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IN THE SUPREME COURT OF NEW ZEALAND SC 32/2023

I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 19

BETWEEN **RAEWYN PHYLLIS COOPER**

Appellant

AND **MARCUS ROBERT WILLIAM PINNEY**

Respondent

MRW PINNEY FAMILY TRUST

Interested Party

Hearing: 1-2 November 2023

Coram: Winkelmann CJ
Glazebrook J
Ellen France J
Williams J
Kós J

Counsel: P G Watts KC, S J Zindel and I T F Hikaka for the

Appellant
S N van Bohemen and R L Powell for the Respondent
A S Butler KC, N L Walker and J A Tocher for the Interested Party

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CIVIL APPEAL

MR WATTS KC:
May it please the Court, Mr Watts, Mr Zindel and Mr Hikaka for the appellant.

WINKELMANN CJ:
Tēnā koutou, Mr Watts, Mr Zindel and Mr Hikaka.

MR VAN BOHEMEN:
E ngā Kaiwhakawā, tēnā koutou. Ko van Bohemen tōku ingoa. Kei kōnei māua ko Dr Powell mō te kai – sorry, kaiurupare.

WILLIAMS J:
Urupare. Yes. Not bad.

MR VAN BOHEMEN:
May it please the Court, van Bohemen with Dr Powell for the respondent.

WINKELMANN CJ:
Tēnā kōrua, Mr van Bohemen and Ms Powell.

MR BUTLER:
Ata mārie, e ngā Kaiwhakawā. Ko Andrew Butler tōku ingoa me Nathaniel Walker, me Jamie Tocher tēnei. Butler, Walker and Tocher for the interested parties, the trustees of the MRW Pinney Trust.

WINKELMANN CJ:

Tēnā koutou, Mr Butler, Mr Walker and Mr Tocher. Right. Mr Watts. You can speak on behalf of everybody, Mr Watts. I'm going to ask you, have counsel conferred about timing?

MR WATTS KC:

No, we haven't, your Honour. We haven't, I think, conferred about timing, but we've had a brief chat and we've indicated that we think we'll need the morning and possibly a little bit of the afternoon, but that was a preliminary view.

WINKELMANN CJ:

Our expectation is that this will not take the full two days.

MR WATTS KC:

I think that's probably right, your Honour.

WINKELMANN CJ:

Right. Go ahead.

MR WATTS KC:

I think it will take possibly more than today though.

WINKELMANN CJ:

Yes.

MR WATTS KC:

Your Honours, at its highest level, this case is about when does a beneficiary under a discretionary trust have more than a mere spes or hope of an interest, but rather has rights of access to the assets of the trust. Such rights of access are traditionally called "a general power of appointment". We do not in this case attempt to provide a comprehensive test of what creates a general power of appointment and not a mere spes, and it may be that this Court in a single decision can do no more than pencil in the boundaries.

But the appellant does submit that this case is family within the boundaries of a general power of appointment, the concept of a general power. The arguments that the appellant will make about general powers of appointment could be applied in a number of contexts, but we recognise for the purposes of this case the Court needs only give a ruling confined to the definition of property within the Property (Relationships) Act 1976. Hence, the Court does not have to say anything about general powers of appointment applicable in other contexts such as insolvency. It is true, too, the definition of property in the PRA, as I'm calling it, is not identical to that in the Insolvency Act 2006.

If it is the Court's inclination to confine its reasoning to the PRA, then so be it, but we have not in these submissions confined our submissions just to the PRA. We think that the case does have implications for other areas and do not shy away from that.

What I propose to do, your Honours, is first to make quite a number of general and quite broad points about the existing law on general powers of appointment and the background policy issues. Then I will turn to the first four of the five main substantive sections of the appellant's written submissions, leaving the fifth, the relevance of tikanga to be addressed by Mr Hikaka.

I'm taking the written submissions as read and address only what I consider are the more important points but also wish to respond in quite a bit of detail to the points made by the respondents and the trustees, and there are quite a lot of points to make.

So the appellant's basic argument is that the core of the MRW Pinney Family Trust is a general power of appointment, giving the respondent generally unrestricted and lawful access to the trust assets. Cases about general powers of appointment have appeared in Commonwealth case law since at least the 19th century. The concept of the general power of appointment is referred to statutorily in the Wills Act 1837, for instance, which was until relatively recently applicable in New Zealand. Most of the cases are mainly in the England and Wales jurisdiction and it's my submission that these cases

are important and could well have enlightened, if they had been used more often, some of the cases in this area in recent times.

It is a common, albeit not universal, feature of disputes about general powers of appointment that the instrument in question will have named not just the putative donee as a beneficiary but also others, either as discretionary beneficiaries, or as parties who would take by default if the first party did not have a general power? What is not a dominant feature or indeed any feature at all of the older cases is an argument that the presence of other named beneficiaries is by itself inconsistent with the general power. The courts have instead approached the issue simply as a question of construction. If the background to the trust and its terms led one to conclude that X among the beneficiaries was intended to be able to decide what happens with the trust assets, then so be it. So there are a few, until recently, arguably no suggestions that ignoring the interests of the other beneficiaries would be inconsistent with fiduciary obligations or the irreducible core of the trust.

Now, I'm still well in the introduction, your Honours, but I think I'd like to take you to *Re Penrose* [1933] Ch 793 straight off.

WINKELMANN CJ:

Sorry, can you just clarify, there are a few suggestions that ignoring the interest of the beneficiaries would be inconsistent with the core obligations of a trustee?

MR WATTS KC:

Yes.

WINKELMANN CJ:

And you're saying that's as a broad proposition, not just in the context of a particular exercise?

MR WATTS KC:

Yes, so if one looks at the cases where there have been disputes, they generally treat it as a question of construction. There's no – there have been parties as we'll see in *Penrose* and other cases have raised fiduciary obligations, but the courts have batted them away in these cases as we'll shortly see.

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GLAZEBROOK J:

In the context of discretionary trusts, it's usually said that there's very little review of a trustee's decisions except to the extent that they haven't at least considered when they're making a decision on the beneficiaries generally, and a suggestion, although I think this rather mixes up public law concepts of *Wednesbury* unreasonableness and without a duty in any circumstance to give reasons, therefore one – a slight difficulty in review. But are you saying that's a modern phenomenon in terms of at least considering the interests of the beneficiaries or are you saying it's just a question of construction of the particular instrument or what's the submission?

MR WATTS KC:

Yes, it's a question of construction of the particular instrument, your Honour. The *Wednesbury* unreasonableness, I mean, I don't want to go down that –

GLAZEBROOK J:

No, no, I –

MR WATTS KC:

I think it's an extremely bad test to use in this environment, but I – which I could do chapter and verse on, but I don't think – so I certainly don't think, relevant or irrelevant considerations tests have really – that's a very modern phenomenon. It's misconceived. But, so, it is a question of looking at the trust deed in its context and the particular words and if somebody is intended to have access to those assets, then they're intended to have access to them.

KÓS J:

But buried in this is a debate about the apparent form of the power and the lawful exercise of the power. It may be the power enables the trustee to appoint property to himself as beneficiary, but it may also be that that exercise is unlawful and can be restrained and it's a very important distinction.

MR WATTS KC:

Yes. These cases say it's not – if there's a general power, it's not unlawful. It's consistent with what the settlor provided for.

KÓS J:

Well, the question becomes whether the capacity to restrain because to exercise the power would be unlawful means that it's not a general power of appointment.

MR WATTS KC:

Yes, it wouldn't be if that would – I mean, that would be right. You're correct, Sir.

KÓS J:

Yes, that's right.

GLAZEBROOK J:

Although the cases normally say that a general power of appointment is not subject to the fraud on a power doctrine.

MR WATTS KC:

Yes.

GLAZEBROOK J:

So it might be rather circular in terms of an argument, and you say if it's a general power of appointment, it just is and is not constrained. Is that…?

MR WATTS KC:

That's right. There will often be a gift over so that if the person with the power dies intestate, then other aspects of the document may operate, but while they are alive and they can use the general power to have access to the assets.

WINKELMANN CJ:

Right, so you were taking us to *Penrose v Penrose*.

MR WATTS KC:

Yes. So in *Penrose*, the holder of the putative general power was the husband of the settlor and the beneficiaries were defined as the issue of the settlor's late father or her husband's late father. It was just a reasonably wide family class. It was held that he was a descendant of his late father, not surprisingly, and fitted the definition, and that as a matter of construction, he could appoint all the assets to himself, although on the facts, he gave part to himself and part to his sons.

The passage in Mr Justice Luxmoore's judgment that I start with is on page 804. I should warn there's a slight fishhook as we'll see here because there's an obscure point that isn't explained, but we'll read through it. So the paragraph: "The point was next raised in the English Courts in…*Taylor v. Allhusen*. It was there held that a lady having a power of appointment among grandchildren, of whom she herself was one, might appoint to herself. The learned judge dealt with the question purely as a matter of construction, but he was referred to *In re Sinclaire's Estate*."

Now, that looks as if it's in the English equity division because it's an Irish case, it's not LR at the bottom, but IR. You just can't see it. There was a footnote. That passage is hard to follow because there seems to be some problem with that case. What it is, and I'm not sure I haven't – I'm afraid until I got preparing for the case saw that was Irish and haven't got it, but it's discussed in the *Taylor* case and it seems to be not a problem at all. I can't see what it is. So I think we can ignore that and continue with the next paragraph.

"It is to be observed that the dictum in *In re Sinclaire's Estate* is general and covers the case where the donee is expressed to be the object of the power. In my judgment the decision in *Taylor v Allhusen* in effect rejects this dictum" – this is the *Sinclaire* dictum – "and, accepting Sir George Farwell's criticism of it, decides against it, holding that the question is in reality" – we need scrolling – "one of construction and not of invalidity arising out of any fiduciary capacity with which the donee of the power has been invested."

This is the next sentence: "I respectfully agree with the opinion expressed by Sir George Farwell…Quite apart from the decision in *Taylor v. Allhusen*, I should have come to the conclusion that there is nothing illegal per se in an appointment of [*sic*] a donee of a power in favour of a limited class of persons appointing to himself if on the true construction of the instrument creating the power the donee is himself a member of the class and not excluded from it."

"The question, therefore arises: Is there anything in the will, construed in the light of all the material circumstances which can properly be taken into consideration, to exclude the testatrix's husband from the prima facie meaning of the words, 'the issue immediate or remote' of his father. It is argued that I must, on the true construction of this will, come to the conclusion that the husband is excluded…first, because he is constituted the tenant for life." So he already had express interest and the submission I assume was that that was meant to be exhaustive. He was constituted the tenant for life subject to the power after this life interest.

WINKELMANN CJ:

Sounds like quite a good argument.

MR WATTS KC:

Yes, but it wasn't accepted though. "It is certainly not an unusual thing to find gifts…after a life interest," said the Judge, "…through the medium of a trust under which the life interest [*sic*] may in certain events take the whole or a part of the capital." Carry on please. I won't read the next sentence. There's another bit about fiduciaries coming up, I think. "It is next said that the form of

the power itself suggests that the donee must be excluded…first, because the form is not [*sic*] usually employed when conferring what lawyers generally call a special or a limited power and such a power is in its nature fiduciary. This argument really begs the question, because the power can only be fiduciary if the donee is not an object. It is next said that as the power is to appoint by deed or will" and so on. I think that's all we need. That gives the gist of saying it's a question of construction and batting away any notion that there's necessarily fiduciary obligations that need to be effectively overcome.

Re Mills [1930] 1 Ch 654 –

WINKELMANN CJ:

So do you say that the proposition that emerges from that is that the power is not fiduciary if the donee is an object of it?

MR WATTS KC:

Yes. *Re Mills* was a similar case but with perhaps even weaker indications that the donee was intended to be the dominant beneficiary. We won't – I don't take you to this case, but effectively, the facts were that the putative donee of the power was named as one of the family members and with the power to select amongst them the person most likely to maintain family fortunes. He of course thought that was himself and he chose himself as the party most likely to favour family fortunes and gave it all to himself, and that, too, was treated as a question of construction.

Most of the older cases are what one might call internal disputes which is a dispute like the present where there was a challenge by a named beneficiary or a party who were taken to fault had the power not been a general power. There are, however, some external disputes amongst the older cases, namely proceedings brought by a creditor arguing the beneficiary had a general power of appointment and not just a spes, and that gave the creditor access to the trust assets.

KÓS J:

How are you classifying this, internal or external? The present appeal? It's external, surely?

MR WATTS KC:

Oh, sorry, external. Quite right, your Honour. Actually, yes. Sorry, my mistake. Yes, external. Yes, no, that's an error. Thank you. Yes, so *Re Phillips* [1931] 1 Ch 347 is an example with a creditor and I'll come back to that case.

There can be a number of reasons why the settlor in these cases of general powers of appointment might have named the other beneficiaries. It may be that the settlor did not wish the assets to fall into intestacy if the main beneficiary died. It may be as simple as the settlor viewing the other beneficiaries as worthy objects while also content nonetheless that the party with the general power might take everything if he or she wished.

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More pertinently to the present situation the settlor may have named the other beneficiaries not just because they were viewed as worthy objects, but also because their presence conveniently distracts from the fact that the settlor's primary intent is to benefit the donee of the power. In such cases the settlor is aiming at external factors and that is what was going on in our submission in relation to, in the cases *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] 1 NZLR 551, *Webb v Webb* [2020] UKPC 22, [2021] 2 NZLR 376 and the present.

Two of the more common types of external factors of course are bankruptcy, the main beneficiary, and the breakup of a domestic relationship. Do such attempts work? Well it depends. Where a statutory regime turns on, or contains provisions that turn on a party's ownership of assets, it will be very common for the regime to include interests that that party beneficially owns. Usually as a beneficiary of a trust. That is true with the Property (Relationships) Act and Insolvency Act. Commonly the legislation will not, however, expressly refer to trusts but rather to a party's "interests in

property". The question may then arise, however, whether it makes all the difference that the trust confers on the relevant party only an uncertain beneficial entitlement rather than a fixed one.

WINKELMANN CJ:

Are you in your submissions there Mr Watts? Are you in your submissions?

MR WATTS KC:

Yes, I'm in, you want me to tell you…

WINKELMANN CJ:

Are you in your oral submissions, or written submissions, because if you're in your written submissions –

MR WATTS KC:

No, I'm in oral submissions.

WINKELMANN CJ:

What paragraph are you at?

MR WATTS KC:

In the written?

WINKELMANN CJ:

Yes.

MR WATTS KC:

Well actually, your Honour, I'm not working through my written submissions.

WILLIAMS J:

You're working through your other written submissions?

MR WATTS KC:

These are other written submissions, yes your Honour, but nonetheless I'm happy to take obviously questions, but the oral outline roughly follows what, the order in which I'm doing things.

WINKELMANN CJ:

Okay.

MR WATTS KC:

One tends to rewrite things over and over again, that's the problem, but hopefully it can be followed.

GLAZEBROOK J:

Can I just check? I can understand making a distinction between general powers of appointment and special powers of appointment, but is there an argument in terms of property that any power of appointment might be property, it just may be valued at a different – so if you only have an expectation in a discretionary trust, for example, which is obviously not a power of appointment, but coupled with some type of power of appointment, perhaps in terms of an ability to appoint trustees as in this case, but that it might just be a question of valuing it? Because otherwise you, I mean as you say you end up with, you know, does just adding another beneficiary make it not a general power of appointment, does adding another trustee make it not a general power of appointment, and is that, is that perhaps not what we should be looking at in terms of property, are we too hidebound in a regime like the Property (Relationships) Act by what might be traditional definitions of property?

MR WATTS KC:

There's no doubt that I think the drafter of the Property (Relationships) Act intended a broad, very broad approach to be taken and not the one that might be taken in other contexts. So there's no doubt that there's an intention there that there be a broad scope and that we would submit that include general powers of appointment. But I don't think your Honour's suggesting that the courts might, even without a general power say well the clauses are close

enough but perhaps we ought to say that you've got some entitlement if there is no general power. I wouldn't be submitting that if I'm sure I follow.

GLAZEBROOK J:
All right, so you're just relying on the general power distinction.

MR WATTS KC:
Yes.

GLAZEBROOK J:
Thank you.

KÓS J:
That's a concession that special powers are not, because their fiduciary character can't be treated as property for the PRA?

MR WATTS KC:
Yes.

WINKELMANN CJ:
What about the notion that is discussed by Justice Miller of "weakly fiduciary"?

MR WATTS KC:
Well…

WINKELMANN CJ:
Which seems to be a key part of his reasoning.

MR WATTS KC:
Well with respect, your Honour, I don't know that it was key really. I think that it's probably a recognition that – you would have seen it from the written submissions but it's submitted that you can have a trust without any fiduciary element, it's controversial, but it would be consistent with a case such as the present where there are trustees other than the holder of the general power, that they owe fiduciary duties to him. They can't run off with the assets, and if

he dies intestate they, you know, there would be fiduciary obligations to any remaining beneficiaries.

GLAZEBROOK J:

And what are those fiduciary obligations though, because in a discretionary trust the fiduciary obligations relate to keeping the property intact, one assumes, but otherwise in terms of the beneficiaries themselves, and administering it properly in good faith et cetera, but in terms of the beneficiaries they only have a right to be considered, don't they, at most?

MR WATTS KC:

Yes, at most because in some, in a very broad discretionary trust, there only might be a duty to survey, even with a special power. There's no duty to consider every individual beneficiary.

WINKELMANN CJ:

So going back to the question though, what do you say – does your concession that special powers are not property for the purposes of the PRA, does that extend to weakly fiduciary powers?

MR WATTS KC:

I'd need to have a precise point. I wouldn't concede it.

WINKELMANN CJ:

Well there was a precise point, and we'd have to find Justice Miller's reasoning. He says that some of these powers are weakly fiduciary, doesn't he?

MR WATTS KC:

Yes.

KÓS J:

I think what he means by that is that the enforcement of the fiduciary obligations is complex and difficult, as it is for a discretionary beneficiary. That's why it's weakly fiduciary. Looks powerful, but just isn't that powerful.

WINKELMANN CJ:

I'm not sure that's right, reading what he says, but anyway, perhaps that's something to be reflected upon.

MR WATTS KC:

Right, okay. Yes your Honour. So my basic submission is that it's a question of policy that the courts are entitled when approaching trusts such as the present to give effect to the purposes and policies that are in the relevant statute, both when construing obviously the statute and its reach, but also when construing the trust document. It's not necessary that the statute gives an express fiat to override the terms of trust instruments. So the basic submission is that parties cannot avoid the implications of the law of relationship breakups just by willing them away through the use of a discretionary trust. That, it is submitted, is the import of *Clayton v Clayton*. It is for this reason that the appellant rejects the argument made more than once in the respondent's submissions, paragraphs 46 and 90, that general powers of appointment are very uncommon in New Zealand because settlors would know that the trust assets might then become exposed to the claims of third parties, and insolvency or relationship break-up, and that is the very thing they do not want. This candid argument, in my submission, involves asking the courts to promote the settlor's intention to avoid the inconvenient application of public policies manifested in statutory form, and at the same time the settlor's content to permit the main beneficiary to dominate decision-making.

The respondent goes on at paragraph 59 to say that the Property (Relationships) Act works on the concept of property, not control, but it is submitted that control is as central to the boundaries of relationship property law as it is to insolvency law and not incompatible with a broad definition of "property". Powers are about control and this is the very reason why powers

shade into property. It's not being submitted that control by itself is enough. There needs to be control and the ability to self-benefit, but powers and property are very much connected and this is the main point of the Privy Council's very important decision in the *Tasarruf Mevduata Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 case, which I hope to return to. *Tasarruf* was followed on this and other points in *Clayton* and in *Webb.* It's not an outlier. It's distinguishable on its facts, but that basic argument of Lord Collins in that case, that powers, in particular general powers, are relevant to ownership is fundamental in this area.

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The point could be put the other way around. To be effective against general insolvencies or relationship property law, there needs to be the requisite degree of lack of power to self-benefit if the powers which the trust confers are not to be treated as property within the statutory regime.

Obviously, it's a difficult question as to just what is that lack of control and that's what this case is about on its particular facts. The respondent and the trustees argue that fiduciary law ensures that lack of control and the holder of the powers of the trust. So at paragraph 5.17 of the trustees' submissions, they say that because of fiduciary principles, "the powers Marcus would 'control' would not permit him to, in the language of *Clayton*, appoint all of the assets of the MRWP Trust to himself," and at paragraph 5.18, they go on to say that the respondent has two children who "could realistically be expected to hold Marcus to account". Well, there were children in *Clayton* who might, could have been argued, could realistically have held Mr Clayton to account on that argument.

Secondly, even where fiduciary law does apply and hence there's no suggestion of there being a general power of appointment, and this responds more specifically to points your Honours have already made this morning, the decision of this Court in *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 says that even where there are fiduciary powers, there may be nothing wrong

in all the assets going to a single beneficiary. In that case, the Court stated that the trustees were, and this is the Court at paragraph 23 of *Kain v Hutton*, "perfectly entitled" to distribute trust assets to just one beneficiary, although on the facts of that case, only roughly half were distributed to one beneficiary.

So this case, *Kain v Hutton*, clearly dispels the notion that trustees who favour a single beneficiary prima facie act unlawfully, and therefore, it is submitted that the trustees' submissions clearly overstate the effect of fiduciary law in this field.

KÓS J:
That wasn't a self-dealing case though.

MR WATTS KC:
No.

KÓS J:
It's quite an important distinction.

MR WATTS KC:
They don't say that in the case.

GLAZEBROOK J:
Well, it was a breach of trust case, basically.

MR WATTS KC:
Pardon?

GLAZEBROOK J:
It was a breach of trust case, the allegations at heart.

MR WATTS KC:
Yes, but the point remains a good one, that fiduciary law does not involve meaning that beneficiaries can intervene to stop a decision to make a distribution to a single beneficiary.

KÓS J:

But if that beneficiary were the donee of the power, it might be a rather different situation.

MR WATTS KC:

Yes.

WINKELMANN CJ:

So what do you say is the general fiduciary obligation of a trustee when making distributions amongst a range of potential beneficiaries?

MR WATTS KC:

Of a special power? Fiduciary power?

WINKELMANN CJ:

Yes, special power.

MR WATTS KC:

It's to act in good faith, to survey the range of beneficiaries and to avoid corruption, conflict of interest and self-profiting. If you want –

WINKELMANN CJ:

And then –

MR WATTS KC:

In my submission, I mean it is very much a matter of semantics, but I think there's a lot to be said for Lord Millett's view where a lot of what is said to be breach of fiduciary duty is actually breach of trust. It's going outside the terms of the power and acting for an improper purpose, and that's not breach of fiduciary duty. Fiduciary law is aimed at preventing – generally speaking, preventing corruption.

WINKELMANN CJ:

Well, isn't the essence of fiduciary law, which is what's said for the trustees, the obligation to act in the best interest of another? Isn't that the essence of it?

MR WATTS KC:

Yes, it is, and not in self-interest is another way of putting it.

WINKELMANN CJ:

Yes, well, that supports the obligation, doesn't it? Because you're holding for another –

MR WATTS KC:

It reinforces the basic obligations, but I think we should resist pushing too much into the fiduciary label when a lot of it is better dealt with as a breach of the express or implied terms of the obligations undertaken.

WINKELMANN CJ:

So if that's the obligation of a trustee who's not one of the beneficiaries, obligation to act in good faith, survey the range of beneficiaries and to avoid self-dealing, when you come to a trustee who's also amongst available range of beneficiaries, what do you say the situation is then?

MR WATTS KC:

Plainly, they plainly can self-benefit if it's expressly there. Again, I would say that they can do anything that is not anathema to the settlor's intentions. But if they –

WINKELMANN CJ:

So you'd say that – but don't you take it further? Don't you say that it's a matter of necessary construction if they're amongst the – if they're given control, and they're amongst the range of beneficiaries, they're also relieved of the obligation to survey the range of beneficiaries and to avoid self-dealing because that's really plainly what's in the contemplation of the settlor?

MR WATTS KC:

I think they still probably ought to consider the range and needs and interests of the beneficiaries. That wouldn't be a breach of – it's not so much breach of fiduciary duty, that's an implication in the language of the trust. But they're not –

ELLEN FRANCE J:

Why's that not a fiduciary duty?

MR WATTS KC:

Because, in my view, your Honour, I take – and using the fiduciary concept in a narrow way about abuse of power, to avoid the rules of that, to avoid corruption, the prior questions are, and the more important ones, really, in many contexts, is this within the scope of what was intended, and self-benefit might be within the express scope but there will be context that suggests that in the absence of – if you can't conclude it's a general power, that there would also be a duty to consider other people's needs and interests. That isn't, in my view, strictly part of fiduciary law, it's part of acting for a proper purpose. So proper purpose law is designed to give effect to set intention. Fiduciary law is almost composed ab extra to equity to prevent corruption. So the proper purpose doctrine and –

WINKELMANN CJ:

So are you disaggregating out of the concept of fiduciary, then, the obligation to act in the best interests of beneficiaries which is entailed in the notion of considering their needs?

MR WATTS KC:

That is the basic obligation, is a question of undertaking, and the fiduciary law reinforces that on top.

WINKELMANN CJ:

I had understood that fiduciary law was the effect that – it was because you had this obligation to act on behalf in the best interest of another that you

were a fiduciary, which doesn't Lord Millett say that in some other case, it's a mistake to disaggregate those things?

MR WATTS KC:

Well, he does disaggregate them. It's exactly what he does do in *Bristol BS v Mothew* [1998] Ch 1.

WINKELMANN CJ:

It's *Bristol v Mothew* I'm thinking of.

MR WATTS KC:

Yes.

KÓS J:

Or *Armitage v Nurse* [1997] EWCA Civ 1279, [1998] Ch 241.

MR WATTS KC:

Or *Armitage v Nurse*. But you do have to act for the benefit of the beneficiaries, and one can – it's a semantic point. I'm happy to say, you know, concede that that can be, you know, is a fiduciary duty, but it's also the basic duty of the trustee to comply with the wording and the implications of the trust.

WINKELMANN CJ:

Can I just take you back to an earlier statement you made which is, I asked you if the power is not – you said the power is not fiduciary if the donee of that power is also a beneficiary of it.

MR WATTS KC:

No, your Honour. Power's not fiduciary if as a matter of construction, they need – they are intended to be able to consider only their own interests. And that is what I think must be the conclusion in *Clayton v Clayton* because there were children there. It could've said that it didn't matter that he was the sole trustee, he still had to do as the respondent and the trustees are saying

should happen in this case, but the Court, having said that as a matter of construction in that case that he wasn't subject to any duties to the children, the question then is, well, why are there duties to the children in the present case?

GLAZEBROOK J:

But if the duties to the other beneficiaries only relate to considering, that's not much of a constraint on a power, is it?

MR WATTS KC:

With a general power, I don't even think they need to consider. With a fiduciary power, I think they need to consider but they also need to consider what the settlor, what was the intention of the trust that's been created and the duties of the trustees.

KÓS J:

You said before it was a question of whether what was proposed was anathema to the settlor's intentions. In this case, it seems to be anathema to the settlor's intention that Marcus control the property because he was a spendthrift.

MR WATTS KC:

Well, your Honour, can I – I can respond to that. I mean, that point is dealt with in paragraphs 10 and 11 of Justice Miller's judgment and I will take the Court to those shortly.

KÓS J:

All right, well, I note it now.

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MR WATTS KC:

So in my view the courts are entitled and should take account of the context that the argument that, well because the general powers would mean spouses and bankrupt creditors can get at assets, they can't have possibly wanted

that, and therefore the Court should construe the documents narrowly because they're at settlor intention. Our submission is that settlor intention is fundamental to the law of trusts, but settlors can't have inconsistent things, give access to the assets to a favoured beneficiary, but treat them as not having access at the same time. In clauses such as giving a trustee absolutely discretion, unreviewable discretion, and we submit that the *Gisborne v Gisborne* (1877) 2 App Cas 300 approach to those terms, or the English *Gisborne v Gisborne* approach, which was recently assumed to be correct, but explained in the *Grand View Private Trust v Wang* [2022] UKPC 47 case, that approach, those words are very important in indicating a general power. There's to be no review. And why would, in our submission, the courts ignore all the wording and the signs, where doing so facilitates a known desire to avoid relationship property law? So the effect of the majority – the approach of the majority of the Court of Appeal in this case can be put this way. Well we can't take the words "absolute and uncontrolled" literally because that might stop the children of the father being able to hold him to account, and we need the children to be able to hold the father to account, if he's going to be able to stop the mother receiving anything. That may be what the settlor hoped to achieve, but I don't think the Court is obliged to give effect to that intention. The trustees intimate –

KÓS J:

What is wrong with the – I mean there's almost an element of an ouster clause here, and I know you don't like to mix public and private law, but the *Grand View* analysis was that a clause, like clause 11 in this deed of trust provides an uncontrolled discretion, but it's not an uncontrolled power, unconstrained power.

MR WATTS KC:

Well it may be, you've still got to construe, the *Grand View* thing is you've still got to construe what is the decision-making boundaries if, within that though they're unreviewed, that's the approach in *Grand View*, so there tends to be room for the proper purposes doctrine, but if it's within the proper purposes it's unreviewable, and I mean it's true that ultimately the Court's a bit like with

ouster clauses in public law, there are, Professor Finn in his book said that, you know, courts ultimately sometimes can't bring themselves to give effect to the natural meaning of “absolute and uncontrolled” but our submission is that even if that was right, there’s been far too strong a tendency, as shown in the Court of Appeal in this case, to say well it doesn’t mean anything.

KÓS J:

Well some people might say that’s just tough. After all you’ve chosen to proceed here via a trust, and trusts are subject to the supervisory jurisdiction of Chancery, has been, you know, for 400-500 years. You could have done it by contract if you wanted to, and you didn’t.

MR WATTS KC:

That’s true. That’s true to an extent, your Honour, but I don’t, I actually think that’s inconsistent with the equitable principle. The equitable principle says it is a legal document, the trust is a legal document, and it has some effect. It’s got – there can't be a trust without some binding obligation.

KÓS J:

Absolutely.

MR WATTS KC:

But they also say that settlor intention is a paramount, a paramount element, and it is the duty of an equity judge to give effect so far as, in general terms, to settlor intention, and that’s *Gisborne v Gisborne*, and I think it should still be part of New Zealand law.

GLAZEBROOK J:

And how do you construe settlor intention in your submission? Is it just by construction of the document or is there an element of surrounding circumstances in the same way you’d construe a contract?

MR WATTS KC:

I actually think the surrounding circumstances are probably more important in the trust context than the contract context. So it's not just a matter of the words. It is context but important. And part of the context, you're not, but you're not, you can't allow inconsistency and that part of the context which says, we want to avoid the Property (Relationships) Act, I don't think the Court's obliged to give effect to that because it's inconsistent. They're trying to do inconsistent things.

WILLIAMS J:

What's the effect of that submission? Does that mean there's only one way to avoid the PRA, and that is via the PRA exclusion track?

MR WATTS KC:

No, your Honour. If you – it's for the Court to decide quite where the boundaries are beyond this case, but it's arguable that if the – no single beneficiary can control who are the trustees, then that makes a big difference, may be the critical difference. In this case –

WILLIAMS J:

Even if your intention is to avoid the PRA?

MR WATTS KC:

Probably. We've got to draw a boundary somewhere.

GLAZEBROOK J:

Well there'll be things within the PRA.

WILLIAMS J:

How do you reconcile active intention to overcome the PRA by holding the property at more arm's length than you suggest is the case here, how does that work with your analysis?

MR WATTS KC:

Because you can't – I think that your Honour would be to go, to have a, to have an avoidance, income tax avoidance approach to the Act and so –

WILLIAMS J:

So I'm trying to work out what your constraint –

GLAZEBROOK J:

Well there are avoidance provisions in the Act, so if you did put your property in with it, then you would be caught by the avoidance provision.

WILLIAMS J:

So I'm trying to work out what your, where your line is, because you start from saying "you can't possibly enforce a trust that is designed to avoid the PRA" but now you have to add to that sentence "in the following circumstances". Now can you tell me what they are?

MR WATTS KC:

Well –

WINKELMANN CJ:

Do you actually put it that high Mr Watts?

GLAZEBROOK J:

No, I think you were just saying –

WILLIAMS J:

I'd just like an answer, be nice.

MR WATTS KC:

If they've got personal control over the decision-making, and are named as the beneficiary, then that is the key test. So it's not – an intention to avoid the Act does not, in itself, lead to an ability to open trust, but you shouldn't ignore it when they're applying hot and cold, giving themselves decision-making power or control over who is making the decisions.

WILLIAMS J:

Right, so where you have the inconsistency you articulated earlier, coupled with an intention to subvert the PRA, that's enough?

MR WATTS KC:

The Court should take account, yes.

WINKELMANN CJ:

Right, I had understood – you're not saying it's an invalid trust?

MR WATTS KC:

It's not an invalid trust.

WINKELMANN CJ:

No.

WILLIAMS J:

I wasn't suggesting that that's what you were saying.

WINKELMANN CJ:

I thought you did say it.

MR WATTS KC:

No.

WILLIAMS J:

It's whether that gets you to whether it's property in terms of the PRA.

MR WATTS KC:

Yes, your Honour.

WINKELMANN CJ:

It's just the issue of property?

MR WATTS KC:

Yes, your Honour.

GLAZEBROOK J:

But you do say it has to be a general power of appointment for it to be property?

MR WATTS KC:

I think that's the label we put on it where you've got both control and benefit in that degree.

WINKELMANN CJ:

And do you accept that fiduciary obligations are inconsistent with a general power of appointment?

MR WATTS KC:

Yes, your Honour.

GLAZEBROOK J:

But you do say except – are you saying good faith is proper purpose?

GLAZEBROOK J:

And a duty to maintain the property, and not fritter it away in some way. Proper administration of the property.

MR WATTS KC:

Yes, there could be that, having that residual obligation. As I say, if the holder of the general power drops dead and doesn't leave a Will, that deals with expressly or implicitly with the assets that include a general power, then the assets would still go to whoever's named in the trust instrument.

GLAZEBROOK J:

Well a general power, I wouldn't have thought, allows you to use it to gamble without having first appointed the property to yourself, does it?

MR WATTS KC:

I think you're right, your Honour, probably.

WINKELMANN CJ:

Do you say this is the reasoning that Justice Miller applied, because it seemed to me that he didn't accept that there were no fiduciary obligations.

MR WATTS KC:

Yes, your Honour. You're right. I disagree with that part of Justice Miller's reasoning.

KÓS J:

That's the weakly fiduciary argument again. He says they are fiduciary but…

WINKELMANN CJ:

Weakly.

KÓS J:

Weakly.

GLAZEBROOK J:

Well that may be just the duty to maintain the assets and not gamble…
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KÓS J:

It's tricky though because the most fundamental aspect of fiduciary obligation is self-abnegation and preference of the beneficiary. That's the core of it.

GLAZEBROOK J:

Which is difficult when you are both trustee and beneficiary.

KÓS J:

Yes.

GLAZEBROOK J:

Well, it's inconsistent with that unless you can't do that.

KÓS J:

Yes, it's never been complete self-abnegation. In a fiduciary, for instance, there's usually power for a fiduciary to be paid if they're a professional. So, there's a measure of self-interest allowed.

WINKELMANN CJ:

72 of his judgment, paragraph 72.

MR WATTS KC:

Yes?

WINKELMANN CJ:

If you have a look at that. It just seems to be that you're pitching your argument in a more extreme or pure – yes, your argument is pitched differently to his reasoning.

MR WATTS KC:

Yes.

WINKELMANN CJ:

Because he says that: "The Supreme Court judgment in *Clayton* establishes that to classify a trustee's…power as fiduciary in nature is not to end a court's inquiry in litigation under the PRA," and the courts have to "take a realistic view of substance". So he's not saying you have to do away with all the fiduciary obligations.

MR WATTS KC:

Well, I wouldn't go that far, your Honour, that it is not fiduciary at all, but it's not necessary for the appellant to go that far. Justice Miller's analysis reaches the – he still reaches the same conclusion. Obviously, we're not going to object to it, but in my view, it would be better to say that the holder of the general power does not have fiduciary obligations in exercising that power.

But Justice Glazebrook's probably right. I hadn't thought about that, of, well, what if they're not purporting to exercise it? I mean, they're not. That is interesting. I'm not – there may be something in that.

WINKELMANN CJ:

Sorry, something in what? Can you just go back?

MR WATTS KC:

In the point that, well, they've got no – when they're exercising the power, they're uncontrolled, but when they're not exercising it, they should jolly well just keep, you know, at – duties of care and skill may still be there about the assets. That's, I admit, I hadn't been thinking about, but that may well be right.

WINKELMANN CJ:

And you accept that they would still have obligations to consider the best interests – to address themselves to interest the beneficiaries but you say those obligations aren't fiduciary, they arise from the purpose of the trust?

MR WATTS KC:

Yes, and they do not have to – I don't go so far as to say they have to get – there may be obligations to take care of the assets as a part of duty of care and skill, but they don't have to concern themselves with the interest of the children or the other beneficiaries. When it comes to distributing assets, they don't.

KÓS J:

Does it matter much what the source of the constraint is, whether it's fiduciary, whether it's the trust or this amorphous proper purposes doctrine? The question is the measure of the constraint and whether that is inconsistent with general power or alternatively, consistent with general power but as Justice Glazebrook suggests, then touched on the valuation of the property, the value of the right. Does the source matter here? It's just the constraint that matters, isn't it?

MR WATTS KC:

That's probably correct, your Honour. I think there's still – I mean, it would be useful for the courts to keep separate the concepts of breach of trust and breach of fiduciary duty.

KÓS J:

Mmm.

MR WATTS KC:

So the other points I want to respond to on this part of the submissions in relation to my learned friend's arguments is that in our submission, taking account of what the settlor's trying to do of avoiding the Property (Relationships) Act and taking account of the wording "absolute discretions" and so on, is what the Court should do, and doing that will not throw the law of trust into disarray which is implied in my learned friend's submissions in my view, nor would it put New Zealand law of trusts out of line with the way in which the courts in the United Kingdom and Australia approach the place of discretionary trusts in bankruptcy and relationship property, although admittedly, of course each country has rather discrete relationship property legislation.

Now, proof of child of course is based on New Zealand law, but Mr Justice Birss in that case, which is – this case I'll be coming back to, of course, your Honours, it's one of the more closest cases on the facts, the present fact pattern. It's a very important decision in our submission. Mr Justice Birss says that he doesn't think the law of England and Wales is any different. Approves *Clayton*. The *Tasarruf* case is important for the point I've made that in broadly discretionary trusts, the courts will treat terms of a trust as a general power and that goes to the concept of property. *Tasarruf* was applied by the Privy Council, and again, admittedly not another England and Wales case, but England and Wales judges, United Kingdom judges, referring to how can central controllers to disputes of the presence, or *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 in Australia takes us – is alive to the same issues with discretionary trusts.

