and serious depression, including a suicide attempt.[19] It was only in 2011 that Cliff got support for his addiction. He believes that the abuse he suffered has negatively affected his financial position.[20]

BACKGROUND – ROBERT'S ESTATE PLANNING

13. All children gave evidence that they expected Robert would make provision for them from his estate in order to recognise his horrendous actions during his life. Alice's evidence is that she believed Robert would leave her his home in his will and she would be looked after. Her older brother Greg (now deceased) told her that Robert had told him as such.[21] Alice says that she had expected Robert would acknowledge his children in his will, and that her brothers would receive financial acknowledgement. She thought her father would recognise his appalling behaviour and make amends financially. She thought her father would at least recognise his obligations to his children and provide for them, not deliberately take steps to make sure they could not make any claim against him or his estate.[22] When Alice discovered that her father had done so, her depression intensified and she was granted further cover from ACC to assist with her PTSD and depression.

14. Barry's evidence is that his father would have known that he needed to try to make amends and that Alice especially would need his financial support and maintenance. His evidence is that he expected his father would do the right thing by providing for his own children in some way, especially Alice, and not deliberately set out to ensure that they received nothing from him.[23]

---

[18] **CB201.0030** at [3].
[19] **CB201.0032** at [12]; **CB201.0032** at [15] **CB201.0033** at [17]-[19].
[20] **CB201.0033** at [20].
[21] **CB201.0017** at [72]. This was not challenged in cross-examination.
[22] **CB201.0023** at [103] and **CB201.0019** at [82].
[23] **CB201.0045** at [40] and **CB201.0046** at [46].

15. Cliff's evidence is that he believed his father was aware of his obligations to his children and the effect his behaviour and mistreatment had on his children and that he always expected his father would "actually do something about this and make provision for his own children" in his will, especially Alice.[24]

16. Robert himself recognised that he needed to provide for his children and in particular to provide for Alice. Robert executed seven wills between 21 December 2001 and 21 December 2015. In six of those seven wills Robert's children (or their children) are named as beneficiaries. In various wills Alice received his house or a life interest therein. It is submitted that this shows some awareness of the duty he owed his children. It is only his final will where his children are removed from his estate completely.[25]

17. By 22 October 2014 Robert had decided to set up a trust. His lawyer's file note recorded that one of the reasons Robert wanted a trust over a will was to prevent "any of his family chasing" any of his assets.[26] At a meeting on 12 November 2014 Robert told his lawyer that claims by his children was an issue.[27] The Trust was settled on 22 December 2014. Robert was one of the trustees. The appellants are not beneficiaries of the Trust. Phillipa's children and grandchildren are. Robert then took a series of steps that meant that by the time he died he had denuded himself of all substantive assets he once held personally. He did this by gifting his house to the Trust on 22 December 2014 and gifting shares he held to the Trust in 27 January 2016.

18. Robert died in 2016. His final will made no provision for his children. His estate was approximately $46,840. It is accepted that the assets transferred to the Trust are worth about $700,000.

FIDUCIARY RELATIONSHIPS

19. This Court in *Chirnside v Fay* confirmed two broad circumstances in which the courts will categorise a relationship as fiduciary:[28]

    (a) Relationships which, by their very nature, are recognised as being inherently fiduciary. Examples include solicitor and client, trustee and beneficiary, principal and agent, and doctor and patient (an "**inherently fiduciary relationship**").

---

[24] **CB201.0034** at [24].
[25] **CB301.0011**, **CB301.0014**, **CB301.0017**, **CB301.0021**, **CB301.0025**, **CB301.0029**, **CB301.0092**.
[26] **CB301.0033.**
[27] **CB301.0039**.
[28] *Chirnside v Fay* [2006] NZSC 68; [2007] 1 NZLR 433 at [73]. **CB601.0062.**

(b) A relationship where, upon an examination of its particular aspects, justify it being classed as fiduciary (an "**particular fiduciary relationship**").

20. When it comes to identifying new fiduciary relationships (whether inherent or particular) it is accepted that the imposition of fiduciary duties in novel situations should not be lightly assumed.[29] This is not to say that it cannot happen. It is well accepted that "the categories of fiduciary relationships are not closed.[30] Indeed, as more recently put, "[a]pplying fiduciary law to new relationships is a manifestation of the jurisdiction's purpose".[31] That purpose is to provide relief against unconscionable conduct.[32] What is required, however, is a careful analysis of whether this relationship ought to be recognised as fiduciary in light of both existing legal principles and the role of the common law.

21. All fiduciary relationships, whether inherent or particular, are marked by an entitlement of one party to place trust and confidence in the other.[33] As a result that party is entitled to rely on the other not to act in a way which is contrary to their interests.[34] As Justice Tipping acknowledged, this entitlement is also sometimes rendered as a legitimate expectation that the fiduciary will not utilise their position in such a way which is adverse to the interests of the other party.[35]

22. Beyond this there is no single formula or test that has received universal acceptance in deciding a particular fiduciary relationship exists.[36] It is submitted all that can be said as to the existence of a particular fiduciary obligation is that it is a question of fact to be determined by examining the specific facts and circumstances surrounding the relationship. If the facts "give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief."[37] Ultimately whether a particular fiduciary relationship exists will require a careful scrutiny of the context and the facts on a case-by-case basis.[38]

---

[29] *H v R* [1996] 1 NZLR 299 (HC) at 307. **CB601.0388.**
[30] John McGee, ed *Snells Equity* (34th ed, Sweet & Maxwell, London, 2019) at [7.006].
[31] Miriam Bookman "A Legal Backstop for Historical Māori Grievances: Proprietors of Wakatū v Attorney General" (2017) 23 Auckland U L Rev 348 at 362.
[32] *The Laws of New Zealand* (LexisNexis, online ed) *Modern Jurisdiction in Equity* at [2].
[33] At [80].
[34] See also Blanchard J's similar view in *Paper Reclaim Ltd v Aotearoa International Ltd* NZSC 26, [2007] 3 NZLR 169 at [31].
[35] As it was by the Privy Council in *Arklow Investments v MacLean* [2000] 2 NZLR 1.
[36] *Chirnside v Fay*, above n 28, at [75]. **CB601.0062.**
[37] *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at [154]. **CB601.0576.**
[38] *J v J* [2014] NZCA 445 at [64]. **CB601.0416.** See also *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 where the Supreme Court of Canada referred to a "reasonable expectations" test whether, having regard to all the facts and circumstances, "one party stands in relation to another such

23. That is not to say there has not been attempts to identify guiding principles and indicia. The Court of Appeal in *Dold v Murphy* has recently summarised these as follows: [39]

> Some relationships are inherently fiduciary in nature, involving trust, confidence and a degree of dependence, such as solicitor and client and trustee and beneficiary. In other cases a fiduciary relationship is only likely to be inferred when the legal relationship between parties involves: (1) the conferral of powers in favour of the alleged fiduciary, which may be used to affect the proprietary rights of the beneficiary; (2) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary (for example, to promote the beneficiary's interests, or to prefer the interests of the beneficiary over those of third parties); and (3) the implied subordination (although, not necessarily, elimination) of the alleged fiduciary's own self-interest.

24. In New Zealand these guiding principles have primarily been derived from commercial cases and as Justice Collins recognised in the Court of Appeal decision not all of these principles are able to be "grafted onto other situations" in which a fiduciary relationship may exist, including where "fiduciary does not benefit financially or economically at the expense of the person to whom fiduciary duties are owed".[40]

25. This is apparent when considering the recent summary of the Court of Appeal in *Dold v Murphy* which is prefaced on a legal relationship and proprietary rights. To the extent the summary of the Court of Appeal in that case suggests that it has set out the "only" circumstances in which a particular fiduciary relationship will be inferred, it is submitted that this is incorrect. Perhaps this may be so in a commercial context. The indicia are not clear-cut in a non-commercial context.

The obligations owed as a result of that duty

26. The core fiduciary duties are to avoid profit, conflict and disloyalty. These duties have different applications in different context and their precise scope must be moulded according to the nature of the relationship.[41]Not all obligations of a party in a fiduciary relationship, or a party subject to fiduciary duty are fiduciary in nature.[42] In other words, as the Privy Council has held, it is not the label that defines the duty.[43] It is "not enough to say that the parties are in a relationship

---

that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other". **CB601.0576.**

[39] *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834. **CB601.0117.**

[40] CA decision, above n 3, at [67].

[41] *New Zealand Netherlands Society "Oranje" Inc v Kuys and The Windmill Post Ltd* [1973] 2 NZLR 163 (PC) at 166.

[42] See *BNZ v NZGT* [1999] 1 NZLR 664 (CA).

[43] *Arklow Investments*, above n 35, at 6.

which gives rise to fiduciary obligations; it is necessary to identify those obligations.[44]

27. The scope of the obligations that are owed as a result of these duties are determined by the nature and extent of the reliance or trust which has been placed by the beneficiary upon or in the fiduciary. This requires a "meticulous examination of the facts of each individual case."[45]

Breaches of fiduciary duty

28. The nature of the obligation determines the nature of the breach.[46] In general terms, a breach a fiduciary duty connotes the idea of disloyalty or infidelity in the exercise of the power. Mere incompetence is not enough.

Fiduciary duties in a family context in New Zealand

29. While there is no authority in New Zealand as to the scope of a fiduciary duty between parent and child, there can be no doubt that the courts have recognised such a duty does exist. In *J v J*, although finding no fiduciary relationship between uncle and niece, the Court of Appeal accepted that New Zealand courts have been willing to extend fiduciary obligations to parental and quasi-parental relationships.[47] The Court held that where a fiduciary duty has been found to exist between family members, the facts have typically been "close to a relationship directly analogous to the inherently fiduciary role of guardian or parent.[48] However no framework for the recognition of this relationship has been set out by the courts.

Fiduciary duties in a family context in Canada

30. It is settled law in Canada that there is an inherent fiduciary relationship between parent and child. In *M(K) v M (H)* the Supreme Court of Canada held that:[49]

> It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Indeed, I can think of few cases that are clearer than this. For obvious reasons society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation. Equity has imposed fiduciary obligations on parents in contexts other than incest, and I see no barrier to the

---

[44] *McLachlan v Mercury Geotherm Ltd (in receivership)* 23/5/06 PC 36/05 at [26].
[45] *Cook v Evatt* [1992] 1 NZLR 676 (HC) at 685. **CB601.0093.**
[46] *Equity and Trusts in New Zealand* Andrew Butler, ed (2nd ed, 2009, Thomson Reuters, Wellington).
[47] *J v J*, above n 38, at fn 45. **CB601.0416.**
[48] At [67]. **CB601.0418.** See, for example, *S v G* [1995] 3 NZLR 681 at 691 **CB601.0713**; *H v R* [1996] 1 NZLR 299 at 307 **CB601.0388**; and *B v R* (1996) 10 PRNZ 73 at 75 **CB601.0003**.
[49] *M (K) v M (H)* [1992] 3 SCR 6 at 61-62 **CB601.0677**.

> extension of a father's fiduciary obligation to include a duty to refrain from incestuous assaults on his daughter.

31. The Court was satisfied that being a parent is a "unilateral undertaking" that is fiduciary in nature. Equity then imposes a range of obligations to coordinate with that undertaking. Even a "cursory examination" of the *Frame v Smith* indicia establishes that a parent "must owe fiduciary obligations" to their child:[50]

> The inherent purpose of the family relationship imposes certain obligations on a parent to act in his or her child's best interests, and a presumption of fiduciary obligation arises.

32. La Forest J held that the "essence of the obligation" was "simply to refrain from inflicting personal injuries upon one's child".[51] The content of the parental fiduciary duty was clarified by the Supreme Court of Canada in *K.L.B. v British Columbia*. The Court did not accept that the duty was to act in the best interests of the child as such a duty does not provide a workable basis for assigning legal liability as it "simply does not provide a legal or justiciable standard".[52] Rather the duty imposed is to "act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust".[53] Or, as later put by the Supreme Court of Canada, cases on the parental fiduciary duty focus "not on achieving what is in the child's best interest, but on specific conduct that causes harm to children in a manner involving disloyalty, self-interest, or abuse of power".[54]

Fiduciary duties in a family context in Australia

33. The High Court of Australia has held that a relationship of guardian and ward is a fiduciary relationship with particular characteristics,[55] although it has not gone so far as to accept that a parent or guardian is subject to fiduciary duties not to engage in physical or sexual assault. A full court of the Federal Court of Australia concluded that tort law addressed any such claim and so there was no need for fiduciary duties to overlay the tortious.[56]

---

[50] At 65. **CB601.0681.**
[51] At 67. **CB601.0683.**
[52] *K.L.B. v. British Columbia* [2003] 2 SCR 403 at 431. **CB601.0474.**
[53] At 433. **CB601.0476.**
[54] *EDG v Hammer* 2003 SCC 52, [2003] 2 SCR 459 at [23]. **CB601.0193.**
[55] *Clay v Clay* [2001] HCA 9.
[56] *Paramasivam v Flynn* (1998) 90 FCR 489.