It's true that if the Court allows this appeal, I think a degree – or it's submitted a degree of recalibration of trust drafting is likely to take place and it's submitted that that would be no bad thing for the separation of trust assets from personal assets. It has been set far too low by the Court of Appeal in this case, in my respectful submission. Many trust lawyers in New Zealand have been giving too little weight to the natural meaning of the words used and too much weight to reading in unexpressed obligations.

That's the end of the general survey, your Honours, and returning to specific points in the written submissions. The respondent and the trustees in –

KÓS J:

What would you say if you were advising Mr McIntyre who was trying to keep this – well, you're quite right to point out that calling it separate property was rather foolish, but he was trying to keep this out of the Property (Relationship) Act's regime. How should he have redrafted this deed?

MR WATTS KC:

By not having absolute and uncontrolled discretion wording and by making sure that the respondent could not appoint and remove all trustees.

WINKELMANN CJ:

Would you also say that they shouldn't have been able to put a company in as a trustee because it enabled him to have himself as both trustees? Is that part of your argument?

MR WATTS KC:

No. I think if he wanted to do that on the – given the context of the trust deed and that's the wider background, I think he could've put a company in as the other trustee as in *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48, (2012) 246 CLR 325.

WINKELMANN CJ:

Yes, but the question is whether –

MR WATTS KC:

That would've been lawful?

WINKELMANN CJ:

– that's relevant, whether it's relevant to the extent of his control.

MR WATTS KC:

Oh, I see. Yes, sorry, your Honour. Yes, I think that would be problematic if you were – it's likely to be a general power if you put a company in that you control. Sorry, I misunderstood the question, but I think that is the answer.

So the main question here when one looks at the particular wording of the trust document and so on in this case is, are the differences sufficient to justify not following *Clayton*, and I want to discuss some of the main points that the respondents and the trustees make about the differences in wording. I note, however, before doing that neither the respondent nor the trustees seem to argue that *Clayton* was wrongly decided, although the respondent at paragraph 69, respondent at paragraph 69 seems to suggest that clause 11 of the trust deed in *Clayton*, and I think we need to go to that shortly, expressly allowing discrimination amongst beneficiaries, is key to the Court's decision in *Clayton* and that such a clause would now be overridden by section 26 of the Trusts Act 2019, and so I need also to deal with section 26 of the Trusts Act.

They otherwise argue though that *Clayton* was a special and unusual case and implicitly said it should be confined to its facts.

KÓS J:

I think they also suggest it would now be regarded as an invalid trust which is certainly not what *Clayton* held.

WINKELMANN CJ:

Well, it didn't engage with it. Oh, no – yes, it didn't hold that.

KÓS J:

Exactly.

MR WATTS KC:

Sat on the fence on that issue.

KÓS J:

No, they didn't.

GLAZEBROOK J:

Yes, it didn't. It said we're not going to decide that.

WINKELMANN CJ:

They also say – no, it didn't on the – that was the illusory trust it sat on the fence on.

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MR WATTS KC:

They did hold it – *Clayton*, you're saying it's a valid trust? Yes. That may be right. I think there's a case that it is a valid trust for the reason I've given. If Mr Clayton died without leaving a Will, and the named other beneficiaries are not the same people who would have got the property on an intestacy, they would take over the – over and above what would happen in an intestacy.

WINKELMANN CJ:

Actually I think you might have been the first time around because they didn't decide – because if it's an illusory trust then it's not a valid trust and they didn't decide that, did they?

MR WATTS KC:

Yes, sorry, that may be right. I think you've got – I got convinced.

WINKELMANN CJ:

Yes, it's taken us around in circles.

MR WATTS KC:

I thought they did sit on the fence in *Clayton* on it.

GLAZEBROOK J:

No, no, we did, definitely.

WINKELMANN CJ:

We definitely sat on the fence on that.

GLAZEBROOK J:

Yes. It was not decided.

MR WATTS KC:

I got briefly persuaded out.

GLAZEBROOK J:

I mean it could have been a non-valid trust in that one could have argued that the terms upon which it was set – supposedly set up were such that you would never set up the trust in the first place, but I see the argument otherwise that says, well, if you assume it's valid, if he died, then the terms of the trust would apply.

WINKELMANN CJ:

One of the most important things I think that's said against you is the impact of the Trustee Act 1956 on this trust deed.

MR WATTS KC:

Yes. I'm going to come to that of course. The trustees also argue, and these are their points about the trust deed in the present case. The respondent's power to appoint and remove trustees, and this is at paragraph 1.6 of their submissions, is the respondent's one and only power. With respect that's a misleading way of putting things. The respondent has been a trustee of course and can make himself so again. He isn't at present. His belated resignation happened after, I don't know the date of it, but it's happened since

the hearing in the Court of Appeal as I understand it. I'm not sure but about the time of the Court of Appeal hearing. So he can put back on. It's not his only power being to appoint or remove the trustees.

There are other differences though that I wish to respond to, and that's going to bring us to the Trusts Act 2019. But I want first to deal with this clause 11 of the trust deed in *Clayton*, and there are these three limbs that for the avoidance of doubt, duty to act impartially, which imposes the duty to act impartially not – any rule of law that "… the duty to act impartially towards beneficiaries, the trustees shall have unfettered discretion… even though (a) the interests of all beneficiaries are not considered… (b) the exercise would or might be contrary to the interest of any present or future beneficiary; (c) the exercise results, at any time whether before or on the vesting day, in the whole or in any part of the capital… being distributed to any one beneficiary…".

So there are these three limbs and we submit that all three of those limbs could be present in a perfectly unobjectionable trust with special powers where the trustee, totally different people to beneficiaries, not even a beneficiary. We know that under *McPhail v Doulton* [1971] AC 424 approach to discretionary trusts that sometimes it's only a duty to survey, not even, you don't have to consider even each individual beneficiary. We know that actually making a choice under a discretionary trust is likely to be contrary, if there's no assets left at least, to the interests of people who haven't received anything. We know if there's a power of removal of beneficiaries that that's a valid power but it's not in the interests of the party being removed, and we know from *Kain v Hutton*, and other cases, that giving the whole capital income, it wouldn't necessarily be a breach of duty either. So these terms I think do not, are not as important as the respondents and the trustees make out. They could be present in a trust document where the trustee wasn't even a beneficiary.

That then brings me to section 26 of the Trusts Act.

WINKELMANN CJ:

So is your central submission that the clause in *Clayton* which enabled discrimination – empowered the trustees to discriminate, it's not the significant?

MR WATTS KC:

Well it's – it was definitely relevant amongst the, amongst, you know, the overall scenario, but it doesn't mean that it's absence in our case – it means that it can't be a general power. It wasn't, it was something that could be, as I say, in any trust.

KÓS J:

But it did contribute to the Court's conclusion that it was a general power in that case? So it's one of the building blocks.

MR WATTS KC:

Yes, your Honour.

GLAZEBROOK J:

Well, I suppose you say combined with the fact that there was control in other areas.

WINKELMANN CJ:

I'm just trying to catch your submissions. So is your submission, it's not that significant because it could have been in any trust, even where the trustee is not one of the beneficiaries, but also because you say the extent to which a trustee's power to appoint the assets is really quite uncontrolled by, on the case law? It's uncontrolled by the fiduciary obligations or it's broad notwithstanding the fiduciary obligations. How would you put that?

MR WATTS KC:

If the – again it turns on the context of a trust, but in a family situation such as the present case where the, there's a very broad power of distribution, coupled with control over who are the people making those decisions, those

are the key clauses. The presence of section 11, clause, might help. The presence of a clause that allows the trustee to remove beneficiaries, you know, reinforces there's no power to remove beneficiaries in this case, and my learned friends make something of, more of that than I think is warranted, because it's implied that they can't then give to all the world if they can't add beneficiaries, so that's the adding point. No power to add or remove beneficiaries. But of course if you've got a general power you don't need such a clause. You give it to yourself or direct if you're not the trustee, direct the trustees to send it to anyone in the world.

KÓS J:

Unless it's anathema to the settlor's intention?

MR WATTS KC:

I expect so.

KÓS J:

Yes.

MR WATTS KC:

But I don't think that's the case in this case. It's not anathema to the settlor's intention.

WINKELMANN CJ:

That's pretty much what Justice Miller said at paragraph 72 then isn't it? "It must follow that the trustee's powers, or trust assets, may be property for PRA purposes where the trustee's powers are so weakly fiduciary," and here because of the extent of the powers, unreviewable discretion, "or other beneficiaries' rights so precarious, there is no meaningful accountability." So it's accountability he's positing it upon?

MR WATTS KC:

Yes.

GLAZEBROOK J:

Though I think you say unconstrained power rather than accountability. Is that right? I mean that was my understanding?

MR WATTS KC:

Yes. I think that it is unconstrained power when distributing.

GLAZEBROOK J:

Yes, obviously the second one, not just unconstrained power but unconstrained power as to how you distribute.

WINKELMANN CJ:

But accountability must be connected to that surely, because it's constrained if there is accountability.

GLAZEBROOK J:

Yes.

MR WATTS KC:

Section 26. Section 26 is not dealt with in the written submissions, and I'm prepared to concede it should have been, but in our submission not a fatal omission. Section 26 says: "A trustee must hold or deal with trust property… for the benefit of the beneficiaries, in accordance with the terms of the trust."

It's our submission that the respondents and the trustees are putting no weight, in fact they don't even mention the second part of that phrase "in accordance with the terms of the trust", and that the dominant purpose of section 26 is to say that the trustees must act for the beneficiaries as defined by the Trust, not for all the beneficiaries, they don't have to act for all the beneficiaries if that's not what the Trust requires. So the duty of the trustee is to give each beneficiary his or her just deserts according to the trust deed but no more. It's I think absolutely clear that section 26 cannot have been intended to require trustees to act in the interests of all beneficiaries because

that would be inconsistent with most, well with many, particularly larger, discretionary trusts.

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WILLIAMS J:

Does it allow the trustee to disregard in making whatever decision they wish to make the interests of all the beneficiaries before doing so?

MR WATTS KC:

If there's a general power they have no duty and the question, the issue is whether to distribute. They don't have to consider the other beneficiaries, no.

WILLIAMS J:

So –

MR WATTS KC:

They only – the general power of the beneficiary there is the holder of the power and that according to the construction of the trust deed is the beneficiary. He – in accordance with the terms of the trust, they must benefit, act to benefit.

Section 26 must also – it's a general application but if one considers the power to remove beneficiaries, well that's not going to be in the interests of the beneficiary being removed and the Privy Council in *Grand View* noted that point, not in relation of course to section 26 because it wasn't a New Zealand case, but it plainly is not in the interests of the beneficiary being removed, but –

WILLIAMS J:

But acting for the benefit of the beneficiary as a whole is not inconsistent with choosing beneficiaries within the group, it's some win, some don't, that's in the nature of these things.

MR WATTS KC:

Well sometimes it might in the interests of the whole.

WILLIAMS J:

"This is for your own good," they will say, as governments say. Why is that inconsistent necessarily with the –

MR WATTS KC:

It's not –

WILLIAMS J:

– idea of a duty to consider all before taking to self?

MR WATTS KC:

I haven't put the submission quite as high as I think your Honour's inferring. It may be in some circumstances that making decisions in favour of some is interest of the group as a whole or – but often it won't be and I don't think there's any duty in doing – for a trustee to say, right, I'm going to give two-thirds to beneficiary X and – but I need to check, is that in the interests of everyone else?

WILLIAMS J:

No, "I need to check the interests of everyone else before I make my decision." Even at that, I think Justice Miller would say, weak level there is some procedural safeguard.

MR WATTS KC:

In not all cases depending on the terms of the trust deed. In a family group perhaps, but in a – often in a discretionary trust there are some beneficiaries that are plainly makeweights and were not really intended to have to be considered, and in some the number of beneficiaries would be so huge, you know, vast employee numbers for instance –

WILLIAMS J:

But it doesn't mean you have to consider every individual employee of Ford Motor Company, you just have to broadly consider before making your choice.

MR WATTS KC:

Yes, yes.

WILLIAMS J:

That's an essential trustee's duty however you describe the power. It might be said in – is it so wrong to read section 26 as if it replicates that idea, at minimum?

MR WATTS KC:

Yes, I think it is wrong, your Honour, to read it, read it as going that far. Yes, I don't think that's –

WILLIAMS J:

It's not very far.

MR WATTS KC:

No, but it doesn't – if properly construed it's a general power, I don't think they even need to do that. They're acting in accordance with the trust deed.

WILLIAMS J:

But the problem is that the label becomes the analysis. What – and what you have to do is read the terms of the Trust and section 26, they live together. It's possible to read 26 as saying when you are a trustee, think about all before you exercise your decision.

MR WATTS KC:

That may be right, your Honour, but it wouldn't require them to not abide by the intent of the settlor that this person had the power to call for the assets, was intended to have the power to call for the assets.

WILLIAMS J:

Well one aspect of the intent of the settlor is they put all those people in it.

MR WATTS KC:

Yes.

WILLIAMS J:

I mean that can't have been for no purpose?

MR WATTS KC:

Well –

WILLIAMS J:

Or it's a sham?

MR WATTS KC:

Well it can be a sham, your Honour.

WILLIAMS J:

Yes, but we're not in that territory. So the settlor listed a group of people who were at least possible beneficiaries –

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MR WATTS KC:

Well, they did it in *Clayton v Clayton* too so if that's true that's true also *Clayton*.

WILLIAMS J:

Well, yes, but that becomes a cumulative assessment, doesn't it, looking at all of the indicators as was already discussed. And before section 26 didn't exist then.

MR WATTS KC:

That's true but in my view there was no indication anywhere – submission that *Clayton v Clayton* was intended to be altered by this Act.

KÓS J:

No, perhaps not, but I mean the important point in *Clayton* was the power to remove beneficiaries, which in a way touches both limbs of section 26(a) "for the benefit of the beneficiaries", now reduced to one "in accordance with the terms of the trust". Well that's, you would say Mr Clayton's acts there comply with section 26.

MR WATTS KC:

Yes. So our submission, your Honour, is that Parliament did not intend to the concept of the general power of appointment.

ELLEN FRANCE J:

How do you say your submission fits with the – in the relation to section 26 fits with the fact that here we don't have the clause that was in *Clayton* about, even though the interests of all beneficiaries are not considered. So that clause is absent here, present in *Clayton*.

MR WATTS KC:

Yes. In my submission, your Honour, that's implicit in the present case. Once you've, once there are enough indicators that there was an intention that, the only beneficiary that mattered was the respondent. I mean it's true in *Clayton* of course they had the power to remove beneficiaries, the discretionary – any beneficiaries while the trust was operating, but not the final beneficiaries, and I don't, it seems to me unlikely that section 26 has abrogated *Clayton*, and I don't think the Court needs to read it as having done so.

WINKELMANN CJ:

So is the reason that you haven't adopted Justice Miller's reasoning that assumes that he is assuming that it's probably because the respondent could effectively act in defiance of the terms of the Trust, which is what the majority say against him, and you're saying that's not – you're saying we don't need, you don't need to reach that view because actually the terms of this Trust are

such that the – that the power of appointment of the assets is unconstrained and not fiduciary.

MR WATTS KC:
That's right.

WINKELMANN CJ:
Not fiduciary when the respondent as the trustee is exercising that power, or not fiduciary when anyone is exercising it.

MR WATTS KC:
When anyone is exercising it. The trustees say that general powers of appointment are never held by trustees in that capacity. I mean they certainly can be held by a trustee. They cite *Thomas on Powers* for that, but Thomas doesn't cite – case law confirms that as an absolute rule, so in my view a trustee can hold the legal title and have a general power, and it's a semantic point only. So there's nothing incompatible with being one of the legal owners and trustee and having a general power. *Re Mills*, the holder of the general power was one of the two trustees. Admittedly he didn't need the consent of the other trustees, but in several of the English cases, *Phillips*, which I'm coming to, and at least three other English cases that we rely on, they did need the consent of others, the trustees and, what's more, they didn't appear, it appears from reading the law reports, because we don't see the actual trustees out, but it appears from reading the law reports that actually the holder of the general power in that case couldn't remove those others.
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But, so, they're quite, they're a step beyond what we need for this case because there they had to consent but the Courts ruled as a matter of construction they didn't have to consent as to who, they only had to consent as to timing effectively. Now one might say those cases go too far, but at least they've gone even further than we're seeking to do in this case.

In paragraph 18 of the respondent's submissions they rely on three other critical factual points of distinction. First, the respondent was not the source of the trust property. Secondly, the responsibility was only a nominal settlor. Thirdly, the period of the relationship resulted in a financial reversal. I'm not sure that that last one is intended to cover this question that it comes in that part of the respondent's submissions. It may be that they're only directing that third one to the consequences of the remedy. None of them have any bearing, I think, on determining the outcome of this case as a matter of construction of the trust deed.

As for the respondent not being the source of the trust property in this case, that's relevant only to the point that if the rights and interests of the respondent has a property within the Property (Relationships) Act then at least some of the key assets were prima facie separate property. It's quite common for general powers of appointment to arise when the donee was not the source of the property, see *Re Mills*, see *Re Penrose*. The respondent's point that he was only a nominal settlor is also misconceived.

Prima facie the duty of the Court when construing a trust deed is to consider the intent of the settlors, the nominal settlors, the people who are named there. That's the prima facie person that's deciding that the nominal is not real.

KÓS J:

I've never come across the concept before. Is there such a thing as a nominal settlor in equity?

MR WATTS KC:

Well, your Honour, I doubt there is. I think one does hear of it. I wouldn't say it's – I haven't come across it but the submission is that there's a –

KÓS J:

Well the only –

GLAZEBROOK J:

It was common for trusts to be settled by somebody saying here's $10 which was usually never paid, and then the transfer of assets in after that, and before gift duty it had to be the sale of assets, and after that, and not a settlement. For the abolition of duty. It had to be a sale with a debt back and not a, not actually a settlement because a settlement incurred gift duty.

MR WATTS KC:

The revenue legislation which your Honours are referring to has a special definition of "settlor" but in general equity terms the prima facie important person is the person who put the $10 up because they are the person who signed the deed. But that's the starting point, prima facie starting point. If they are – we're only, even at the time the trust deed was settled, only a nominee, they were acting effectively as an agent and the people who were going to put the real assets in knew – were there, then it may be possible when construing the intent of the named settlor that they were, you know, you can look to what the people who put the assets in. But if it doesn't happen in that order, the Court's correct approach is to say, well you've put assets into this trust, you're bound by what the person who only put the $10 in, because they're the party who signed it. So in our submission the respondent, as one of the signers of this deed, his intent is relevant in construing this deed. He's not the only settlor of course.

KÓS J:

Well that's probably right, but the real skin in the game was put in here by the parents, who resettled the Pinney Trust, so they were the major economic contributor. So if you're looking to what the purpose of the settlor was in the establishment of this Trust, presumably you would give, you certainly don't exclude them from consideration.

MR WATTS KC:

No.

KÓS J:

And one of their purposes was to essentially ringfence this property and continue to have some control over it, presumably for two purposes. One, so Marcus wouldn't waste it, and secondly, probably, so Raewyn, in fact certainly, that Raewyn wouldn't get her hands on it.

MR WATTS KC:

Well, your Honour, this is where I think I need to go to the paragraphs in Justice Miller's judgment as a quick way, instead of going to the evidence, because he sets out, he quotes from the evidence. So paragraphs 10 and 11: "A decision was made on 2 June 2005 to distribute the Pinney Trust's assets to

separate trusts for Marcus and his brother. Mr McIntyre deposed that at this meeting: 'It was agreed in principle that the time was appropriate to transfer assets into individual trusts for these beneficiaries.'"

At that time the respondent had no children. I'm not saying that's a slam dunk answer, but there were no children, and when they talk about "individual trusts for these beneficiaries" they mean for this beneficiary, in my view, the respondent. Then we've got this other point on, Mr McIntyre wrote to Marcus offering advice. "The principal issue in terms of structure is to maintain the assets transferred from the Pinney Trust, and any other future inheritance from your mother and father's estate as separate property…". Well as Justice Kós has said, that was not particularly, you know, if they'd have been happy with separate property, then so would we as a starting point, so they've done something more than that, attempted to do something more than keep it as separate property, they've tried to keep it outside altogether. But that does show that the major intent behind this was to look – to the interests of the respondent against the Property (Relationships) Act and yet still give him powers of control over who made the decisions, and those people making decisions had an absolute and uncontrolled discretion. So our submission is that –

KÓS J:

Well what do you say about paragraph 16 of Mr McIntyre's affidavit? Because it's rather more complex and nuanced than you're suggesting I think.

GLAZEBROOK J:

I was also going to refer to paragraph 12 of Justice Miller's where he submits that it was a dynastic control, which assumes a longer-standing inheritance –

KÓS J:

Mmm, that reflects paragraph 16.

GLAZEBROOK J:

Yes, exactly.

WINKELMANN CJ:

And he says these are consistent objectives.

MR WATTS KC:

Yes. Well –

WINKELMANN CJ:

Which is your point I think. These factual findings are also part of the majority's judgment I think, because they just roll on from them is my recollection.

MR WATTS KC:

Yes. No doubt that they, the parents and Mr McIntyre realised that he was just not good with money, but in our submission they nonetheless, nonetheless shown that their predominant intention was him not the dynasty, and that – and they've set things up in a way which allows him to determine who it is that makes the decisions, and they've set it up in a way that there are no controls, it's absolute and unfettered.

KÓS J:

Well that's not apparently what they intended. It may have been what they've achieved. But clearly they had in mind that he was to be one only of the trustees, and the trustees would have to act unanimously, and there were some pretty good trustees in this trust. You had McIntyre, you had Acland, who was a farmer, you had Sir Peter Elworthy I think. They were not pushovers.

MR WATTS KC:

No, but he could have removed them at any time. They left –

KÓS J:

Well could he have exercised the power to do that though?

MR WATTS KC:

Yes, in my submission he could have.

KÓS J:

Consistent with the intention of the settlors, not anathema to the settlor's intentions? To enable him to control the assets himself? It seems anathema to me.

MR WATTS KC:

Well, I don't agree with that your Honour. I don't think the – the fact is that this was part of a scheme – they had an intention – the predominant intention was to stop spouses getting anything out of the Trust.

KÓS J:

Well I don't know how you could separate that from making sure that Marcus doesn't get it and waste it. They run together. You can't say one's predominant.

WINKELMANN CJ:

Well I suppose you might say that if they were so worried about him, they wouldn't have given him the power of appointment of a trustee.

MR WATTS KC:

That's right your Honour.

WILLIAMS J:

It's more than likely that they, if there was a falling out then someone would have to fix it, and since he was the one with all the skin in the game, it was him. But it is quite striking that professional trustees were appointed and active in respect of an asset of this modest value. This is a small and unprofitable farm on any analysis. It was never going to be more than that, and yet you have professional trustees who are doing more than just being on the page. That can't have been an accident.

WINKELMANN CJ:

Have you got an answer or should we take the morning tea adjournment?

MR WATTS KC:

Take the morning tea adjournment I think. I'll come back after the morning tea.

WILLIAMS J:

Coffee will help Mr Watts.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.49 AM

MR WATTS KC:

Thank you, your Honour. So it's true that the evidence is a little bit mixed as to what – you know, they had a number of intentions, but it's our submission that the dominant intention was to exclude the Property (Relationships) Act and it was – as part of that, part of a process of unwinding the earlier trust, which nobody objected to, it had two brothers in it and a more complex structure, into a trust for Marcus and at the end of the day, for the respondent, at the end of the day they haven't, in the wording, achieved controls over him

and it's – if you – in the actual – so it's a combination of intent. Obviously the settlor's intent's important, I've stressed that, but you look at the actual wording and if the wording allows them to blow hot and cold, as I argue is the case here, then they haven't achieved that part of the intent, if there was any, and a key part over the later generations, and it would be very easy to set up correspondence. So it says: "Well we're worried about later generations." The cases say pretty consistently that the reference to "children" is, you know, that obviously they will be intended to be beneficiaries but one shouldn't treat that as saying that you can still have control over all the assets and be one of the main beneficiaries, you're in peril of the Court finding that it's – especially where there are indications of undermining of statutory policy, in peril of the Court finding that it's a general power of appointment.

If I can take you therefore to *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) case, paragraph 292. I've accepted that for Pugachev's, the beneficiaries were – included his children and his current partner, I think, was another beneficiary. Mr Justice Birss wasn't prepared to be fooled by the fact that the children were named beneficiaries. "I do not doubt he truly did and still does intend that his children should benefit from his wealth." All the more so when he was living with Ms Tolstoy and the children. "But that is different from saying that at any time he intended to part with ultimate control of the underlying assets in favour of the trustees." Remember in this case, he wasn't a trustee but he did have the power of removal and appointment of trustees. "The fact that he wanted to look after his family is not inconsistent with the idea that he wanted to retain control. Nor is the fact that Mr Pugachev allowed the family to benefit from the trust assets for a number of years."

Then, if I can take your Honours to paragraph 267. He disagrees with the way that Justice Heath in New Zealand proceedings, related New Zealand proceedings construed the deeds. "In my judgment the true construction of these trust deeds is that the powers conferred on Mr Pugachev…are conferred to be exercised freely for his own benefit. Or put another way, considered objectively, the powers are personal powers…They are not

constrained by a consideration of the interests of the Discretionary Beneficiaries as a class."

Can I go back? Sorry. Paragraph 188. "The defendants also refer to various passages from *Thomas*…Again the main submission…is that this work shows that one way or another the powers will always be subject to scrutiny and the supervision of the court. However, the defendants'…point about court supervision is circular. If the exercise of the power is subject to some limitation (such as a fiduciary duty or a power conferred for a limited purpose) then there is a standard against which a court can measure whether the power was used lawfully or not. But if the power can be exercised selfishly putting the holder's own interests ahead of anyone else's then the court's scrutiny makes no difference." Then it – "If the purpose of the protector's powers in this case allows the protector to act in his own selfish interest then it cannot be a misuse of such a power to exercise it for example by vetoing distributions to any other of the discretionary beneficiaries or removing a trustee who does not act in the protector's wishes."

Then if we can go forward to 438.

WILLIAMS J:

Paragraph number again, sorry?

MR WATTS KC:

438. It's 874 of the appellant's authorities, page 874 to 875. "The situation in this case remind me of a similar phenomenon in patent law" – Mr Justice Birss is a patent lawyer, of course – "known as the Angora cat problem first identified by Professor Franzosi, an eminent academic expert in the field." And if we can go down to the quote italicised: "…likens a patentee to an Angora cat. When validity is challenged, the patentee says his patent is very small: the cat with its fur smoothed down, cuddly and sleepy. But when the patentee goes on the attack, the fur bristles, the cat is twice the size with teeth bared and eyes ablaze." He says that's what's going on with these – he says, oh, we've got professionals in this case involved and so on, but at the end of

the day, they are vesting in one person the ability on literal wording of the powers and with a predominant, we would submit, predominant intent of avoiding that legislation. They've allowed the party with those powers to control what happens and to give it all to himself.

KÓS J:

Well, only if there's a conspiracy with equity putting it into full retreat so it doesn't supervise. You are winding back equitable intervention here a long way.

MR WATTS KC:

Well, no more than I think took place in *Clayton v Clayton*, with respect, your Honour. That was – all of those things could have been done in *Clayton* and the Court could have said, oh, well, you know, you can't give it all to yourself because it's set the children are beneficiaries, the courts put controls, implied controls on all this, which is the very argument that's being made here in this case, that the children can control this. Well, *Clayton* has already said. In my respectful view, I think *Clayton* has got traditional equity right, that New Zealand judges have tended to interpose obligations that were not truly intended and are not part of traditional equity principle. And in the process, they're allowing parties to achieve their end goal of avoiding Property (Relationships) Act and insolvency law.

So that's all we have time for from *Pugachev*, but it's a very important case in our submission in terms of the facts, closeness to the facts, a separate trustee but a power of appointment and removal of that trustee. He was the settlor of the assets but as I've already showed, it's not necessary for a general power of appointment that the holder of the power be the source of the assets.

In the interest of time, we'll not go through all the cases I've referred to on general powers, but they do show, as I said – *Re Phillips*, *Re Dilke* [1905] 1 Ch 529, *Triffitt's ST* [1958] Ch 852. *Phillips, Dilke* and *Triffitt*, a trio of cases that we cite, are all cases where the holder of the general power needed the

co-operation of the trustees, but the courts still held that the predominant intention was that one beneficiary had a general power of appointment.

In particular, it's well worth reading the *Phillips* and the *Dilke* judgments. *Tiffitt* is also good but the dicta in both are clear. There's a very good dictum, for instance, in *Phillips* from Mr Justice Maugham which I just lost the page to, but if I can find it… Where he rejects the argument that there were fiduciary obligations of – oh, page 354.

WINKELMANN CJ:

Of which case, sorry?

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MR WATTS KC:

Of *Phillips*. It's on the screen now. "Was there imposed on them a duty towards the persons entitled in default… Could the persons entitled in default of appointment have brought an action for breach of trust against the trustees who gave their consent to the exercise of the power," so this is the other trustees who just rubberstamped him taking all the assets defeating a creditor in the process, and the Court would not allow the creditor to be defeated. "Could the persons entitled in default… have brought an action for breach of trust against the trustees who gave their consent to the exercise of the power, if they could establish that the trustees had not exercised any discretion in the matter as regards the persons who were to benefit… In my opinion the answer to this question must be in the negative… My view is that the trustees in such a case have, it is true, a power of veto to the exercise of a power, but they are not persons in whom the description… is reposed; they have no duty to select, and they are entitled, if they think fit, to assent to the exercise of the power by the donee of it, leaving to him the free exercise of the power which has been reposed in him." There is similar dicta in the *Dilke* case which is next discussed.

So obviously I'm making a lot of these cases, but I think it's necessary to do so because they bring a perspective focused on construction.

WINKELMANN CJ:

Can I just ask in the *Phillips* and *Dilke* cases, were those powers sitting within a trust or were they part –

MR WATTS KC:

Sitting within a trust I think is correct your Honour.

WINKELMANN CJ:

So it's quite, it's akin to this situation.

MR WATTS KC:

Yes.

WINKELMANN CJ:

Because it looks, just trying to… I'm not sure if you can, if you know the facts.

MR WATTS KC:

Yes, I'm just looking in my written notes as to where I've got *Phillips*.

WINKELMANN CJ:

It's authority 72.

MR WATTS KC:

It's in the submissions. The facts are in the submissions actually. We made submissions.

WINKELMANN CJ:

It's a complicated set of facts. It's not conventional.

MR WATTS KC:

No.

WINKELMANN CJ:

It's not a conventional. They had committed to pay into the trust.

MR WATTS KC:

Oh it's complicated. I can explain that, that bit may help if I – so there, if when reads the judgment there's a, you've got to be careful there were two – the creditor was the beneficiary of an earlier trust, a settlement under, I think a marriage settlement or some other settlement, so the creditor was also the person claiming under a trust that the same family had set up some, about four years earlier than the one that's been construed, and that earlier trust provided for the payment of a sum on certain events, which I can't recall, and they never honoured that trust, and they didn't carry out the trust, and so the beneficiary of the first trust is the actual creditor who's suing the alleged holder of the general power under the second trust saying, well, under your second trust you have a general power of appointment. That means that you've got access to the trust assets and the Court should order access to be given to those assets so that our debt obligation, or right under that first trust, is honoured. So there were two trusts and when one read – if you start reading the opening of that case, they do rather shade one into another. It's not – but that I think is the accurate description.

WINKELMANN CJ:

Yes, but the part you took us to appeared to be the trustees of this trust were somehow meant to supervise the exercise of a power.

MR WATTS KC:

Well they were – they needed their consent, they weren't supposed to supervise what – who he gave it to. He was entitled to give it all to himself, and that was why the creditor can get access. If it was a special power of appointment that was conceded, then the creditor would not have access.

Then I, in the written submissions, cover a series of more modern cases. The Australian cases on the power to appoint and remove trustees not always being fiduciary, and actually in a family context I think one could say that the weight of modern Australian authority is that there's a barely a presumption of any fiduciary obligation on the holder of a power to appoint and remove fiduciaries.

The *Montevento* case in the High Court of Australia is very striking because there there was an express prohibition on the appointer, who was one of the beneficiaries, from appointing themselves as a trustee, and yet they appointed a company which they wholly controlled as the trustee, and the High Court of Australia accepted that that was a lawful use of that power of appointment, and it's interesting how the High Court of Australia got to that conclusion because if one looked at it without knowing anything of the background, one might assumed, well, this was a case where plainly the settlor didn't want the main beneficiary having full, you know, uncontrolled access. That he had to be an independent trustee, just as in this case, but the Court in the court below, Justice Buss in the Western Australian Court of Appeal, said that looking at the background that was there for a tax reason because you could, you apparently, I don't know whether it worked, but apparently there was a view that if, you had to make sure that there was an independent trustee to avoid state duty and stamp duty and death duties, and the Court in the – Justice Buss on appeal – Justice of Appeal Buss in the Western Australian Court of Appeal said that well that was the purpose. There wasn't a purpose of protecting the other beneficiaries, named beneficiaries.

WINKELMANN CJ:

I must say I have a great deal of difficulty with that reasoning. Since they're not an independent trustee, how could it possibly avoid those…

MR WATTS KC:

Well I agree. I agree. I don't know your Honour how it works as to whether it was, we're not told that actually that it worked. We are told that that was the intention though, and in those circumstances the High Court of Australia says, well, since it wasn't part of the intention to protect the other beneficiaries, then there's nothing wrong with appointing a company that he controls. You will have already, I assume, seen that case in the legal appeal and will be very familiar with it.

Can I make one point that isn't made in the written submissions, a very small point in some ways, but it is something that I missed in the appellant's written submissions. The power of appointment that the respondent has in clause 15 of the current trust deed, I don't know whether we need clause 15, but that power devolves to the respondent's successors and I mean it's arguable that that shows that it was very much a personal power. It went with his immediate successor. It would be more normal with a fiduciary replacement power to rest the power with the trustees, to choose who's going to replace one of their number, or a professional person as protector.

So that's all I want to say on this point on the construction of the trust deed and whether this case is distinguishable from *Clayton*. There's more detail, of course, in the written submissions.

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The next part of the written submissions I developed a submission that one can't have a trust without fiduciary obligations, which has drawn, not surprisingly, a degree of hostility. I don't – in my view Lord Millett does take that view, and I think he is correct, and – I mean what we don't say is, we of course don't say is the trustees' suggestion one placed that fiduciary obligations are not part of a trust, they normally accompany a trust, but Lord Millett is – he's clear in that article that it doesn't come – fiduciary obligations come separately from the trust in that one can have a trust without fiduciary obligations. Can you bring up the passage? I will look at it briefly. I'm going to truncate this, but it doesn't seem to me absolutely crucial to the appellant's case. In our view, there is a trust, there are – it's possible to say there are fiduciary obligations of a weak sort in Justice Miller's approach. There's certainly fiduciary obligations on the non-beneficiary trustees if there's appointed. They're currently two non-beneficiary trustees, they have fiduciary obligations to the respondent and again, as I say, if the respondent were to die it's –

WILLIAMS J:

Just stop just a minute. What is that?

WINKELMANN CJ:

It's just shifting the – it didn't seem that sunny to me but –

WILLIAMS J:

Well the heavens have closed you on you, Mr Watts.

KÓS J:

Yes. No, I was about to be blinded. It's the left wing that gets it.

WINKELMANN CJ:

Go ahead, Mr Watts.

WILLIAMS J:

Sorry, Mr Watts, carry on.

MR WATTS KC:

So the passage is: "An express trustee is the paradigm example of the fiduciary."

WINKELMANN CJ:

What – oh, right. Just what case is this, sorry?

MR WATTS KC:

Oh, this isn't a case, this is Lord Millett extrajudicially in the *Law Quarterly Review*. This is 4.20 of the trustee's submissions. "An express trustee is the paradigm example of the fiduciary. As Maitland explained, the relationship between the trustee and the settlor is one of trust and confidence, but the trustee owes no fiduciary duties to the settlor. There is no such relationship between the trustee and the beneficiaries." I think he must mean fiduciary per se, but I'm not quite sure of the meaning of that sentence. "The fiduciary duties which an express trustee owes to the beneficiaries, therefore, are based, not on the relationship" – that's of trustee and beneficiary – "but on his voluntary undertaking to the settlor to manage the trust property for their benefit and not his own. To derive his fiduciary character from the trust, that

is to say, from the separation of the legal estate and the beneficial interests, is simply nonsense. They both derive from the same source, that is to say the obligations which he undertook when he voluntarily accepted the office of trustee." So he separates out fiduciary obligations from a trust which effectively is an undertaking to comply with the terms of the trust deed.

WINKELMANN CJ:

That sentence: "There is no such relationship between the trustee and the beneficiaries," is it – his point is that there isn't the mutuality between them that there is between the trustee and the settlor who accepts the trust on the terms the settlor is asking?

MR WATTS KC:

I think so.

WINKELMANN CJ:

Can you explain what you say that this means again? I'm sorry, I'm finding it hard to –

MR WATTS KC:

Well the point of this section was to say to the Court that I don't think – I mean well I'm not making any rigid submission that there are – there's no fiduciary obligations of any sort in the present case, I think there arguably isn't, but the Court needn't feel that there isn't a trust, that if they were to say that the respondent had a general power of appointment, it has access to the trust, trust instruments, then – trust assets, that there wasn't a trust and, you know, so the – it's –

WINKELMANN CJ:

Isn't it saying no more than it's not simply the splitting of the legal and the beneficial estate, it's the fact that the trustee has undertaken to hold the beneficial estate for these others, that is what is a source of the fiduciary obligation?

MR WATTS KC:

Yes, but it needn't – that undertaking needn't be present to do – to have fiduciary obligations and the bare trust, it has been said, there's mixed views on it and the academics as to whether it carries fiduciary obligations.

WINKELMANN CJ:

Yes, and you make that point and it's said against you that's not right, that even a bare trustee has fiduciary obligations?

MR WATTS KC:

Not necessarily.

KÓS J:

Some would say it's the most preeminent example of fiduciary obligation, there is no discretion. There is only one thing to do which is to hold the property and account for it to the beneficiary.

MR WATTS KC:

But I would reply to that, your Honour, that actually that's just complying with the terms of the trust and you don't need fiduciary obligations on terms of that, they've got nothing to do, they just hand it over and that's the sole term of the trust.

KÓS J:

In any event, as I think I suggested before, the real question is are there lawful constraints? If there are, then there may not be GPA, and if there aren't, your point has more force. But you accept there are constraints of some sort?

MR WATTS KC:

Yes. So that part is really saying the idea that this would mean – that *Clayton* means there's no trust, I think, as I say, even in *Clayton v Clayton* where he was the sole trustee, it wouldn't – a sole trustee, it wouldn't mean there wasn't a trust and if he had died without a will, then it would continue on, and that's true of most of the cases, English cases I've been relying on but I don't – I'm

not going to say that the Court should adopt Lord Millett's view, it's undoubtedly one that is – I mean he's the most notable advocate of it.