DECISIONS OF THE HIGH COURT AND COURT OF APPEAL

High Court

34. Justice Gwyn held that Alice, Barry and Cliff had established that the alleged abuse by Robert occurred.[57] Justice Gwyn was also satisfied that all the children suffered incalculable damage as a result of that abuse, Alice in particular.[58]

35. Justice Gwyn then held that Robert's relationship as parent and caregiver while Alice, Barry and Cliff were children was inherently fiduciary and Robert owed a fiduciary duty to refrain from sexually or physically assaulting them.[59] The proven sexual and physical abuse was a breach of this fiduciary duty he owed them as children.[60] Robert's relationship with his children when they were adults was not, however, inherently fiduciary and it therefore had to be considered whether it was a particular fiduciary relationship.[61] Applying the *Frame v Smith* test, Justice Gwyn was satisfied all classic characteristics of a fiduciary relationship were present at the time Robert disposed of his assets to trust:

    (a) The exercise of Robert's right to alienate his house and shares was the exercise of a discretion or power. In this context "power" is to be interpreted more broadly than the technical sense of authority to deal with or dispose of property.

    (b) The unilateral exercise of that discretion or power had the potential to, and did, affect the adult children's interests.

    (c) Robert's abuse of the children, in breach of the fiduciary duties owed to them at that time, rendered them (and particularly Alice) vulnerable and at his mercy. The children were peculiarly vulnerable as adults as a result of their abuse as children.

36. Applying the reasonable expectations test, Justice Gwyn was satisfied the children had an actual expectation that when Robert came to dispose of his property, he would make amends for the damage he had caused through his earlier breaches of fiduciary duty; and their expectation that Robert would act in a way that was not contrary to their interests was reasonable and legitimate.[62]

---

[57] HC decision, above n 2, **CB101.0115** at [91].
[58] **CB101.0115** at [91].
[59] **CB101.0120** at [107].
[60] **CB101.0121** at [113].
[61] **CB101.0121** at [113].
[62] **CB101.0131** at [151].

37. Justice Gwyn was satisfied fiduciary principles should be extended to the circumstances of the case. In her view this was not a case about testamentary freedom, but rather about "property rights and the ability to deal with property during one's lifetime, subject only to pre-existing legal constraints."[63] Concerns as to floodgates were unfounded given that under *Frame v Smith* the need for a "peculiar" vulnerability serves as a public policy backstop.[64] Further, in this case there was no risk of a floodgate of litigation.[65]

38. Justice Gwyn held that Robert did owe particular duties to his children to recognise them as members of his family and to provide for them from his wealth. This duty was due to the vulnerability his earlier breaches of fiduciary duties had caused them. The evidence showed that at least one of Robert's reasons for transferring his property to the Trust was to prevent his adult children from having a claim to his assets. This deliberate step to ensure his estate would not be available to meet their needs was in breach of the fiduciary duty he owed to his adult children.

39. The trustees of the Trust were imputed with Robert's knowledge and received the property knowing the breach of his fiduciary duties. As such the trustees held the property on constructive trust for Alice, Barry and Cliff. In addition, the trustees accepted the gift with an improper purpose or intention of putting the gifted property outside the reach of the adult children. Justice Gwyn considered there was no undue delay in respect of the breach of the property transfer or any other reason it would be inequitable for a constructive trust to stand and so laches did not apply.

Court of Appeal

40. The Court of Appeal allowed the respondent's appeal unanimously insofar as it related to Barry and Cliff and by majority (Kós P and Gilbert J) as to Alice. Notably, both Kós P and Collins J appeared to accept there is an inherent fiduciary relationship between parent and child prior to the age of majority and that the abuse suffered by the children was in breach of that duty.

41. On Justice Collins' analysis Barry and Cliff did not have the requisite trust that their father to provide for them in his estate or had confidence that he would do so.[66] On Kós P's analysis any duty, whether inherent or particular, ended when

---

[63] **CB101.0133** at [158].
[64] **CB101.0134** at [162].
[65] **CB101.0134** at [163].
[66] CA decision, above n 3, **CB101.0033** at [88]-[96].

the responsibilities of parent care ended. Here this had occurred when the children left home.[67] On Gilbert J's analysis there was no undertaking by Robert to act for or on behalf of his adult children when dealing with his asses and so the central and distinguishing obligation of a fiduciary — to act with undivided loyalty in the interests of the beneficiary in a particular matter — was absent and so the claim failed. Gilbert J made clear that a power or discretion in this context must be one conferred on or held by the fiduciary for the benefit of the beneficiary and the legal or practical interest that may be affected must link to the fiduciary power held for that beneficiary. It is the beneficiary's wrongful exercise of the power that is relevant.

42. In the appellants' submission the Court of Appeal erred by allowing the appeal. In allowing the appeal, the Court of Appeal needed to be satisfied that there was no inherent fiduciary relationship **and** that there was no particular fiduciary relationship at the time Robert disposed of his assets to the Trust. The Court of Appeal did not undertake this requisite analysis. If it had, it would have been clear to the Court of Appeal that there was a fiduciary relationship between Robert and his children at the time he disposed of his assets to the Trust and further that his actions were in breach of his fiduciary duties.

SUBMISSION ONE: THE RELATIONSHIP (OR RELEVANT ASPECTS OF THE RELATIONSHIP) BETWEEN ROBERT AND ALICE, BARRY AND CLIFF WAS FIDUCIARY IN NATURE, EITHER AS AN INHERENT FIDUCIARY RELATIONSHIP OR PARTICULAR

The non-commercial nature of the relationship

43. Before any analysis of the fiduciary relationship can take place, consideration must be given to the context of the claimed relationship and what, if any, impact this context should have on the fiduciary analysis.

44. The appellants say that the non-commercial nature of the relationship between Robert and his children is of huge relevance to the imposition of fiduciary duties. Although, as is clear from fiduciary relationship in a family context, non-commercial fiduciary relationships have been accepted in New Zealand, it has not gone much further than that. This case provides this Court with the opportunity to set out appropriate indicia for non-commercial fiduciary relationships such as parent and child. It is submitted that these indicia ought to be wider than those generally followed in a commercial context such as *Dold*

[67] **CB101.0053** at [161] and **CB101.0054** [166].

v Murphy. This is necessary and desirable to ensure that equity is able to protect non-commercial interests.

45. It is submitted that the dissent (now a leading judgment in this area) of Justice Wilson in the Supreme Court of Canada in *Frame v Smith* is of assistance. Both of the courts below applied this framework. Justice Wilson identified three common features that provide a "rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent":[68]

    (a) The fiduciary has scope for the exercise of some discretion or power.

    (b) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiaries' legal or non-legal practical interests. It is the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary.

    (c) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. This vulnerability arises from the inability of the beneficiary (despite their best efforts) to "prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power."

46. This idea of peculiar vulnerability should, it is submitted, be the underlying basis of a non-commercial fiduciary relationship. This sits alongside the overarching requirement of *Chirnside v Fay* that there is an entitlement by one party to place trust and confidence in the other. It is that peculiar vulnerability that entitles the beneficiary to repose trust and confidence that whatever powers and discretions held by the fiduciary will not exercised in a way which is contrary to their interests.[69] The peculiar vulnerability is such that the beneficiary has a legitimate expectation that the fiduciary will not utilise their position in such a way which is adverse to their interests. It is only when this vulnerability to the fiduciary in relation to the exercise of their powers ends that this trust and confidence does too, and so the fiduciary relationship comes to an end.

---

[68] *Frame v Smith* [1987] 2 SCR 99 at [60]. **CB601.0363.**

[69] See also Blanchard J's similar view in *Paper Reclaim Ltd v Aotearoa International Ltd* NZSC 26, [2007] 3 NZLR 169 at [31].

47. Powers in this framework is used in a wider sense and is not limited to the ability to deal with or dispose of property.[70] In accepting that there is a fiduciary relationship between parent and child (as has already been accepted by New Zealand Courts previously), New Zealand law has impliedly accepted that the powers or discretions held in a non-economic fiduciary relationship need not be the same as those we are accustomed to in an economic fiduciary relationship. It is submitted that this is correct.

48. The need that the power held by the fiduciary be managerial or administrative, for and on behalf of another, ceases to have the same relevance as it does in other 'economic interest' fiduciary relationships. What is instead required is the fiduciary has a power or discretion that directly impacts the interests of the other and to which the other is peculiarly vulnerable so that an entitlement to response trust and confidence in the exercise of that power or discretion arises. This is sufficient for fiduciary obligations to attach.

49. It is submitted that this wider approach to powers or discretions aligns with *Chirnside v Fay* where Justice Tipping rejected arguments that the appropriate test for whether a party owes a fiduciary obligation to another was whether a party had undertaken or agreed to act for or on behalf of the other's interests and further that such an undertaking or agreement must be express. In Justice Tipping's view these arguments had a "strong contractual flavour which does not properly reflect the approach of equity". He held that fiduciary obligations do not arise only when expressly undertaken. Rather, "equity imposes an obligation to eschew self-interest when the circumstances require." In His Honour's view, to hold otherwise would be to "confine the powers of equity to situations akin to express trusteeship and would emasculate the breadth of equity's traditional reach by its use of concepts such as constructive trusteeship and its imposition of fiduciary obligation".

50. This must be correct so that fiduciary relationships can operate to protect more than purely commercial interests. New Zealand law is capable of taking a broader concept of traditional terms such as property, where context requires.[71] This is such a context. To narrow the power or discretion as suggested by Justice Gilbert in the Court of Appeal in a non-economic context is to deny relief because of the nature of the interest involved and afford protection only to material interests, but not to human and personal interests. This approach was

[70] As accepted by Justice Gwyn in the High Court.
[71] *Clayton v Clayton* [2016] NZSC 29.

rejected by Justice Wilson in *Frame v Smith* and described as "arbitrary in the extreme".[72] It is not an approach that this Court should endorse.

Inherent fiduciary relationship

51. The appellants submit that an inherent fiduciary relationship exists between parent and child that extends beyond what has been suggested by the courts below.

52. It is submitted that Kós P and Collins and Gwyn JJ were correct in holding that there is an inherent fiduciary relationship between parent and child. As explained in the Canadian jurisprudence, this fiduciary relationship emanates from the vulnerability of the child and the power and authority of the parent. The appellants submit that this inherent fiduciary relationship therefore continues until the vulnerability of the child ceases to exist. Under this analysis the inherent fiduciary relationship exists while a child is a minor. It also continues for example, where a child is disabled and remains vulnerable to their parents' power and authority.

Inherent fiduciary relationship between Robert and his children

53. Robert was in an inherently fiduciary relationship with his children that had not ended at the time he disposed of his assets to trust. It is apparent from the evidence that his children remained peculiarly vulnerable to him and at his mercy in relation to the powers he held that could be unilaterally exercised so as to affect their interests.

54. It is accepted that Alice is the most likely to have still been in an inherent fiduciary relationship with her father. She is profoundly emotionally damaged by Robert's abuse. She is unable to maintain physical relationships. She is unable to work. She has no economic security. The impact on her from Robert's abuse has been in reality disabling for her and this impact will likely never cease. She is particularly vulnerable to the exercise of her father's powers and discretions which directly affect her interests. In light of this particular vulnerability she was entitled to and did repose trust and confidence that he would provide for her from his estate. The pair were in an inherent fiduciary relationship.

Particular fiduciary relationship

55. In the alternative, the appellants submit that a particular fiduciary relationship existed between Robert and his children at the time he disposed of his assets to the Trust.

---

[72] *Frame v Smith*, above n 68, at 143. **CB601.0370.**

56. It is apparent that, as recognised by Justice Gwyn in the High Court, the *Frame v Smith* test is met:

(a) Robert held a power or discretion to alienate his house and shares.

(b) Robert had the ability to, and indeed did, unilaterally exercise that power or discretion to affect the children's interests and in particular to deliberately defeat their legal interest to make a claim under the Family Protection Act.

(c) His children were peculiarly vulnerable to or at the mercy of Robert in the exercise of that power or discretion because of his abuse of them as children (which the appellants say was a breach of his inherent fiduciary duty that existed for at least as long as they were minors).

57. What should not be ignored is that the peculiar vulnerability of each child arose from the abuse inflicted by Robert during their childhood. At this time the children were at their most vulnerable to their father and most inherently entitled to place trust and confidence in him to act in their interests, Robert elected to repeatedly inflict harm on them. He then elected to inflict further harm on his children when he exercised his powers in relation to his house and shares. He absconded from his chance to remedy or attempt to atone from his actions, and he did so deliberately. Robert knew his children had suffered immensely and by all accounts was aware they might claim against his assets. The validity of a claim under the Family Protection Act

58. Robert was not content to inflict injury on his children during their childhood. He took deliberate steps to ensure that his final exercise of powers that were capable of affecting their interests did just that.

59. The three characteristics of a fiduciary relationship are present. The consequence of this is that when Robert was exercising his powers in relation to his assets, fiduciary obligations to his children were extant.

60. The appellants also submit that particular aspects of the relationship between Robert and his children are such that the appellants were entitled to, and did, repose trust and confidence in their father when exercising his powers in relation to his assets that he would not act in a way contrary to their interests.

61. The evidence is that the children did place trust and confidence that their father would not do exactly what he did. Further, it is submitted that in the particular

circumstances the appellants were entitled to place trust and confidence that Robert would not put himself in a position where he could not provide for his children should he be called upon to do so for the remainder of his life or make some provision for them upon his death, and that he would not act deliberately contrary to their interests in this regard.