WINKELMANN CJ:

So is it possible simply to construct a contractual arrangement so that the – say person A holds the legal estate and is strictly constrained by the terms of the contract which creates this legal relationship to deal with the beneficial estate in different ways. Are there such commercial instruments around that attempt to do that? In the old debenture trust deed, but that's always seen as imposing a fiduciary obligation on the trustee.

MR WATTS KC:

I think it's quite common for contract and trust to go together and it will be a question of – I mean interesting legal points could arise where one might conclude that a certain obligation was only contractual and not part of the trust obligations. If that's relevant to your Honour's thinking, I'm not sure.

KÓS J:

I mean very well-structured joint venture agreements are not necessarily fiduciary, the primary obligation's contractual, some of these syndication agreements.

MR WATTS KC:

Yes, your Honour.

KÓS J:

I mean trust needs to come in as a kind of makeweight, or not so much a makeweight but more where there's been an omission or a perceived omission of the contractual form.

MR WATTS KC:

I don't disagree with that.

KÓS J:

Hmm?

MR WATTS KC:

I don't disagree with that, your Honour.

KÓS J:

No, no.

MR WATTS KC:

The respondents and trustees cite against this view the *Children's Investments v A-G* [2020] UKSC 33 case in the UK Supreme Court, but that's got a dictum that assumes fiduciary obligations in every trust from Lady Arden. It's a most peculiar case that since it seems that none of the other judges actually agreed with the reasoning in Lady Arden's judgment, only the result, but in any event the Judge didn't have in mind anything like, in my submission, the case of the present sort. *Children's Investments* case was a complex case but it certainly wasn't a highly-discretionary family trust of the present sort. The same goes for the dictum cited from *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 which is a joint venture-type case.

I think we've already – the next part of the written submissions discuss what – where the lines might be drawn but I think I've indicated enough that – where that might be that there needs to be trustees. You cannot be removed by a beneficiary or the main beneficiary at least. I'm not suggesting that you should draw the line and say, well, they can't be relatives or family members, I think that would be a step too far. But we don't – we are confident on this fact pattern that there's too much control being vested in the respondent for the Court to say, well, there was a dynastic background and, you know, we're going to give effect to that, when it's clear the predominant effect was – intent was to defeat spouses in our submission and they haven't achieved it in the wording that – in powers that have been conferred.

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That then brings me to the next part which is, if we are right, there is a general power here, how does that work on the facts of the present dispute, and on this we do adopt the reasoning and conclusions of Justice Miller in the Court of Appeal. Those conclusions in relation to the assets now at stake are in turn largely the same as those of Judge Grace in the Family Court.

KÓS J:

So this remedy would go well beyond what you might achieve in a constructive trust argument, in terms of her, a *Lankow v Rose* [1995] 1 NZLR 277 (CA) type argument, contributions to the trust asset.

MR WATTS KC:

Well, your Honour, I wouldn't want – haven't prepared an answer to that. I'm not sure how much – there could well be a constructive trust, *Lankow v Rose* approach but our submission is one shouldn't have to use that when the Act has a scheme and you wouldn't force somebody back onto *Lankow v Rose* when you don't have to.

KÓS J:

But it's plainly not all or nothing. I mean it could've been, a remedy could have been obtained on that basis given the arguments about contribution. You just haven't run the case that way, and that's fine.

MR WATTS KC:

Yes, your Honour, that's right. It's not a case of there being absolutely no remedy but the question is, is this how the Act was intended to work, and we submit not, that you cannot have your cake and eat it and hope to avoid the Property (Relationships) Act.

WINKELMANN CJ:

Can I take you back to your 74, paragraph 74 of your written submissions.

MR WATTS KC:

Yes.

WINKELMANN CJ:

Because I think you've just dealt with your argument about what a hard line, bright line might be to avoid the application of the PRA, and you said: "A softer line would exclude from the PRA trust deeds that expressly impose fiduciary obligations or state that the powers are 'trust powers'."

MR WATTS KC:

Yes your Honour. I think I was too soft there.

WINKELMANN CJ:

I thought you might be stepping back from that, that's why I wanted to raise it.

MR WATTS KC:

Thank you. Yes, I think I was.

WILLIAMS J:

Your argument is not the absence of fiduciary obligations, because I think you did in discussions with Justice Glazebrook accept there could be fiduciary obligations, but they have to be relevant ones capable of holding a cuddly cat to its cuddliness and stopping it from being a killer.

MR WATTS KC:

Yes your Honour.

WILLIAMS J:

Where you draw that line in terms of accountability is tricky, I would have thought. I'd quite like some help on that. Obviously you say a duty to survey the class of beneficiaries doesn't get you there if effectively you can pick yourself without any constraint other than the mere duty to look, almost a public law duty, so can you give me some granular detail about where you would draw the line?

MR WATTS KC:

Well our submission has been that there needs to be somebody has to be a party to a decision, who cannot be controlled by a power of removal or appointment.

GLAZEBROOK J:

Sorry, can you just repeat that?

MR WATTS KC:

There needs to be somebody who's part of the decision-making process. You cannot be removed and replaced.

GLAZEBROOK J:

All right. Thank you.

WILLIAMS J:

And that's the key?

MR WATTS KC:

That's the key.

WILLIAMS J:

For this case, or more generally?

MR WATTS KC:

More generally I think your Honour.

GLAZEBROOK J:

And that's removed by the beneficiary because…

MR WATTS KC:

Yes.

GLAZEBROOK J:

Yes, well although the person who holds the – would, the person you say would hold the property interest I suppose.

KÓS J:

Well it could be a contingent beneficiary. It could be, they could have a power to appoint further beneficiaries and then appoint to themselves.

GLAZEBROOK J:

Yes, yes.

WINKELMANN CJ:

Would you extend that principle that far? That would be a cunning plan.

MR WATTS KC:

Yes. Well, it is difficult to go much beyond where I have about having control over who the trustees are.

WINKELMANN CJ:

Yes, so what you're really saying is –

WILLIAMS J:

But the answer to that is yes, then, isn't it? As long as you can trace control back to the source, it's fatal. For PRA purposes.

MR WATTS KC:

Yes, the source –

WILLIAMS J:

No matter how many steps you take to get there.

WINKELMANN CJ:

But if the trustee –

GLAZEBROOK J:

Or unconstrained power, isn't it.

WINKELMANN CJ:

If the appointor was, they would be constrained because if they were alien to the purpose of the settlement of the trust, then they wouldn't be able to appointment themselves as a beneficiary, even if they were a trustee, because it would be outside, it would not be…

MR WATTS KC:
Outside the terms of the trust.

WINKELMANN CJ:
So you would, yes.

MR WATTS KC:
In any event, whatever it is it's far too late to say that fiduciary law can do this, because that's inconsistent with *Clayton*.

WINKELMANN CJ:
So your fundamental proposition is that when the individual A is a beneficiary of a trust, if he or she also has broad unfettered – an unfettered discretion as to who they appoint or remove as a trustee, that properly can be regarded – that power of appointment can be regarded as part of their assets for the purpose of the PRA?

MR WATTS KC:
Yes your Honour.

KÓS J:
The real argument is over unconstrained or unfettered. That's really the question. I mean you can take these steps with the questions. You can take these steps in theory. The question is, could you get away with them?

MR WATTS KC:
(Nods)

WINKELMANN CJ:

What does it mean unconstrained or unfettered, because it sounds like it's unconstrained or unfettered. So it suggests is there case law on that in the context of the trustee allegedly having, or of an individual in a trust context allegedly having unconstrained or unfettered powers? Is a fiduciary duty nevertheless read contextually around it?

MR WATTS KC:

Well, it's, the traditional view is that you only need good faith. The *Gisborne v Gisborne* view. And compliance with, I mean obviously compliance – you can't do something that the trustee doesn't authorise, but if it's within the scope of what is authorised, then the *Gisborne v Gisborne* approach is good faith. But it, and the answer of Justice Birss, is it bad faith to give it to yourself when that was contemplated, answer, no. Whereas the approach of – they didn't rule on it in the Court of Appeal about "absolute and unconstrained", but they indicated that they didn't think it meant much. With respect, I don't think that is the –

KÓS J:

Sorry?

MR WATTS KC:

They indicated that the words "absolute and unconstrained" didn't add that much.

WINKELMANN CJ:

The majority did.

MR WATTS KC:

The majority did.

KÓS J:

They did but they had greater faith in equity than you do, too, to intervene and control.

MR WATTS KC:

Yes.

KÓS J:

Justice Miller didn't.

MR WATTS KC:

No and that faith wasn't shown in the Supreme Court in *Clayton*.

WINKELMANN CJ:

Unconstrained on its face does sound to disapply fiduciary duties that might otherwise constrain the exercise of the power. Do you say that?

GLAZEBROOK J:

Is this, the submission rather just as in the case law, that if that happened nobody could come along and say, you weren't allowed to do that.

MR WATTS KC:

Yes.

GLAZEBROOK J:

Because there would be nothing to review because you were allowed to do that because the trust deed said so.

MR WATTS KC:

Yes.

GLAZEBROOK J:

Ie you were able to appoint it to yourself.

MR WATTS KC:

That's basically Justice –

GLAZEBROOK J:

And the only possible constraint may be that you'd have to consider whether – you'd have to at least survey the beneficiaries possibly before doing so or – but having done that no further constraint.

MR WATTS KC:

That is essentially the argument of Justice Birss, or the way Justice Birss puts it in *Pugachev*.

WILLIAMS J:

And the point is whatever equity could do, it wouldn't be enough. It couldn't be enough. Equity doesn't have the armaments in this context because a requirement to review the beneficiaries before being selfish is meaningless in this context. Isn't that what you're arguing?

MR WATTS KC:

Yes, your Honour. Yes.

KÓS J:

So we'll need to hear from the respondents and the trustees on what those elements are.

GLAZEBROOK J:

Although you do concede that a trust deed could put – could contain provisions that would constrain that and would mean that a beneficiary could say that you're outside the terms of the trust deed when you've done this?

MR WATTS KC:

I'm nervous about – that's why it was an option but it – is that enough, that's the question, because it was – it would've been very easy in *Clayton* to have done that and I don't think – in other words, I put weight on the "absolute and uncontrolled" but I'm not sure that – I think it should not be ignored, that's the submission. It's really a big – it's a really important sign but I don't think removing it is going to be enough, either, to distinguish *Clayton* if you've still got both the power –

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GLAZEBROOK J:
Oh no, I wasn't suggesting that. I was just saying generally one can set up a trust with constrained powers.

MR WATTS KC:
Oh, yes.

GLAZEBROOK J:
In the trust deed itself. Or else –

WILLIAMS J:
Doesn't that mean that the removal of "absolute and unconstrained" without more simply provides you with the procedural safeguard, to think in public law terms, without any substantive protection?

MR WATTS KC:
Yes.

WILLIAMS J:
On the appointment power.

MR WATTS KC:
If you've got – you say if –

WILLIAMS J:
That's not enough.

MR WATTS KC:
Yes, your Honour. I agree. Also submit.

So that brings me to the PRA and section 9A submissions. So it is accepted, as it was by – well, it was held by Justice Miller in his dissenting judgment, but the fact that the trust powers attract the PRA does not mean that the powers

are not separate property rather than relationship property. That in itself suggests, it's submitted, that the respondent suffers no serious injustice simply from the finding that the family trust is caught by the legislation. It's roughly where that statement of Mr McIntyre thought they might be actually.

But as Judge Grace and Mr Justice Miller – Justice Miller concluded the history of the parties' domestic relationship supports an argument that the increase in value of the farm between the beginning and the end of the relationship is subject to section 9A of the Property (Relationships) Act, a conclusion which we submit is supported by the reasoning of this Court in *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1. The relevant reasoning and the evidence that we rely on is set out at paragraphs 83 and 84 of the written submissions. Obviously, one might have hoped for more detailed fact-finding if in the first instance there were more elaborated judgment, but it is where we are and it's submitted that the Court would not be right to re-open that evidence.

But that still leaves a number of arguments that the respondents have made that are very important and crucial, really, to our case that we contest them. These arguments generally stem from that point that the relationship is not a financial success for the trust or for the parties.

There are several responses we wish to make to that, your Honours. First, despite the – let's park for a moment the idea that the approach has to be global, you have to measure it when you look at a general power, the value of all the assets over which the general power attached at the beginning and then compare it with the end. That's the more important point and I'm going to come to that. But assuming one can look at individual assets, despite the businesses run by the parties in this relationship ultimately losing money, it is still possible and it was found to be the case in the first instance that the appellant made financial and non-financial contributions during the relationship that directly and indirectly helped to increase the value of the land legally owned by the trustees, and it's perfectly possible for the business as a whole to run at a loss but underlying capital assets to be improved by the

steps taken, and that, it is submitted, is implicit I think in the reasoning and at first instance in this case.

To take Justice Kós' point about *Lankow v Rose* trust, I draw your Honours' attention to the *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397 case in the Court of Appeal in 2016. *Hawke's Bay Trustee v Judd*, where *Lankow v Rose* trust was applied. In this case, the asset, main asset and contention was an orchard business. The asset had gone down in value actually whereas ours didn't go down – the land didn't go down in value. But they still granted some award to the wife in that case against the trustees of that orchard. It was a relationship of six and a half years and she had helped look after the children from the husband's first marriage and made other contributions and that was recognised even though the land had gone down in value. Implicitly, they thought the land might've gone down even more in value had she not been there to help stem the problems. So the fact that even if land went back in value, you might still say, if the facts support it, that if you stop land going back in value more than it otherwise would, that that then can be a contribution in relation to that particular asset.

Rose v Rose is a less –

KÓS J:
That decision was a pure constructive trust decision, not an RPA case.

MR WATTS KC:
No, that's right, your Honour. But I think the reasoning is applicable under the PRA.

Rose v Rose itself is another example involving a Marlborough vineyard where the property hadn't gone up in value at the date the relationship had broken up but then apparently soared or went up quite a lot subsequently, and the Court again concluded that the evidence was that the work and other activities during the relationship with the claimant, with the plaintiff justified an award under section 9A.

So those are just points about, assuming we can ask for the individual farm in this case, the position of it to be considered discretely from any other assets that the Trust might have owned.

KÓS J:
What about the homestead element here? Which is part of the farm.

MR WATTS KC:
Yes. Justice Miller, I think I'm right in saying, took the view that it was difficult when the trustees owned the asset to directly apply the homestead provisions but considered that you could take them into account when valuing the whole farm as part of an element of it. I think that's accurate.

That brings me to this global valuation point. So it was paragraph 108 in particular of the respondent's submissions and following, that the only way to value rights where the rights are a general power under the Property (Relationships) Act are the net value of all the assets of the trust. Our submission is that that is not correct. It assumes that the global approach is the one and only way to approach the valuation of a general power of appointment. We accept that that can be a valid approach. We don't say it's never the valid, the right approach, but it's only one, and for reasons I'll hopefully explain.

Then we have a problem with the way in which the parties have applied this global approach which are factual issues and I intend briefly to deal with those now if I may. The relevant – I don't think we need at this stage to go to the actual schedule to their submissions. The essence of the –

WINKELMANN CJ:
Can I just ask why are we not dealing with the first point? That this assumes the global approach is the –

MR WATTS KC:

Oh, because I want to deal with the factual problems before I deal with it. I mean this might be the –

WINKELMANN CJ:

Okay, all right.

MR WATTS KC:

I'm happy to do it the other way around.

WINKELMANN CJ:

No, that's all right. We'll deal with the factual problems.

KÓS J:

Just take me to where this is in the written submissions?

MR WATTS KC:

Paragraph 16 of the respondent's submissions in terms of the starting point. They have a schedule as well, but at paragraph 16, they say that the figure of trust assets at the start of the relationship is $1,652,992. Have I got the right –paragraph 16? I'll just double-check.

KÓS J:

Yes, that's right.

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MR WATTS KC:

And then if you go all the way to 115 and compare it to 1,572,758 and the key point really is – there are two figures to be added, I'm just trying to find where – roughly adding up to 330,000 being indebtedness of the respondent to the old trust which was treated as an asset. Sorry, I didn't make a note on my submissions. Oh, yes, paragraph 16.

KÓS J:

16(b).

MR WATTS KC:

Of the respondent's submissions. So they say the global figure went down from 1.652 to 1.572 but to get there they include the debt owed by Marcus to the original trust that was taken over, assigned presumably to the current trust, plus a current account debt that was also assigned, as I understand it, and you get then a figure of roughly 333,000/34,000, and they include that as part of the initial valuation, but in our submission that's plainly, plainly wrong. It actually more than explains the entire difference between the two valuations, but it was a debt owed by Marcus and if you're valuing the general power you don't include as an asset money that the person who holds the power owes to the asset you're valuing, that is a set-off, and in my view this has to be treated just as a point of set-off. You can't include in the global value of the Pinney Trust assets a debt that he himself owes when you're valuing it for the purposes of what's the value in his hands. It's worse than that actually because that debt was forgiven by the trustees of the current Trust it seems. So he's never had to pay it, it was a pre-relationship debt, and the forgiveness was of no benefit to the appellant. She didn't see any cash out of the forgiveness of course, it was just a book entry.

So, in our submission, if that is necessary to work out the global values, it more than counts for the difference, downward difference and, in our submission, its lack of merit is only matched by its lack of generosity.

The same could be said about the point made at the respondent's submissions at paragraphs 12 and 126. So 12 where there is effectively a complaint that: "Clark J also determined that Marcus was not entitled to a contribution from Raewyn to offset his overdrawn current account with the Company," so this is 128,962, they say, should be divided between them. Justice Clark wasn't prepared to do that and we submit that she was quite right not to do that.

First, the parties, including the appellant, appear to have worked quite hard for the company in various ways but without salary or wages and that might explain why there was a current account debt. I mean that's of course not

unheard of way of approaching things and in any arm's length situation they would've been entitled to wages. So the company advances are not, in our view, of much weight.

Secondly, this debt was also capable of being forgiven by the trustees. It hasn't, as far as I know yet, been forgiven, but the respondent is wanting this Court to treat the appellant as having to pay her half while he hasn't yet paid his and as far as I know it's not earning any interest.

So Justice Clark, in our submission, was quite right to ignore these ways of trying to bring in indebtedness as a method of reducing what the global values are.

There's a very – actually I won't – perhaps Justice Clark's judgment, it might be useful at paragraph 173 of her judgment which is 101.0044, page 93. So Justice Clark said: "The debt in question primarily arises from a debit in the shareholders' current account, of a company of which the MRWT owns 98 per cent and of which Mr Pinney is sole director. From my review of the evidence, it appears there was no clear division between drawings for personal use or business purposes. In particular, given Mr Pinney's relationship to the company, it may well be that the book value of the debt does not reflect reality. Further, and as I observed above…it appears [the Trust] may have forgiven Mr Pinney's former debts" – which is the $300,000 I've been talking about – "and it may do so again in future. Finally, an attempt to divide the debt requires a confidence about the figures which the evidence does not engender."

That then brings me to the question of principle. There's authority for the principle that when valuing a general power of appointment, one has to value all the assets covered by the general power and compare it with the period of the relationship across the period of the relationship, and the authority cited for that is *Clayton* and there is a dictum that could be read as that might be an appropriate approach, but there's, with respect, nothing in *Clayton* that says it's the only approach. There was no – there was only one asset at issue or

principal asset at issue in *Clayton*. There weren't any loss-making other assets that were discussed. So the point about global was – specific asset valuations was not at issue.

Which brings me to the point of principle and on this, I rely, we rely quite heavily on the *Tasarruf* case, Lord Collins' judgment in the *Tasarruf* case, and it's consistent with Lord Collins' reasoning in that case that if a party has a general power of appointment, then it's not in every case, it might depend on the terms of the general power, but they would be entitled to arrange for distribution of individual assets including in specie.

But Justice Collins does say that sometimes it can turn on the construction of the power and there are a number of ways there might be a different meaning to a general power, so sometimes, it's a bit like the hierarchy of equitable interest, a legal and equitable interest. So at the top is legal title. Below that is equitable title. Below that is the floating charge. Below that is the mere equity, and at the bottom is a purely personal obligation. So those are five different types of proprietary interests that equity recognises, and although Justice Collins – Lord Collins doesn't put it in those terms, the point he makes that it turns on construction is, sometimes as a matter of a construction, the general power mightn't be intended to give any proprietary interest until exercised, but sometimes even before exercise, it could be treated as having the equivalent of effectively of some sort of floating interest, and I think that that is the analysis to apply, and if you've got – unless it says there's to be no interest in individual assets, it's – that a general power would in most cases and in this case be the equivalent of a floating charge, and that can then be crystallised and the holder of it can ask for individual assets in specie. So there's nothing wrong with – unless there's some particular construction that says they're not to have that, then the general power holder saying, well, I only want this trust asset, not all of them, and the trustees would have a duty to hand that particular asset over, in our submission, to the holder of the power.

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So the passages I'm relying on – do your Honours want to see them? I'll take you to them there. At paragraphs 41 to 43, and then there's a – he discusses cases that he –

WINKELMANN CJ:

Perhaps we should look at them.

MR WATTS KC:

Paragraphs 41 and 43. So paragraph 41's the start: "[Quite] apart from express legislative intervention general powers have been regarded as giving rise to property rights." There's a reference to a dictum of Lord Hoffmann, Lord Justice Hoffmann as he then was, referring to a view that they don't give any proprietary rights and that's the whole point of this case is to say that that view is far too narrow, that often general powers will give property rights. Then in paragraph 42 from *Triffitt's* case, which is the case we rely on, one of the cases we rely on, "where there is a completely general power in its widest sense, that is tantamount to ownership", and "the fundamental distinction between the concepts of power and property has not been preserved in all contexts and for all purposes". So there was some cases and one unfortunately called *In re Watts* [1931] 2 Ch 302, 305 where as a matter of construction, there was not said to be a proprietary interest, but that "a donee of a truly general power can appoint the subject matter of the power to himself. He therefore has an 'absolute disposing power' over the property." Doesn't say individual items there, but that is perhaps where we're extrapolating.

If we go down –

KÓS J:

If it's a valuation exercise, don't we need to take the best and highest value? Given the power hasn't been exercised, so it's a contingent prospect. Don't we need to say, well, at the date of the ending of the relationship, if the donee of the power were to act in complete self-interest, which bits would he appoint to himself to come away with the most? Isn't that as simple as it is? I mean,

he would leave behind negative aspects, debts, reverse debts, but would take away the best part of the booty, highest and best value.

MR WATTS KC:

Yes, your Honour, except I would reserve the point that they could decide just to take any that they wanted and leave the others there.

KÓS J:

Sure. Well, that –

WINKELMANN CJ:

Well that's just what Justice Kós said, I think.

MR WATTS KC:

Yes, they don't have to take the whole – all the best bits.

KÓS J:

No, that's right. That would – the question is what's the highest value of the power if exercised in self-interest. So you would leave behind negative assets, take any positive assets.

MR WATTS KC:

Yes.

WINKELMANN CJ:

Well, could they do that?

MR WATTS KC:

Well, in our submission, they can, yes.

KÓS J:

Must be your argument.

WINKELMANN CJ:

I'm not sure they can.

GLAZEBROOK J:

But as I – I think I'm missing something here, because if it's a general power of appointment and you can appoint the whole thing, what's it matter whether it's a difference in value? I mean, wouldn't you say well, we'll treat that as being his property, then we'll work out, because it's a Property (Relationships) Act issue, whether it's separate or… So if he did appoint it all to himself, would it be separate property or would it be relationship property?

MR WATTS KC:

It would be separate property except to the extent that the value had gone up across the relationship. That's why we need to use section 9A. So the increase in value is a key issue.

WINKELMANN CJ:

I'm just wondering whether he could –

GLAZEBROOK J:

Well, except that you say that's not what the cases say because they do give a part on – for contribution to the asset, whether there's been an increase in value or not, didn't you? That's what you said in the first place.

MR WATTS KC:

Oh, yes, you'd need to show I think though that you had – there had been some evidence that you had stopped the decline.

GLAZEBROOK J:

Well, if – is that what those cases are based on or is it just based on the fact that you have contributed to the assets by working on them? So you get a portion of them because you have worked on them, not because you have contributed to an increase in value or stopped a decline.

MR WATTS KC:

Well, that would be convenient, but I'm not absolutely sure your Honour that that's what *Rose v Rose* permits.

ELLEN FRANCE J:

That's what I was going to say.

WILLIAMS J:

But those are constructive trust cases though.

ELLEN FRANCE J:

That was going to be my question, as to whether that's consistent with *Rose.*

MR WATTS KC:

I think you'd have to show either that there's been an increase in value as a result of the contribution or a lesser decline in value because of the contribution under *Rose v Rose*. That was my understanding of it, but I can see that in section 9**,** the Property (Relationships) Act's not my complete flush as it were.

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GLAZEBROOK J:

Well you, in any event, say there was an increase in value?

MR WATTS KC:

Pardon?

GLAZEBROOK J:

You in any event say there was an increase in value?

MR WATTS KC:

Oh, yes. Yes, there was, and once one cuts out this idea that one should factor in trust debts that predated the relationship is removed, and 59–

GLAZEBROOK J:

Well and you say you look at it in terms of the increase in value of the particular asset, not of the trust property generally, is that the –

MR WATTS KC:

You can do either and in my view it's – unless there are good reasons to require the global approach, you can do it on an individual assets approach. I mean after all, if this hadn't been in the Trust and there'd been separate items of gifted property direct to a relationship party, a series of gifts direct, you wouldn't – and the claiming partner had worked on one of them, you would look at each individually, you wouldn't say oh, well, this one went down in value, unless there was a fault.

GLAZEBROOK J:

Well you wouldn't take a global approach?

MR WATTS KC:

No.

GLAZEBROOK J:

Especially when some of it might be totally separate property in the first place so it wouldn't be fair to take a global approach.

MR WATTS KC:

So – well I think your Honours appear to me to have actually grasped the point.

WINKELMANN CJ:

Grasped the point. Yes, we have.

MR WATTS KC:

So I think that only leaves in the couple of minutes left very brief remarks about remedy, the last part of the submissions, and after lunch Mr Hikaka will address you on tikanga.

WINKELMANN CJ:

Well can you do this in the last couple of minutes?

MR WATTS KC:

Yes, I can I think, unless –

WINKELMANN CJ:

Unless we ask you questions.

MR WATTS KC:

Well we basically just argue – asking for the Court to endorse Justice Miller's judgment, except to say that it doesn't have to go back –

WINKELMANN CJ:

Doesn't need to go back to the High Court.

MR WATTS KC:

Doesn't need to go back to the High Court.

WINKELMANN CJ:

Because we have the trustees here.

MR WATTS KC:

Yes, we now have the trustees here and we can submit that the respondent can be ordered to direct the trustees to find the judgment sum and to pay it directly to the appellant and we cite as authority for that a passage from *Lewin*. Can I have *Lewin*, paragraph 33-005. "Since he can" – this is, so, after footnote 10. "Since he" – this is the holder of a general power – "can first make the property his own by appointing it to himself and then give it away, and what can be done in two steps can be done in one, it should follow that he is also free to appoint anyone else, even if not named or described as an object." So in our submission, the respondent can be directed to cause the current trustees to find the judgment sum. They would be bound, in our submission, by such an order and, if necessary, I mean the respondent could be directed to sue the trustees if they refused but they'd be in breach of trust in our submission. Alternatively, the Court could order appointment of a receiver to replace the trustees, but that seems unnecessary.

WINKELMANN CJ:

All right, well we will take the adjournment.

MR WATTS KC:

Thank you.

WINKELMANN CJ:

Thank you, Mr Watts.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:

Mr Hikaka.

MR HIKAKA:

Tēnā koutou e ngā Kaiwhakawā. I'm here to address what tikanga or tikanga perspective may bring to this appeal and I propose to do so in seven stages. The first, and especially in the light of the fact that the respondents have, it appears, objected to tikanga being addressed at all, I will clearly set out what the argument in relation to tikanga is, and importantly, what it is not. I will then illustrate why tikanga in our submission is useful and relevant in this case before arguing why it can be considered even though it has not been raised in the lower courts.

If I am then permitted to proceed to the substance of the argument, I will attempt to show what the relevant concepts of tikanga are, and how they are engaged in this case, before addressing what tikanga may – what assistance it may provide when considering fiduciary obligations, or obligations under the Trustee Act, that the respondent and trustees, the trustees in particular, have raised as being the kind of constraint that means this should not be treated as property. Then finally a wrap-up as to the how the appellant's approach, in

our submission, aligns better with the need for Property (Relationships) Act to serve all of society.

The argument as it relates to tikanga. I wish to be clear that we are not arguing for the direct application of tikanga. We are not asking this Court to determine what the tikanga of, that applied at the end of a relationship was, and then applying it to this case. I agree with the Law Commission and various academics that that's actually not an available option because the Property (Relationships) Act is a code, and so it will apply in place of customary division, or division of tikanga. Rather the argument here is that tikanga can provide assistance in the issues of interpretation that arise in this case to echo some of the comments of this Court in the *Ellis v R* [2022] NZSC 1114, [2022] 1 NZLR 239 case. Tikanga here provides a new vocabulary for existing concepts within the common law, and by providing that vocabulary, submit it produces fresh insights. It's echoing your Honour the Chief Justice at paragraph 176 of the *Ellis* decision, and to echo the comments of your Honour Justice Glazebrook at paragraph 118, tikanga principles and values may influence the development of the common law, and here we say they should, and they can provide a new way of thinking or a new intellectual framework for the development of the law.

In the light of the above our submission is that the concerns raised by the respondent at paragraphs 137 through 145 of their submissions are not matters that ought to concern the Court. Because we're not seeking to define tikanga, or ask the Court rather to define tikanga for this situation, we're not going to be running into a situation where this Court could be usurping tikanga.

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I'm also going to be relying on tikanga concepts and values that are well recognised and supported. I'll be making it clear, I'm making the submission that this is the tikanga framework, or the values and concepts of tikanga, not because I say that's the case, but because they have been identified by others much more worthy than me.

Finally I submit the analysis we'll be providing is a coherent one. I am not going to be simply plucking tikanga values out and providing them to this Court out of context.

So then the question comes, well, should tikanga not be considered because it wasn't raised in the earlier courts. I think first I ought to address why it is relevant and, in my submission, will be of real assistance to this Court. The starting point is that in this case, like almost any case that comes before this Court, Te Kōti Mana Nui, there is a question arising as to the development of the common law. It's a question as to which way the law should go and how it ought to be developed. In some ways that phrase, that development here could be phrased in a number of different ways. One of them could be, are we, is the law to develop such that *Clayton* is restricted effectively to its facts, or does it have broader import, and aligning in with that are questions about the natures of powers and property under the Property (Relationships) Act.

WILLIAMS J:
It doesn't really help you with you only raising it now, though, does it.

MR HIKAKA:
No.

WILLIAMS J:
That's a bit of a problem for you, isn't it? Because we're there first instance Court dealing with a potentially novel tikanga argument. It's not to be encouraged. Not impossible, but not to be encouraged.

MR HIKAKA:
I appreciate that your Honour. Maybe I'll turn to address that directly now, which is the third point, and then pop back to the relevance. As this Court – well, first we say it's relevant but I'll come back to why. I note the Court has considered tikanga arguments in similar circumstances, *Ellis* being the most

obvious one, of course, where the question of tikanga was raised by the Bench itself.

WILLIAMS J:

I think we might have said, that's the last time. If not in actual words, that was the vibe.

GLAZEBROOK J:

Well it was also in a situation where it was 20 years on from the previous appeal and, so we were, in fact, dealing with it almost as a first appeal, from what was a criminal trial, and in respect of a matter that certainly hadn't arisen at the time of the original time, given that he was very much alive at that stage.

MR HIKAKA:

Yes. It also then arose in the *A, B and C v D* case, where it was a matter about fiduciary relationships, whether they could continue beyond death in the sexual abuse context. I'm not sure if your Honours remember that.

WILLIAMS J:

Yes.

MR HIKAKA:

It was considered and listened to there. Then we submit as this Court recognised in *Ellis* the common law is in a state of transition as regards to the place of tikanga in the common law. This case was – I mean the relationship here ended in 2014, or some nine, nine and a half years ago, well before it appears tikanga was on most people's radar as a relevant matter. During this transitional phase, and especially for matters commenced prior to the the *Ellis* decision, it can be expected that there will be situations where tikanga was not raised before the lower courts, but it may have relevance to issues that this Court needs to consider, and it's respectfully submitted the Court ought to consider tikanga arguments in those circumstances because to not do so would mean that the transition phase simply extends for longer. So,

for example, in this case we submit tikanga is relevant and useful, and if the Court does not consider tikanga as part of its consideration of the obligations and interpretations necessary in this case, it can be expected that the issue will simply be raised again at some stage in the future where it has been firmly argued before the lower courts.

In some ways what will happen there is the courts' resources will potentially need to be used twice. There will be a further period of uncertainty as we don't have the guidance of this Court as to whether tikanga is an appropriate or helpful consideration, and during that period of uncertainty meritorious claims may not be pursued or unmeritorious claims may be brought because the approach to the issue has not been clarified. So this being a case that commenced well before the *Ellis* decision, we submit it falls within that transitional period, and so it's appropriate that it can be dealt with here.

Also because I am, as I say, I am not, this is an argument that's akin to an interpretation argument, not one that's based on fresh evidence that's being led, but interpretation of how tikanga, an aspect of the common law, might be weaved into the result that this Court needs to look at in this case.

So that's my answer to your Honour Justice Williams' question as to well, it's coming up now. That's way late. Accepted. But this kicked off well before *Ellis*.

So why do we say tikanga is relevant here. The development of the common law should be such that it's, "law that serves its society" of Aotearoa New Zealand and "all in our society", referring there to your Honour the Chief Justice's comments at paragraphs 164 and 174 of *Ellis*, and it must be "mindful of the values" that give the "sense of community and and common identity", referring to your Honour Justice Glazebrook at paragraph 110 of *Ellis*. Here, we submit that the questions raised are of some broad policy import in a developing area of law, and "such development would benefit from a consideration of relevant tikanga principles" to echo your Honour Justice Williams at paragraphs 263 to 265 of *Ellis*.

In the Property (Relationships) Act context the Property (Relationships) Act has been recognised by this Court as social legislation, and that's recognised at paragraph 38 of the *Clayton (Vaughan Road Property Trust)* matter. So we submit that as social legislation the values of tikanga can be particularly important in interpreting social matters. It has some additional relevance because customary marriages, including marriages at tikanga, would be simply treated as de facto relationships under the Act. They wouldn't be treated as marriage or anything else, they're de facto relationships, so this will apply to them. We note that family law is a recognised area where tikanga has paid a shaping role and we submit that the relevance that I identify here is also identified by the Law Commission in its 2019 report on the Property (Relationships) Act where at paragraph 14.1 of that report, and I'll read it out so I may as well pop it up: "We said that there is an implicit principle underpinning the PRA that a just division of property should recognise tikanga Māori and, in particular, whanaungatanga." And it is whanaungatanga that will be the core value that I'll be submitting is relevant in this matrix.

WILLIAMS J:
Which report is this?

MR HIKAKA:
This is the Law Commission's 2019 report on the Property (Relationships) Act.

WILLIAMS J:
Right, thank you.

MR HIKAKA:
That is why we say tikanga is useful and relevant and ought to be considered. If I may then turn to what the relevant concepts of tikanga are in our submission and how they're engaged. I acknowledge here that the sources I've primarily relied on are those of the expert report in the *Ellis* case and the sources gathered in the Law Commission's *He Poutama* report, which was

published after the submissions from the appellants were filed, the day after actually. So that contains a useful collection of concepts and authorities.
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The starting point though, we submit, is whanaungatanga. Whanaungatanga is a fundamental and foundational concept. It creates rights and responsibilities within the matrix and web of relationships it applies to, and I draw that from the pūkenga statement in *Ellis*, paragraphs 96 through 97. What whanaungatanga requires is support and it involves reciprocal obligations to assist in maintaining mana, as identified in the *He Poutama* report at page 57.

Whanaungatanga goes beyond whakapapa and includes non-kin persons who become kin through shared experiences, again identified in the *Ellis* pūkenga statement at paragraph 97, and we submit that Marcus and Raewyn, or Ms Cooper and Mr Pinney's relationship, that of de facto partners and parents of their children engaged the principle of whanaungatanga between them and in engaging that principle it engages their rights and obligations inherent in whanaungatanga. One of those is mana. Whanaungatanga involves reciprocal obligations to assist in maintaining mana as all persons have mana and the obligation to care for mana, manaakitanga, is therefore engaged. As identified in *He Poutama* at paragraph 3.115, the concept of manaakitanga is inherent in mana and linked to whanaungatanga. So we do have this interrelated web of concepts and obligations.

WILLIAMS J:
I think your issue here is that tikanga would generally almost always prefer the ancestral right. So in tikanga the spouse does not take title. If you're familiar with Māori Land Court Rules 2011, that's the rule because it is consistent with tikanga. It's pretty hard to argue that in tikanga Raewyn would have any right to that land in ownership terms. She might have other rights but it's really the antithesis of whanaungatanga that someone unrelated by blood to the land should get access to rights in it because that breaks the whanaungatanga matrix. In this case of course these are not Māori but it's obviously a family

asset, references have been made to dynastic elements, et cetera, so you can see how tikanga might struggle to help your case, might in fact help the other side.

MR HIKAKA:

And I think I've got three responses to that, your Honour. First, as I stated at the start, we're not seeking to directly apply tikanga because we're doing it within the concept of the – within the rubric of the Act. So that's the first response.

The second response is, in my respectful submission, the reason tikanga respects the ancestral right, as your Honour put it, is because of whakapapa, because you can whakapapa back to the land and because these are non-Māori you cannot whakapapa back to the land in our submission.

WILLIAMS J:

Yes, but you see, whanaungatanga is whakapapa. They are really heads and tails of the same coin. If you want to invite one in the door, you've got to – the other one comes with it.

MR HIKAKA:

Well, your Honour, our submission is that whanaungatanga has developed to apply in situations where it moves beyond whakapapa, and I better take –

WILLIAMS J:

But does that mean you can pick and choose which bits you want? Because if this were occurring in a tikanga context, the outcome you're suggesting is probably not the result. There'd be other ways to deal with it, but that outcome would not be the result.

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MR HIKAKA:

Yes, and that is I submit, your Honour, because you've also got the overlaying whakapapa concept in there. In a tikanga concept. In a pure tikanga –

WILLIAMS J:

I guess my point is, maybe whakapapa just overcomplicates this, and not necessarily in your favour.

MR HIKAKA:

Yes. Well one of the reasons I say that whakapapa doesn't apply simply because of ownership or dynasticism is, I take some support from the judgment of his Honour Justice Harvey in *Doney v Adlam* where an argument was raised that a person who was Māori who had been found to have taken a bunch of money from some trusts, was required to repay that money, and said, and so the trustees applied for orders selling her properties, and she said: "No, you can't sell my properties, that would deprive me of my turangawaewae," and his Honour said: "No, that's no right. You don't whakapapa to that land." So that's not actually being impacted here. So I submit that where we do not have that whakapapa connection, I accept that if there was a whakapapa connection here, tikanga would be operating differently because we would be introducing that concept as well. The submission here is that without that we are engaged in whanaungatanga, and whanaungatanga in the extended meaning that *He Poutama* identifies that it has come to take as tikanga has developed, that includes persons who do not whakapapa but who still share the obligation to protect each other's, to show manaakitanga, aroha and atawhai**.**

GLAZEBROOK J:

Why do you say they don't, I've probably sort of lost you at the first hurdle. Why do you say they don't, nobody whakapapas back to the land in this case?

MR HIKAKA:

To put it bluntly, your Honour, because they're not Māori.

GLAZEBROOK J:

Well…

WILLIAMS J:

You might get some disagreement out in the community on that.

MR HIKAKA:

Yes, but…

GLAZEBROOK J:

Well I think with Justice Williams, you can't pick and choose, but say because you're Pākehā you can have this bit, but not that bit.

KÓS J:

How long has this farm been in the family?

MR HIKAKA:

I don't know the answer.

WILLIAMS J:

Well they bought it, didn't they, for Marcus in, what, 2004/2005, something like that?

MR ZINDEL:

Mia Stafford, the former partner of Marcus Pinney, and Marcus Pinney bought it in the year 2000.

WILLIAMS J:

Thank you Mr Zindel.

MR HIKAKA:

It's not time immemorial.

WILLIAMS J:

No, but it's dynastic in Pākehā terms.

MR HIKAKA:

I should be clear I'm not trying to pick and choose between various concepts here. I'm trying to property contextualise tikanga and make sure it is not

slipping into places where it's not, so that we do not consider a 20, now 23, ownership to be the equivalent to whakapapa.

WILLIAMS J:

Yes but to do that you see you have to distort the idea of whanaungatanga and there'll be lots of critics of a court willing to do that without a very good reason because they will say "there you go, those Pākehā institutions doing damage to tikanga without knowing what they're doing".

MR HIKAKA:

I'm not sure, and I'm not meaning to be querulous.

WILLIAMS J:

No, no, be as querulous as you like, these are important matters.

MR HIKAKA:

I'm not sure what the distortion to whanaungatanga is.

WILLIAMS J:

Because you cut away whakapapa, which if these two people were Māori, would have not have produced anything like the result you want, because it's convenient to you, one might say, and you back-thread an artificial form of whanaungatanga that produces the result you want, which back-threaded frame can then be picked up and worked with in later cases where tikanga experts might say "don't you dare do that".

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MR HIKAKA:

Well then I think the best I can do then is actually bring the Court to the sources that I'm using to say why whakapapa and whanaungatanga are not necessarily hand in glove anymore, and the first, and probably most important, is if I could your Honours to the *He Poutama* report, and page 57 of that report. So under paragraph 3.38. While we're waiting I can read out what it says. This is in one of the parts where the Law Commission has

collected some of the expressions of the relevant values, in this case it's under the nice little graphic designed box "Expressions of Whanaungatanga". It says: "… [t]he whanaungatanga principle goes beyond just whakapapa and includes non-kin persons who become like kin through shared experiences." And we submit a de facto relationship and having children together would be a stereotypical non-kin relationship that becomes kin-like.

WILLIAMS J:

The problem with taking that rather bland and superficial statement, and applying it to whenua in a particular relationship where the asset is a family asset provided for the son and intended, it seems, to be maintained past that, you rather miss the nuances of the idea of whanaungatanga as applied to that kind of asset.

MR HIKAKA:

And, your Honour, this might be where we're talking about slightly different things. I'm not saying that the principle of whanaungatanga gives Ms Cooper a right to the land, in and of itself.

WILLIAMS J:

No, but you are saying that you should interpret the law consistently with whanaungatanga in a way that would protect Ms Cooper. So if you're wrong about that, and whanaungatanga doesn't help Ms Cooper, then your argument doesn't have much horsepower. So that's why this needs to be interrogated rather carefully, I would have thought.

MR HIKAKA:

Well if whanaungatanga does not apply to a relationship of de facto husband and de facto wife.

WILLIAMS J:

Well of course whanaungatanga applies. The question is, what does it mean in this context when, if they were Māori, it would not, definitely not produce the result you're after. You have to confront that.

MR HIKAKA:

I completely accept, and always have, that at tikanga, and that's why I set it out in our written submissions, that the result of tikanga would be quite different because we are, we would be dealing with a very, very different system of law or structure, a better word to save saying tikanga again and again and again, as to how this would be dealt with, because the primary obligation at tikanga is that the whānau is the primary support model, so that upon the end of the relationship Ms Cooper would return to her whānau, and Mr Pinney would return to his, in very simple terms of course.

WILLIAMS J:

Yes, well the rights would go to their children.

MR HIKAKA:

Yes.

WILLIAMS J:

She would have a right for life but the ultimate vesting rights would go to the children. Which is the way the Māori Land Court deals with these things now.

MR HIKAKA:

Yes, yes.

WILLIAMS J:

Which brings me to the point, I definitely do not want to labour this, but given the potential for disagreement over content here, probably a good reason why dealing with this for the first time at this level might not be that helpful for you.

MR HIKAKA:

I, of course, can't deal with it at any other level your Honour.

WILLIAMS J:

No, of course, but there you go. It's hardly a slam dunk, is my point.

MR HIKAKA:

No, no, I wouldn't expect anything before this Court to be a slam dunk.

WILLIAMS J:

Oh, you've had a few.

KÓS J:

I think the question for me is what difference tikanga actually makes if we are to embrace it and the difficulties of analysis of it here at first instance. I'm not really convinced it makes an awful lot of difference to your argument.

WINKELMANN CJ:

And does it provide any fresh or helpful insights.

WILLIAMS J:

Vocabulary.

WINKELMANN CJ:

Or vocabulary.

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MR HIKAKA:

I submit it does all of those things and I'll show you how. If I may then – I mean unless your Honours would like to try and see me take that point any further, but I can't – because I'm not here –

WILLIAMS J:

You've done very well, Mr Hikaka.

MR HIKAKA:

Thank you, Sir.

WILLIAMS J:

Perhaps not convinced us, but you've done well.

MR HIKAKA:

Well I am very clear that I cannot take the matter back beyond the sources I rely upon.

WILLIAMS J:
Sure.

MR HIKAKA:
Because otherwise I would be saying to you here's what it is, trust me on that, and that would be inappropriate.

WILLIAMS J:
Well you won't be the first guy to do that in this court.

WINKELMANN CJ:
I think what Justice Kós is asking you to do is to cut to the chase.

MR HIKAKA:
Right, we'll move on. So here we say Ms Cooper satisfied her obligations to her whānau and whanaunga by – she worked around the farm, ran the home and cared for the children. That's the Family Court judgment at section 37, and our argument is that in contrast the respondent has failed to show manaakitanga and aroha. Ms Cooper's actions were mana-enhancing, and if you want to translate that to PRA terms, were valuable contributions and value-enhancing, but there's been a failure to reciprocate and reciprocity is a key principle of tikanga in this sphere, and fulfilling such obligations are fundamental to tikanga, and again I refer to the *He Poutama* report and this one was – I was going to read it out, so I –

WILLIAMS J:
So this is more like the constructive trust style of argument?

MR HIKAKA:
It's very similar, yes, your Honour, except it's similar when you look at the end results but we submit that the foundation is different.

WILLIAMS J:

You're suggesting contribution has been made per *Rose v Rose* or per section 9A and that reciprocity is required not just by section 9A and *Rose v Rose*, but in this case within the PRA?

MR HIKAKA:

Yes, your Honour.

MR HIKAKA:

Well, that's not a difficult concept to understand.

MR HIKAKA:

No, no, and I mean I don't phrase it as a constructive trust of course because the foundation is very different because I'm trying to found it in tikanga rather than constructive trust. But it does –

WILLIAMS J:

A bit interesting that the foundation is reciprocity actually.

MR HIKAKA:

Yes, exactly, your Honour, but –

WILLIAMS J:

In both cases.

MR HIKAKA:

Yes. Because once – the more one looks at this in some ways is that there is, and I don't want to sound like I write for Disney, but overall there's more that, for humanity as a whole, there's more that binds us than divides us.

WINKELMANN CJ:

It does sound very Disney. It's the circle of life, isn't it, Mr Hikaka?

MR HIKAKA:

It is, at the wheel of fortune. I'm actually going to make reference to Disney later on, but I wasn't intending to do it right here. In some ways the – tikanga by providing a fresh – the freshness to the vocabulary comes not because it's so out of this world, it's never been thought of before, but another way at seeing the fundamental obligations that we submit underlie the common law, and in particular a common law that has tikanga woven through it and part of it.

WINKELMANN CJ:

So you're saying it reminds us of the values that in fact underpin some of the principles of our law but of which we have lost sight through the encrustations of the decided decisions of judges, including us.

MR HIKAKA:

Yes, your Honour, yes. So –

KÓS J:

Is it or is it simply a gloss on section 9A? I mean section 9A is capable of interpretation. That's the heart of the matter here, is section 9A.

MR HIKAKA:

Yes, and we submit that in interpreting section 9A one ought to do so reminded of that cultural background and legal background that stems from the common law and tikanga's role in it. So if I flick between tikanga and section 9A terms, say utu or reciprocity, is required here to reach a state of ea, a state of balance, and in this situation the resources available to achieve ea exist but the respondent says they're unavailable because of the trust structure, a trust structure, the beneficiaries of which are the whānau.

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Now, there is a whakapapa link between Ms Cooper and her children of course who are the beneficiaries under the trust, and I submit that in interpreting the definition of property under the Property (Relationships) Act, achieving substantive justice consistent with the tikanga principles of

reciprocity, reflected and mirrored in the Act, ought to be sought, and my learned senior has argued about how it is appropriate that the powers held by Mr Pinney here ought to be classified as property and we say that interpretation is consistent if one is looking at the matter through a lens that I say is based as well in tikanga and consistent with it.

The next area where I think it is likely to be very helpful is the question of fiduciary obligations or constraints on the power. Returning to the dialogue as to, well, what are the actual real constraints here? The key response from the respondents and trustees is that, well, it might appear as though you could exercise your powers under the trust to bring the property to yourself, but actually fiduciary obligations would prevent that. As you're exercising powers in that way, it would mean it was not an honest or good faith exercise of the powers for a proper purpose and in the beneficiaries' interests. I'm picking up there the trustees' submissions which themselves are based in the Trusts Act.

I submit that a tikanga analysis, an understanding of the obligations for ea and reciprocity, and that the failure to bring that about can continue a state of imbalance, that is not to be encouraged tikanga, brings a useful perspective because the trustees' approach is based on a narrow view of those questions of proper purpose, beneficiaries' interest and good faith exercise and ignores the potential impact of tikanga completely.

The mana of the whole whānau in here, all the Trust's beneficiaries, is impacted by the failure to comply with manaakitanga, the failure to recognise adequately Ms Cooper's contributions, and there is an interest and a benefit for all involved, the beneficiaries, Ms Cooper and Mr Pinney, for the whole whānau to be able to say kua ea, to be able to use the Trust's – for the trust assets to be able to be used to bring about the state of balance. So restoration of mana by restoring that balance is in the beneficiaries' interests, we say, and thus a proper purpose for which a trust power can be exercised, and if exercised for that proper purpose, bringing about that balance, that would be done honestly and in good faith. So there isn't – what – this concern that, well, the beneficiaries don't have an interest –

KÓS J:

How is that achieved here then by the traditional equity approach that your leader advanced? Because that seems to argue for a very limited level of constraint on a person who's the donee of powers, because I would've thought your argument suggests that a more intrusive modern equitable approach is more appropriate in this country to constrain what is effectively the selfish use of powers to the exclusion of beneficiaries.

MR HIKAKA:

Forgive me, your Honour, I don't quite follow. Is the concern that my argument is actually suggesting that greater –

KÓS J:

I'm trying to marry your argument, which relies on reciprocity as underpinning argument with your leader's argument that essentially trust powers are relatively arid and permit selfish use with limited constraint.

WINKELMANN CJ:

Another way of putting Justice Kós' question, which is what I was going to say, is that your argument seems completely disconnected from the front-end of the argument and it seems just to be focused on result as opposed to the principles to be applied to get to the result.

KÓS J:

I mean it works for section 9A. I understand your point in relation to section 9A, but I don't understand how it's consistent with the argument we heard this morning.

MR HIKAKA:

I think it's – I'm not trying to undermine my learned senior's argument of course, that would be bad. What I was more focusing on is whether the constraints that have been suggested are true constraints, and we say they're not because if the – well, I think we need to –

KÓS J:

But shouldn't they be true constraints to further the underpinning values that you're contending for? Shouldn't we breathe life into those constraints?

MR HIKAKA:

I'm not asking the Court to go that far. I'm just –

KÓS J:

Well, no, because it doesn't suit your argument for the – on the first half of your argument.

MR HIKAKA:

Yes, well, we only raise things that suit our arguments unless challenged by the Bench. What I don't want – no, I don't – because the – as I see the way this works in a kind of a wizard's duel which I'll get to later is the claim of fiduciary obligations is being used by the respondents and the trustees as some kind of shield, so you can go no further than this because if you were to go further than this, you would be acting against the beneficiaries' interest, ie if you were to – if trust property was to be used in that way, it would be against the beneficiaries' interest and I'm saying we need to look deeper at that because I don't think that is correct, because it can be the use of powers by – if Mr Pinney was to use his powers in the manner suggested by my learned senior, it would not be against the beneficiaries' interests. So that's –

WINKELMANN CJ:

Are you talking about Mr Pinney using his powers to ruthlessly control the dispersion of property through his power of appointment or are you talking about the use of Mr Pinney's powers at the direction of the Court and the purely remedial end of it?

MR HIKAKA:

It could apply to both because as I understand, the argument I'm seeking to meet here is the argument that neither approach is permissible according to the trustees because it would be against the beneficiaries' interests.

WINKELMANN CJ:

As it would entail a breach of trust?

MR HIKAKA:

Yes. Yes. And we say it wouldn't. In some ways, to provide an analogy, I mean, about whether this would actually be a breach of trust or not, no one seems to doubt that a trust could make a distribution to a beneficiary to enable that beneficiary to pay their creditors and avoid going into bankruptcy. What's happening there is the trust property is really going ultimately to the credit of the beneficiaries, but avoiding for – sorry, the credit of the beneficiaries' creditors, but is avoiding for that beneficiary the shame and inconvenience of bankruptcy, and we say that if one takes a wider view of what is in the beneficiary's interests and we say that wider view is consistent with the common law informed by tikanga, you can see a very similar result by the application of trust funds to reach an outcome such as contended for by Ms Cooper.

KÓS J:

Try that one again, Mr Hikaka. It's missed me completely.

MR HIKAKA:

So, as I understand the trustees' objection, it is that it would be a breach of trust for the – for Mr Pinney to, or the Court through Mr Pinney, to accrete the property to himself in order that it can go to Ms Cooper. We say that's not the case because in undertaking that transaction, for lack of a better word, Mr Cooper – sorry, Ms Pinney [*sic*], is benefitting all the beneficiaries by removing the imbalance that occurs because of the lack of reciprocity after Ms Cooper's contributions. In a similar way that –

WILLIAMS J:

So are you saying that tikanga will bind Mr Pinney to producing that outcome? Because if you are, then you're really on the respondent's side.

1500

MR HIKAKA:

No, I'm not – to go back –

WILLIAMS J:

In common law or actually in equity as opposed to by way of a property analysis under the PRA which requires the trustee to have almost no constraints in order for that to get home. The point I've just made badly is what Justice Kós made better earlier.

MR HIKAKA:

All I'm seeking to do is, I'm not actually seeking to use this as a sword but to say that the shield that is attempted to be raised by – it's a breach of trust for – as I understand, it's a breach of trust for Mr Cooper to accrue the property to himself. It is not correct. And maybe I don't need to add the extra cost that I've done through say the bankruptcy analogy. But in our submission there's nothing in this claim that well, you have to act in the best interests of the beneficiaries as a whole that prevent – that means that Mr Cooper's powers – sorry, Mr Pinney's powers cannot be used in the way that my learned senior set out.

I sense some understand what I've said and others are still confused by it.

WINKELMANN CJ:

I think we all understand what you've said.

MR HIKAKA:

Excellent, and that is the best I can hope.

WINKELMANN CJ:

Yes. So are you pretty much finished, Mr Hikaka?

MR HIKAKA:

Yes, yes your Honour. In summary, just finish off by noting that if the definition of "property" is read too narrowly as the respondents would do and

there's not sufficient realism about the powers and their exercise, it would create a regime that undermines the purposes of the PRA. Just to go – I'll abandon some of this and come down to the question of if properties and property is too narrowly defined to cut out this situation it will, in our submission, lead to a hollowing out of the section 21 regime. It's hard to square, in our submission, the High Court and Court of Appeal outcomes in this case with the Supreme Court's decision in *Sutton v Bell* [2023] NZSC 65. Both were attempts by somebody to set up a trust in order to avoid potential claims under the Property (Relationships) Act. In that case, the property was put into the trust before the relationship began. Whilst it was in reasonable contemplation, but before the relationship began. Here, the property was put into this Trust after the relationship was on foot and had been on foot for several years. But apparently in the first situation it was vulnerable but here it is untouchable.

WINKELMANN CJ:
It was a different kind of challenge, wasn't it?

MR HIKAKA:
Well this one started off as a section 46 – sorry, section 44C claim as well, which we submit is still – well, the complexity here in some ways is because we're probably dealing with increased value primarily rather than a family home.

WINKELMANN CJ:
Yes.

MR HIKAKA:
But I don't think that should distort the underlying question that we're – in both cases we're still dealing with relation – what would otherwise have been relationship property if it had been held personally or because somebody could have contracted out. This is the thing. The section 21 regime permits you to achieve whatever end you want so long as it's not seriously unjust. In order to achieve it though, you need to follow the process of that Act which is

a protective process so that spouses are aware of what they are getting into and have the benefit of an explanation from a professional as to the effects and implications of doing so.

In which case, unless I or anyone else from the appellants can be of any further assistance to the Court, those all are the submissions for the appellant.

WINKELMANN CJ:

Thank you, Mr Hikaka. Mr van Bohemen.

MR VAN BOHEMEN:

Thank you your Honour. Your Honours, this appeal is a claim against trust property, and on first principles is beyond the ambit of the PRA, because the PRA is about division of relationship property, property beneficially owned by the parties. The appellant says my client Marcus has powers which are property in terms of *Clayton*. We submit that he does not, and my junior Dr Powell will take you through the analysis in relation to the powers of the Trust, the powers that Mr Pinney has.

We also submit that even if the Court determines that Mr Pinney has powers which are property, in this case there is no basis for an award under section 9A, and at this stage your Honours I want to address the issue of tikanga.

As we set out in our written submissions at part 5, our principal submission is that it would be an injustice for this Court to try to grapple with tikanga now. It has submissions as to what, how tikanga should be applied. It has no evidence as to what the tikanga is which should be applied, and as we set out in our submissions, this Court, and the Law Commission, have been very clear that tikanga is specific, and it's a complete system and care must be taken not to pick and choose the element which apply in a particular situation, and this was the issue that Justice Williams was raising. We simply, we as counsel don't know what principles of tikanga the appellant says apply in this case. We have some submissions about it, but how do we know that what my friend says is tikanga, is in fact tikanga for these parties. We simply don't.

WILLIAMS J:

But it's not tikanga for these parties for obvious reasons. This is about the structure and shape of the law, not necessarily the attitudes of these parties.

MR VAN BOHEMEN:

But how do we know what tikanga is, or the shape and structure of the law without some evidence about it?

WILLIAMS J:

Well, fair point, except there are some on the Bench who know a little bit about the subject.

MR VAN BOHEMEN:

You have an advantage, but we have to advise –

WILLIAMS J:

It's a temporary one. The next generation coming through will know more about it than me.

WINKELMANN CJ:

Your point is fair enough though, although Justice Williams might know about tikanga, if you don't have the evidence –

MR VAN BOHEMEN:

How can I advise my client.

WINKELMANN CJ:

– then you don't know, and how can you engage with what he's thinking, unless he spends a long time telling us.

KÓS J:

Unless there are broad uncontested principles that inform the development equity.

WILLIAMS J:

And there are, aren't there? The principles themselves are uncontested, their application will be highly contested, but the principles are not, hardly new, they've been written about for quite a long time now.

1510

MR VAN BOHEMEN:

But what are the principles of tikanga which apply in a relationship property context for a Pākehā couple? Are they, as my friend submits, manaakitanga and ea and this requirement to achieve balance.

WILLIAMS J:

It's not such a bad start.

WINKELMANN CJ:

Yes, I was going to say, it sounds nice. It sounds like a good principle, and actually that was what counsel submitted to us in the *Preston* case to be a principle.

KÓS J:

It's not quite hard-edged elements of the Property (Relationships) Act though.

MR VAN BOHEMEN:

No.

KÓS J:

Which has some bright lines that don't quite fit those rather more generous principles.

MR VAN BOHEMEN:

Because the PRA is a code and –

MR WILLIAMS:

Yes, but Mr Hikaka has a point, doesn't he, that you can read reciprocity into section 9A because section 9A is all about reciprocity. These are not foreign ideas.

WINKELMANN CJ:

And balance into the whole scheme, yes.

MR VAN BOHEMEN:

Well, no, I disagree. I mean section 9A is about – 9A is a recognition in the statute of a new form of property. The new form of property is the increase in value of an asset.

WILLIAMS J:

Yes, provided by the applicant.

MR VAN BOHEMEN:

No, no, it starts off –

WILLIAMS J:

It's fair compensation for their contribution.

MR VAN BOHEMEN:

Section 9A is has there been an increase in value? Is this a new asset? Does it exist? Has there been an increase in value?

WILLIAMS J:

Yes, post commencement of the relationship.

MR VAN BOHEMEN:

Yes, and then there has to be what contributed to the increase in value.

WILLIAMS J:

Correct.

MR VAN BOHEMEN:

If the increase in value has, under section 9A(1), if it's been created by the application of relationship property then the whole of the increase is relationship property. Under section 9A(2), if the increase in value has been

created by the non-owning spouse, the whole of the increase is relationship property but they share in it unequally. So that's not balance.

WILLIAMS J:

Well it depends on what do you mean by balance?

MR VAN BOHEMEN:

Well, exactly.

WILLIAMS J:

But that's what – reciprocity is reciprocity, it isn't equality, it depends on the context.

MR VAN BOHEMEN:

Well, that's – your Honour has the advantage of me because –

WILLIAMS J:

Well, no, this is just the definition reciprocity.

MR VAN BOHEMEN:

But does reciprocity mean equivalence or does it mean an acknowledgement? I mean one could argue that reciprocity has a sense of some equivalence.

WILLIAMS J:

It's worth an argument but it's not a foreign argument for a lawyer to make. We're not in completely alien territory here, are we?

MR VAN BOHEMEN:

Well the difficulty for me as counsel is to advise my client on the issue and to make submissions.

WILLIAMS J:

On matters you're not familiar with you mean?

MR VAN BOHEMEN:

Beg your pardon?

WILLIAMS J:

On matters you're not familiar with.

MR VAN BOHEMEN:

And which are not in evidence in this court and on which we haven't been given the opportunity to seek advice to provide alternative evidence to test the evidence, all of those things which happen before the courts make a judgment.

KÓS J:

And nor do we have the advantage of the reasoning of courts below on this issue.

MR VAN BOHEMEN:

Absolutely.

WILLIAMS J:

I agree with you on that but we're talking about general principles here, we're not talking about evidence about what tikanga is because these are matters of quite general principle that have been extensively written about. There's nothing new in any of this.

MR VAN BOHEMEN:

Well, I beg to differ that your understanding of tikanga principles I expect is quite different from my understanding of tikanga.

WILLIAMS J:

No, I'm talking not my understanding but what's in the sources.

MR VAN BOHEMEN:

But what's in the sources is, and this is the Law Commission's report, is that it's a complete system, it applies – "… tikanga is a complete system with principles for the 'right to correct way of doing things'. These principles order

Māori affairs and so regularly influence behaviour that they have been referred to as Māori custom."

WILLIAMS J:
Yes, no question about that.

MR VAN BOHEMEN:
No question about that.

WINKELMANN CJ:
I'm just wondering how much further – I mean I think we're going possibly around and around on this point.

MR VAN BOHEMEN:
Okay.

WILLIAMS J:
Well it's a little – well, okay, all right.

KÓS J:
I mean you're really raising an objection, given the objection you've just advanced on the fact that you say you don't know much about tikanga. I'm not expecting to hear much from you on the subject of tikanga because I'm not going to be informed by it.

MR VAN BOHEMEN:
That's exactly right, Sir.

WINKELMANN CJ:
And your point is a procedural one and Mr Hikaka has said, well, look it's an important development of the law and when this case was argued at lower levels we didn't have the benefit of *Ellis,* and all we're asking you to do is apply general principles, and your point is that you might be asking us – we might – he might be asking us to apply general principles which even may be very well understood amongst the general population of judges and perhaps

lawyers, but it's the application to particular case when it is a complete system which is nuanced in its application which provides – which is a difficulty.
1515

MR VAN BOHEMEN:

That's exactly right, your Honour.

WILLIAMS J:

Well, can I just – it's potentially an important point for counsel appearing in this court, anyway, and it's this, the Law Commission's report says a lot more than that, including underpinning the fact that tikanga is now woven into the fabric of our law in all sorts of areas and your point is well taken, that this has come up late, and so I'm rather sympathetic to that perspective. I'm rather less sympathetic to "I don't know anything about this judge" because there is now rather less excuse than there was 20 years ago for saying "I don't know anything about this judge".

MR VAN BOHEMEN:

Well, Sir, I'm not –

WINKELMANN CJ:

I think, Mr van Bohemen, you're not saying "I don't know anything about this judge", you're saying "I don't know anything about the application of tikanga to this case because we didn't get evidence on it".

MR VAN BOHEMEN:

And I'm saying what I think I'm –

WILLIAMS J:

But that's my point. You don't need evidence on it because that's like, we didn't get any evidence on fiduciary obligation. Of course you didn't. You don't need any because you understand the principle and you can refer to the cases.

MR VAN BOHEMEN:

But we have things such as, you know, textbooks on – and we now have – but, but we –

WILLIAMS J:

Correct. You now have many cases and some textbooks. On tikanga.

MR VAN BOHEMEN:

So my point is – I just want to stop with this last point, that I'm not saying it's not fair to the Court to consider it because *I* don't know about it. What I'm saying is it's not just for this Court to consider it because, in my submission, the law on tikanga is not as developed as – and its application, is not as developed for example as the law on powers on trusts, in terms of consolidated authorities and textbooks, et cetera. It is developing. And if you look at what happened in *Ellis* –

WINKELMANN CJ:

And its interface with state law. At the point of interface with the state law, is your point. It's not as developed at a point of interface with state law. You're not trying to say it's not a developed body of law on the marae.

MR VAN BOHEMEN:

No, I'm not. And what I'm saying is that if you look at what the Court did in *Ellis*, when the issue arose, it adjourned, it obtained evidence, then came back and reconsidered how to incorporate the evidence into the – and if that is what my friend, sorry, the appellant wants the Court to do, that is where the Court wants to go, then that is what should happen here.

WILLIAMS J:

So the point I was making is that's thoroughly unnecessary here because of the generalised application of the principles in the context of an area of law of whanaungatanga and mana and so on that's been the subject of 30 years of jurisprudence and great deal of academic writing, and really, this is no criticism of you because this has just come up, Mr van Bohemen, and so as I

say, I'm sympathetic to the proposition that you shouldn't have to deal with this at first instance in the New Zealand Supreme Court. But, had it come up earlier, it ought to have been no answer.

MR VAN BOHEMEN:

Had it come up earlier, we would've had the opportunity to deal with it.

WILLIAMS J:

Correct, so I'm with you on that.

WINKELMANN CJ:

So you're in violent agreement.

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

Let's move on before we find some area of disagreement.

MR VAN BOHEMEN:

Where we differ. The next thing I'd like to do is respond briefly to some of the matters raised by counsel for the appellant. As I said at the outset, Dr Powell will be addressing the trust powers issues, so I'm not exhaustively responding to my learned friend's arguments.

1520

And there was a discussion before lunch with Mr Watts and the Bench about if we get to a section 9A position, so we say there is – whether one makes a global valuation, and as my submissions say, that that is the correct approach when working – if you're going to say what are the values of the powers, you need to do a net assessment of value, and the question I think Justice Kós raised was wouldn't you just take the highest and best value and leave the debts behind? To which I say the trustees can't do that because – and if the holder of the general power of appointment says, well, I have gold, but I don't

want the debt, the trustees have an answer to say we as trustees have an equitable lien over the trust assets. We are personally liable for these debts.

WINKELMANN CJ:

Well that might be appliable when it's an external party, but when it's the individual himself, I mean, it can be forgiven –

MR VAN BOHEMEN:

I'm distinguishing – I'm talking about the debts which the Trust has to the bank.

WINKELMANN CJ:

Right.

MR VAN BOHEMEN:

Not the debts – so we're going to talk about the other debts, but I'm talking about the debts that the Trust has to the bank, which are third-party debts.

So if I may take you to the outline which we filed, it's axiomatic that in court the courts apply the law to the facts, and in my submission, what has happened over the course of this case is that the facts have been lost sight of. So –

WINKELMANN CJ:

So have we concluded your general overview and we're now into the depth of the argument?

MR VAN BOHEMEN:

We're into the factual analysis.

WINKELMANN CJ:

Right.

MR VAN BOHEMEN:

So I'd like your Honours to just bring up the chronology, and I'm not going to read it but the Pinney Trust dates back to 1977, and it's common ground that the Pinney Trust beneficiaries were Marcus and his brother Jonathan. In 2000, Marcus and his then partner signed a contract to purchase some farmland at Whataroa which is the land we're now talking about, and what happened was that the trustees took over that contract and acquired the land. Marcus and his then partner farmed the land until they separated, and in January 2003 the Pinney Trust advanced money to Marcus so that he could clear debts and reach a settlement.

In 2004, the parties met. At that stage, Ms Cooper had no assets, Mr Pinney had assets, he owned some stock and some plant and vehicles and he had debts to the Pinney Trust. In 2004/2005 the Pinney trustees start talking about resettling trust assets into two trusts, and that's the evidence of Mr McIntyre, and in June 2005, he wrote to Mr McIntyre – sorry, Mr McIntyre wrote to Mr Pinney and said what the proposal was and pointed out the obligations to set up a trust to maintain the assets and to facilitate the future receipt of other assets which would be coming to him via his father's and mother's estate. As we point out –

WINKELMANN CJ:

So according to this chronology it wasn't until 2005 they started talking about this resettlement.

MR VAN BOHEMEN:

That's –

WINKELMANN CJ:

Not 2004.

MR VAN BOHEMEN:

Sorry, your Honour. It is 2005 this is happening. But it was in June 2005 the Trust – the distribution takes place at the end of December 2005. The new trust is settled in January 2006.

1525

At paragraph 97 of our submissions we set out what the intentions and the objectives of Pinney trustees were, and this is important because my friend argues that the whole purpose of the new trust was to avoid the PRA, and Mr McIntyre's evidence is that this is not the case. The trustees wanted a one structure to consolidate distributions from the Pinney Trust and distributions from his parents' estate. That structure had to ensure that future inheritances could be resettled. That required that the new structure comply with the terms of Marcus' father's Will, which said no spouses or partners. The Pinney trustees wanted to protect the inherited assets and the flexibility of management, and they were well aware that Marcus was a novice trustee and relatively inexperienced in business. Justice Kós called him a spendthrift. He had clearly not had a successful business career.

KÓS J:

That's really what Mr McIntyre called him by another word.

MR VAN BOHEMEN:

Yes. And the Pinney Trust, because this was a dynastic trust, wanted to protect the other beneficiaries. Now of course at that –

WINKELMANN CJ:

I mean when you say "dynastic trust" that's a rather grand, I mean it's really an unfortunate expression, isn't it? It's simply that it's people trying to protect capital they've accumulated.

MR VAN BOHEMEN:

Well that's what they were doing. That's what Mr Bernard Pinney wanted to do.

WINKELMANN CJ:

Mmm. It's not a dynasty, it's just simply protecting capital that you've…

MR VAN BOHEMEN:

Well, an inheritance trust or…

GLAZEBROOK J:

Well especially given the fact that the recent acquisition of the assets in the first place, and the history of that acquisition.

WINKELMANN CJ:

It's simply trying to protect capital from claims by domestic partners.

MR VAN BOHEMEN:

Well, yes, but he's – thereby it's implicit he wants it to go down the bloodlines, isn't it, because it's for children and grandchildren. Whether that's a good thing or a bad thing, it's just what he wanted. So the Trust was set up and –

GLAZEBROOK J:

But that's what's said against you though, so you I think were trying to argue it was more than that, but you've just said to protect it from, to do down the bloodline and protect it from claims from domestic partners.

MR VAN BOHEMEN:

Well I'm saying to look after future generations. To that extent it wasn't to avoid –

WILLIAMS J:

Well they're not mutually exclusive ideas. They're consistent ideas. In order to maintain the dynasty, or whatever you want to call it, spouses have to be kept out.

MR VAN BOHEMEN:

That's right.

WINKELMANN CJ:

Can I just ask you about the Wills' trust. What did the Wills stipulate as to the recipient of the…

MR VAN BOHEMEN:

Well we don't know very much about it. It's in the letter from Mr McIntyre, which is…

WINKELMANN CJ:

Can we get that up on the…

MR VAN BOHEMEN:

Yes, I'm just trying to, here we are. Whether, if you see that middle paragraph, principal issue: "We have obtained some legal advice in respect of the Will of your father where his estate is eventually left to his children and grandchildren but not partners or spouses… The approach we are seeking to take, is to apply to the Court to enable trustees to resettle from the estate to trusts for individual beneficiaries and their families. The advice given is that provided the trusts formed by beneficiaries exclude spouses or partners, it is likely that the Court will approve the resettlement. The trusts formed for beneficiaries should include a resettlement clause so that it is not necessary…" to apply for further resettlements. "The trust deeds may also have powers to include other potential beneficiaries although we are unsure what the Court reaction to this may be in relation to the initial application." Scroll down.

KÓS J:

Sorry, is there a distinction between the Pinney Trust –

GLAZEBROOK J:

I'm just not sure what they're resettling.

MR VAN BOHEMEN:

Sorry?

WILLIAMS J:

It's the two sons' trusts. The two sons' trusts.

WINKELMANN CJ:

The Wills' trusts.

GLAZEBROOK J:

No, no, I understand that, but once you've already set up the trust, you either distribute to the new trust or you you resettle on another trust. So resettling on this trust, is that what they're talking about?

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

Okay.

WINKELMANN CJ:

So they were wanting to distribute the assets in a way which kept it out of the relationship property, because if they distributed straight from the Wills' trust to him, then it would become possibly relationship property so they wanted to carry this stream of assets, dynastic assets away from the – so it's all carried away from the domestic partner.

1530

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

Well, under the Will, do we understand that – well, if we don't have it, we have no idea, but –

MR VAN BOHEMEN:

That's as much as we know about the Wills.

GLAZEBROOK J:

So we don't know whether it even set up a trust?

WINKELMANN CJ:

Well, it suggests it did.

GLAZEBROOK J:

Well, you see what I mean?

MR VAN BOHEMEN:

No, it suggests that it's in there, it's in the Will, I mean Mr Pinney certainly – Mr Pinney Snr is dead, Mrs Pinney Snr is not dead. She's still alive.

KÓS J:

Just to be clear though, sorry, we have a Will which may or may not set up a trust and we have the Pinney Trust?

MR VAN BOHEMEN:

Yes.

KÓS J:

And how do those two interconnect?

MR VAN BOHEMEN:

The Pinney Trust has assets, and this is Mr McIntyre's trustee of the Pinney Trust, advising Marcus Pinney to set up a new trust to receive assets from the Pinney Trust and to set it up in such a way that that new trust, the one I call the "Marcus Trust", can also, in due course, receive assets from the estates of his parents.

KÓS J:

Right, okay.

WINKELMANN CJ:

It does suggest that there's a Will's trust, because it says "apply to the Court to enable trustees to resettle from the estate to trusts for individual beneficiaries and their families".

GLAZEBROOK J:

It seems to assume the Court will have to approve a resettlement from the estate.

WINKELMANN CJ:

Mmm. Which suggests it's a trust.

GLAZEBROOK J:

Which is actually would be a very weird trust.

WILLIAMS J:

Unless he's actually – he was deceased by this time, I presume?

MR VAN BOHEMEN:

Bernard Pinney was deceased.

WILLIAMS J:

Right, so you would need court approval. Yes, I see.

MR VAN BOHEMEN:

So the Trust was – sorry, so in December, the trustees of the Pinney Trust executed a deed of partial distribution which was to put assets into the Marcus Trust once the Marcus Trust was settled, and here we have the deed of distribution. They were going to distribute – or they – and then did distribute the land and buildings at valuation, the advances which had been made by the Pinney Trust to Marcus of some $311,000, his overdrawn current account with the Pinney Trust, a half share of the Dunrobin Partnership investment and some cash of $216,000. And those assets went into the Pinney Trust. They –

WINKELMANN CJ:

But there's also an agreement for sale and purchase dated in January of 2006 for the same land, was there?

MR VAN BOHEMEN:

Yes, but that was sort of a belt and braces because – and I think it's explained in Mr McIntyre's evidence that just to ensure that there were no tax issues about it, they did it as a sale but there was no –

WINKELMANN CJ:

Well, so, it was a sale? Because it can't be a sham, I assume.

MR VAN BOHEMEN:

It was a distribution.

WINKELMANN CJ:

It was an agreement for sale and – or was his evidence that the agreement for sale and purchase was not a real thing?

MR VAN BOHEMEN:

I think that was essentially his evidence.

ELLEN FRANCE J:

Where does he say that?

MR VAN BOHEMEN:

If we can call up his affidavit.

WINKELMANN CJ:

It was just done for tax purposes?

MR VAN BOHEMEN:

If you just scroll on down. It's at paragraph 62 of his affidavit: "To ensure the tax treatment of the transaction was clear, a sale and purchase…" was agreed to. They were instructed to complete the deed of distribution and the conveyancing took place. And you'll see at paragraph 64 that for tax purposes, it was treated as a resettlement.

WINKELMANN CJ:

Where's it say that?

MR VAN BOHEMEN:

Beg your pardon?

WILLIAMS J:

64.

WINKELMANN CJ:

Where did it say that for tax purposes, it was treated as a resettlement?

MR VAN BOHEMEN:

"The handwritten note" – paragraph 64: "The handwritten note that I received back from CA McDonald confirm that the matter was undertaken as a resettlement…Annexed hereto and marked" –

WINKELMANN CJ:

Does that say that's for tax purposes?

MR VAN BOHEMEN:

Well, he's asked for the tax implications.

1535

WINKELMANN CJ:

Okay.

MR VAN BOHEMEN:

But the net effect of it was that all of these assets, worth 1.6 million, went from the Pinney Trust to the MRW Trust. So –

KÓS J:

Anything from the Will trust?