62. There is no requirement that Robert actively assent to this role. It is a prescribed expectation, similar in concept to that elucidated by Justice Tipping, that "equity imposes an obligation to eschew self-interest when the circumstances require." Emphasis needs to be on the particular circumstances that give rise to the fiduciary obligation. These circumstances include:

    (a) Robert's horrific abuse of his children, which the appellants say constitute repeated breaches of the fiduciary duties he owed his children by virtue of the inherently fiduciary relationship between parent and child during their minority (at least);

    (b) The incalculable damage done to the children by these egregious breaches, in particular Alice, and the complete failure by Robert to ever attempt to atone for his actions that caused his children such extensive damage;

    (c) The power held by Robert in relation to his assets and estate to provide for his children, who were in particular need due to the damage done to them in their childhood by Robert;

    (d) Robert's awareness of the financial and emotional struggles that his children suffered throughout their lives; and

    (e) Robert's awareness of some form of duty to his adult children, given his provision for them in his previous wills and his deliberate decision to rob them of any chance to claim against his estate.

63. Having regard to these circumstances it is submitted that it could be reasonably expected that Robert would act or refrain from acting in a way contrary to the interests of his children when exercising his powers.[73]

[73] Echoing the Supreme Court of Canada "*reasonable expectations*" framework.

SUBMISSION TWO: A FIDUCIARY RELATIONSHIP SHOULD BE RECOGNISED

64. It is accepted that the above analysis does extend the accepted categories of fiduciary relationships to a (somewhat) new and novel context. For the reasons set out above it is submitted that this extension is justified based on existing legal principles. It is further submitted that recognition of a fiduciary relationship in this factual scenario is an acceptable and indeed desirable development of the common law.

Principles of developing the common law

65. As this Court has held, the development of the common law should:
    (a) Mean law serves the society of Aotearoa/New Zealand, and all in society;[74]
    (b) Reflect the values of society; [75] and
    (c) Respond to social change to maintain its relevance. [76]

66. It is submitted that the common law should develop to recognise the claim of the appellants. In doing so it will develop in a more appropriate, coherent and principled manner that reflects the underlying purposes of the common law (as identified in this Court) than to allow it to develop in the manner proposed by the respondents.

Tikanga, values and the common law

67. As confirmed by this Court in *Ellis*, the development of common law also includes tikanga. The appellants acknowledge that tikanga has not been previously raised in this matter. However, it is submitted that that does not mean tikanga should not be considered by this Court.[77] That tikanga has not previously been raised is no barrier to it being raised and considered by this Court – indeed, the Court is prepared to raise tikanga itself as something that needs to be considered.[78] This is completely appropriate, and in accordance with tikanga being part of the law of Aotearoa/New Zealand; and this Court's role in considering matters of public importance and defining the law in those matters of public importance. And, as this Court recognised in *Ellis*, the

---

[74] *Ellis v R* [2022] NZSC 114 per Winkelmann CJ **CB601.0251** at [164] and **CB601.0254** [174].
[75] Per Glazebrook J at [110]. **CB601.0235.**
[76] Per Williams J at [259]. **CB601.0284.**
[77] The appellants respectfully agree with the issue identified by Williams J in *Ellis v R* that the orthodox approach to proving custom as akin to proving 'foreign' law as a question of evidence is not an appropriate approach with respect to indigenous law and note the comments of the Privy Council, on appeal from the Cook Islands on this point: *Browne v Munokoa* [2018] UKPC 18 at [16]. **CB601.0021.**
[78] *Ellis v R* being the prime example of this.

common law is in a state of transition regards to the place of tikanga in the common law.[79] During this transitional phase – especially for matters commenced prior to the Ellis decision – it can be expected that there will be situations where tikanga was not raised before lower courts but may have relevance to the issues this Court needs to consider. It is respectfully submitted that the Court should consider tikanga in such circumstances.

68. It is submitted that the following principles of tikanga, which have previously been recognised by this Court and others, are relevant to this matter. They are, as is the nature of tikanga, all interlinked – whanaungatanga, mana, whakapapa, utu, ea and hara.

69. The appellants submit that valuable assistance can be obtained from the Royal Commission of Inquiry into Abuse in Care as to the identification of the relevant tikanga.[80] As part of the interim report *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānui* the Royal Commission of Inquiry specifically considered tikanga Māori concepts in the context of its enquiry. The Commission identified that in addition to the concepts above there were further concepts framed specifically in the context of abuse akin to that suffered by the plaintiffs. These were tūkino and puretumu torowhānui.[81]

70. In any event, the appellants' principle submission that the tikanga position is absolutely clear cut and in favour of a remedy here. This is a case calling for the development of the common law in a particular context: inter-familial obligations/whanaungatanga which is of deep interest and concern to tikanga. It is submitted that therefore this is an area where the common law must develop with consideration of tikanga and following a "mutually advantageous dialogue."[82]

---

[79] *Ellis v R* at [82]. **CB601.0224.**

[80] *Ellis v R* supports such a procedure. See, for example, **CB601.0289** at [273] per Williams J "*In some contexts it may be sufficient simply to refer to learned texts or reports of the Waitangi Tribunal. We must, after all, recognise that the issues in the particular case as well as the time and the resources of the parties, will not always require or permit more elaborate procedures."* And see *Doney v Adam* [2023] NZHC 363 **CB601.0144** where Harvey J determined the relevance and application of tikanga without any evidence other than submissions from counsel.

[81] Abuse in Care Royal Commission of Inquiry December 2021 *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānui* at [1.3]. **CB601.0717.**

[82] Extracts from *Ellis* support this submission: At **CB601.0235** [108] – [110] per Glazebrook J, **CB601.0254** [171]–[174] per Winkelmann CJ, **CB601.0283** [257]–[269] per Williams J, and **CB601.0292** [279] per O'Regan and Arnold JJ.

Contextualising tikanga within this case

71. Robert and the appellants were whānau, connected by whakapapa in the most direct way. The principle of whanaungatanga, binding the relationships together as a whole and recognising the community responsibility, becomes important.

72. Robert's actions were a grievous violation at tikanga. As the Royal Commission notes, hara does not sufficiently capture the gravity of the actions and the term tūkino is appropriate - a transgression that is unjust, unfair, violent, destructive, cruel and abusive.