MR VAN BOHEMEN:

Nothing.

KÓS J:

No.

MR VAN BOHEMEN:

The Marcus Trust, the MRW Trust, has only received assets from the Pinney Trust.

WILLIAMS J:

So whatever was planned in that letter didn't happen?

MR VAN BOHEMEN:

It hasn't. Well, hasn't happened yet.

WILLIAMS J:

Yet. Oh, the mum's still alive?

MR VAN BOHEMEN:

Didn't – yes. So by beginning of 2006 the Marcus Trust now owns the farmland, has some cash and has as assets debts which Marcus owes it. At the same time – well the other thing that the Pinney Trust acquired, sorry, the Marcus Trust acquired was 98 shares, 98 of the 100 shares in Te Taho Deer Park Limited, so the farming company. That was set up in January 2006 with Mr Pinney having one share, Ms Cooper having another share and the Trust having 98 shares.

KÓS J:

And where did the company's assets come from? Or what –

MR VAN BOHEMEN:

The company's assets were –

WILLIAMS J:

The lease.

MR VAN BOHEMEN:

– essentially the advance of stock that Mr Pinney put in at the start.

WILLIAMS J:

And a formal lease, was it not?

MR VAN BOHEMEN:

No, no, they – he owned the stock and plant –

WILLIAMS J:

No, but –

MR VAN BOHEMEN:

– he put some in, so his current account goes up to 160,000 credit, 168,000 credit at the start. The company has an informal lease with the Trust for the land. So the company, you know, it's fairly typical farming arrangement with a land and earning trust and a farming company. Company farms the land, there's notional rent paid by the company to the Trust for – or lease rental – rental. Shortly after this arrangement's put in place, so 2006/2007, the Trust used some of its cash reserves to do improvements to the house and buildings on the farm. So it's about $175,000 was used to make some bedrooms and bathrooms and improvements to the farmhouse because Marcus and Raewyn wanted to operate a homestay/Airbnb-type arrangement.

Te Taho, which was the farming – which was the company, operated, during the course of the relationship, operated three businesses: an Airbnb business or a homestay business, a farming business and a hunting business. They tried various ways to generate income. None of the business ventures was successful. In the chronology I've tracked the financial statements for the company each year and the year ended 31 March 2007, the company had a trading deficit of $9,000, it had a debt to the bank, so your Honour's question, where did the company get its capital from? It's from the bank and from Marcus' initial cash.

WINKELMANN CJ:

And also initially Ms Cooper worked off-site, didn't she? Wasn't that – was that to support the family or was that partially to support the business?

Because there was a suggestion the business wasn't viable without off-site contribution.

MR VAN BOHEMEN:

That was certainly the Pinney trustees said, have always said that there needs to be some off-farm income to support the operation. That was the – and Ms Cooper worked off the farm for a period but I think she stopped, she had stopped working off-farm by 2007, September 2007 when their first child was born.

1540

WINKELMANN CJ:

So she was working off-farm to support the operation?

MR VAN BOHEMEN:

Well, to support the family, I suspect, because the operation wasn't – well, when they're supporting the operation, they're supporting the family. It was – to keep – to buy the groceries.

So by 30 June 2007, so that's the 18 months after this operation has started, the Te Taho Deer Park has a trading deficit, it has bank debt, and Marcus' current account which had started off at $168,000 which was a debt the company owed him, had reduced to $33,000 because they had drawn shareholder drawings. And the cash reserves of the Trust had diminished from 216,000 to just over 9,000. That pattern continued that year on year, the company traded without profit or traded at a loss. Mr Pinney's shareholder current account went from a cash credit to a debit. By 2011, he owed the company $40,000 by way of drawings, and the company only made a profit in two years, in 2013 and the year ending 30 June 2014. In 2013, it was a $1,200 profit after shareholder's salary. In 2014 which was just – so the party separated in April 2014, so the year ended 30 June 2014, there was a surplus for the year, but that was achieved by the sale of capital stock.

KÓS J:

I mean, the true economic performance of the company rather depends on what the shareholder drawings were which I don't have the detail of here. I mean, it may or may not have been profitable if there were very large drawings which would drive it into deficit. It's nonetheless a profitable enterprise in one sense.

MR VAN BOHEMEN:

But – you're right, but for purposes of this chronology, I mean it's in the financial statements there wasn't a profit, and in the Family Court, we spent some time traversing the profitability of the company and with Ms Cooper and that's recorded in the Family Court judgment and it's also recorded in the High Court judgment that the company was not profitable.

So that meant that at the end of the relationship, as her Honour Justice Clark found, the relationship property pool was minus $78,067. And could we just call up the High Court judgment? Paragraph 16 – sorry, yes, it's paragraph 167, where there's a table there. So this is the High Court's determination of the relationship property. Cash at separation, which Ms – so the Judge is just identifying the assets, not who has them, but cash at separation, Ms Cooper's bank account, Mr Pinney's bank account, a car, the current account with the Trust, my client's current account with the Trust, and then the debts, we've got a UDC debt and the overdrawn shareholders' current account. So you get to a net deficit position of $78,000.

1545

In the High Court, it was our submission for Mr Pinney that the Court should divide debt, and that is addressed by her Honour at paragraph 172 because there are conflicting authorities as to whether there is jurisdiction under the PRA to divide debt, and her Honour says: "I tend to the view that where [they're] in an overall state of indebtedness there is no power to make an order for division of relationship property because there was no property to divide…only negative equity…The language of 'entitlement' is inapplicable to a negative equity. Nor in any event do I think such an order would be appropriate in this case," and then she then talked about why she wasn't

prepared to make an order for division, but she did find as a fact that the debt, the shareholder debt was a relationship debt. She didn't say the debt didn't exist.

WINKELMANN CJ:

Well where did she find that as a fact?

MR VAN BOHEMEN:

Paragraph – if you just scroll up to there, in that table on paragraph 167. She's got it as a liability. If you just scroll up to the, just to the top of paragraph 167. Yes, as the table below shows the total value of the property, deducting relationship debt, there is negative equity.

WINKELMANN CJ:

She seems to be talking quite loosely there, does she? Because she's grouping the whole current account debt and –

MR VAN BOHEMEN:

Well that was the – in the court, your Honour, there was – and part of the reason she says there's uncertainty about the debt is that in the 2000 and – I can't remember whether it was in the 2014 or the 2015. In one year the current account debt is shown at $128,000 and then in the following year, you know how they have the comparative table, the debt is bigger. It's at 150 –

WINKELMANN CJ:

This is a joint current account for them?

MR VAN BOHEMEN:

No, it's Mr Pinney's shareholder's current account, and so the confusion was because we had two sets of financial statements with a higher and a lower figure and we accepted for present purposes we'll just take the lower figure.

On my roadmap at the back I've attached an appendix. This was in essence the order I was asking the Judge to make, which was to apportion between

the parties the various assets of relationship property and then to make an adjustment order at the bottom. So in Ms Cooper's column she has the cash, the bank account, the car and the UDC debt, so she's at a plus $17,000. In Mr Pinney's column he has a little bit of money in the bank, his current account with the Trust and the overdrawn shareholder's current account, so he's at minus 95. Deduct 17,801 from 95 you get to a total property pool of minus 78,000 which was the figure her Honour Justice Clark landed on. If that's divided in two, that means that each of the parties should have shared – have come away from this relationship with minus $39,000 and to achieve that, taking into account that Ms Cooper has $17,800 credit and Mr Pinney has $95,000 worth of debt, she would need to pay him $56,834 by application. If there was jurisdiction to divide debt, it's my submission that is the answer that the Court would've come to, and the Judge didn't say the debt doesn't exist because of the – the shareholder's current account debt doesn't exist because if she had, then there would've been a cash payment due from – well if she had, her Honour's table wouldn't be right and there would've been a cash payment due from Mr Pinney to Ms Cooper. So the purpose of this, traversing this was to show that this relationship did not produce any fruits. It produced debt.

1550

WINKELMANN CJ:

You mean in economic terms?

MR VAN BOHEMEN:

Yes. Yes, solely economic terms. And then there's the issue of what happened to the Trust and my friend addressed, Mr Watts addressed this, and attached as an appendix to my schedule is what I say happened to the Trust.

KÓS J:

Sorry, where's that?

MR VAN BOHEMEN:

It's just up on you screen now, your Honour.

KÓS J:

Oh, I see. Sorry, yes.

MR VAN BOHEMEN:

So what I've done, your Honours, is created this schedule by reference to the financial statements of the Pinney Trust, of the MRW Trust.

GLAZEBROOK J:

Have we got a copy of this? Is it attached – where is it attached?

WINKELMANN CJ:

Where is it?

MR VAN BOHEMEN:

It's the schedule A to my written submissions.

WINKELMANN CJ:

Thank you.

WILLIAMS J:

Your full written submissions?

MR VAN BOHEMEN:

Yes. And just while we're talking about the detail, there is a typo in the line where it says, just above the table, it refers to document 301. Should read document 302.0803, which is the document in the evidence which sets out the financial statements of the Trust as at June –

GLAZEBROOK J:

I'm sorry, which – what was the correction?

WINKELMANN CJ:

Where are you?

MR VAN BOHEMEN:

Oh, we're at schedule A, and you'll see on the screen there's a yellow highlight.

GLAZEBROOK J:
Oh, okay. And what should that read?

MR VAN BOHEMEN:
302.0803. So what I've done is I've gone to the financial statements and in fairly standards terms, a list of current assets and non-current assets, investments, et cetera. So in the financial statements, the current assets show money in the bank and an asset owed to the Trust by the Deer Park and a tax credit comes to a total of $192,000.

As I've set in brackets, the biggest asset was the 188,000 owed by the Deer Park, Te Taho Deer Park Limited. Possibly that company was insolvent, so that could not have been – that 188,000 was not a given.

Its non-current assets were land and buildings. Now, in the book value of – in the financial statements, the land and buildings have a value of 1,273,137. What I have inserted instead, the 1,545, is the value of the farm as at the date of hearing in the Family Court in accordance with section 2G of the PRA.

I've added the furniture and fittings, and then there's a $98 – that's the shares which the Trust has in the company, so you get to total assets of 1.7 million.

Under the liabilities, there are GST, accounts payable, and there's a beneficiaries current accounts, so there's a liability of 34,900. And I've included as an item, which is not in the financial statements, the Te Taho ANZ debt of 132,908. The reason I've done that is because in – during the course of the relationship, the company borrowed money from the bank and the bank required security and the trustees granted a mortgage to the bank. So this is a third party liability which in my submission the trustees would have to meet if the Trust were liquidated, particularly given the parlous state of the company. So that comes to a net assets of 1.5 million and contrasts with the value of the

assets transferred into the Trust in 2006 which was 1.652. That was about $80,000 less. So in simple terms, the net assets of the Trust diminished over the course of the relationship.

WINKELMANN CJ:

Why is the Te Taho Deer Park Limited relevant for the assessment for Ms Cooper?

MR VAN BOHEMEN:

Because she is claiming against the assets of the Trust and so the – and I say you have to take a net position, so you have to go net – gross value of the Trust's assets less the net value of the Trust's liabilities, and they include a liability that they've taken on for the company.

KÓS J:

Plus the 98 shares are worthless presumably?

MR VAN BOHEMEN:

Plus – yes. So that's the second – the line at the bottom. If you say Te Taho's worth nothing, then the Trust's situation is not 1.5 million, it's 1.3 million.

KÓS J:

And obviously including the mortgage, assumes it's worth nothing otherwise it will clear its indebtedness itself?

MR VAN BOHEMEN:

That's right. The Trust at this stage had negative equity of $90,000. Now my friend, Mr Watts, said in his submissions that it is wrong to ignore – sorry, I don't want to misrepresent him. He said it was not right to say that the trust assets have gone down because it's forgiven the debt which was owed by Mr Pinney. Remember that? He was saying that this was a debt of Mr – because his argument is that essentially Mr Pinney has the power of appointment so therefore the trust assets are his anyway, we say that's not

the case, but even if you say, okay, for this exercise, this schedule A exercise, let's put the debts which Marcus owed the Pinney Trust and which were put into the Marcus Trust, let's put them back into the equation and, Mr Registrar, could you pass out the ones with the green highlights?

GLAZEBROOK J:

But why would you put those in the equation if they're not owed by the Trust?

MR VAN BOHEMEN:

Sorry, beg your pardon?

GLAZEBROOK J:

Why do you –

KÓS J:

It's the – this is reversing the forgiveness.

MR VAN BOHEMEN:

Yes. Thank you.

GLAZEBROOK J:

Why?

WINKELMANN CJ:

I'm not quite understanding why myself but…

MR VAN BOHEMEN:

Why reverse it?

WINKELMANN CJ:

Mmm.

KÓS J:

Well it's one – one of the partners is going to advance from the Trust, to pay out from the Trust, she has not, he has, I assume is the argument.

GLAZEBROOK J:

Well someone's going to have to explain it to me but it's 4 o'clock so –

WINKELMANN CJ:

Yes, it's 4 o'clock. But the forgiveness of debt actually reduces the financial position of the Trust, correct?

MR VAN BOHEMEN:

Yes. But if you don't – if you reserve that, that's what the green sheet of paper does.

KÓS J:

That's right.

MR VAN BOHEMEN:

It – so what I've put – the green highlighted bits is putting the – is reversing that forgiveness, so that gives a net asset value of 1.7 million, assuming that the Te Taho company is still valid. They've – sorry, the Te Taho company is still solvent, or 1.5 million if the Te Taho company is not solvent. But if we take the higher figure, it's 1.7 million. Now at the bottom of that page I've said trust assets at end of relation, 1.7 million, trust assets at start of relation, 1.65 million, increase in value is 61,973. So the point of these pieces of paper is on one analysis, and I say the correct analysis, the trust assets diminished during the course of the relationship. My friend has taken issue with that argument to say you shouldn't factor in the forgiveness of debt so I've put it back in, put that back in, then the trust assets have increased in the course of relationship by $61,972.

1600

WINKELMANN CJ:

And that's different to Mr Watts' calculation how?

MR VAN BOHEMEN:

Well I don't think Mr Watts did the calculation, he just said you don't have to do a global valuation, and I'm going to talk about that more when I talk about section 9A, but I'm just – I say you do have to do a global valuation when you're valuing the Trust and the purpose of this discussion, your Honour, is over the course of the relationship Ms Pinney went from zero to plus $17,000, Mr – sorry, Ms Cooper did, Mr Pinney went from plus $168,000 with debt to the Trust to minus $128,000, the Trust went from 1.6 million to either 1.5 or possibly 1.7. So there was not –

WINKELMANN CJ:

So I mean how does this relate to what Justice Miller said at paragraph 99: "The increase in value of the farm between December 2005 and 12 November 2018 was $445,000"?

MR VAN BOHEMEN:

So that's –

WINKELMANN CJ:

And you say you have to take off that the external party debt of 100 and – which was Te Taho?

MR VAN BOHEMEN:

132,000. So that comes to the section 9A which I'm not addressing now because it is now 4 o'clock, but I'm going to talk about how it applies to section 9A, but I'm just saying the big picture is this is what happened over the course of the relationship.

WINKELMANN CJ:

All right, well we'll take the afternoon adjournment now. Figures are a low point to finish on at the end of the day.

MR VAN BOHEMEN:

Can I just check, your Honour, when you say the afternoon adjournment or were you –

KÓS J:

Oh, evening adjournment.

WINKELMANN CJ:

Oh, well, we're going for the day. Goodbye.

MR VAN BOHEMEN:

Yes.

WINKELMANN CJ:

We're going for the day, goodbye.

KÓS J:

You're welcome to return.

MR VAN BOHEMEN:

Thank you.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON THURSDAY 2 NOVEMBER 2023 AT 10.03 AM

WINKELMANN CJ:

Good morning Mr van Bohemen.

MR VAN BOHEMEN:

E ngā Kaiwhakawā ata mārie. Yesterday your Honours I addressed the facts and highlighted the financial reality for the parties during the relationship and the financial reality for the Trust, what happened during the relationship. I say that well, of course, the facts are important but there are some other important facts in this case which distinguish it from the *Clayton* case, the *Webb* case, the *Pugachev* case and the *TMSF* case.

Now in each of those cases the man, Mr Clayton, Mr Webb, Mr Pugachev, and I know he wasn't Mr TMSF, but had assets which he consciously put into a trust with the intent of – well with a consequence, or intended consequence, that those assets not be available for PRA claims in the *Webb* and *Clayton* case and for creditors in the *TMSF* and the *Pugachev* case. So each of them had assets, each of these men had assets, they set up a trust which was then subsequently attacked but and found that each of them, their actions, had been ineffective to achieve the goal that they wanted. So but for the Trusts in those cases, the assets would have been available for the PRA claims of *Webb* and *Clayton* and would have been available for creditors in the *TMSF* and *Pugachev* case.

That is not the situation here. Mr Pinney did not have the assets and put them into a trust. But for the Trust, but for the Marcus Trust, the assets would be owned by the Pinney Trust so they would never have been available to Ms Cooper. In my submission that is an important factual distinction between this case and –

WINKELMANN CJ:

Well unless they were distributed directly to him?

MR VAN BOHEMEN:

Yes, but…

WINKELMANN CJ:

You've got a counterfactual but there's another counterfactual.

MR VAN BOHEMEN:

If they had distributed to them but they would have been the settlors of the Pinney Trust, somebody other than Mr Pinney.

GLAZEBROOK J:

Well it would have been separate property and then it would have been subject to the rules in relation to separate property like intermingling –

MR VAN BOHEMEN:

Absolutely.

GLAZEBROOK J:

– like section 9A and homestead.

MR VAN BOHEMEN:

But my point is your Honour that the person to take the step to bring it within the parameters of the Act would not have been Mr Pinney, would have been the trustees of the Pinney Trust.

GLAZEBROOK J:

Well it wouldn't be within the parameters of the Act if it was separate property?

MR VAN BOHEMEN:

No, but the trustees –

GLAZEBROOK J:

But then what he did after that –

MR VAN BOHEMEN:

That's right, what he did –

GLAZEBROOK J:

– would make it separate property, would make it relationship property –

MR VAN BOHEMEN:

Relationship property, yes, but they would have to do something first.

GLAZEBROOK J:

– or to whatever –

KÓS J:

You're talking about source?

MR VAN BOHEMEN:

Yes.

KÓS J:

Different source?

MR VAN BOHEMEN:

Different source.

KÓS J:

Not the defendant but a third party.

MR VAN BOHEMEN:

Thank you, Sir. And the other which is different is, of course, the financial consequences in each or the financial outcomes in each case. In the *Pinney*, *Webb*, *Pugachev* and *TMSF* cases assets were accumulated, in this case assets were diminished.

WINKELMANN CJ:

So is entailed in your submission that that somehow changes the legal status of the powers under the Trust?

MR VAN BOHEMEN:

No, no, I'm just doing a factual distinction. My junior, Ms Powell, will now address you on the issue of powers and I'll now hand over to her.

WINKELMANN CJ:

All right, so I should have said at the beginning of the day, in terms of timing when do you anticipate being finished by?

MR VAN BOHEMEN:

We've had a brief chat with other counsel. We anticipate being finished by the morning adjournment, possibly sooner.

WINKELMANN CJ:

Yes. Good. Thank you.

MR VAN BOHEMEN:

Just I will be coming back to talk about section 9A after.

WINKELMANN CJ:

Yes, we'll let you.

MS POWELL:

Tēnā koe e te Kaiwhakawā. Today I'm going to address the Court on the appellant's argument that Marcus has powers in relation to the Trust which amount to property under the PRA. I'm going to be working to parts 2 and 3 of our written submissions but focusing on part 3.

Part 2 sets out principles of trust law and equity and property law which I say are the foundation to the decision made by this Court in *Clayton*. In *Clayton* the Court was respectful of those foundations. It didn't alter or attempt to alter

the existing principles of equity. It was also respectful of the statutory framework of the PRA which is based on the concept of beneficial ownership of assets. The Court held that in combination Mr Clayton's powers and entitlements under the Vaughan Road Property Trust Deed amounted to a general power of appointment over the Trust's property. The core or the key component of that reasoning is this concept of a general power of appointment and that's going to be the focus of my submissions today.

1010

KÓS J:

Was the essence of that conclusion though that equity could not restrain him from exercising those powers because that's really the important point that's at issue with Mr Watts' submissions?

MS POWELL:

It's an aspect of a general power of appointment that equity won't direct the exercise of the power in the sense of which of the objects will benefit from it so it is an important component and it's one that I will address.

KÓS J:

Good.

WINKELMANN CJ:

Did you answer Justice Kós' question though because he asked whether it was an important part of it, it could not restrain the exercise in a particular way?

KÓS J:

I understood you to answer that.

WINKELMANN CJ:

Did you. All right, okay, well maybe it didn't come through to me.

MS POWELL:

I agree with that proposition Ma'am, yes.

WINKELMANN CJ:

Right, okay, that's an easier answer I find.

MS POWELL:

So what is a general power of appointment over property? It's the power to dispose of or give away or appoint that property to anyone in the world. The person who has a general power of appointment can choose what to do with it and that includes keeping it for themselves but the starting point is in fact the power to appoint it to anybody and that's why a general power of appointment is necessarily unlimited as to objects. It's a –

GLAZEBROOK J:

I don't think that's right, is it?

MS POWELL:

It is right, Ma'am.

GLAZEBROOK J:

So, you say a general power can only be where you don't have a closed class that you can appoint to, is that…

MS POWELL:

Yes, Ma'am, that is exactly what a general power of appointment is.

GLAZEBROOK J:

All right.

MS POWELL:

So, if there is a limited class of beneficiaries, for instance, in any discretionary family trust where the appointors may only appoint in favour of the discretionary beneficiaries, it is a special power, a limited power and not a general power.

WINKELMANN CJ:

I think the difficulty that Justice Glazebrook is having with that argument is it seems to be that's it, you've won, because this isn't a general power of appointment because there's a defined –

MS POWELL:

Well that is the easy reason. That is the quick answer but there are, I do have further reasons.

GLAZEBROOK J:

Well especially in light of *Clayton* because I don't –

WINKELMANN CJ:

Clayton, yes.

GLAZEBROOK J:

I mean I think there might have been a power to add beneficiaries in *Clayton* but –

KÓS J:

Well that's the point.

GLAZEBROOK J:

Well, yes, but it was clearly a family trust in that circumstance.

WINKELMANN CJ:

So it was constrained on your reading?

MS POWELL:

Well, what I was about to do was to explain at least my interpretation of what the Court did in *Clayton* and how it reached it's, you know, what the analysis was which does incorporate Justice Glazebrook's point. So, the starting point was this general power of appointment over property and it was already established in law prior to *Clayton* that this was tantamount to ownership, that a person who held the general power of appointment was akin to the owner of

the property and so that's what made it so easy for the Court to, I suppose, overcome the hurdle between powers and property and say that Mr Clayton's powers well, therefore, gave him rights which were interests and came within the meaning, the definition of property in section 2 of the PRA.

What were the powers in question? Well they were, and I think it would be good to bring up *Clayton* at this point, at paragraph 52 the Court referred specifically to clauses 6.1(a), clause 10 and clause 8.1 of the trust deed. Those powers are all broad, dispositive powers over the Trust's property and they were all held by Mr Clayton in his capacity as sole trustee. That in and of itself one might think is not particularly different or special or exceptional. It's very common. In fact, most discretionary family trust deeds in New Zealand would incorporate broad discretionary powers to dispose of the trust property in favour of the discretionary beneficiaries. So there had to be more to the reasoning than that and, in fact, they are the points that Justice Glazebrook and Justice Kós have just raised. The first of those was there was the power, and this was held personally by Mr Clayton, the power to add and remove beneficiaries and that was in clause 7.1 of the Clayton Trust Deed. In my submission, the existence of 7.1 must have been central to this Court's reasoning that there could have been a general power of appointment because it enabled the power to become general. It overcame the issue of the limited class of objects.

WINKELMANN CJ:

Do they say that?

MS POWELL:

Not in those terms but the Court does put emphasis on clause 7.1 in the round.

GLAZEBROOK J:

Well at 52 it says three are decisive, 6.1(a), 10 and 8.1.

MS POWELL:

But the reasoning of the Court didn't end there. I'll just –

GLAZEBROOK J:

Well decisive sounds pretty decisive to me in terms of not adding other requirements.

MS POWELL:

If we read the passage as a whole it goes on and I was about to sort of go through this passage as a whole. The discussion of the role of 7.1 comes at paragraph 57.

KÓS J:

And also 62 where it's clearly a decisive or at least a material consideration.

MS POWELL:

So it forms, what the Court – the Court was looking holistically at the powers Mr Clayton held under this trust deed and that's why it didn't say the powers he holds as sole trustee amount to general power of appointment. It said the powers he held as sole trustee and principal family member. You know all of the powers he held in his different capacities when looked at holistically amounted, in effect, to a general power of appointment and my submission is that clause 7.1 was an essential ingredient because otherwise he would only have had a special power or a limited power and not a general power.

WILLIAMS J:

That suggests that that is a slam dunk every time. As soon as you have a closed class of discretionary beneficiaries, no matter how described, it can't be a GPA, are you sure?

MS POWELL:

Sir, that is the reasoning in *Clayton* so the reasoning in *Clayton* was he held a general power of appointment and therefore –

WILLIAMS J:

Yes, but the general power of appointment was by reference to a much broader analysis than whether the class of discretionary beneficiaries was closed or open.

GLAZEBROOK J:

And also included appointing to himself. I can understand a special power when you only have a power to appoint to a closed class if you don't also have a power to appoint to yourself.

MS POWELL:

Well, I mean, if the Court were to say that limited powers are general powers that would just be inconsistent with hundreds of years of trust law and I'd find that surprising.

WILLIAMS J:

So was *Kennon v Spry* heresy?

MS POWELL:

Kennon v Spry was operating a different statutory context.

WILLIAMS J:

But it was talking about property. That was the essence of its reasoning. This is property because and then there was an analysis of various contextual points that got them to that point but nothing about the class of beneficiaries at all.

MS POWELL:

I'm looking at the specific reasoning in *Clayton*. The appellant has pinned their flags to the mast of *Clayton*. They have said their argument is that there is a general power of appointment here and –

WILLIAMS J:

Sure, but you –

MS POWELL:

– and I'm saying there isn't.

WINKELMANN CJ:

Well is the difficulty perhaps that that's an overly technical approach because really what the Court as concerned was with in *Clayton* was whether he had the ability basically to enjoy all the incidence of ownership and he did. It didn't really matter that it was a general power of appointment. He had the ability to take the asset to himself at his will.

MS POWELL:

And *Clayton* could have been decided on a different basis and wasn't and you'll recall the discussion yesterday that the Court was – didn't determine the illusory trust type of argument.

GLAZEBROOK J:

Well, just don't assume that it's enough for you to say that's the distinction here.

MS POWELL:

I won't, Ma'am.

GLAZEBROOK J:

So don't assume that we're with you. I think you've probably gathered we may well not be.

MS POWELL:

I do have much more to say.

KÓS J:

But the important –

GLAZEBROOK J:

Well at least two of us.

KÓS J:

The importance of other beneficiaries though is simple. It is the potential for those beneficiaries to bring an action or to enforce fiduciary obligations.

MS POWELL:

That's right.

KÓS J:

If you can't exclude them then they are there and that's why that question of enforceability becomes important.

1020

MS POWELL:

So where I was going to move after clause 7.1 was exactly there. The other core component of the Court's reasoning in *Clayton,* and it follows from the 53, 54 passage, around 56, was the concept that in *Clayton*, actually I'll just pause a moment and note that Mr Clayton held these powers in his capacity as the sole trustee. So one would normally expect him, therefore, to be subject to duties that are inherent in the role of the trustee. If we think about what the essence is of a trust being a set of obligations reposed on the trustee so the settlor has put trust and confidence in the trustee to manage and property for the benefit of others. Those inherent duties needed to be dealt with and they were dealt with by the Court in *Clayton*.

So, at paragraph 56 the Court considered whether in exercising his trustee powers Mr Clayton was constrained by fiduciary duties and the Court looked in particular at three clauses again. All of these clauses modify or negate established fiduciary duties which would otherwise have applied to Mr Clayton as a trustee and that again isn't unusual. It is normal in New Zealand discretionary trustees to find clauses which modify or negate fiduciary duties. The reason for that is the reality of the New Zealand, the way that discretionary trusts have developed in New Zealand law as a very common instrument where many people have trusts and it's very common for people to be both a trustee and a beneficiary and I'd hazard a guess to say that's the

norm. So some trusts have purely independent trustees who are not beneficiaries but certainly in my experience and practice that is the minority. So it's simply necessary for trustees to include clauses which modify the fiduciary duties in some way otherwise you have this impractical situation where the trustees cannot do anything because they cannot…

WINKELMANN CJ:

Unless they have another trustee.

MS POWELL:

And they would then also need a clause modifying the duty to act impartial – unanimously so –

WINKELMANN CJ:

Which they do do sometimes.

MS POWELL:

Yes, they do. So there's lots of different ways in which trustees grapple with the modification of duties and in this particular trust deed, in the Vaughan Road Property Trust, there were these three clauses that the Court commented on. Clause 14.1 that negated the prohibition on self-benefit so it enabled Mr Clayton to distribute property to himself as a beneficiary. Clause 11.1 modified the duty of impartiality and I'm going to come back to clause 11.1 because I think it is something very significant about that particular clause. Clause 19.1(c) authorised the trustee to act in situations where there was a conflict.

So, again the Court looked holistically at the trust deed. It took into account all of these different clauses in coming to its conclusion. But, again, in my submission it would have been difficult to reach – or the conclusion the Court reached in relation to the negating of fiduciary duties couldn't have been reached if it weren't for that clause 11.1. If we stop and think about what the core of a fiduciary duty is, it's the duty of loyalty and the duty that, you know, and it has different aspects to it but fundamentally it's about others before

yourself and in a discretionary family trust if we think about the rights, typical rights, of a discretionary beneficiary, it's the right to be considered by the trustee in the exercise of their discretions and the right to proper administration of the trust. I am going more on that topic later.

What clause 11.1 did is it negated the need to even consider the interests of the other beneficiaries. So it's taken away a critical component of the rights of discretionary beneficiaries under that Trust. Mr Clayton could act, distribute property to himself, having not even considered anybody else's interests and in my submission that is very important and it's fundamental to the reasoning that the position – that the Court landed on the understanding that on this trust deed the rights of the discretionary beneficiaries to hold Mr Clayton as trustee to account were minimal.

WINKELMANN CJ:

Have you got the paragraph reference for us on that?

KÓS J:

56 to 58.

MS POWELL:

Thank you, Sir. It's in that passage just below. So –

WINKELMANN CJ:

Your reasoning, and I think the Court's reasoning, is more than that, it's not just the rights to hold him to account are minimal, it's actually his obligations are minimal.

MS POWELL:

Well rights and obligations, one person has a right, another has –

WINKELMANN CJ:

No, no, there's a difference, isn't it? You might have quite significant obligations but the ability of anyone to hold you to account to them is – and

that's one of the issues in this case and I think you would be pointing that out, wouldn't you, because it's not enough to say that the beneficiaries are limited in their ability to review what's happened if the person still has the obligations, they have the obligations.

MS POWELL:

Ma'am, my understanding of rights and obligations is that they are reciprocal. If one has a right, another has an obligation and then –

WINKELMANN CJ:

Well that's – let's not get into Hohfeldian discourse.

MS POWELL:

But then, of course, the Courts have an inherent jurisdiction over the administration – proper administration of trusts to see that they are faithfully administered and it would be most unfortunate if there were a precedent set by this Court which said that –

WINKELMANN CJ:

I don't think you've been listening to what I just said to you, because it's said against you, it's said against you, look these obligations are unenforceable and that's a reason to regard it as a property in your client's hands and what I'm saying is that you would say that it's not the case in *Clayton* that just the beneficiaries didn't have much they could do to enforce it. It was actually that his obligations were reduced which is not the case here. That's your argument I think.

MS POWELL:

Thank you, Ma'am, yes.

WILLIAMS J:

It is now.

ELLEN FRANCE J:

Well, that's what 58 says, isn't it? The provisions mean that Mr Clayton is not constrained by any fiduciary duty. He can unrestrain by fiduciary obligations et cetera.

GLAZEBROOK J:

So the question really is whether the fact that you have to – I'm not sure whether you have to consider it or just survey the beneficiaries because it's obviously not a case, especially with a very wide quantity of beneficiaries, that you have to wonder whether the residual cat home needs money more than your daughter but whether it was – it is critical for there to be a general power of appointment that they at least could enforce consideration except that, of course, in practice that's very difficult to do because a trustee doesn't have to give reasons.

MS POWELL:

There's quite a lot in that. If the –

GLAZEBROOK J:

It's very minimal requirement and the issue is, is that enough to make it not property?

MS POWELL:

Well, I suppose, I differ on the fact that it's a minimal requirement, that the requirement of the trustee is to act in good faith when it exercises its discretion and that includes not just, you know, a peripheral glance at the possible beneficiaries but actually genuinely considering prior to exercising your discretion whether or not to do so and we're working in a context where okay the trustee doesn't have to give reasons but they certainly have to give information and that enables the beneficiaries to then come to the Courts for a remedy if they consider that decisions weren't reasonably reached by the trustee.

1030

WINKELMANN CJ:

But the trustee need not give – there's an express provision that they needn't give reasons, isn't there, so they don't have to explain what they do?

MS POWELL:

Except that if a beneficiary did bring in an application under section 126 and section 127 of the Trusts Act to say that a decision wasn't reasonably open to a trustee, if the trustee chose then to not provide reasons for its decision, it might find itself in a difficult situation so –

WILLIAMS J:

Well the Court could make the trustee give reasons because that – the trustee owes the Court reasons as to supervise, or whatever the trust deed says, but where you've got really a purely procedural safeguard, albeit one on the basis of good faith, where you can act selfishly in good faith because that's what the deed says, I just wonder how useful any of these enforcement provisions really are apart from them being massively expensive for most of the 400,000 trusts.

KÓS J:

But that seems inherently inconsistent to me. I don't know that you could act in good faith in such a selfish way where –

WILLIAMS J:

But you're allowed to be selfish. That is consistent with good faith because the trustee actually says it.

KÓS J:

Well that – yes, but even then I suspect a first instance judge will look at that and say: "Hang on, you –

WILLIAMS J:

Sorry, Dr Powell, you're a spectator in this.

WINKELMANN CJ:

Yes, and I wonder if that's appropriate actually. Anyway, perhaps Justice Kós you'd like to address a question?

KÓS J:

Well, I think I've made – I think part of the process here is to make points and I just made one.

WINKELMANN CJ:

Can you repeat it because it was interrupted and I was wanting to hear what you said?

KÓS J:

Well the point I was trying to make was this. If the trustee has cleared out the cupboard completely and a first instance judge faced the section 126 application by a beneficiary will immediately say: "What possible good faith justification can there be for a complete clearing in favour of you, the trustee beneficiary, to the complete exclusion of the others?" It poses more than just a procedural problem for the trustee trying to justify. That's the point.

MS POWELL:

And if the trustee refused to provide reasons for its decision in that context, I think it would invite the Court to draw inferences that it could have had no proper reason for doing something along those, you know, along those lines.

WILLIAMS J:

But you see, and this is probably a good example of just such a likely outcome where Marcus Pinney would simply say: "This is a legacy asset. I was always supposed to get it. The history shows that. I'm not acting in bad faith when I give it to myself. That was the point."

MS POWELL:

Well, Sir, with a legacy asset it's there for the future, it's there for Marcus' children and his grandchildren –

WILLIAMS J:

Or Marcus if he –

MS POWELL:

– who are the final beneficiaries.

WILLIAMS J:

Yes, but or Marcus if he chooses to take it and that – it's hard to see how that could be expressed to be in bad faith, and unless there's some mala fides somewhere, how could mere selfishness in this case be bad faith?

WINKELMANN CJ:

And that is actually explicitly said against you by the other side.

MS POWELL:

Yes. Marcus can't make these decisions. The other side also says that Marcus can just do this. Well Marcus cannot do this. Marcus, even if he were a trustee, would only be one of two trustees and each of those two trustees would have a duty of good faith and a duty to consider the interests of all the beneficiaries and a duty to act unanimously. The trustees would not be permitted to act on Marcus' direction as Mr Watts has suggested they might.

WILLIAMS J:

Yes, well that seems to me your best argument by a long shot and would normally be the clincher, I would have thought, but for the ability to remove and replace. And you might say that the bad faith inquiry would be about whether you did that simply to achieve what you want to achieve without having to consider the interests of other beneficiaries, then that would be an action in bad faith perhaps.

MS POWELL:

Well I would say that the good faith applies equally to Marcus' power to add and remove trustees. That was something I was –

WILLIAMS J:

That's the point I'd be making.

MS POWELL:

Yes. I was going to get to that last. I'm happy to address it now if that's preferable.

WILLIAMS J:

It's all right, it's –

GLAZEBROOK J:

No, no, you do it in the order you were doing.

WINKELMANN CJ:

Well, actually I mean you've been, yes, you've been subjected to quite intense questioning and I think – I'm not quite sure where you're at in your argument so you might want to regroup and just take us through it in your order which is –

MS POWELL:

Thank you, Ma'am.

WILLIAMS J:

I thought you were doing rather well actually.

WINKELMANN CJ:

Yes, I agree. I'm not – I'm just saying just take a moment to regroup and you take us through in the order you want to take us through.

MS POWELL:

Right, so I was starting at paragraph 17 of the oral outline and I'd mostly got through that. There is something there though about the fiduciary obligations and it's just that general powers of appointment are not thought to be subject to fiduciary obligations and the rationale for that is simply that the idea of loyalty doesn't have a place when the donee of the power or the person who

can exercise it can exercise it in favour of anyone or in favour of themselves so selfishly. So the fact that the Court focused on the modification of fiduciary duties was part of its reasoning why Mr Clayton didn't have a general power of appointment.

WINKELMANN CJ:

So do you say that Justice Miller was wrong in how he characterised it then?

MS POWELL:

I find it difficult to know what to do with Justice Miller's reasoning.

WINKELMANN CJ:

Well I imagine –

MS POWELL:

I don't agree with it.

GLAZEBROOK J:

Well you just say that there are, as I understand you, you say that the requirement to consider the interests of the other beneficiary is a substantial constraint at least procedural, but you say substantive, that takes it outside of a general power of appointment and that's especially the case here because there's another trustee involved.

MS POWELL:

Yes, Ma'am.

GLAZEBROOK J:

So it wouldn't matter if there wasn't another trustee involved because you say that does it itself. I think your first argument is it has to be all the world –

MS POWELL:

Yes.

GLAZEBROOK J:

– but the second one is even if it doesn't, the fact that you have to consider is a substantial constraint that's fatal to it being a general power of appointment?

MS POWELL:

Yes, so yesterday Mr Watt –

WINKELMANN CJ:

Watts.

MS POWELL:

Watts, apologies. Mr Watts didn't adopt this concept that it would be sufficient for a special power of appointment. He didn't adopt that argument. But if we were to look at that argument where, you know, if we forget about the unlimited objects aspect of general powers of appointment and say: "Well okay it's limited as to objects but it's still broad and unconstrained," those trustees are still subject to fiduciary duties and –

WINKELMANN CJ:

Can I take you back to my question because we are hearing an appeal and I find it very helpful if people engage with the judgments under appeal and at paragraph 72, which is the paragraph I took Mr Watts to, of Justice Miller's reasonings he said: "The Supreme Court judgment in *Clayton* establishes that to classify a trustee's (or settlor's) power as fiduciary in nature is not to end a court's inquiry in litigation under the PRA. A court must be prepared to look beyond form and take a realistic view of substance." And he refers us to paragraph 64 of *Clayton*'s case which acknowledges that: "The powers he exercises are fiduciary… But the freedom given…" by the clauses "…mean the normal constraints of fiduciary obligations are not of any practical significance in relation to his powers..." So I'm just interested to know what you say about that because that's the crux of Justice Miller's reasoning and dissent I think.

MS POWELL:

I think the answer is that there is meaningful accountability for the discretionary beneficiaries through the Courts particularly in the present case.

GLAZEBROOK J:

I'm sorry, can you just start that again, I think I missed the first part of it.

MS POWELL:

Apologies. There is meaningful accountability –

GLAZEBROOK J:

There is, thank you.

MS POWELL:

– for the discretionary beneficiaries through the Court in this case.

GLAZEBROOK J:

And you say that through what – that the duty to consider?

1040

MS POWELL:

The duty to provide information, the duty to consider interests, the duty to faithfully administer the Trust, the ability of the Courts to apply for review of a trustee's decision, the ability of beneficiaries to apply to the Court to replace a trustee including on grounds of conflict of a trustee and there are, you know, instances where the Court has considered a trustee unable to fulfil their duties due to conflict.

WINKELMANN CJ:

All right, but because of those – I was just going to say all of those were present, of course, in *Clayton's* case, so what the Court is focusing on there is the reduction of his obligations so…

MS POWELL:

And where I was moving to in applying *Clayton* to the present case is to say that these same provisions aren't present and particularly that clause 11.1, which negates the duty to survey the beneficiaries, if we call it that, that's simply not present in this case. The trustees of the Marcus Trust are required to consider the interests of the discretionary beneficiaries even if they then decided to make a decision that favoured Marcus. And if we're talking about looking at substance and practical reality, well the practical reality is that Marcus is the father of the other discretionary beneficiaries and it's no surprise that the settlors placed trust and confidence in him to look after their interests. They're not some random other people.

ELLEN FRANCE J:

And you say section 26 would then have some bite given the absence of clause 11.1?

KÓS J:

Section 126.

ELLEN FRANCE J:

Section 126, sorry.

MS POWELL:

Yes, section – well section 126 would be the mechanism that the beneficiaries would use to challenge a trustee decision. So moving then to the present case, and I hopefully can move through this quickly because most of it has come up, my submission is that the dispositive powers held by the trustees are special and not limited powers and I note the comments about that from the Bench. The reason for it is that there's a limited class of beneficiaries, discretionary beneficiaries Marcus, Marcus' children and grandchildren and there is also no ability, and it's a critical distinction from *Clayton*, no ability for anybody to add or remove discretionary beneficiaries from this Trust and that was a deliberate decision.

If we recall the evidence of Mr McIntyre about leading up to the establishment of the Trust and the need for this Trust, in fact it – yes, so paragraph 67 of Mr McIntyre's affidavit he refers to the need to ensure significant oversight by the trustees so he's not thinking of a situation where Marcus would be in singlehanded control over the property. He's talking about the facts that the property would never have come to Marcus personally. It would otherwise, the property would have stayed in the Pinney Trust and that one of the objectives was actually to give effect to Marcus' parents wishes to see property pass through the family in this sort of a way.

Mr McIntyre wrote a letter to Marcus in the lead-up to the establishment of the Trust, I think it's 10th of June 2005 and he's, on behalf of the trustees of the Pinney Trust, he's introducing this proposal to resettle property from the Pinney Trust on a new Trust for Marcus and his children or his future children. Over the page he talks about… it's actually not the path I was expecting to refer to. Hang on. Here we go. It's this discussion about the clause – Marcus' father Bernard Pinney's Will and the need to – so it appears, because this letter is all we have on the topic, it appears from the letter that Bernard Pinney's Will says – sets up a testamentary trust of some nature. It could be, for example, that there was a life interest to his wife and the residual interest to the children but we don't know that. And there was a proposal that be a resettlement from that Trust onto this Trust and there was therefore a need to consider the – to keep the class of beneficiaries consistent with Bernard Pinney's Will. So there's a discussion. Mr McIntyre talks about the advice that they needed to exclude spouses and partners as part of this trust deed to facilitate that potential resettlement. As far as we know it hasn't –

GLAZEBROOK J:

So it's not the most attractive of motives it has to be said but carry on.

MS POWELL:

No, but here I'm talking about the fact that it was a deliberate – the class of beneficiaries is kept deliberately narrow and it was a deliberate decision of the settlor. So when we interpret a trust deed we think about what did the settlor

intend by this deed and the settlor intended there not to be the ability to expand and, in fact, reduce the discretionary beneficiaries.

GLAZEBROOK J:

Well you wouldn't be able to do that anyway without an express power.

MS POWELL:

No, you wouldn't, Ma'am. And so there is neither an express power nor is there the ability to use the power of amendment under this trust deed which is clause 12 to achieve that.

WINKELMANN CJ:

So it looks like setting this up for Marcus and possibly the children?

MS POWELL:

Well Mr McIntyre says and definitely the children. If we scroll over to the second page of his letter, he's very focused on the children.

GLAZEBROOK J:

Well one assumes that Marcus would look after the children in any event.

MS POWELL:

It would be reasonable to assume that and there's certainly no evidence of anything else. So Mr McIntyre says: "Because of your relative inexperience in financial management" – right he doesn't want to put Marcus in singlehanded control – "trustees of the Pinney Trust are of the view that you should consider carefully who to ask to join you as trustees or trustee…" but they will respect your wishes. So you can choose who the co-trustees will be but they need to exist. And then he goes on to say: "The trustee's role is to look to the interests of all potential beneficiaries and not just to your interest as primary beneficiary." So the intentions of the settlors in setting up this Trust was not to simply provide for Marcus. It was to provide for all of the discretionary beneficiaries and that was made clear to Marcus right at the start. So we have –

KÓS J:

What did you make of Mr Watts' thesis yesterday about there being a trust obligation not to act in a way that is anathema to the settlors' wishes? This is novel to me.

MS POWELL:

Well I agree with that submission, Sir. The Trust needs – the trustees, the inter – sorry, in exercising their discretions and their powers under the trust deed, the settlors need to bear in mind the purpose for which they were given those powers and here the trustees are given powers over property to look after all of the beneficiaries and that same argument then applies that Mr Pinney, Marcus, has got the power to appoint and remove trustees but he needs to also do so mindful of the settlors' intentions in giving him that power. It comes back to the reposing of trust and confidence in the person who holds the power.

GLAZEBROOK J:

Are you suggesting that they couldn't bring forward the vesting date? I mean I just have difficulty in, and I'm not – it's really the more substantive aspects rather than the considering because some of these arguments could say well you're never allowed to bring forward the vesting date, you're never allowed to get these assets out of the Trust and that doesn't seem to be the sort of flexibility that New Zealand trusts are looking for.

MS POWELL:

No, Ma'am, I'm not making – I'm not setting the bar that high and I'm not making the argument –

1050

GLAZEBROOK J:

So it's just a – you're relying on the requirement to consider?

MS POWELL:

Yes, I'm saying this is a very ordinary family trust, just like all of the other family trusts in New Zealand. This is quite unlike the trust in *Clayton* and the usual rules of trust law which apply, apply to this Trust too.

WINKELMANN CJ:

The trust in *Clayton* is probably not that unusual though, is it? I mean I've seen lots of trusts that have got all these sort of extreme carve outs of fiduciary duties and obligations et cetera.

MS POWELL:

I think it's unusual to have a clause where the trustees are not required to consider the interests of the beneficiaries. I've never seen a clause like that, Ma'am. The other –

GLAZEBROOK J:

The others are more common but I –

MS POWELL:

Yes.

GLAZEBROOK J:

– think that is probably more because it's such a low duty it seems –

WINKELMANN CJ:

I'm dubious actually. I think you'll find these things are increasingly pervading trust documents.

GLAZEBROOK J:

Well they probably are.

WILLIAMS J:

I think there might be a few fewer of them now.

GLAZEBROOK J:
Yes, I'd say there –

WINKELMANN CJ:
Yes, hopefully. Unfortunately trust documents hang around a long time.

MS POWELL:
Yes, yes.

GLAZEBROOK J:
And are usually pulled off the shelf as precedents with a whole pile of inconsistent provisions added to them.

MS POWELL:
Yes. I do, you know, think there's a problem with the way in which trusts have evolved in New Zealand and it is good to be putting things back on track and making sure that trustees do abide by their obligations in accordance with the law and, you know, there's no reason why this Trust and these trustees shouldn't be expected to do that too.

Right, I'm just looking to see what I have and haven't covered. So, I've mentioned that the dispositive powers belong to the trustees, not to Marcus, and also that those trustees have to act unanimously. There's no carve out of the rule, the unanimity rule. The only power that Marcus holds individually that doesn't have to be exercised unanimously is the power to appoint and remove trustees and in my submission that's in a way a side issue because the constraints on the trustees, the requirement for there to be two trustees and the constraints on those trustees, is sufficient to distinguish this case from *Clayton* but I will address this to trustee – this power of appointment and not leave it hanging.

The starting point is that the power to appoint trustees is accepted in New Zealand law a being a fiduciary power and the reason for that is that the office of the trustee sits at the heart of the trust relationship. The settlor has –

GLAZEBROOK J:

What does that entail?

MS POWELL:

Well, if you strip back a trust to it's core, you have a trustee holding – owning property, having the legal interest in property, legal estate in property which they hold subject to obligations to deal with it for benefit –

GLAZEBROOK J:

I'm just saying what are the fiduciary constraints on appointing trustees?

MS POWELL:

I think the core of it would be to consider the interests of the beneficiaries when you do so and arguably not a fiduciary constraint but I'm going to go on and say in exercising that power Marcus also has to consider the intentions of the settlor, the purpose for which he was given the power. So, the settlors have, and I think it comes through that passage from – the letter from Mr McIntyre to Marcus, the settlors, you know, he discusses the fact that Marcus is going to have the power of appointment of trustees in the same paragraph as he discusses the need for the trustees to act and to consider all of the beneficiaries and that's because those concepts sit together so closely.

While the trustee – the settlors put trust and confidence in the trustee to administer the trust he's also, or they have also put trust and confidence in Marcus to consider who should be the trustees. It's his choice but he's been given that responsibility. So one way to look at it is it's a power coupled with an obligation. That power regardless, so my first submission is it is fiduciary and he does have to exercise it in the interests of the beneficiaries, but regardless it would still be subject to other rules on scope and purpose and those rules are based in equity so it's not necessarily part of fiduciary law, they're broader rules of equity.

WILLIAMS J:

I just wonder whether these are all motherhood and apple pie, of course, but I'm not sure that they would bite that hard. Isn't the real issue here that no one with this sort of power could use it purely instrumentally to benefit themselves?

MS POWELL:

And that would be a breach of the proper purpose, the purpose for which he was given the power.

WILLIAMS J:

Well it would bad faith in however you construe the power, you could not exercise it in bad faith.

MS POWELL:

I think – I agree, Sir, we could wrap it up in lots of different ways. We could say it's bad faith, we could say it's a breach of fiduciary duty, we could say it's outside the scope because there's an implicit limit in that power that Marcus, if he is to appoint, the two trustees need to not both be Marcus. That's so obvious it's not stated.

WILLIAMS J:

Or Marcus' puppet if you like.

MS POWELL:

Alter ego, yes. I'm thinking of Marcus Limited, the company in which Marcus –

WILLIAMS J:

Well I was thinking of person A who's taken the job on condition that they allow this to happen.

MS POWELL:

So I think we have to treat the tame trustee separate from the alter ego. The tame trustee, the answer to that, is that that trustee is subject to the same duties as every trustee and if they, you know, if they neglect their duties then we're back to the beneficiaries having a remedy in the Court for that trustee not having properly considered their interest and acting on Marcus' direction. That's the answer to that.

KÓS J:

So your point is that the alter ego can't be appointed at all and the tame trustee has to behave?

MS POWELL:

In a nutshell, yes. So you can get there through lots of different routes of reasoning but the source of all of those reasons is actually the intention of the settlors in setting up this Trust that there be two trustees, that Marcus not have unilateral control over the property and that the interests of all of the beneficiaries are protected, whichever route we get there.

Thinking of the Marcus Limited, the way it was put in by the Court of Appeal in the *Brkic v White* [2021] NZCA 670, [2021] NZFLR 840 case was that it would be – that, you know, the power can't be exercised for a collateral purpose to undermine the words of that trust deed. That's not an exact quote, it's a paraphrase, but I think that same argument works here. Whichever way we get there, if Marcus were to exercise his power of appointment of trustees to – with the intention of bringing about a situation where he was both of the two trustees, that would be the exercise of a powerful and proper purpose.

WILLIAMS J:

Can we take a counterfactual then with a tame trustee, Marcus has an obstructive trustee, removes her, appoints a trustee who he knows will be prepared to do what he wants, that trustee, those trustees record in a minute they've considered all the interests of the beneficiaries and Marcus takes, how could you review that? In other words, what are the teeth in the system to

protect against self-serving records of what are essentially bad faith decisions?

MS POWELL:

Yes.

KÓS J

Well, that's where section 126 comes in and perhaps *Lambie Trustee Ltd v Addleman* [2021] NZSC 54 is a good example of quite an intrusive review by the Courts of what were apparently good faith decisions.

MS POWELL:

I suppose the trustees could be cross-examined on their decision making and it would become apparent if what had happened wasn't actually in good faith and they had simply concocted documents to create a paper trail in order to satisfy a possible future inquiry.

1100

WILLIAMS J:

Yes, well it's not unheard of, is it, even by well-meaning people?

KÓS J:

Section 126 is quite a radical power and it's a much more expressive power to enforce fiduciary duties than existed before that amendment.

MS POWELL:

Yes, and it's for the most part I would say the Trust Act codified existing law but section 126 is an exception to that. It's gone much further in ensuring – well the trustee duties have become clearer, more transparent, and there is a new mechanism for them holding trustees to account and, also as part of that matrix, there are the new rules on provision of information which again are much more clear and transparent and which would provide a beneficiary with the tools. I do take your Honour's point that if it's all fraudulent and if the

documents are concocted it makes it harder but that is the, you know, that is something that could be teased out as part of the process.

WILLIAMS J:

So, yes, section 126 provides an accountability mechanism and you're going to need the evidence to establish any plaintiff potential beneficiary's case?

MS POWELL:

Like any case.

WINKELMANN CJ:

I think I've rejected an argument in an earlier case about 12 years ago that a person with the power of appointment controls a trust by virtue of their ability to appoint trustees on the basis that the trustees immediately were seized – immediately had fiduciary duties.

MS POWELL:

Well, Ma'am, I'd agree with that reasoning.

WINKELMANN CJ:

It's a case called *Financial Markets Authority v Hotchin* [2011] 3 NZLR 469 (HC).

MS POWELL:

Right, yes.

WINKELMANN CJ:

It just occurred to me these arguments are ringing bells.

MS POWELL:

And I think I may be wrong because I'm stretching my memory here, Ma'am, but there was an issue there about a trustee who hadn't consciously exercised and who had just left it all to the other one and they weren't able to use that as a shield against liability. That's my recollection but…

WINKELMANN CJ:

That might have been another case again.

MS POWELL:

Right.

GLAZEBROOK J:

It's usually not bad faith in these cases. It's not understanding what the role of a trustee is I think and certainly there's been issues about proper administration of trusts because people don't understand their duties and one of the issues with an alter ego trust is effectively if you say it was always their property then in a way you're actually allowing breaches of trust.

MS POWELL:

And I agree there is an issue with alter ego trusts and trusts where people, trustees take on these roles, including professional advisors, who take on these roles but actually don't actively participate in the decision in the way they should and the Courts ought to be addressing that and holding them to account if things go wrong.

WINKELMANN CJ:

So how are we going for timing?

MS POWELL:

Ma'am, I think I'm done unless the Court has any further questions for me.

KÓS J:

I've got one. How do we deal with the question of speculation here? I mean what we're doing is trying to work out how bad a trustee could be. In Mr Clayton's case, it was pretty obvious that Mr Clayton could be very bad because it was set up in a way that enabled him easily to exploit the powers there to appoint the property to himself equals a GPA. Easy, easy inference. We don't have that same context here and so what we are looking for is – what Mr Watts is looking for is a way past all the constraints of equity to give

Mr Pinney absolute powers. There's a degree of speculation that comes into that which is rather different from one case to the other. All cases will be different.

MS POWELL:

Yes, and there is nothing in the facts of this case at all to suggest there was, you know, there's any issues in the administration of the Trust or any intention to deprive Marcus' children of their property.

KÓS J:

Well I'm not sure about that. The Trust seems to have been well administered in the days of Mr McIntyre and Mr Acland and rather slackly administered in more recent times.

MS POWELL:

Well there's actually very little to do, Sir, because the Trust owns the farmland and certainly during the relationship it was the farming company which did all the action.

WINKELMANN CJ:

Well, we'll hear from Mr Watts on reply but I didn't think that was his argument. I thought his argument was that this man had sufficient control, that he simply could very effectively and without any effectiveness constraint direct the property to himself and to do so would be consistent with the purpose of the Trust because it was ready to set up to hold property of him.

MS POWELL:

And my response, Ma'am, to that is no he can't direct as a beneficiary. Those decisions are for the trustees.

WINKELMANN CJ:

And you'd also say that the purpose of the Trust was just not him?

MS POWELL:

I would say that, Ma'am, yes.

WINKELMANN CJ:

Right. Mr van Bohemen?

MS POWELL:

I'll hand back to Mr van Bohemen. Thank you.

MR VAN BOHEMEN:

So we're at paragraph 21 of the oral outline. We only have to address section 9A if this Court determines that Marcus' powers are property. If your Honour accepts – if your Honours accept the arguments as outlined by my junior, Ms Powell, you will reach the conclusion that his powers are not property and therefore section 9A is not engaged. If it is engaged, the powers are his separate property because he has these powers because he is a beneficiary of the Pinney Trust. If it is engaged, we have this question of what is the value of the Trust powers and in the *Clayton* judgment at paragraph 99 there's a clear statement that the value of the powers is equal to the net value of the Trust assets.

So section 9A is an unusual section of the PRA. The heading is: "When separate property becomes relationship property" and it creates a new genus of property because the underlying property remains separate. It's the increase in value which becomes a new item of property.

GLAZEBROOK J:

You seem to suggest that you lump all separate property together which wouldn't be the case in terms of separate property would it normally?

MR VAN BOHEMEN:

I'm not suggesting you'd lump all the property together.

GLAZEBROOK J:

Okay, well that's why I can't – I just had difficulty with the trust analysis beforehand.

MR VAN BOHEMEN:

No, the reason, the separate property in this case is the powers.

GLAZEBROOK J:

Well it might be but you'd look at the underlying assets that made that up, wouldn't you, if you were doing a proper counterfactual –

MR VAN BOHEMEN:

Well that's what *Clayton* –

GLAZEBROOK J:

– because it is only a proper counter – it is only a counterfactual not…

MR VAN BOHEMEN:

But that's what the Court did in *Clayton*. They said the powers are the property, the property for the PRA purposes is the powers. The next question is what is the value of those powers and because the powers were to take all the Trust assets, the value of the powers was equal to the net value of the trusts. I'm not saying –

ELLEN FRANCE J:

Where's the best place to see that in *Clayton*?

MR VAN BOHEMEN:

It's in *Clayton* at 99: "What is the correct valuation of the powers?"

WILLIAMS J:

That conclusion is at 107.

MR VAN BOHEMEN:

Thank you, Sir.

GLAZEBROOK J:

Yes, I just wouldn't see that analysis as being the analysis that would apply in a case such as this if you're looking at section 9A.

MR VAN BOHEMEN:

No, we're only looking because section 9A –

GLAZEBROOK J:

Because it's hard to see that you've got a value of a power that's increased over the period of the Trust.

MR VAN BOHEMEN:

If the value of the power hasn't increased section 9A doesn't –

GLAZEBROOK J:

Well but that's what doesn't make sense to me because you're not – you're actually looking at what's happened to the particular assets as if they were separate property.

MR VAN BOHEMEN:

But remember where this is a PRA claim, so the claim has to be formulated within the PRA. The whole claim about the way Ms Cooper comes to the Trust is to say that Mr Pinney has rights which are property under the PRA and she accepts that the underlying rights, the value of the assets of the Trust are his separate property, it's only the increase in the value of the underlying rights which could be the basis of a claim under section 9A.

KÓS J:

Doesn't that go and lockstep the rights and the underlying assets, don't their values rise and fall together?

1110

MR VAN BOHEMEN:

Well they do and the tricky part, well not the tricky part, if you compare the underlying assets here, with the underlying assets in *Clayton*, in the *Clayton* – and it's not especially clear in the *Clayton* judgment, but in the Family Court in *Clayton* there was this argument that the underlying assets had been Mr Clayton's separate property and the Family Court Judge made a deduction of $500,000 to take account of that. So the Family Court Judge – and it's referenced in the Supreme Court judgment this $500,000 calve off, which was his separate property, and so they said the value of the powers was the value of the – the net value of the assets. That was after they'd taken off the 500 so really it's the increase in value is what they valued in *Clayton* and in that case the value of the assets increased so it was easy to find a remedy. But just in terms of section 9A, you know, section 9A is looking to items of property, items of separate property, has there been an increase of value, if so, there is a possible PRA remedy. You've got to have separate property and it has to have increased to get a remedy. So our first point is there is no increase therefore there is no remedy available.

GLAZEBROOK J:

What about looking at the farm alone?

MR VAN BOHEMEN:

I'm just about to do that.

GLAZEBROOK J:

Thank you.

MR VAN BOHEMEN:

Because that's what Justice Miller did. So Justice Miller said that – if you can call up the Justice Miller decision, it's at 97 – so this is Justice Miller's engagement with the issue: "But for the Trust it would be appropriate to make orders of these kinds" – which is sections 9A, 17 and 12 – "In my view the appropriate remedy, but for the Trust, would be an order under s 9A declaring that the increase in the farm's value…" Now, but the farm isn't the separate property. It's the powers which is the separate property and the powers are

the powers to deal with the Trust so that's why applying *Clayton* the values of the powers equals the net value of the assets. So that's why it was, in my submission, wrong for Justice Miller just to value the farm because it's not the farm which is the separate property. It's the powers and they're valued by reference to the –

KÓS J:

Well this goes back to the debate yesterday about the fact that the trustee couldn't pick and choose which assets to appoint to himself.

MR VAN BOHEMEN:

The beneficiary.

KÓS J:

The farm was the value – sorry, well the trustee beneficiary exercising the power of appointment.

MR VAN BOHEMEN:

Yes, yes.

KÓS J:

Your argument yesterday was that that would be highly contestable if he simply chose to transfer the best asset to himself and left the rubbish behind?

MR VAN BOHEMEN:

Well, and in particular in this case, left a debt to a bank behind that the trustees have got a claim. They can say "no."

KÓS J:

That's really your argument why the farm can't be picked out?

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

The trouble with section 9A what you're looking at is what has had relationship property applied to it. So if you're just looking at the power it's difficult to see if there's been relationship property applied to it, so aren't you really just looking in terms of a value or what should come through to the underlying asset? Now you may say that you still get to the same result but I just don't see you get it. It's too cute what you're doing because say, for instance, they had a whole pile of shares in the Trust as well and the shares had just done what they'd done, had had absolutely no relationship property applied to it, section 9A wouldn't get a look in.

MR VAN BOHEMEN:

That's right.

GLAZEBROOK J:

So you don't say well the value of the power includes those – say you had 100,000 shares and 100,000 farm, the relationship property had only been applied to the farm, you don't say: "Oh, well actually there's been this major increase or decrease because of the shares"?

MR VAN BOHEMEN:

Well it depends. If the Trust owned the farm and the shares –

GLAZEBROOK J:

Well that was the hypothesis shares.

MR VAN BOHEMEN:

So if the Trust owns so if you –

GLAZEBROOK J:

So if you just look at the power, the power might have gone sky high but has absolutely nothing to do with the application of funds because the shares, nobody's applied anything to them and the farm they have.

MR VAN BOHEMEN:

But case law under section 9A(1) is if relationship property has been applied to increase the value of separate property the whole of the increase is separate as relationship property.

GLAZEBROOK J:

Well I understand that but I just don't think that you would say when you haven't – if there are two separate assets in a trust and the relationship property has only sustained one of them, that you would still have a section 9A claim to the whole of the trust property.

MR VAN BOHEMEN:

Can we just wind it back because in that scenario you've got a trust which has a farm and shares and relationship property is applied to the farm and let's say it's a trust like this and well I imagine that Ms Cooper would come to the Court saying all of these assets are owned by the Trust, the farm and the shares. At the start of the relationship they were X, at the end of the relationship they're worth X plus Y equals Z so they're worth Z. Ms Cooper would say look what the Court said in *Clayton*, the value of the powers is the value of the assets and if the value of the powers at the start of the relationship was X and that the value of the powers is Z, she wants the difference as relationship property. That's what she would say because that's –

GLAZEBROOK J:

And I think she'd have a great deal of difficulty in saying that if relationship property had not been applied to the shares.

MR VAN BOHEMEN:

Well –

GLAZEBROOK J:

Because if it had been in his personal name she wouldn't have had any possibility of claiming against the shares.

MR VAN BOHEMEN:

This whole issue that you're identifying, your Honour, is because we've got to this fiction that we're valuing powers, the asset is powers not the property, that's the – you know the asset, the PRA asset is powers, not the underlying property and that's very clear from *Clayton* and that's what her claim is here. The asset is the powers and in *Clayton* it's how do you value the powers and I'm not contesting the valuation. I'm saying it comes up with, in this case, the specifics of this case, applying the orthodox *Clayton* valuation methodology, there is no increase in value, there is nothing to talk about.

KÓS J:

But to go to Justice Glazebrook's point, it would be to appoint the, all the assets, the farm and the shares, that would be the power and the value of the power so to that extent it would incorporate the shares –

MR VAN BOHEMEN:

That's right.

KÓS J:

– even if Ms Cooper had made no particular contribution towards them.

MR VAN BOHEMEN:

And if –

GLAZEBROOK J:

Well except that section 9A wouldn't incorporate the shares because nothing had been applied to them.

MR VAN BOHEMEN:

But if you take that analogy, then we don't even have to talk about section 9A at all because if the power is the property – sorry, if the property is the powers –

GLAZEBROOK J:

Well that's too cute. I mean it's far too cute.

MR VAN BOHEMEN:

But, I'm sorry, that if you're saying it's too cute to say section 9A doesn't apply because we're talking about –

GLAZEBROOK J:

Well section 9A applies. Section 9A will apply to whatever relationship property has been applied to so it would – and the homestead would be separate anyway because that would be – would have been relationship property, section 9A would apply to whatever relationship property has been applied to and if it hasn't been applied to the shares it wouldn't apply to that.

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MR VAN BOHEMEN:

Section 9A applies to separate property. When does separate property become relationship property? That's the statute. So if – so you have to have an item of separate property which has had relationship property applied to it. Now, I accept it's too cute for me to say the powers are separate property, no relationship property has been applied to the separate property therefore there's no section 9A argument. I accept that. I'm saying the property is the powers, the value of the powers is the underlying, the net value of the Trust, so to do the exercise for section 9A you value the Trust at the beginning and you value the Trust at the end.

WINKELMANN CJ:

And the other approach is that the value of the power is the assets underlying it?

MR VAN BOHEMEN:

But it's assets – again if you go back to section 20D of the PRA which is what is relationship property, it's assets minus liabilities, it's net value. It's that concept you're always taking assets minus debt. So, let's go back to Justice Miller.

GLAZEBROOK J:

I think debt's a bit complicated, isn't it, in terms of separate property in section 9A because you don't say: "Well the value of the property because I have this huge mortgage at the beginning was nothing." The mortgage has been paid off so the difference is between nothing and the value. I think you look at the increase in value of the property and then deal with whatever the debt situation is on top of that?

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

It's my understanding.

MR VAN BOHEMEN:

You can't bring a section 9A claim simply because you've paid off the mortgage, relationship property has paid off the mortgage because that hasn't changed the value of the asset.

GLAZEBROOK J:

But you also can't say when an asset hasn't changed in value just because I've paid off the mortgage here's the increase throughout the period?

MR VAN BOHEMEN:

Yes, I agree with you.

GLAZEBROOK J:

You would look at the value of the property not taking account of the debt, wouldn't you –

MR VAN BOHEMEN:

Yes, and it's clear you've got to –

GLAZEBROOK J:

– and deal with debt separately?

MR VAN BOHEMEN:

You've got to have added a second storey or, you know, done something to it.

GLAZEBROOK J:

Exactly.

MR VAN BOHEMEN:

But it's different when the property in question is powers which are valued by reference to the net value of the assets which is the *Clayton* authority.

GLAZEBROOK J:

Can you deal with it on a counterfactual that says you're wrong about that and you actually look at the increase in the value of the property, what do you say happens in that case about the debt?

MR VAN BOHEMEN:

Okay.

GLAZEBROOK J:

So you're wrong and you look at the difference between, is it 450,000 and whatever it is. Just for my benefit, I'm not…

MR VAN BOHEMEN:

I have – I've prepared a yellow spreadsheet which does that, perhaps can I –

WINKELMANN CJ:

Yes. Do you want to hand it up or have you handed it up?

GLAZEBROOK J:

It's really part of the basis as to if it is decided and, of course you're right, if it is a general power of appointment this is irrelevant but it's really – it was really a question Mr Watts says this can be dealt with by this Court.

GLAZEBROOK J:

Thank you.

WINKELMANN CJ:

So this is yet another iteration.

MR VAN BOHEMEN:

Yes, this is my yellow appendix.

WINKELMANN CJ:

As opposed to your green appendix.

MR VAN BOHEMEN:

Yes.

WINKELMANN CJ:

It makes removal easier no doubt.

MR VAN BOHEMEN:

So in this yellow appendix, your Honours, I have added as an asset – so this is essentially if you accept the appellant's argument, you add as an asset in the relationship property pool the increase in value of the farm and the chattels shared equally $490,000. If you do that, the net value of property retained by each party becomes $17,000 to Ms Cooper and 394 to my client. You add that together, you get to 411, you divide it by two to get a half share, you're at 205,000. You deduct the payment that Ms Cooper has – the assets Ms Cooper has, the 17,000, and you get that yellow line to achieve equal sharing Mr Pinney pays Raewyn 188,000.

So if you accepted the appellant's argument, the argument is – the answer is not 245, it's at best it's 188. But you don't stop there because you then have to – so the point proceeds on the basis that only increase of value – I've lost that point for these purposes – but it includes chattels which the High Court held are not relationship property. Last night I looked at the judgment from the Court of Appeal on the leave decision which was written by Justice Miller and delivered by Justice – with the addition of Justices Miller and Kós and it specifically said that leave was not granted to – or the leave was only granted

to address two issues in the Court of Appeal and it was specifically excluded any appeal about chattels. So in my submission Justice Miller is wrong and the appellants are wrong to bring chattels in so you have to take off 22,500.

WINKELMANN CJ:

That's not in your written submissions is it?

MR VAN BOHEMEN:

It is.

WINKELMANN CJ:

Is it?

MR VAN BOHEMEN:

At paragraph 115. I hadn't found the reference to the Court of Appeal's judgment.

WINKELMANN CJ:

You hadn't at that point, no. I just hadn't noted the reference to the Court of Appeal's judgment in your submissions.

MR VAN BOHEMEN:

No, sorry, no, I hadn't. The point about the chattels shouldn't be included is – and it's not a big money item but... So you take off $22,500 and at this stage in my submission the Court must also deduct the debt which is secured over the farmland. So it's a debt of 132,000, half of that is 66,000 –

GLAZEBROOK J:

Do you – is that right in terms of the whole amount? This is actually a question because you could have debt over separate property and only a small amount that's related to the increase. That's why I'm not –

MR VAN BOHEMEN:

But we're talking, we're doing –

GLAZEBROOK J:

Because wouldn't you have to work out whether it was separate debt or relationship debt?

MR VAN BOHEMEN:

Well it's very clear that this debt, the 132 –

GLAZEBROOK J:

And which one is this, just remind me?

MR VAN BOHEMEN:

This is the debt to the bank.

GLAZEBROOK J:

That's what I thought you were talking about. I was just checking.

MR VAN BOHEMEN:

This debt to the bank of 132 was incurred by the company and the security was provided by the Trust so if –

GLAZEBROOK J:

It's just the extent to which you would say that's sustaining the asset which remained separate property or relates to the increase, I don't know the answer to that but I would have been surprised if the whole of it was taken as being –

MR VAN BOHEMEN:

Well we know, we do know that the current – Marcus is – so think, remember 132 owed to the bank and remember 128 which is the current account, Marcus' overdrawn current account with the company, they're not exactly the same but they're very close, and Justice Clark and the Family Court Judge say that the 128 was incurred to meet the living expenses of Raewyn and Marcus. So that's a finding of both the Family Court and the High Court so that's why the 128 is a relationship debt.

GLAZEBROOK J:

But we're not talking about that are we?

MR VAN BOHEMEN:

No, we're not talking about the 128 so –

GLAZEBROOK J:

Because I thought Justice Clark said she wasn't splitting that.

MR VAN BOHEMEN:

She didn't divide it but she said it was a debt. She didn't, sorry –

GLAZEBROOK J:

We can't bring it in again now is what I was inquiring of you?

MR VAN BOHEMEN:

No.

GLAZEBROOK J:

These are just questions, sorry, but…

MR VAN BOHEMEN:

Yes, but she didn't say it wasn't a debt. She said it was a real debt that had to be brought into account when ascertaining the net value of the relationship property pool. That's why we end up with a negative value in the relationship property pool. So the reason that the relationship –

GLAZEBROOK J:

So are you seeking to bring it back in again is the question I'm asking you?

MR VAN BOHEMEN:

Well we're playing – sorry we're not playing, we've got a scenario where…

WINKELMANN CJ:

I think it's quite a – it might be good if you answer yes or no first before you – are you asking us to take into account, when we look at whether there is any

value that would be attributable to the appellant, are you asking us to deduct it from any increase in value of the property?

MR VAN BOHEMEN:

I'm not asking you to take the 128 into account. I'm asking you to take the 132 into account.

WINKELMANN CJ:

Right, okay so this is right –

GLAZEBROOK J:

So we ignore the 128 basically?

WINKELMANN CJ:

So we can put that from our minds.

ELLEN FRANCE J:

Well you can see that from the diagram, can't you?

WINKELMANN CJ:

Yes. I wasn't quite clear why we spent so much time on it.

GLAZEBROOK J:

It kept being brought up and therefore I wasn't sure.

WINKELMANN CJ:

Okay.

KÓS J:

Right, 132.

WINKELMANN CJ:

132.

GLAZEBROOK J:

132.

WINKELMANN CJ:

Which was the money which was advanced for the improvement to the homestead?

MR VAN BOHEMEN:

No.

WINKELMANN CJ:

No?

MR VAN BOHEMEN:

The money for the improvements was cash the Trust had in the bank and it spent on the improvements. The 132 is money which the bank lent to the company to give the company and which the bank required security from the Trust.

WINKELMANN CJ:

So the bank lent that what for livestock or something?

MR VAN BOHEMEN:

Just it was an over – it's essentially an overdraft facility.

WINKELMANN CJ:

It's working capital?

MR VAN BOHEMEN:

Yes.

KÓS J:

But the company is now worthless?

MR VAN BOHEMEN:

That’s right. So –

KÓS J:

So what –

GLAZEBROOK J:

Is just would you in a section 9A claim deduct that? It's a question to understand what the submission is.

MR VAN BOHEMEN:

Okay, perhaps –

GLAZEBROOK J:

Because the only thing you get on – so it's a – well…

WINKELMANN CJ:

It's morning adjournment.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

I suppose the point is that is a business debt secured over the property and the business continues so that's the question whether that should be brought to account. We'll take the morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:

Now Mr van Bohemen I think you're probably just about finished. Well I think we've gone through the material reasonably thoroughly.

MR VAN BOHEMEN:

Yes, sorry, Ma'am. I thought we stopped – there was this apparent confusion on the Bench as to whether we're bringing in a $128,000 debt or a $132,000 debt.

WINKELMANN CJ:

Okay, I was just going to ask how much longer you think you're going to be. I think we got the answer to that question which is it's the $132,000 debt, the bank debt secured over the house.

MR VAN BOHEMEN:

Yes, but –

WINKELMANN CJ:

Anyway, timing. Timing, I want to indicate that we need to adjourn 10 minutes early because I've got a commitment through the lunch time that I have to start at 1 o'clock, so adjourn at 10 to one and then we'll reassess shortly before that whether we need to come back early from the lunch break.

MR VAN BOHEMEN:

Yes, yes, I'd certainly had hoped I'd be finished by now. So I don't think I've got much longer to go but if we can come back to the yellow appendix and you'll see that the $128,000 debt which is the debt, the overdrawn shareholder account, is brought into account because that's what Justice Clark brought into account. At the bottom of the page, the $66,000, which is half of 132, I say needs to be brought into account if we're looking at the increase in the value of the farm. Justice Glazebrook, you asked the question does this debt relate to the relationship or could it, is it separate debt and my answer is on the facts of this case, this debt is relationship debt because the debt with the bank was incurred by the company to support the family's living arrangements. There was no bank debt at the start of the relationship. All of that debt was incurred during the relationship.

GLAZEBROOK J:

I can understand that. I just – why wasn't it then taken into account as relationship debt in the split earlier?

MR VAN BOHEMEN:

Because the Trust isn't in the relationship property pool so it's not above the line. So in the yellow appendix –

GLAZEBROOK J:

When you say it was company debt because that was 98% held by the –

MR VAN BOHEMEN:

Trust.

GLAZEBROOK J:

The Trust. Okay, now I understand that now, thank you.

MR VAN BOHEMEN:

Thank you. So the purpose of the yellow appendix is to say if the farm, if the Court determines that we can just look at the value of one asset, Justice Miller said you can look at two assets plus chattels, the purpose of the yellow appendix is to say that the answer is not 225, the answer at the end of the day is 99,000.

GLAZEBROOK J:

So it was incurred during the relationship by the company for living arrangements but what's the – is there a finding below about that?

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

So effectively to provide drawings.

MR VAN BOHEMEN:

Yes. It's definitely…

GLAZEBROOK J:

You can let us know later. It's not easy to find.