73. Robert's tūkino damaged the mana of all involved. They damaged the plaintiffs' mana – self-evidently, but the Royal Commission's comment that "the mana of children in traditional Māori society, and the great care and affection accorded most children means that any action that harms a child or fails to respect the child's mana is significant" is also noted. They damaged Robert's mana – his mana tāngata is lowered as a result of his actions. And they damaged the mana of the whānau. Though the interconnectedness of whanaungatanga, they damaged the mana of the community. Further, it could be said that in disposing assets to the trust, the beneficiaries of whom were members of Robert's 'second family', there was a whanaungatanga relationship between them, the trustees, Robert and the plaintiffs. Their mana is also implicated in this matter. The disposal of the property with deliberate intention to deny redress can be seen either as a continuation of the original hara or a further hara in and of itself (or both). Either way, the mana of the trustees and the beneficiaries is also implicated, and they can properly be part of restoring ea.

74. A state of imbalance has been created – a state of ea needs to be achieved. Utu is required in order to restore the mana of those damaged by the tūkino. But what is required is, in this context and to the extent possible, puretumu torowhānui. As the Royal Commission said:[83]

> The concept of puretumu includes to seek redress, compensation or obtain satisfaction. It is underpinned by seeking justice and the restoration of mana and provision of compensation to the person and their whānau. The concept of 'puretumu torowhānui', or holistic redress, in this context covers a wide range of matters that taken together might be done to put right the tūkino that has been experienced.

75. The whakatauki "he purapura ora, he mara tipu" and pēpeha "he rātā te rākau i takahia e te moa" referred to by the Royal Commission are of relevance here. The former references that a seed trampled in a garden can still grow, and the

[83] **CB601.0719** at [1.3].

latter that a rātā tree trampled as a seedling by a moa can still grow, though it may grow crooked or affected by the trampling. The evidence in this case demonstrates the truth of those pieces of traditional wisdom. Though all the plaintiffs have grown, they have grown affected by the tūkino of Robert, and still show the harm that has come from it. The necessary utu/peretumu to achieve a state of ea has not been reached.

76. That Robert has died does not mean that a state of ea has been reached. The mana harmed by the tūkino still exists[84] and utu or puretumu is still required before a state of ea can be achieved. That puretumu has not occurred.[85] Robert himself never acknowledged, took responsibility for, or apologised for his conduct. Rather, when confronted about it he responded with denial and aggression including attempting to silence his victims through legal threats – further taking advantage of the vulnerable position his actions had put them in. With his death, any acknowledgment directly from Robert is no longer available.

77. The final opportunity to obtain utu from Robert would be in the form of compensation through exchange of property from Robert, or his estate, to the plaintiffs. Such an opportunity existed though the Family Protection Act 1995, but Robert sought to stymie that as well. He deliberately, and for the purpose of denying the plaintiffs' legitimate claims, denuded himself of assets through the creation of a trust. If not a separate hara itself, this action is definitely a continuation of the original hara/tūkino and an attempt to avoid utu and deny ea. It is, simply put, not tika.

78. It is submitted that from a tikanga perspective the situation is clear. A harm of the most grievous kind has been committed, damaging the mana of all those involved. It cries out for utu, so that a state of ea can be achieved. That state has still not been achieved. Robert himself has attempted to deny that ability to achieve that state. But the Court can ensure that a state of ea, or as close to ea as can hope to be achieved given the nature of the tūkino, is able to achieve. At tikanga, it is submitted that the Court should do that.

79. Furthermore, it is submitted that where there is a choice as to which way the common law should develop, tikanga is a mandatory consideration in this particular whanaungatanga context. It is accepted that this Court could still weigh up reasons for and against a fiduciary duty here and ultimately decide no

[84] *Ellis v R* per Williams J **CB601.0281** at [251].
[85] It is acknowledged that funding from ACC received by Alice could be seen as a form of puretumu, as could the acknowledgement of each of the siblings to the other and the acknowledgment from their mother. But that is inadequate to restore the mana resulting from the tūkino.

duty even after considering tikanga. But it is submitted that the Court must consider tikanga. And given that no remedy would be an anathema to tikanga, it is a strong factor in favour of developing the common law to recognise the fiduciary duty.

Common law should be developed

80. What stands in the way of developing common law to respond to the scenario before this Court? The respondents rely on two aspects of the common law as justification that there should be no remedy for the appellants. First, they say the creation of a trust by Robert stops the appellants from having a remedy. Second they support the view taken in the courts below that any duties at law that were owed to the children ceased when they became adults. The appellants say that neither of these barriers justify stymying the development of the common law. The appellants also say that claimed issues of floodgates will not arise. As such, the common law ought to be developed to recognise the fiduciary duty argued for by the appellants.

1. Common law does not and should not permit the use of trust structures to avoid legitimate claims

81. It is submitted that the disposition of the property to Trust ought not be a barrier to recovery in this case nor to the development of the common law by recognising a fiduciary duty between Robert and his children.

82. The question for this Court is could Robert, by reciting the legal shibboleth of a trust, effectively grant modern sanctuary to his property to protect it from claims made after his death under the Family Protection Act – in circumstances where that was his express aim.

83. From a tikanga perspective, this would not stand. The evidence shows that the purpose of Robert's creation of this trust was to seek to prevent claims by his children against his estate – an attempt to mean that ea could never be achieved. As noted earlier, it seems clear Robert was aware that he had breached his duties to his children and that they would be entitled to have that duty set right through the Family Protection Act. His settling of the trust was a deliberate attempt to thwart that.

84. It is further submitted that the development of the common law has been to restrict or remove the ability of persons to take steps to render themselves or their property immune from legitimate claims. This has occurred both through statute and the approach of the Court when considering claims, especially where property has been disposed of to trusts.

85. Examples of statutes where the ability to freely deal with property in the face of potential claims is restricted include the voidable preferences regime under the Insolvency Act, sections 44, 44C and 44F of the Property (Relationships) Act 1976 and 'look through' provisions relating to rest home subsidies. It is also so under the Family Protection Act 1955. Under this Act, the Court has a discretion to order provision from an estate if adequate provision for the proper maintenance and support of the applicant family member is not available from the estate under the deceased's will.

86. This has been the position in New Zealand since the Testator's Family Maintenance Act 1900. It recognises the primacy of the parent-child relationship and the duty of a parent to make adequate provision for the proper maintenance and support of their child. The scope of the duty takes into account moral and ethical considerations. The Court is empowered to order provision to repair the breach of that duty.[86] Mistreatment can enhance a moral obligation to provide upon death and indeed violence by a parent upon a child has been found to give rise to a duty to "recognise, apologise and compensate for the incalculable harm he had caused her during his upbringing" as the daughters "sense of rejection had been lasting and painful throughout her adult life".[87] It cannot sensibly be suggested that Robert's children were not entitled to make a claim against his estate to recognise, apologise and compensate for his abhorrent actions. Robert instead elected to use a trust in an attempt to avoid this duty.