MR VAN BOHEMEN:

Thank you. So –

GLAZEBROOK J:

I think I remember seeing it in any event actually now you mention it.

MR WATTS KC:

It's all very well doing it later but I need – I would like to be able to address the issue on the facts so to know where the source of what –

GLAZEBROOK J:

Yes, I think that will be provided before – once…

MR VAN BOHEMEN:

So in the yellow appendix we're saying if the Court adds in as a new item of relationship property the powers and says that they're worth the value of the farm which brings in $490,000 it has to make some deductions. So what it does is it brings the item in as an item of property, and when you go to section 20D of the Property (Relationships) Act, you then say what is the net value, what is the gross value, what is the debt, relationship debt, that equals the net value, that is what is shared so that is the calculations under adjustments and then I say you have to do some more adjustments because the 490 is overcooked.

GLAZEBROOK J:

Yes, I think we understand the argument. You have to take off relationship debt and that's what you do with the yellow at the bottom.

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

But we can forget about the 128,000 so just the bank debt.

MR VAN BOHEMEN:

Well the 128 is there.

WINKELMANN CJ:

Up above.

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

Yes.

MR VAN BOHEMEN:

So, but of course, you only do this exercise under section 9A(1) if relationship property has increased the value of the separate property. So if for present purposes we're saying that the – so we say the value of the separate property is the net value of the Trust, but if we're saying the value of the separate property is the value of the farm, you then have to find the application of relationship property to the increase in value of the farm and there is no evidence of that. So section 9A(1) cannot apply.

WILLIAMS J:

Say that again? There's no evidence of the application of relationship property…

MR VAN BOHEMEN:

To the increase in the value of the farm.

WILLIAMS J:

Well, we do have evidence of the application of relationship property to the farm.

MR VAN BOHEMEN:

No.

WILLIAMS J:

Do we not?

MR VAN BOHEMEN:

You have evidence of the application of trust property to the property, the $175,00 spent by the Trust on improvements, so that's – and we have evidence that no relationship property was created during this relationship because it went financially backwards. So it's the physical impossibility for relationship property to have been applied to increase the value.

WINKELMANN CJ:

I thought the –

WILLIAMS J:

It's not the second part of that sentence I'm asking about, it's the first part, the application of relationship property, whatever the result in terms of value change was, does the evidence show there was no relationship property applied to this farm at all or are you –

MR VAN BOHEMEN:

Yes.

WILLIAMS J:

Okay.

MR VAN BOHEMEN:

And the test is on the applicant, the appellant, to show that –

GLAZEBROOK J:

But I thought there had been findings in respect of that –

MR VAN BOHEMEN:

Well Justice –

GLAZEBROOK J:

– in terms of drawings being applied?

MR VAN BOHEMEN:

Well the drawings are not relationship property.

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WINKELMANN CJ:

But at the finding that Justice Miller makes at 97 –

MR VAN BOHEMEN:

Yes, I was just going to go there your Honour.

WINKELMANN CJ:

Yes, and I don't think that's – that's not, I don't think the majority traverses upon this so we might be able to take it they agree with it. She contributed directly and substantially with the improvements made and the business run on the property.

MR VAN BOHEMEN:

So that's section 9A(2). That's direct and indirect contributions. That's the language of –

WILLIAMS J:

But that depends on whether the "she" there is her or whether it's the application of her income which is relationship property.

MR VAN BOHEMEN:

No, it's definitely in that paragraph it's "she", sorry –

WILLIAMS J:

But that doesn't necessarily mean – it's not saying: "She personally with a shovel in her hand" it's just saying "she."

WINKELMANN CJ:

No, because the evidence was she was offsite at the beginning of this and her money was being used in the context of the relationship which enabled them to go and work on the farm.

MR VAN BOHEMEN:

No, well the – if we dig down into the evidence, Ms Cooper stopped working off farm in 2006/2007 so very early in the relationship she stopped bringing off farm income into the relationship. The financial statements of the Trust, of the company, which was their source of family income, show it going increasingly into debt because the parties were drawing to live on it.

WILLIAMS J:

It's a different question though.

MR VAN BOHEMEN:

But relationship –

WILLIAMS J:

The point's well made but the first question is whether she contributed anything that itself could be described as relationship property, whatever the result was –

MR VAN BOHEMEN:

Yes.

WILLIAMS J:

– and you've already conceded that up to 2006 that must be the case?

MR VAN BOHEMEN:

No, I'm not conceding that, Sir.

WILLIAMS J:

Oh.

MR VAN BOHEMEN:

She has to show – so let's say her income is relationship property, I agree with that, she has to show the application of that to the increase in value.

WINKELMANN CJ:

So are you saying that no judge in the Family Court, the High Court and the Court of Appeal has made that finding?

MR VAN BOHEMEN:

Justice Miller –

WINKELMANN CJ:

No, but it was a Family Court finding first.

MR VAN BOHEMEN:

Yes. I've just got Justice Miller open. But the Family Court Judge –

WINKELMANN CJ:

Because my recollection was that there were such findings.

GLAZEBROOK J:

Yes, I thought there were those findings.

KÓS J:

But you're not arguing that she didn't apply relationship property. You're saying there's no increase.

MR VAN BOHEMEN:

That's –

WINKELMANN CJ:

No, no, I think he's –

MR VAN BOHEMEN:

I am saying –

WINKELMANN CJ:

I think your first argument is that there were no evidence that there was the application of relationship property. That's the first argument.

MR VAN BOHEMEN:

That is my first argument but then Justice Williams says: "Well her income is relationship property" and I say: "Well where's the evidence that there is no evidence –

WINKELMANN CJ:

That's the first argument.

MR VAN BOHEMEN:

Yes. If –

WINKELMANN CJ:

You need to have at your fingertips whether or not there were such factual findings because it's, you know, if there were factual findings against you, you need to be able to tell us why they're wrong. Your junior might be able to help.

WILLIAMS J:

He's on his own.

GLAZEBROOK J:

On paragraph 77 of Judge Grace's finding.

MR VAN BOHEMEN:

Yes, but – thank you, your Honour. It is paragraph 77.

WINKELMANN CJ:

It is.

MR VAN BOHEMEN:

"Relationship property has been applied to the property during the course of this relationship. I say this because any income generated during the relationship, –

GLAZEBROOK J:

Can you – sorry, I suspect it's not coming through –

WINKELMANN CJ:

Move in front of the microwave, microphone.

MR VAN BOHEMEN:

Sorry.

WINKELMANN CJ:

Move in front of the microwave, yes. Well we were talking domestic things so.

MR VAN BOHEMEN:

It's family law. So that's the conclusion – that's his conclusion but it doesn't satisfy the test of section 9A(1) which is that you have to show a co-relation between the application of property and the increase so if I'm wrong –

WINKELMANN CJ:

Okay, so yes but –

GLAZEBROOK J:

Well you don't because inflation increases included –

WINKELMANN CJ:

Can I just say Mr van Bohemen you were making a first point which was that there was no evidence that there had been that application, well that's obviously not sustainable so we're now moving onto your second argument, is that correct, or are you still asking us to re-assess that factual finding against you?

MR VAN BOHEMEN:

I am because what is relationship property? It's income earned and it's assets generated during a property, during the property. So there is some income earned by Ms Cooper in the early stages of the relationship –

WINKELMANN CJ:

No, but the finding at 77 is more than –

GLAZEBROOK J:

It's paragraph 77.

WINKELMANN CJ:

– is more than that.

MR VAN BOHEMEN:

But his Honour doesn't say how – that's the second point. So okay his Honour says relationship property has been applied so I accept that and then we move onto the second point.

WINKELMANN CJ:

Okay, so we've only got the one argument now then.

MR VAN BOHEMEN:

Which is –

WINKELMANN CJ:

Which is a sensible concession by you.

MR VAN BOHEMEN:

Thank you. The second point is that there is no evidence that that application of relationship property increased the value of the assets.

GLAZEBROOK J:

Well if inflation can be included which *Rose v Rose* says it can –

MR VAN BOHEMEN:

No, I'm coming to that. That's under section 9A(2). Under section 9A(1) if any relationship property is applied to the increase in value the whole of the increase in value is relationship property including inflation. So taking the – I'm making the concession relationship property was applied. I'm saying there is no proof that it contributed to the increase in value therefore there is no jurisdiction for section 9A(1).

WILLIAMS J:

It depends on what you mean by attributable, doesn't it? If the application of income or effort ensured well each of them is covered in one bit of section 9A –

MR VAN BOHEMEN:

But they're different bits, Sir.

WILLIAMS J:

Let me finish, then I'll let you finish.

MR VAN BOHEMEN:

Sorry.

WILLIAMS J:

Whatever is applied the attributable test may be met by simply the fact that application ensures the asset could continue to be held so that the advantages of value increased through time could be obtained. That's attributable enough it might be said. In other words, it needn't be directly attributable.

MR VAN BOHEMEN:

There's a number of points. Section 9A(1) is about the application of relationship property to the increase. Section 9A(2) is about the direct and indirect contribution of the non-owning spouse so that's the *Rose v Rose* scenario.

WINKELMANN CJ:

And both are advanced here, correct?

MR VAN BOHEMEN:

No, they're advancing section 9A(1). They're saying the whole of the increase.

GLAZEBROOK J:

All right, so where's your authority for the section 9A(1)? You say *Rose v Rose* only relates to section 9A(2)? Sorry…

WILLIAMS J:

Yes, section 9A(2).

MR VAN BOHEMEN:

It's the plain wording of the statute that has there been an application of relationship which has led to the increase in value and –

WILLIAMS J:

Well that was my question which I need you to engage with.

MR VAN BOHEMEN:

And the answer is –

WILLIAMS J:

What about indirect effect of application of effort under (2) or property under (1) which ensures the property can be held over time –

MR VAN BOHEMEN:

Well that's section 17, Sir.

GLAZEBROOK J:

No, but there must have been authority on this. I just don't believe that this is in a vacuum so you're going to have to show some authority on there being a difference between the two.

MR VAN BOHEMEN:

Between section 9A(1) and section 9A(2)?

GLAZEBROOK J:

Well what you've got – obviously there's a difference between direct and indirect contribution but when you have it applied, a finding that it's applied to the farm, that's the finding in paragraph 77.

MR VAN BOHEMEN:

Yes.

GLAZEBROOK J:

Then you'll have to have authority that applying it to the farm isn't enough, you have to then prove that applying it to the farm led to an increase in value –

MR VAN BOHEMEN:

Yes, and there is –

GLAZEBROOK J:

– and therefore presumably you take inflation out of it then?

MR VAN BOHEMEN:

You do.

GLAZEBROOK J:

And where's the authority for that?

WILLIAMS J:

I think your answer was the plain words of the section.

MR VAN BOHEMEN:

But there is authority and it's in my written submissions and it's – but it's slightly out of context. It's in my section 17 submissions.

KÓS J:

So where's that?

GLAZEBROOK J:

I mean there may well be authority for it, it's just that it doesn't seem consistent with *Rose v Rose* that says you keep inflation in there to actually require something different under the other provision.

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MR VAN BOHEMEN:

You do, because just if you step back, most section 9A(1) cases, as – let's say block of flats, relationship property adds another story. So then the whole of the increase in value of the block of flats is relationship property regardless of inflation. That's just the application of the law. If it's indirect contributions, which is the efforts of the party, and that is what Justice Miller found caused the increase in value at page – at paragraph –

WINKELMANN CJ:

Yes, but the Family Court found direct contributions caused the increase in value.

MR VAN BOHEMEN:

Well, no, the Family Court finds that relationship property has been applied to the property, but he does not find that it increased the value.

WINKELMANN CJ:

And you say as a matter of law he had to make that finding?

GLAZEBROOK J:

And you're going to find the authority for that for us?

WILLIAMS J:

Well you say *Hebberd v Hebberd* [1992] 3 NZLR 517 (CA) and *McIlraith v McIlraith* [2015] NZHC 2758?

MR VAN BOHEMEN:

Those line of cases, the *Hebberd v Hebberd* and the – which are in a slightly different context, they basically say that you have – and that's a section – so section 9A is getting a share of the capital gain, section 9A is getting a share of the capital gain. If you get a capital gain you can get a share of it under section 9A(1) or 9A(2). If there is no gain in the value of the property, section 17 provides a remedy where relationship property or the spouse, the non-owning partner, has help to maintain and sustain the property.

So my submission is that the findings of the Family Court Judge at 77 and the findings of Justice Miller at 97 of his judgment are in fact findings of sustenance and maintenance of separate property, not increase in value.

WILLIAMS J:
Was there an inflationary increase in value?

MR VAN BOHEMEN:
There was an inflationary increase in value.

WILLIAMS J:
Right.

MR VAN BOHEMEN:
And that's –

WILLIAMS J:
So the question is whether attributable under section 9A can mean, shall we say, opportunity advantage arising from inflation?

MR VAN BOHEMEN:
Well that's when *Rhodes v Rhodes* – sorry, *Rose v Rose* comes in in section 9A(2). So if you have – if you can't – and that was the *Rose v Rose* situation, relationship property had not increased the value so it was a section 9A(2) claim, it was the indirect contributions of Ms Rose which increased the value, and the Court in *Rose v Rose* had to address who got

the benefit of inflation, was that shared, was that Mr Rose's or Ms Rose's, and the Court says it's Mr Rose's because it's a value associated with his underlying asset. So –

WILLIAMS J:

So *Rose v Rose* says attributable means directly not – shall we say indirectly for want of a better term?

MR VAN BOHEMEN:

Well it's –

WILLIAMS J:

I thought Justice Glazebrook said it was the opposite result?

MR VAN BOHEMEN:

Rose v Rose is a section 9A(2) case, so it says relationship property has – sorry, it says there has been an increase in value. Section 9A(2) says the increase in value has been caused in part by the indirect contributions of the non-owning spouse. The issue for the Court is how do you value – sorry, just go back. Section 9A(1), if there's any increase it's shared 50/50. Section 9A(2), if it's – if there's an increase you share it in proportion to your contributions to the increase in value. So you have to look at which party contributed to the increase in value.

WILLIAMS J:

Perhaps your best argument is that the "whether directly or indirectly" in subsection (2) is not present in subsection (1).

MR VAN BOHEMEN:

Because section 9 – well that is a – yes.

WILLIAMS J:

Yes. Perhaps you should've said that about five minutes ago, we could've shortened this discussion.

GLAZEBROOK J:

Well but there must be authority on it because I just don't believe there is not.

WILLIAMS J:

Yes, there is. It's been referred to. Well that's under section 17, isn't it?

GLAZEBROOK J:

But section 17's different.

MR VAN BOHEMEN:

But the point of –

WINKELMANN CJ:

You say it's a matter for statutory interpretation?

ELLEN FRANCE J:

And presumably you can point to the scheme of the Act. So you have section 9A(1), 9A(2) and then you have section 17, and they're dealing with different aspects?

MR VAN BOHEMEN:

Yes and that's exactly right, where they fit in the statute. So if I go back to my outline at paragraph 29, sorry, paragraph 26. I'm saying under section 9A(2) Ms Cooper bears the onus of proof, and that's *Rose v Rose*. What caused the interest, I say the Trust expenditure would've contributed to the increase and inflation. That's what the evidence is, there's a valuation report. So I'm saying because – and the *Rose v Rose* says you have to take a global assessment, so I'm submitting that if it's direct and indirect contributions by Ms Cooper, and direct and indirect contributions by Mr Pinney, and there is expenditure by the Trust and there's market forces, I'm saying in the round 20 per cent to the indirect contributions by the parties and 80% being contributions by market forces and the Trust. So Ms Cooper's contributions –

GLAZEBROOK J:

I thought *Rose v Rose* said you don't take inflation out. Are you saying it says you do take it out?

MR VAN BOHEMEN:

Rose v Rose says you give – you credit inflation to the owning spouse.

GLAZEBROOK J:

So where does it say that?

MR VAN BOHEMEN:

Paragraph 48. My junior has just – I think it is brought up on the screen. "Normally" – sorry, it's the top of this page. "Normally the fairer approach is therefore the ownership of the separate property from which these increases in value sprang should be treated…as a contribution by the owner spouse. The Court should then evaluate that contribution together with other contributions…which it identifies as having being made by the owner spouse, and should weigh the aggregate of those contributions against the identified contributions of the non-owner spouse." So that's the section 9A(2) exercise.

WILLIAMS J:

So the distinction appears to be where one is property driven, ie relationship property driven, because it's relationship property the underlying ethos of the legislation will apply, it's 50/50, no questions asked?

MR VAN BOHEMEN:

Yes.

WILLIAMS J:

But where it's effort then you apply the sort of quasi constructive trust approach?

MR VAN BOHEMEN:

Yes.

WILLIAMS J:

So it does matter –

MR VAN BOHEMEN:

Yes.

WILLIAMS J:

– interestingly, rather strangely actually –

MR VAN BOHEMEN:

It is, it's –

WILLIAMS J:

– but that's how the legislator did it. It does matter whether it was her pay rather than her muscle?

WINKELMANN CJ:

And it's both in this case, and Mr Watts yesterday referred us to authority, and I cannot recall the authority, which made the point that it can be relationship property even if it simply reduces the extent of the fall in the relationship, in the fallen value?

MR VAN BOHEMEN:

I don't recall that.

MR WATTS KC:

I think that was the *Hawke's Bay Trustee* case and I'm supplying it by analogy in this context.

MR VAN BOHEMEN:

That of the constructive trust claim, not a PRA claim. So on my submission it doesn't actually apply because this is a code with its own framework. So in my submissions, in my outline and in my written submissions, I submit that in the round Raewyn's contribution is 10% and therefore she, under section 9A(2), would get a 10% increase in value, less 10% of the debt, and then in any event because we're looking at relationship property and we've got from

the Family Court a finding that there's a relationship property debt, a negative relationship property of 76,000 that needs to be brought back into account.
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My last point your Honours is section 17 which is – provides a remedy where property has been sustained and there hasn't been an increase in value. So in my submission there has been no increase in value so at best there's a section 17 remedy to – my first submission is that powers aren't property. If the powers are property, then they're valued by the asset, the Trust – they're equal to the net value of the assets. The net value of the assets haven't increased so at best there's a section 17 claim and that's where the Courts in the *McIlraith v McIlraith* decision citing from the Court of Appeal judgment in *Hebberd v Hebberd* sustenance means "…something more than to merely render assistance…" and in the *Hebberd* case they said yes she contributed but also she got a benefit. "The evidence does not establish that her contribution 'sustained' the farm…" In the *P v S* [2019] NZHC 2608, [2019] NZFLR 44 case Justice Doogue reviewed the authorities and again said that simply because the wife or the female partner had rendered assistance with the business that she had not shown that she had preserved it in the sense of ensuring its continued existence.

WINKELMANN CJ:
Well that's going to be a difficult submission to make Mr van Bohemen. I think things may have moved on. Someone working unpaid on a farm for a long period of time seems to me to be an absolutely classic case of sustaining its value.

MR VAN BOHEMEN:
Well in *Nation v Nation* [2005] 3 NZLR 46 (CA) –

WINKELMANN CJ:
It's a case-by-case basis, isn't it?

MR VAN BOHEMEN:

But in *Nation v Nation* is a classic case of Mrs Nation who worked very hard on the farm and there's a great description of all of the things she did on the farm and under section 17 she would have received an award of $35,000.

WINKELMANN CJ:

What year was that?

GLAZEBROOK J:

It was also under appeal but settled before the appeal as I understand.

MR VAN BOHEMEN:

Right, it was some time ago but –

GLAZEBROOK J:

And it was one that settled on the eve I think of a hearing in the, in this Court from memory when finally the husband –

MR VAN BOHEMEN:

But –

WINKELMANN CJ:

Anyway, I think it's a case-by-case basis obviously.

MR VAN BOHEMEN:

Yes.

WINKELMANN CJ:

So your fundamental submission is that working lengthy hours unpaid is not sufficient evidence of sustaining the property?

MR VAN BOHEMEN:

I don't like that submission. I'm saying that's what the law is.

WINKELMANN CJ:

Okay.

GLAZEBROOK J:

Well the law is probably of wee faith.

WINKELMANN CJ:

The fact you don't like it is probably quite a good indication it has some issues.

MR VAN BOHEMEN:

But we're talking about a claim against capital as opposed to wages and recognition for benefit. This is in the context, of course, if one accepts that at the end of the relationship there was – Her Honour Justice Clark's finding there was minus $78,000, whatever that number is, post that there was an agreement, there were proceedings for maintenance and post that Ms Cooper received by agreement $25,000 which is in the evidence that Mr Pinney had to borrow to pay. So this is a case where, I'll come back to it, this is not a *Clayton*-type case or a *Webb*-type case where there's lots of money. This is case where there is no money.

WINKELMANN CJ:

But there's an asset and a trust.

MR VAN BOHEMEN:

Owned by a trust.

WINKELMANN CJ:

Yes quite back to the beginning.

MR VAN BOHEMEN:

Unless your Honours have any questions.

WINKELMANN CJ:

I mean I don't think that's that unusual that most of the wealth is sitting in the Trust. It may just be questions of scale.

MR VAN BOHEMEN:

Well there is the unusual fact and I say it is unusual.

WINKELMANN CJ:

Yes, I understand the point that it's settlors outside who brought the asset into it, the Trust.

MR VAN BOHEMEN:

Yes, your Honour. Unless you have any more questions, those are my submissions.

WINKELMANN CJ:

Thank you. Mr Butler?

MR BUTLER KC:

Tēnā koe, ngā Kaiwhakawā. Can I just have a moment to set up please? As you know, I'm still old school using bits and pieces of paper which I'll need to array around here.

WINKELMANN CJ:

That's fine. Go ahead.

MR BUTLER KC:

Thank you. Right, I think I have arrayed myself. Your Honours. First of all I want to identify how it is that we are proposing to tackle this matter. I do have a hand up, which I'll ask Mr Tocher to provide to your Honours now. Basically we intend to split the argument on behalf of the trustees between myself and Mr Walker.

WINKELMANN CJ:

How long do you think you'll be Mr Butler?

MR BUTLER KC:

It depends a little, I think, on the nature and intensity of the questions I receive.

WILLIAMS J:

An unfair question I would have thought Mr Butler.

MR BUTLER KC:

Yes, I'm glad you said it your Honour, it was what I was thinking perhaps.

WINKELMANN CJ:

We do need to conclude by 4 o'clock today. Certainly your Honour, I will try and avoid repeating what has said by Ms Powell in particular. I'm no expert in section 9A. I think I would need quite a level of further study to be able to cross those issues. But the issues that were covered by Ms Powell, and some of those broader trust issues, I feel I may have something to contribute to the discussion that's taken place thus far.

WILLIAMS J:

Just before you do, do we have an electronic copy of this?

MR BUTLER KC:

I can organise Mr Tocher to send that through to you now, and I should say before I begin that I'm grateful to Mr Walker's firm for acting pro bono in relation to this appeal in the best traditions of the profession. I just want to acknowledge that publicly.

So your Honours as I perceive it, the key issue has crystallised as follows. Applying *Clayton* does Marcus Pinney, who I'll just refer to as MP, you'll see in the outline, hold a general power of appointment. It is alleged by the appellant that Marcus Pinney does have a GPA because of one, his power to appoint and remove trustees; and two, because of the trustees broad dispositive powers. When I was listening to my friend yesterday, my learned friend, and Mr Watts yesterday, it seemed to me that quite a lot of the submissions that he was advancing were ones which simply affixed the label general power of appointment to the powers that are present here, believing that affixing the label was the answer to the question. But asserting the existence of a power, a combination of powers as being a general power of

appointment is not, in my submission, suffice. Instead what the Court needs to do is to understand what is a general power of appointment, and then determine whether the identified powers meet that understanding.

Broadly when asking yourself the question, what is a general power of appointment, it's not enough, in my submission, simply to point to the existence of broad powers and say, oh well, somebody's got some broad powers, that's sufficient to be a general power of appointment, and it seems to me just stopping there just for a moment, one of the things when you read *Clayton*'s case, in my submission, is that the Court was careful when analysing the terms of the particular trust deed before it and looking at the various roles that Mark Clayton had in respect of that Vaughan Road Property Trust.

It was, indeed, the combination of the powers, and what the Court was trying to do was to see whether or not that combination of powers was such that it could fairly tag that combination of powers as amounting to a general power of appointment or, to use another phrase that was used, tantamount to ownership.

Generally speaking a general power of appointment is, as Ms Powell has outlined this morning, a power you have unlimited objects. So the donee of the power can exercise the power to appoint in favour of anyone, including the donee. That is the classic definition of what a general power of appointment is, and ultimately on analysis that is in combination the power that was granted to Mark Clayton by the terms of the Vaughan Road Property Trust.

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WINKELMANN CJ:

Can I ask you if it is definitional that it has to be to the entire – ability to appoint to the entire world because that doesn't seem to me to be a necessary incident of ownership.

MR BUTLER KC:

So I was just going to come to that. So that's typically how you would understand a general power of appointment if you're operating in the trust's world but that's why I said at the same time what the Court said was you were looking for something that was tantamount to ownership. So a general power of appointment is something that is tantamount to ownership. What I understand your Honour to be suggesting, and that was the nature of the discussion that took place or the exchange that took place with my friend Ms Powell earlier this morning as well, if there was some way of technically making what looks like a general power of appointment not a general power of appointment by a tweak, by being cute, to use your Honour Justice Williams' language, I think –

WILLIAMS J:

It was actually Justice Glazebrook.

WINKELMANN CJ:

I think it was Justice Glazebrook, yes.

MR BUTLER KC:

Justice Glazebrook, sorry, thank you, being a bit cute, what does one do there? So what is it that one is looking for, and I think in essence if you work with that concept of tantamount to ownership, another way of thinking about is, is can the donee of the power act selfishly, in other words by reference to their own lights is another way of thinking about it, because if you're able to operate by reference to your own lights and in particular selfishly, then it might be possible to label that combination of powers as being something that is akin or tantamount to ownership.

KÓS J:

Yes, perhaps not a general power of appointment but the ownership that we required for relationship property purposes.

MR BUTLER KC:

For the purposes of this. Now –

WINKELMANN CJ:

Yes, because I mean *Clayton v Clayton* in the early days of development this might have been concerned to find something which was something relatable, yes this is a general power of appointment and you can go to *Thomas on Powers* and see that could be property but really the Act might suggest that what we're really concerned with is ownership –

MR BUTLER KC:

Tantamount to ownership.

WINKELMANN CJ:

Something that's tantamount to ownership.

MR BUTLER KC:

Correct. So that's the – so for the purpose of the argument I am agreeing with Ms Powell that what *Clayton* says is it's about a general power of appointment, and I've made the submissions as to what is a general power of appointment, and that's the primary position but dealing then with the proposition that emerged from the Bench as to well if it's possible to be a bit cute and by drafting, convert something away from being a general power of appointment to something that's pretty much close to general power of appointment what are we doing there.

WINKELMANN CJ:

And can I say I think there are indications in Clayton's case, in *Clayton*, not Clayton's case, *Clayton*, that the Court wasn't really finding a pure general power of appointment because there were indications that they saw implications of the scheme over all the trust deed which were not consistent with a general power of appointment.

MR BUTLER KC:

Yes, but not really, and I'll come to that if I may.

WINKELMANN CJ:

Well it's particularly the reference to fiduciary duties.

MR BUTLER KC:

Yes, exactly, and I was just going to come – I was just going to come to that.

WINKELMANN CJ:

Okay.

MR BUTLER KC:

But I think in other words if what the Court is looking to do – if what the Court is looking to do is to grapple with *Clayton's* case and try and understand part of its essence, but on the second basis that it's possible to classify as property something which would technically not be a general power of appointment, it is my firm submission that to be consistent with *Clayton* what the Court is striving to identify in any particular case, and that is the message to be sent to the lower courts because ultimately that's why we are here, the message to be sent to the lower courts is still the one that was laid down in *Clayton's* case – sorry your Honour I'm just going to keep going at *Clayton's* case, I beg your pardon – *Clayton's* case, whether it was just me, I just keep –

WINKELMANN CJ:

It's just an insolvency –

MR BUTLER KC:

I always refer to it as *Clayton's* case. I know because it's the other *Clayton's* case the insolvency case. Is you're still looking for something that – to which it can be, the conclusion can fairly be said this is tantamount to ownership.

WILLIAMS J:

That's a big question. You know, what does tantamount to ownership mean and I think your point was that if you are free to act selfishly then it's tantamount, by your own lights you say?

MR BUTLER KC:

By your own lights, yes.

WILLIAMS J:

Then it's tantamount to ownership. So how do you navigate your way through the ability to appoint yourself?

MR BUTLER KC:

So take, for example, in the technical area of trusts law you would describe a power, one would describe a power, and you don't have to take my word for it, you can look at the very useful glossary at the back of *Garrow and Kelly*. I've made reference to it in my written submissions but it is a very useful glossary and they tell you the different types of powers of appointment; general, hybrid or special or intermediate.

So an intermediate power of appointment is a power of appointment which it looks like it's general except that what it does is it says you can exercise the power in favour of anyone except for A, B and C, for example. All right, so we would not classify, we in the trust world wouldn't classify a power like that as being a general power of appointment. We'd say it's an intermediate power of appointment because the class if more limited, which I know is an issue that was raised from the Bench earlier in the exchange with Ms Powell. But in a case like that, your Honour, in terms of depending on the terms of the instrument that confers that intermediate power of appointment, you need to look at it and say well can that power or that intermediate power of appointment be exercised selfishly or is it subject to constraint.

WINKELMANN CJ:

Selfishly is critical, isn't it?

MR BUTLER KC:

It's critical.

WINKELMANN CJ:

I mean it could be that it's subject to constraint but since you're allowed to actually use it to give it to yourself, so it might be that I can give it to myself but what I can't do directly is to give it to person A or B but once I've given it to myself then I am free to give it to A or B so that –

MR BUTLER KC:

That's right, correct and –

KÓS J:

Unless it can be pulled back.

MR BUTLER KC:

Unless it can be pulled back. So that's why revocability that's, of course, what was interesting in *TMSF*, that's why *TMSF* was so interesting, because it was another way – it wasn't itself a situation where there was a – what you would typically regard as a general power of appointment but in effect it was a general power of appointment because of the power of revocation and that power of revocation being – was able to be exercised selfishly. That's the key point so I think if you're looking to try and distil and say what is the key animating principle here, it's that ability to ask selfishly, act sorry, selfishly which is why I think, for example, in the exchanges yesterday there was questions around constraints and what's the nature of the constraints and what are the mechanisms because if you've got a general power of appointment there are no constraints. If you are the owner there are no constraints. If you're able to act selfishly the antithesis of being able to act selfishly –

GLAZEBROOK J:

Do you want to – I think what we need to do is to drill down on what the ability to act selfishly is, especially in the context of a discretionary trust where the only thing you have to do is to consider the interests of the others now and the question is whether that's enough constraint.

MR BUTLER KC:

I say it is and I'll come and talk –

WINKELMANN CJ:

Yes, but that's what you've got to deal with.

MR BUTLER KC:

Yes, no, absolutely. I'm very happy to deal with it.

WINKELMANN CJ:

You don't just apply the label. I think Justice Glazebrook is saying don't just apply that label.

MR BUTLER KC:

No, but what I'm trying to do is my perception of the exchanges yesterday and today was a disquiet of saying well is general power of appointment just a label, right.

WINKELMANN CJ:

And it –

MR BUTLER KC:

And in a sense it is. Sorry, your Honour, I didn't mean to cut you off.

WINKELMANN CJ:

No, I was just going to say and in a sense it is.

MR BUTLER KC:

Yes. So –

WINKELMANN CJ:

What the Court was really concerned with in *Clayton's* case was whether the incidence of ownership was sufficient so that it was caught by the scheme of the relationship property.

MR BUTLER KC:

That's correct, but it did so, of course you'll recall when you go back, as your Honours have read it, but if you go back and look at it after, as you will many times I'm sure after the hearing yesterday and today, you'll see in my submission that the Court was wanting to be sensitive to the fact that it knows that a huge amount of wealth in this country, I think the Law Commission or IRD estimated something like 19% of national wealth in this country is held in trusts, it's hugely conscious of the fact that that is the way wealth is – a lot of wealth is held in this country. It will also be conscious of the fact, for example, that particular types of property are especially often kept in trusts. So, for example, we have in Māori world –

GLAZEBROOK J:

To be honest I'm not particularly concerned about that. What I'm concerned about and, of course, that's true but that's done on certain assumptions in terms of what one can do with trusts where there would be constraints elsewhere because of revenue, gift duty, estate duty, so the –

WINKELMANN CJ:

And it might actually be good public policy reason why it's made clear that people can't basically remove fiduciary duties.

MR BUTLER KC:

Indeed and that's my ultimate, I might as well tell you ultimately where I'm getting to, I will be submitting at the end of my submissions that *Clayton* gave – see I am adapting – *Clayton* gave this Court an opportunity to send a strong message to trust drafters in terms of how they go about drafting trusts.

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This case, in my submission, provides the Court with an opportunity to send an equally strong message to trustees that actually the constraints that operate on trustees, and indeed I will be submitting, and been supplemented on this by Mr Walker, constraints on those people who have got powers to appoint and remove trustees. So that's what this Court should be taking as the opportunity that's been given to it to affirm –

GLAZEBROOK J:

But what you need to do is to tell us what those constraints are.

MR BUTLER KC:

I'm coming to that and it's, as your Honour will see, it's not far off. There's a heading in the hand-up called "Constraints", so I'll be coming to that shortly. But I think it is important for your Honours to have a feel at least from me as to where I'm going and where this, I see this all, how it all seems, from my perspective at least, to fit together.

WILLIAMS J:

So is the – is it – would it be better to articulate the tantamount to ownership test, whatever that means, because it really depends on whether you're talking to an anthropologist, a lawyer or an economist.

MR BUTLER KC:

Yes, that's right.

WILLIAMS J:

But do we really mean freedom to act selfishly and unaccountably?

MR BUTLER KC:

Yes, I think that's right.

WILLIAMS J:

Not just selfishly?

MR BUTLER KC:

Yes, yes, I think that's right. I mean it – wrapped up in my concept of selfishly is that you're not accountable to anybody. You get – you – it's effectively, it's yours because you can act selfishly.

WINKELMANN CJ:

Well how you deal with the asset?

MR BUTLER KC:

Yes, how you deal with the asset's up to you. I'm being told by Mr van Bohemen I'm already over time. Thanks, your Honours.

WILLIAMS J:

Time's up, Mr Butler.

WINKELMANN CJ:

Sounds like you have an old-fashioned telephone in your pocket.

MR BUTLER KC:

So that's in terms of the taxonomy or the overall way of thinking about it, how I've come to try and tackle this issue. So let's talk about some constraints, and I thought it would be helpful if we actually had a look,, for example at the Trusts Act 2019 and just have a look at that Act, because we've talked about little bits of it but actually we haven't looked at the whole of the Act, and in my submission the Act, as your Honours will know, your Honours I am sure have dealt with it, is largely reflective in almost all measure of the pre-existing law.

I would agree with that Ms Powell said is that what it does is it makes certain things clearer, and if I can just stop there, that was one of the points of the Act. One of the points of the Act was to respond to some of the comments that have come from the bench I think this morning about trustees not really understanding what it is that their duties are. It's an express purpose of the Act. So if we look, I'll just pull up my well-worn version of the Act, and so you'll see that's the purpose in section 3(d) for example, and it's not making the law of trusts more accessible to the courts, the accessibility we're talking about there is actually to trustees and to beneficiaries.

Starting then with section 4, I think it's very important that we have regard to the fact that: "Every person" – so that includes trustees but also as you'll see a court – "…performing a function or duty or exercising a power under this Act must have regard to the following principles: (a) a trust should be administered in a way that is consistent with its terms and objectives…".

So I wanted to emphasise that word "objectives" as a reminder, which I don't think your Honours need but sometimes I feel it's very – it will be great if the Courts, in a clarion call, as loud as can be, remind trustees –

GLAZEBROOK J:

But the objective here is to get out of the PRA –

MR BUTLER KC:

I don't agree with that for the reasons that have been advanced earlier.

GLAZEBROOK J:

No, I understand that, but if it were, and *Clayton*'s case probably, if we can use your terminology, was probably a relatively classic one of that, feature of that.

MR BUTLER KC:

Well I'd like to come back and deal with that issue about what the objectives here were at a later point and – but if I can just flag first of all, I don't think that's consistent with the evidence for the reasons that have been covered by my friends, Mr van Bohemen and Ms Powell earlier, so I don't, with respect, I don't agree. Second of all, when thinking about the objectives, of course, there's nothing illegitimate about trustees of a dynastic trust, itself a dynastic trust, wanting to continue on the dynastic trust through another new dynastic trust structure. There's no provision of the PRA which says that's an illegitimate purpose or an illegitimate objective. I's just not.

KÓS J:

That has a lot to do with the source of the property.

MR BUTLER KC:

Indeed, it does, and that's – but that's relevant I think when you're trying to assess what the objective is, so you can't achieve a dynastic outcome if what

you do is you make it vulnerable to a PRA claim or even a Family Proceedings Act 1980 claim, section 182.

KÓS J:

And nor can you start a dynasty with what is relationship property.

MR BUTLER KC:

Correct.

KÓS J:

Which is Mr Clayton's problem. In part.

MR BUTLER KC:

Yes, exactly, that's correct, and that's why it was that Mr van Bohemen emphasised, rightly in my submission, that point about source, because that source is relevant to objectives. So that's section –

WINKELMANN CJ:

You've got five minutes until we're breaking.

MR BUTLER KC:

Oh yes, we do, that's right, we're finishing up early. All right. So I just wanted to emphasise section 5(3) of the Act. So you'll see: "This Act applies to all express trusts despite anything to the contrary in the terms of a trust, except as provided in subsections (4) to (6)."

Now I just wanted to highlight that provision because it's quite important to understand that when the Act distinguishes between mandatory and default duties, the scheme of the Act is that mandatory duties cannot be contracted out of. You cannot exclude the mandatory duties. You can exclude the default duties, and if your Honours want to see what provisions of the Act can be contracted out of, that's set out in schedule 2 it is, isn't it.

WINKELMANN CJ:

Schedule 2 is the default duties, is it?

MR BUTLER KC:

So it deals with default duties, but also deals with important provisions such as, for example, not being able – you can't contract out of section 126, the judicial review. You can't contract out of the trust, the information disclosure provisions, and, and, and. So there's actually a lot of restriction on what it is that is contained in the Act that cannot be departed from.

WINKELMANN CJ:

So although this trust deed says it's not a reviewable discretion, you're saying you can't, yes.

MR BUTLER KC:

You can say whatever you like, but it is. Of course it is. So there are some examples, and helpfully Mr Tocher has just given you an indication. The way it works is column 1 sets out what the section is, that is, that apply, except as modified. Column 2 tells you how it can be modified.

So then if we look at the mandatory duties, those are set out in section – sorry, before we go to mandatory duties, can we actually look at part 2, express trust, which includes the definition of an "express trust".

WINKELMANN CJ:

And then we'll adjourn.