87. Permitting trusts to be used as a structure to avoid the application of legislation (and in particular social legislation) is not an approach that New Zealand law permits. The courts have become ever stricter about limiting the opportunity for persons to use legal structures to avoid their legal responsibilities. Examples include:

    (a) Reading statutes in a manner that reduces the ability for effective disposal of assets, such as by this Court in *Regal Castings v Lightbody*.

    (b) Considering structures with careful precision such that the hoped-for asset protection is not available, such as *Clayton v Clayton*.[88]

---

[86] *Williams v Aucutt* [2000] 2 NZLR 479.
[87] *Lamb v Brock* [2013] NZFC 9167. **CB601.0610.**
[88] This, especially in the family sphere, is a worldwide judicial trend – see for example *Webb v Webb* [2020] UKPC 22.

(c) Treating assets as being available to persons despite structures, such as the approach taken to applications for spousal maintenance and child support.

88. Allowing a parent to denude themselves of all assets to trust so as to deliberately avoid the application of the FPA is unacceptable. It is a maxim of equity that equity will not permit a statute to be used as an instrument of fraud. If, however, equity does not intervene in the current proceeding by way of a particular fiduciary relationship, then that is exactly what will happen. In perhaps more modern terms, it is submitted that equity must step in to serve a necessary anti-avoidance role by prescribing a reasonable expectation that a parent cannot, when exercising their powers in relation to their assets, dispose of their assets in a way designed to deprive their children from a claim against their estate.

89. Nor would it have been successful prior to the abolishment of gift duty in 2011. Had Robert structured his assets and died before the abolishment of gift duty, the appellants would not be left in their current position. The estate would have been able to call in the remaining debt that was owed to him by the Trust and the appellants could have had a substantive claim under the FPA.

90. It is noted that the Law Commission review of the FPA has recommended that new legislation be enacted to include an anti-avoidance provision which would enable property to be recovered by the estate from a third party if the property was disposed of with intent to defeat an entitlement or claim under the proposed replacement FPA legislation. This is recognition that this is a problem currently without a solution. In the interim, equity must step in to prevent Robert's unconscionable conduct in both life and death.

91. As recently espoused extra-judicially by Justice Kós, allowing equity to apply fiduciary law to new relationships "allows equity to fulfil its historical role of preventing the injustice of the hard operation of the law where (for example) contract leaves an evident injustice in its wake".[89] This is such a case. Had Robert died earlier, or perhaps later, the appellants would have substantive claims under the FPA. Currently they are left with nothing.

[89] "This May Seem Hard": Temporal and Personal Perspectives on Fiduciary Law (President Kós, Society of Trust & Estate Practitioners New Zealand 2021 Conference).

2. Common law should extend length of fiduciary duty in these circumstances

92. The second objection is that the fiduciary duties ceased when the children left home. It is submitted that this approach is inconsistent with tikanga and the values of Aotearoa/New Zealand.

93. First, it is submitted that the analysis is fundamentally wrong. The tūkino inflicted upon them was still damaging their (and their whānau, including Robert's) mana as to state of ea had been reached. Tikanga recognises that the harm endures and continues to endure until appropriate recompense is made. To approach the matter as at end because the children went into the world on their own would not be tika.

94. Secondly, it inappropriately characterises the issue of vulnerability. In fiduciary terms, the children remained vulnerable (a key element of the establishment of the fiduciary relations) when they left home. Their leaving home was, in reality, a reflection of their vulnerability – they did not leave home because they had suddenly become invulnerable, they left home to escape the terrorising tyranny of their father. The Court of Appeal's approach treats the decision to leave as being a calculated one from objective minds. The truth is they were driven from their home by abuse.

95. Both the above are reflected in the whakatauki and pēpeha referred to by the Royal Commission. Tikanga recognises that the tūkino suffered by the children has fundamentally affected them and their growth. Tikanga sees that puretumu has not been given, no utu has been made, and so no state of ea has been reached. That continues notwithstanding the leaving of home or the changing of age in the children – the effluxion of time does not itself restore the mana that has been damaged.

96. This also ties to the approach to laches or time-barring of the claims, which was another foundation of the Court of Appeal's decision to allow the appeal. Referring to a "freely informed decision" (as Gilbert J does) not to pursue a remedy until after their father's death fundamentally fails to consider the real and ongoing trauma the applicants have suffered from the abuse of their father. Any suggestion that any of the victims, and in particular Alice, should have done something earlier so as to be able to make a claim for equitable relief shows a complete misunderstanding and indeed disregard for the impact repeated, prolonged, extensive trauma has upon any person, let alone a young child. This is put in sharp perspective when considering Alice's unchallenged evidence.

97. Any submission that Robert and his children were estranged from their father by their own volition as either a bar to a fiduciary relationship or an equitable defence by the respondents should be of limited, if any relevance. The counterfactual is that despite the overwhelming harm and trauma suffered by the appellants they would be required to maintain communication with their father in order to ensure that he upheld his fiduciary obligations. This cannot be palatable to equity.

98. Society and science now recognise, as tikanga has always recognised, that damage as a result of childhood abuse is ongoing and can fundamentally affect a person's growth and development. Society and science also recognise that this damage can include an inability for a person to confront their abuser, or even raise the abuse with others (including authorities) for a significant period after the abuse. It is submitted that it is time for the law, too, to recognise this. There would be no limitation on criminal proceedings being brought against Robert because of a delay in reporting, why should there be a limitation on compensation being sought through another avenue where Robert himself will not 'lose' anything as a result. His death means he has no use for the property that could provide some puretumu. Rather, it may be that Robert's mana could in some way be restored posthumously if appropriate puretumu is made.

99. Allowing Robert to benefit from this trauma by way of equitable doctrines on the basis that the applicants essentially should have done something earlier despite their clear trauma is completely inappropriate and it is submitted an error as to the availability of such defences. It is unwelcome precedent that does not properly take into account the need for proper support of victims of abuse, and indeed penalises them instead.

100. For the reason set out above, the passing of time does not resolve a hara. The observation of his Honour Justice Williams that "Tikanga too, has no time for process without end" is acknowledged,[90] but counsel submits that what his Honour was referring to was that a process would not continue forever (for example by one group refusing to reach an agreement) as someone with appropriate mana could impose a resolution to achieve ea.

101. Here, Robert refused to engage with any process to resolve the matter and actively threatened the children who attempted to engage in that process. He sought, completely on his own terms, to effectively impose an end to the process

[90] *Ellis v R* per Williams J at [253]. **CB601.0282.**

by disposing of assets to the trust. He did not have the mana to do that. This Court has the mana to impose an end to the process, and its decision will do so. If the respondents are correct, it would see an end imposed without any[91] utu being provided to 'compensate' for the mana damaged by the tūkino. It is submitted that it would not be tika for the Court to impose such a resolution by dismissing the appeal.

102. Permitting the appeal would also be to develop the law in a manner consistent with the values of Aotearoa/New Zealand. The law already recognises that some harms will await death before they can be addressed – indeed, this is the entire philosophy behind the Family Protection Act. The cases where childhood abuse has been recognised through awards under that Act are not uncommon, and there has not been a suggestion by the Courts that such actions should not be available because of the length of time between the abuse and the death.

3. Floodgates are no issue

103. It must be remembered that the Court is faced with a situation where there was a clear breach of the most fundamental aspects of a parent/child relationship by Robert, who then deliberately and with specific intent created a structure to try and deny his children any redress. Hyperbolic suggestions that a decision in favour of the appellants would mean parents could no longer go on holidays should be seen for what they are – attempts to obscure the true analysis of the issue and the results by creating nightmarish strawmen. And this Court is well able to note the limits of its decision in a judgment – something it has done many times before.

104. Similarly, concerns about floodgates being opened are overpaid and were neatly dealt with by Justice Hammond in *H v R*. His comments remain apt in the current proceeding:[92]

> I should perhaps say that the supposed problems of a floodgate of litigation for already hard-pressed Courts do not unduly deter me. That argument is always made. Indeed, as soon as KM v HM was decided in Canada an article ("Supreme Court of Canada Extends Liability for Childhood Sex Assault") appeared…Predictions were made of a tremendous increase in civil actions. It is not my understanding that such has yet occurred, although the necessary exigencies associated with producing a trial Court decision have not permitted full research on this. In any event, principle is principle: if the claims can properly be made, then Courts must properly respond, regardless of burden.

---

[91] Or, at least any sufficient.
[92] *H v R*, above n 29, at p307. **CB601.0388.**

105. It is hoped that there are not rafts of parents abusing their children and then deliberately denuding themselves of assets shortly before death to prevent their children from receiving puretumu. At best the flood will be a trickle. And even so it cannot be prohibitive on responding to a proper claim.

SUBMISSION THREE: ROBERT'S FIDUCIARY DUTY WAS TO REFRAIN FROM ACTS OF HARM WHEN EXERCISING HIS DISCRETIONS AND POWERS

106. Whether the Court finds that the relationship between Robert and his adult children was inherently or particularly fiduciary, the appellants say the same fiduciary duties attach. For the reasons set out by the Supreme Court of Canada above at [32] it is submitted that the fiduciary duty owed was not to act in the children's general best interests. Rather, as a result of the fiduciary relationship Robert was under an obligation to refrain from acts that would cause harm to Alice, Barry and Cliff in manner involving disloyalty, self-interest or an abuse of power in relation to the exercise of that discretion or power.

107. As a result of this fiduciary duty, Robert was no longer entitled to deal as he liked with his assets during his lifetime, if in dealing with his assets, he would breach the duties owed to his children. There was a pre-existing legal constraint on his actions. He could not prefer his own interests against his extant duty to refrain from acts that would cause harm to Alice, Barry and Cliff. By deliberately taking steps so as to not provide for his children from his estate, including by structuring his assets so as to deprive them from any claim under the Family Protection Act, Robert breached the fiduciary duties owed to his children at this time.

108. This duty should not be viewed as impinging on property rights or testamentary freedom. It does neither. All it does is recognise that Robert's rights to deal with his property were subject to obligations imposed by his fiduciary duties to Alice, Barry and Cliff. Robert's breach of his fiduciary duties

SUBMISSION FOUR: REMEDY OUGHT TO BE RECISSION

109. The appellants agree with the reasoning of Justice Collins that recission is the appropriate remedy for this breach.

CONCLUSION

110. The law of fiduciaries is the legal system's attempt to "recognise the more blatant abuses of trust we put in each other" and is the "most human area of the legal

system".[93] The present case requires this Court to recognise an abuse of trust during childhood, by a father, so egregious that a fiduciary relationship continued beyond the age of majority.

111. The ultimate decision for this Court is whether equity will permit the unilateral exercise of a power that directly affects the legal and practical interests of person vulnerable to the power holder (such vulnerability arising from the relationship between the parties) so as to defeat the rights of the vulnerable party, and the power holder intends to cause harm with the exercise of this power.

112. At tikanga, it is submitted that the result would be clear. A tūkino has occurred, mana has been damaged and continues to be damaged. No sufficient puretumu or utu has occurred, and so a state of ea has not been reached. Robert's death does not create ea – whanaungatanga and the obligations to restore mana would dictate that puretumu must still be made.

113. This clarity in tikanga can inform the common law and articulate in a different vocabulary why there has been a harm and balance should be restored. That approach supports the conclusion that equity can and should operate to protect fundamental human rights and interests in this scenario. But in addition, the appellants make the more elementary submission that the common law of Aotearoa should and must recognize this fiduciary duty to be consistent with tikanga. Both arguments require a wider concept of power than what the courts traditionally recognize when considering fiduciary duties. This is a necessary corollary of extending equity to protect non-commercial and welfare based interests. It does not mean that it is wrong or impossible for this Court to do so and indeed these submissions show that it can be done in a principled manner in line with existing caselaw.

114. Equity should not permit the law be an instrument in the hands of a perpetrator of abuse to avoid the responsibility of their actions. A fiduciary relationship exists, it has been breached, and the appellants are entitled to remedies accordingly.

Dated this 8th day of March 2023

Lady Deborah Chambers KC/Isaac Hikaka / Josie Beverwijk
Counsel for the Appellants

[93] "This May Seem Hard": Temporal and Personal Perspectives on Fiduciary Law, above n 89.

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

SC 106/2022

BETWEEN	**A, B** and **C** Appellants
AND	**D** and **E LIMITED** a duly incorporated company as Trustees of the **Z TRUST** Respondents

---

CERTIFICATION AS TO PUBLICATION

Dated this 8th day of March 2023

Solicitors
Vicki Ammundsen Trust Law Limited
Solicitor acting: Mike Phillipps
Level 7, VA Trust Law Building
38 Wyndham Street, Auckland 1010
PO Box 106-551, Auckland 1143
T: (09) 303 4704
E: mike@vatl.nz

Counsel acting
Lady Deborah Chambers KC
Bankside Chambers
L22, Lumley Centre
88 Shortland Street
Auckland
T: (09) 307 8777
E: debchambers@bankside.co.nz

CERTIFICATION AS TO PUBLICATION

I CERTIFY that the accompanying submission is suitable for publication and does not contain any information that is suppressed.

Dated this 8th day of March 2023

Lady Deborah Chambers KC/Isaac Hikaka / Josie Beverwijk
Counsel for the Appellants