MR BUTLER KC:

And then we'll adjourn your Honour, thank you. So section 12: "Meaning of express trust. For the purposes of this act, an "express trust" means a trust that – (a) has each of the characteristics set out in section 13."

So what are those characteristics? Section 13: "The characteristics of an express trust are as follows: (a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a

permitted purpose; and (b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law."

So there's an important submission there, namely an express trust has the characteristic of being a fiduciary relationship, and it has trustee accountability.

KÓS J:
So if you try to exclude that is it a trust?

MR BUTLER KC:
It's not a trust.

KÓS J:
No.

MR BUTLER KC:
It's not a trust, and this resolves the issue that if you look at some of the literature in the offshore jurisdictions in particular, in some of these jurisdictions the way in which advisors have been able to persuade the relevant legislatures to define trusts, is to create a, what I will refer to as a hollow, or you might say bin, if you want to use public law language, bin version of a trust and trust obligations and accountability. But it has never been my understanding that in New Zealand we cleave to that view of trust or trustee obligations, or accountability. We instead are at the thicker end of the spectrum when it comes to making sure that the concept of the fiduciary relationship aspect of a trust lies at its heart and that the trustees are accountable.

WINKELMANN CJ:
At least in the legislative context.

MR BUTLER KC:
Yes your Honour.

WINKELMANN CJ:

No one's, we haven't had any decision on illusory trusts to date, yet, have we?

KÓS J:

No, but this is not one, we agree.

MR BUTLER KC:

No, and everybody's agreed this is not one, exactly. Your Honour has to leave so, it's 12.50. Back at what time your Honours.

MR BUTLER KC:

Well how are you going?

WINKELMANN CJ:

You only just started. We'll come back at two. I just have got, I will hopefully be able to come back two.

COURT ADJOURNS: 12.50 PM

COURT RESUMES: 2.02 PM

MR BUTLER KC:

Your Honours, just before I recommence where I was at I should advise I had a discussion with my learned friend, Mr Watts, just after we broke and he's indicated that he will want a reply and no surprise there.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

Plenty to reply to I'm sure, but he's indicated to me at least that he would like something like half an hour to reply. So I just note that in terms of the time that I feel I've got, I'm not promising to him that I'll be done by 3.30, but I will certainly be doing my level best.

WINKELMANN CJ:

Okay.

MR BUTLER KC:

So, your Honours, just before the luncheon adjournment I think we'd alighted upon section 13 of the Trusts Act, which as you'll recall noted the characteristics of an expressed trust and you will recall that (a) makes reference to the fact that "it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose", and (b): "The trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law."

If we could turn now to section 21 of the Act. So here we've got part 3 of the Act. So part 3 of the Act is the part that deals with trustees' duties and information obligations. Subpart 1 deals with the duties of the trustee and section 21 provides the guiding principle in performing duties: "In performing the mandatory duties set out in sections 23 to 27 and…the default duties set out in sections 29 to 38, a trustee must have regard to the context and objectives of the trust."

If we look then at what the mandatory duties are, section 22 introduces why they're – what it means for them to be mandatory duties, they are duties that must be performed by the trustee, here I'm at section 22(a), and (b): "May not be modified or excluded by the terms of the trust," and that's reinforced by the terms of schedule 2 which sets out the provisions that can be modified or excluded, so this is really reinforcing section 5(3) of the Act that I took you to earlier.

So in section 23 you've got to know the terms of the trust, well that's a wake-up call for quite a number of trustees, afraid to say. Your Honour I know will have encountered that for some time I think in the MLC. In a few of the cases that I've done, a number of times where it's trustees have appeared and nobody's ever shown me the terms of the trust, never knew that's what I

had to guide myself by reference to. So it looks pretty basic but actually it is and it needs to be reinforced.

So then we've got section 24, the duty to act in accordance with the terms of the trust. So it's not enough to know it, you've got to act in accordance with the terms of the trust.

In section 25: "A trustee must act honestly and in good faith."
Then section 26: "A trustee must hold or deal with trust property and otherwise act – (a) for the benefit of the beneficiaries, in accordance with the terms of the trust…".

Now just stopping there, on that phrase "in accordance with the terms of the trust", of course that phrase "in accordance with the terms of the trust" really is just a reaffirmation of section 24, but in the context of understanding the duty to act for the benefit of the beneficiaries, of course, the reason why I submit Parliament has reminded everybody that it's in accordance with the terms of the trust is of course there can be different classes of beneficiary, so that when you are holding or dealing with the trust property you may have regard to the fact that it's on the, for example, has the status of a final beneficiary, or a discretionary beneficiary during the life of the trust for example, or might be, it might be a final beneficiary but of a contingent nature for example.

WINKELMANN CJ:
So Mr Watts submitted that "in accordance with the terms of the trust" could be a significant – could enable a significant qualification of (a), and you would allow, I think, that would – it would enable a qualification of (a)?

MR BUTLER KC:
No, I wouldn't allow that, sorry, your Honour. I'm glad you clarified by asking the question –

WINKELMANN CJ:

Well, can I just finish. Why I think you might allow it was because, well, because of provisions that allow trustees to act in a position of conflict?

MR BUTLER KC:

Yes, and so that's the point exactly. When we look at the default duties, which we'll come to, that's section 31 of the Act, so in a sense section 31 needs to be read back into in order to enable you to understand what section 26 means. So I think we're actually, to use a phrase, violently agreeing because section 31, if you look at it, is one of the default duties, establishes as a duty a duty not to exercise power for own benefit, directly or indirectly. So since it's a default duty you know that it is not *necessarily*, that's the key phrasing, it's not *necessarily* inconsistent with the mandatory duty in section 26 for a trustee to benefit qua beneficiary, but the key thing that is not overridden is that in making such a decision the trustee must be making that decision for the benefit of the beneficiaries.

WINKELMANN CJ:

But if there's no conflict rule and you're one of the beneficiaries, then you can favour your interest above the other beneficiaries?

MR BUTLER KC:

No – well, no, I don't like that language if you may favour. You can exercise the power, there is no prohibition on a power being exercised that might see you getting a benefit, but the guiding mandatory duty is that when you are exercising the power you are doing so for the benefit of the beneficiaries.

WILLIAMS J:

But –

GLAZEBROOK J:

That doesn't make any sense.

WINKELMANN CJ:

And what does that mean for a discretionary beneficiary?

MR BUTLER KC:

Well I'm going to come to the constraints in a moment.

WINKELMANN CJ:

Okay.

MR BUTLER KC:

What it means is you can't act selfishly fundamentally.

GLAZEBROOK J:

Well I think it does mean you can act selfishly.

MR BUTLER KC:

It means you can't –

GLAZEBROOK J:

If you can give it to yourself you can't possibly be acting in the interests of the beneficiaries if you're giving it to one rather than another.

MR BUTLER KC:

Well I don't accept that proposition, that's not right. There can be –

WINKELMANN CJ:

Well you're going to come to that later, okay.

GLAZEBROOK J:

Well you have to explain how you are acting for the benefit of all of the beneficiaries when you give it to one of them.

MR BUTLER KC:

But, your Honour, there's any number of reasons why. For example, a distribution might be made to a particular beneficiary who has agreed that they are going to, upon receipt of it, they will allocate it to A, B, C and D.

GLAZEBROOK J:

Well, they could but that's not what happens usually, is it? If you allocate money to a beneficiary, it's you've allocated money to a beneficiary. It's difficult to see by allocating it to one you're acting in the best interests of all of the beneficiaries, but maybe you're going to explain that later.

MR BUTLER KC:

Yes, well, I think I will, yes. Right, so back to section 26, and then section 27: "A trustee must exercise the trustee's powers for a proper purpose." So those are the mandatory duties.

Then we move to section 28 where we've got the default duties: "The duties… in section 29 to 38 are default duties that must be performed by the trustee unless modified or excluded in accordance with section 5(4) and (5)."

So your Honours will be familiar with a number of these duties, I don't need to go into all of them as they don't necessarily arise here. So general duty of care, duty to invest prudently. But section 31: "Duty not to exercise power for own benefit." Section 32: "Duty to consider exercise of power." Section 34: "Duty to avoid conflict of interest." Section 35: "Duty of impartiality." Section 36: "Duty not to profit." Section 38: "Duty to act unanimously."

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So your Honours will be familiar in this case the duty to act unanimously has not been excluded. The self-dealing rule has been excluded by clause 17, but the self-benefit rule has not been excluded in terms by the terms of the Trust.

So we then move to –

WINKELMANN CJ:

Sorry, which ones have been and which ones haven't?

MR BUTLER KC:

So the self-dealing rules, so that would be –

WINKELMANN CJ:

Yes.

MR BUTLER KC:

Broadly speaking that would be regarded as rules which are covered by section 34, because in self-dealing normally the trustees are on one side of a transaction, be it in their own individual capacity or as a trustee of another trust, or a director of a company with which the trust is dealing.

WINKELMANN CJ:

That's been excluded.

MR BUTLER KC:

That's been excluded. That's what clause 17 does.

WINKELMANN CJ:

But the one that hasn't?

MR BUTLER KC:

So the unanimity rule hasn't been excluded, and the duty not to exercise power for own benefit has not been excluded.

KÓS J:

Subject to the self-dealing section.

MR BUTLER KC:

Subject to self-dealing, exactly.

KÓS J:

There's a crossover.

MR BUTLER KC:

Correct, correct.

WINKELMANN CJ:

This is for a trustee of course?

MR BUTLER KC:

Yes, that's right. So we look then at subpart 3, which begins with section 45, that's a duty about keeping core documents. If we turn to the subpart within the subpart, headed "Giving information to beneficiaries" beginning at section 49. You'll see just, you should note for the understanding the scheme, "representative" means the parent or guardian of a beneficiary who lack capacity. So in the case of minors, a parent has, is a representative, and you'll see that a representative has a right to request the disclosure of trust information.

Section 50 tells us what the purpose of the disclosure provisions are, again this is entirely consistent with common law foundations. "The purpose of sections 51 to 55 is to ensure that beneficiaries have sufficient information to enable the terms of the trust and trustees' duties to be enforced against the trustees." That is a reaffirmation of the characteristic of a express trust set out in section 13(b) of the Act. So there is a presumption, there are two presumptions that operate. Section 51 is a presumption that the trustee must notify basic trust information, and that basic trust information is set out at subsection (3). Then section 52 there's a presumption that trustee must give information on request. So the way many of us colloquially distinguish it is to say a distinction between basic trust information and then other trust information.

Then the factors that are to be taken into account are set out at section 53. They are consistent with what this Court said in *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

I'd ask you then to turn to section, part 5, which deals with "Appointment and discharge of trustees". So I think a few things are relevant in this part, and again I'm conscious of time so I'm not taking you to every provision, but I hope I'm whetting your Honours' appetite for the statutory scheme, which I say affirms the common law position. So part 5 "Appointment and discharge of trustees". So we get section 92, tells you who may remove trustee and appointment a replacement. Section 94 I think has some relevance to this

case. "A person with the power to remove or to appoint trustees must exercise any power of removal or appointment – (a) honestly and in good faith; and (b) for a proper purpose." And you'll see that that section is referable not to a person who holds that power as a trustee, but to a person who has the power.

Then you'll see if you turn the page section 95. "A beneficiary may apply to the court for the review of the exercise, by a person with the power to remove or to appointment trustees, of a power to remove or to appoint a trustee." Such an application by review is brought and considered under sections 126 and 127, which there's been some reference to already.

In addition to the ability of a beneficiary to challenge removal or appointment, an innovation of the Act is that which is found at section 109 of the Act. So the way this scheme now works is that where a trustee, where somebody has the power to remove a trustee, they've got to give that trustee notice. The removal does not take effect until 20 working days have expired. If you want to know where that comes from, section 107(3)(b). So if we go back to section 109. An application to prevent removal: "(1) A trustee may… apply to the court for an order preventing the trustee's removal. (2) The application must be made within 20 working days…".

Section 110 then tells you, well what happens on that, so the applicant trustee "… must produce evidence that raises a genuine dispute as to whether the removal decision was reasonably open to the person in the circumstances." There again you see that language that we see in section 126 and section 127.

KÓS J:

Could a beneficiary apply to enforce a trustees obligation to make that application? Or opportunity I should say.

MR BUTLER KC:

I think that is possible, and what I'm going to suggest, where I would get to if I was advised, well, what's the nature of this particular power, if a trustee came and asked me, I'd be saying that in circumstances where a trustee has concern, they have an obligation to make application to the Court. In other words, this itself is not a personal power of application.

WINKELMANN CJ:

Well that happened in *Carmine v Ritchie* [2012] NZHC 1514, didn't it?

MR BUTLER KC:

I have to accept that in terms of this provision, it's not bee the subject of decision. But it seems to me it would be consistent with the nature of equity to say that – well let's put it this way. A trustee who had genuine doubts about the validity of, or the motives behind them being sacked, who just said, oh well, I'm not going to do anything about it, I'll just leave it be, I think would be found to be in breach of trust.

WINKELMANN CJ:

I don't think it was doubted in *Carmine v Ritchie* that he had – he could have an obligation.

MR BUTLER KC:

Correct. But that's what I think so again, yes, I don't need to further elaborate. And it could be in a situation what happens in terms of practical terms, what the trustee does is that they file an application and then say, right, well I've done my piece. It's now for the beneficiaries. I'll provide an affidavit or whatever it may be, as the case may be, and I now leave it to the beneficiaries and the appointor, or the remover in this case to scrap it out. Who knows.

GLAZEBROOK J:

It's relatively narrow grounds upon which you can avoid it though isn't it under section 104 and section 105?

MR BUTLER KC:

Let's have a look. Well section 105: "…it is desirable for the proper execution of the trust…". Then you've got these other: "(iv) the trustee is no longer suitable to hold office as trustee because of the trustee's conduct or circumstances." So I think they're actually quite broad. Some of them are quite specific, I give you that your Honour, so I accept that.

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GLAZEBROOK J:

I was really just indicating that it's not a general power to review without cause in the sense that it has to be reasonably open in respect to argue that you're not removing them for those reasons at least.

MR BUTLER KC:

All right. Well and so, just from my perspective, I think it's – as I understand the statutory scheme, section 109 is: "A trustee may… apply to the court for an order preventing the trustee's removal." That ability to apply is not tagged to whether or not section 104 or section 105 have been invoked.

GLAZEBROOK J:

No, it'd have to be – there has to be a genuine dispute.

MR BUTLER KC:

Yes.

GLAZEBROOK J:

As whether it was reasonably open.

MR BUTLER KC:

Well, I think the reason I've been sacked is because I'm not going to do Marcus Pinney's bidding –

GLAZEBROOK J:

No, we're not talking –

WINKELMANN CJ:

I think that Justice Glazebrook's actually agreeing with you.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

She's saying that there's not an untrammelled power to remove and those are constraints on your power to remove.

MR BUTLER KC:

Well, if she's saying that then I thoroughly agree, but I'm not sure that's what her Honour was saying.

GLAZEBROOK J:

No, it's just there has to be a genuine dispute as to order removal and one can understand that if it's not doing as I say there is a genuine dispute as to whether it was reasonably open. But it's not, well, I'd quite like to stay, I think I missed a few meetings but otherwise I've been doing quite a good job.

MR BUTLER KC:

Well, it could be, for example, so I've been removed, right, I was the professional trustee appointed to this trust, part of the reason why I was appointed to this trust was because I was a professional trustee. What has happened is somebody who is not a professional trustee who is not independent has been appointed in my stead, or alternatively, nobody who is a professional trustee or acts independently has been appointed in my stead. I am concerned that that means therefore da, da, da, da. I think not appointing somebody independent or professional is inconsistent with the purpose of the power that was conferred. Something like that. Sorry, your Honour?

KÓS J:

Well, or on Monday we had a discussion about whether the other trustee could appoint all the property to himself, I disagreed. On Tuesday he gave notice of my removal.

MR BUTLER KC:

Yes. Yes. For myself, I just don't see the courts reading down this power that Parliament has conferred. It would be inconsistent, I would say, with the pre-existing case law and would be reading down in an niggardly ungenerous way a provision which is designed to, after all, to protect the interests of the beneficiaries. I just, I don't see why a court would do that. Of course, the Court retains its general power under the inherent jurisdiction in which it had also statutory under section – I've just forgotten now which one it was under the old Trustee Act. What one was it? Section 46, was it, I think. I can't remember now. But under section 112 the Court has a power to make an order for removal whenever it is necessary or desirable to prevent a trustee – to remove a trustee if it's difficult or impracticable to do so. So why am I mentioning that? So if somebody gets appointed who looks like a patsy a court can say you're out.

So section 126, that's the one that deals with the Court's ability to review. The way it works is: "The court may review the act, omission or decision (including a proposed act, omission, or decision) of a trustee on the ground that…[it] was not or is not reasonably open to the trustee in the circumstances," the application is one that's made by a beneficiary, the review's conducted in accordance with section 127. Importantly, of course, it doesn't limit the Court's jurisdiction to supervise trusts.

Section 127(1) says: "An applicant for a review… must produce evidence that raises a genuine and substantial dispute… If the court is satisfied that… a genuine and substantial dispute," has been established then, "…the onus is on the trustee to establish that the act, omission, or decision was or is reasonably open to the trustee in the circumstances."

Again that goes to the point of saying so that puts the trustees on the backfoot so they have to effectively come forward and explain themselves, and that in my experience of doing quite a number of these, before the Act but certainly since the Act, is that's what happens.

KÓS J:

Well this is a major innovation.

MR BUTLER KC:

It is.

KÓS J:

It's well beyond what equity used to provide.

MR BUTLER KC:

I think that's right to a degree, but there's elements in it that is consistent with the previous rules in equity, so while I think myself might have described it in an article as, you know, a real innovation, it is an innovation, but it's not, it draws on elements that were there already. So, for example, the ability of a court to draw an adverse inference, where the trustees decide not to give reasons, or substantiate things, there's clear law on that. Mr Kinney in his chapter in the book, in the Butler et al book, chapter 6.8.4 from memory, goes through the relevant cases in that regard. So what I'm trying to say is that sometimes if you decide, well trustees don't have to give reasons, therefore it all makes it very hard, a better appreciation, or a more nuanced approach to the no obligation to give reasons, is to consider at which point in time that obligation – sorry, that right or ability, discretion not to give reasons arises. That's typically pre the commandment of an action, to stop you always being second-guessed and having to write everything down. The idea is you should get on with things. The idea that trustees don't have to come to court, and don't have to explain themselves, that's never been my understanding of how it works. Trustees are under the supervision of the Court, and will be expected to come forward and provide information that is relevant to the process that they engaged in to explain themselves.

So those were the key provisions, your Honours, that I wanted to take you through in terms of the Act, because I think it allows me then to talk about constraints and then, to use your Honour Justice Kós' phrase, I think it was Justice Kós anyway, talk about armaments of equity. So what I'm doing in the next section is you'll see I've touched on a number of what the constraints are, and I don't think I'm going to help you if I take you through the bullet points that are there again are there but one that is probably worth emphasising is very important particularly where what you've got is two trustees, and particularly where one of the trustees is not a beneficiary.

You are liable, personally, for a breach of trust. You would be insane to be a tame trustee and give away the capital of the trust to benefit somebody else, if there is not a good reason for it. You just wouldn't do it. So that, it's important that we reemphasise the importance of that personal liability because it is a constraint on trustees in terms of how they go about discharging their obligations.

GLAZEBROOK J:

Let's assume we don't have a trustee who's a beneficiary, and we have a totally discretionary trust.

MR BUTLER KC:

Yes.

GLAZEBROOK J:

It's difficult to see there's a breach of trust if the trustee decides that they are going to distribute the assts of the trust to, say, a parent. Bring forward the vesting day and distribute it to whoever gets it on a vesting day.

MR BUTLER KC:

I don't accept the way your Honour has put it, if I can be engaged with you quite directly with that.

GLAZEBROOK J:

Well what do they have to do before they do that? I mean they would decide that it was in the best – do they have to say, well –

MR BUTLER KC:

Correct, it's in the best interests of the beneficiaries having regard to the context and objectives.

GLAZEBROOK J:

Well it's very difficult to see how it's in the interests of the beneficiaries to give it to one beneficiary. It just doesn't make any sense. In the case of a discretionary trust.

MR BUTLER KC:

That it can make sense when one deals with the individual facts and circumstances, the context and objectives of the particular trust. That's what I'm talking about – sorry your Honour.

WINKELMANN CJ:

I mean aren't you pitching it more highly than you need to? I mean what is the duty in relation to discretionary beneficiaries? It can't be that you're obliged to be satisfied that it's in the interests of every discretionary beneficiary to make a distribution to one.

MR BUTLER KC:

Correct, and we know because the Act tells us in section 35 that the duty of impartiality says: "(2) This section does not require a trustee to treat all beneficiaries equally…". So we know that. It goes without saying.

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KÓS J:

This happens all the time.

MR BUTLER KC:

It does.

KÓS J:

There are three beneficiaries, one has married well, one's an entrepreneur, and the third's marriage has just broken up and they have no money.

MR BUTLER KC:

Correct.

KÓS J:

All the money to third, perfectly valid decision.

MR BUTLER KC:

Correct. So in the context of that what you'd be saying is, look, this was created to support the family, within this family there are certain people who don't need support from the trust or need very little of it. There is one person who unfortunately through no – just through misfortunate needs the support. We've got the resources, that's what we're going to do. That's why I keep saying you have to come back to the circumstances.

GLAZEBROOK J:

Well, what about you say this is a farm, I don't want it split between the three, I'm giving it to the eldest son who's a beneficiary?

MR BUTLER KC:

Yes, you might well come to that conclusion, that that is in the best interests, and normally before you would –

GLAZEBROOK J:

Well, it's hardly in the best interests of the two who don't get the farm.

MR BUTLER KC:

But, your Honour, with great respect, is making an assumption. You don't know whether the two other beneficiaries might say you know what, we know and we want this farm to continue in the family.

GLAZEBROOK J:

Well, that's irrelevant.

WINKELMANN CJ:

You're going back to your position again though. I mean that's not your position that every dispersion has to be in the best interests of every other beneficiary.

MR BUTLER KC:

No, it doesn't.

WINKELMANN CJ:

And I think – so when we loop back to the question at hand which is what happens when you're a trustee and you're allowed to distribute to yourself and you're one of the beneficiaries, discretionary beneficiaries and you're allowed to distribute to yourself, what's the test you apply in deciding to distribute to yourself?

MR BUTLER KC:

You've got to consider, okay, if I'm thinking of doing such a thing – I mean it's very hard to answer in the abstract because I don't have a set of facts, but –

GLAZEBROOK J:

Well, no, but let's have a –

WINKELMANN CJ:

No, no, but there's a – there must be a legal test that that trustee must frame, must assist themselves with. So they have to be satisfied –

MR BUTLER KC:

Yes, you consider that – you, yes, you have to consider the context and the objectives of the trust. What is its purpose? So again, those are matters that can only be articulated on a set of concrete facts.

WINKELMANN CJ:

But don't you also have to consider the needs of other – do you have to – do you also –

MR BUTLER KC:

You have to consider the needs, yes, you must consider the needs. You must consider whether or not if I take all of this for myself, where does that leave everybody else?

GLAZEBROOK J:

Well, I suppose I'm having difficulty because I'm assuming a trustee who has absolutely nothing to do with any of the beneficiaries –

MR BUTLER KC:

Yes.

GLAZEBROOK J:

They're a trustee, they have a trust that allows them to bring forward the vesting day, that allows them to resettle, that allows them to favour one beneficiary over another and they decide they're doing it. What you would – what the trust, the new Trusts Act would suggest is it's only if it's not reasonably open to them to do so, which might be, but it's not reasonably open because there are three beneficiaries and you ought to make sure it's in their best interests of all three beneficiaries, that can't be the test in a discretionary trust? If it is, that turns the whole of the discretionary trust jurisprudence to date on its head.

MR BUTLER KC:

But your Honour's analysis of it is excluding the important nature of the judgement that attaches to a trustee operating within a discretionary trust.

It's not a judgement-free, evaluation-free zone. That's why – I know I keep, I know your Honour doesn't necessarily like –

GLAZEBROOK J:
No, no, but you consider the –

MR BUTLER KC:
Yes.

GLAZEBROOK J:
Well, I suppose I'm just having difficulty seeing how it could ever be in the interests of all of the beneficiaries to give all of the property to one of the beneficiaries and that must be able to be done under a discretionary trust, that's the point.

MR BUTLER KC:
Yes, so I come at it from a different way. In many cases it will not be reasonably open to do that. In some cases it will be.

WILLIAMS J:
So that's the conundrum that this and other –

MR BUTLER KC:
And you can say a priori.

WILLIAMS J:
That this and other cases presents on the one hand Mr Watts' model of a tightly constrained set of controls on trusts. If it's possible that you can do it selfishly, you can't do it, or perhaps he's the reverse.

MR BUTLER KC:
Yes.

WILLIAMS J:

And your one is if it's possible to do it selfishly, that's okay, subject to strong statutorily-based judicial intervention.

MR BUTLER KC:

Yes. By selfishly I mean without having regard to the interests of others, that's what I meant.

WILLIAMS J:

Yes, I get that, I get that.

MR BUTLER KC:

Doesn't mean you will end up with it.

WILLIAMS J:

But in the end your model depends on the quality of judicial intervention and what I – I have some experience of these because judicial intervention in my old court was much more intrusive than it is under the Trusts Act, and the model you're suggesting does have the flavour of some of the powers the Māori Land Court have because you are having to assess subjective judgments, and my question to you is, what do you measure those against? I mean it's easy if it's, the trustee can say to the Judge, well, this was the only one that was broke so, or the beneficiary was the father and the children would eventually take. But I suspect it won't even be a majority of cases like that if there's a general power in trustees who are also beneficiaries decide to get selfish.

GLAZEBROOK J:

But leave out whether they're beneficiaries, because your constraints would operate with a totally –

WILLIAMS J:

Well what I'm driving at is your model really requires, first of all this thing to get to a judge, which in most cases it won't, because it's too expensive to do

that, but in any event you'd have to have the judge be able to say there is something problematic about the way this has been done. So I smell a rat.

MR BUTLER KC:

No, your Honour, your olfactory senses are not working correctly.

WILLIAMS J:

They're not mine, they're the judge's.

MR BUTLER KC:

Oh the judge's, okay, well in that case I'd be saying – when we talk about property, at the end of the day where property bites is when we come to court. So I don't accept a premise which says, well, if there's –

KÓS J:

No, it's well before that. The question here is control.

MR BUTLER KC:

Yes.

KÓS J:

And because there are constraints, and the first of those constraints is you can't do it yourself. You've got to persuade the other trustee. Then, if there's an argument, the Courts have a power of intervening, and then if the beneficiaries don't like it they can intervene, so you don't control it.

WILLIAMS J:

My point is, sorry about this, my point is a structural one. I mean it gets easier on the facts of this case because you're got two trustees, but there'll be lots of situations where there aren't, and there's a strong binary between the model that Mr Watts is putting up as the way the law should deal with this, and the model you're putting up. The big difference is your perception of a strong power of judicial intervention that will act as a disincentive to bad behaviour.

MR BUTLER KC:

Yes, correct.

WILLIAMS J:

There might be a structural question about that, but my question is, what is your measure. How does a judge resolve the question where the trustee can be a beneficiary, and the judge can't smell a rat.

MR BUTLER KC:

Okay. Coming to your structural point first if I may. Your Honour talks about getting to court, et cetera, et cetera, but typically stuff never needs to get to court. The structural protection in many ways goes back to the point I was going to finish on, namely *Clayton*'s case was sending a strong message to trust drafters, this case gives you an opportunity to send strong messages to trustees, and that means their advisors.

WILLIAMS J:

Yes, I understand, but that's your model.

MR BUTLER KC:

That's my model, yes, absolutely, and I say –

WILLIAMS J:

Right, but by what measure. Tell me how, what ruler does the judge use in situations where there's one trustee who's also entitled to appoint dispositively to him or herself, what measure does the judge use to say, you can't do that.

MR BUTLER KC:

Just so I understand, that we're on the same page. So now, so we're talking one trustee, so we're not talking about the facts here, two trustees. So if I have a conversation with you about that I'm not conceding any of the core point, the core case, which is here we do have two trustees and that makes a big difference, so if I engage with you then on the first point where you've got a trustee, a sole trustee, who is a beneficiary, the first thing you'll be looking to

do is see whether or not the self-benefit rule has or has not been overridden. Because for as long as that person –

WILLIAMS J:

Well of course, let's assume that the deed says that.

MR BUTLER KC:

Okay, but it's an important thing to check because not every deed does allow a trustee to occupy office and self-benefit. So again this is my point going back to the various types of deeds that you will see. I think the scenario you paint of a sole trustee who – where the self-benefit rule is overridden, and therefore can – you you were actually talking about a very small category of case because in my practice I have not come across those very much.

GLAZEBROOK J:

They all will be in these types of trusts.

WILLIAMS J:

We run into them all the time in court.

MR BUTLER KC:

But two trustees, not one trustee.

GLAZEBROOK J:

It doesn't matter though.

MR BUTLER KC:

Well I say it does matter, it matters hugely.

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WILLIAMS J:

Anyway, I want you to talk to me about the way in which a judge exercising what appear to be very broad powers in the Trustee Act can control the trustee without appearing to second-guess the trustee or to replace the judge's view for that of the trustee.

MR BUTLER KC:

Right, if we look at some of the standards of the sorts of cases, or in my outline I go to a number of the standards. I need to 'fess up straight away of course, namely if what the Court is wanting me to say is show me a case or a rule that says that in that scenario the trustee beneficiary can never get 100% of the property, then of course I can't.

WILLIAMS J:

I just need you to give me a structured analytical framework for where the line gets drawn. Mr Watts' argument at least has the argument of being a bright line.

GLAZEBROOK J:

And I would say you really, because your argument seems to be that even if there isn't, even if there's a trustee who was a totally independent trustee, there are going to be quite major constraints even in the discretionary trust of this nature in terms – and that's not ever been – that would have to be a change that has come about with the Trustee Act, because that's never been the law before.

MR BUTLER KC:

No, I really do not agree with your Honour in that regard, I'm sorry, I don't.

GLAZEBROOK J:

All right, well maybe you need to point the cases where the trustees, where the Court has been substituting a decision for that of the trustees.

MR BUTLER KC:

No, so that we narrow the difference –

GLAZEBROOK J:

And on what basis.

MR BUTLER KC:

So that we narrow the difference between us, I am not saying that the Court can act as a court of appeal against a decision of trustees. So we're on the same page in that regard. You should know, however, that historically the Court of Chancery did act as a court of appeal effectively. So there's old cases like *Moseley v Moseley* (1673) Fin. 43, *Warburton v Warburton* (1702) 4 Bro.P.C 1 H.L.(E.), and those are cases that are referred to, for example, in *McPhail v Doulton*, where that had been the practice of the Court of Chancery. So I think we're now clear that a court is not a court of appeal from a decision of a trustee. So I can't and don't go that far.

So the question then becomes, okay, by reference to what criteria or standards are used, will a court assess a decision that's been made by trustees, and there's a number of them, and then when you look and see how they get applied, I say they are genuine constraints. So obviously I've talked about the information, right? Because we know the old saying, information is power, so the new Act makes it very plain about the ability of trusts, of beneficiaries rather, to access information. So when you look at one of the tests, honesty and good faith, consideration they give must be genuine and responsible. So you must be able to show that there is genuine and responsible consideration that is being given to the exercise of the power.

All right? In terms of adequate consideration, that phrase comes through in cases like *Clement v Lucas* [2017] NZHC 3278 and *Masters v Stewart* [2014] NZHC 2419. I was just going to - they're not in anybody's bundle, they should have been, and that became obvious to me when we were having the discussion yesterday about constraints. They should have been in the bundle, so I have them available as hand ups if that will be helpful to your Honours, but you've got the citations. I'll ask Mr Tocher to do that.

Take, for example, in *Masters v Stewart*, so that's a decision of his Honour Justice Mander, there the settlor's son and siblings were beneficiaries of a trust which held commercial properties. One was a market garden. The settlor entered into an arrangement with the son to sell the market garden to the son. The price was set at market value, but a large proportion of the debt

arising from the purchase price was distributed to the son from the trust in exchange for the earlier work and contributions that he'd made to the trust. Some time later the trustees made distributions to the other beneficiaries to "even up the ledger". The son filed proceedings claiming on a number of grounds, including that the trustees had not exercised their discretion properly. It was a normal style discretionary trust with wide discretion.

In that case Justice Mander found that the trustees, when they were exercising their discretion to distribute to the other beneficiaries had taken into account the distribution of the debt to the son, but they had not taken into account the value of the son's work and contributions. The work and contributions were the very reason for the distribution of the debt so they ought to have been taken into account, and so the decision was set aside. So it's a pretty granular investigation of purpose, facts, circumstance, and what the sorts of considerations are that the trustees should've been taking. It wasn't enough, in other words, that the trustees, well, you've got a wide discretion, you can do whatever you like. No, you can't.

Take *Clement v Lucas*. So *Clement v Lucas* was a case, involved a trust formed by settlors to hold farm property and some other assets that ultimately were to go to two sons and one daughter. Before that trust was formed, certain property had been transferred to one of the sons and promises have been made to the other son and the daughter. There'd been some estate planning, advice had been given, et cetera, et cetera. The idea behind the trust that's in issue here was it was to be a suitable vehicle for "evening the ledger", and if you look through the decision you'll see it's a good example of the Court looking to the context and the purpose of the trust and being guided by that context and saying, well, how is it that you should've gone about making this decision. They didn't go and say, oh, look, hey, look how wide your powers are.

WINKELMANN CJ:

Yes. So what Mr Watts says against you is that when you look at the context and purpose of this trust, its context and purpose is really to – that the asset is the son's –

MR BUTLER KC:

It's not, it's –

WINKELMANN CJ:

– and so there wouldn't be any kind of reviewability.

MR BUTLER KC:

Well, that's just not right. It's a dynastic trust. The one person who is definitely not going to get the property was Marcus. Marcus was, to use the language of Justice Kós –

WINKELMANN CJ:

Well, I don't think that could be a fair characterisation. The one person who is definitely not going to get the property was one of Marcus' partners.

MR BUTLER KC:

Well, that couldn't – because it'd be ultra vires if that's true. But also then when you look at how it was going to go down, unless Marcus was going to be able to convince these trustees that it was a good idea to give him even some, forget about all, of the trust property, he wasn't going to get anything out of it, at least without good business plans, et cetera, et cetera. So I think when you look at the facts of this particular case, its context and objectives, one of its purposes was to protect that family legacy. This was dynastic.

WINKELMANN CJ:

I just don't like that expression.

MR BUTLER KC:

Yes, I know it sounds a bit American but –

WINKELMANN CJ:

It's genetic, it's not to do with – this is about preservation of capital.

MR BUTLER KC:

Yes, but for whose benefit? Not just for Marcus and stop.

WINKELMANN CJ:

For the family. For the family.

MR BUTLER KC:

For the family, exactly, his family, whoever that might be and that family might be if he partners up with somebody else, the kids of that relationship for example. I don't know, I'm saying that without any knowledge of circumstances so – but there is –

WILLIAMS J:

So the controls, the yardsticks are proper purpose?

MR BUTLER KC:

Yes.

WILLIAMS J:

Relevant consideration and irrelevant consideration, all those quasi-public –

MR BUTLER KC:

Yes, adequate consideration is actually the way, is an expression, and that would –

WILLIAMS J:

Yes, but it's you should've taken this into account because the context says you had to take that into account.

MR BUTLER KC:

Correct.

WILLIAMS J:

Or the deed says it or whatever which public lawyer would call relevant consideration or taking into account irrelevant considerations, it's the same basic idea.

MR BUTLER KC:

Yes. Correct. Correct.

WILLIAMS J:

And that's as far as it goes? Unless it's, shall we say, irrational to –

MR BUTLER KC:

Well for example Robert Goff – sorry, Robert Walker J, as he then was, in the *Scott v National Trust* [1998] 2 All ER 705 (CA) case gave examples of legitimate expectations. Somebody might have a legitimate expectation in terms of how they might benefit under a trust. You can't again just rely on your discretion, say it's – you were turning the tap off.

WINKELMANN CJ:

So just to take this back to Mr Watts' argument in this case, are you saying it's as high as it would be a breach of fiduciary duty for the trustees to distribute direct to Marcus the farm because he was the person that it was not to be distributed to?

MR BUTLER KC:

On the facts of this case, yes. I think – I'll personalise it. If the trustees had come to me and said, look, we want – Marcus has asked us to give us, for us to give him the whole farm for himself, shall we do it? I would be telling them you'd be mad or whatever the, you know, whatever I can – a lot more words than that. Why would we be mad?

WINKELMANN CJ:

A legal expression of it.

MR BUTLER KC:

– because I can't see how you could justify that decision in the circumstances of this case. Look at the track record that the trustees have, the concern, look at what the original purpose of the trust was, consider what might happen to the farm if it's to be handed over to him, and then also it's dynastic. If we give it to him and put it in his hands, then it loses the ability for it to be given that dynastic tag. Why would we do that? You just wouldn't do it.

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GLAZEBROOK J:

Well in a way they did hand it over to him, because they handed it over to him in a trust form, but without the same sort of constraints that had been there before, and with the ability for him to change. I'm not saying that necessarily changes the issue, but whether it was in a trust or not, if he was part of the management, and they were concerned about that, but still gave it to him, if he was part of the management then whether it was in a trust or personally it was going to fail.

MR BUTLER KC:

I don't understand the last bit. It was going to fail?

GLAZEBROOK J:

Well it doesn't make a difference if he's, if he is controlling it, whether it's with somebody else or not, then it's going to fail whether he owns it or it's in the trust.

MR BUTLER KC:

But that brings us back down. I don't agree with your Honour's proposition that he has control of it, fundamentally. That's where we –

GLAZEBROOK J:

No, no, I'm speaking more generically than – control at least in the sense of being one of the trustees, and the ability to change the trustee.

MR BUTLER KC:

But then I don't agree with that your Honour.

GLAZEBROOK J:

Well he doesn't have an independent trustee there now.

MR BUTLER KC:

Well he's got –

GLAZEBROOK J:

At least in terms of a professional trustee, and one can understand why not because that's expensive.

MR BUTLER KC:

Yes it is.

GLAZEBROOK J:

And also it's relatively difficult to find people, for very good reason, who are prepared to act in that way.

WINKELMANN CJ:

Given the Trusts Act's demanding framework.

GLAZEBROOK J:

Yes.

MR BUTLER KC:

Yes.

GLAZEBROOK J:

So I mean it's certainly not a criticism in any sense, it's just that…

WINKELMANN CJ:

Mr Butler, on your analysis would *Clayton*, the decision in *Clayton v Clayton* be different now with the imposition of the Trusts Act?

MR BUTLER KC:

I think there will be a challenge or a barrier to *Clayton*, because the question you would ask – the question for me when *Clayton* came out, indeed while it was being argued, but of course I had a particular side that I was on, but the curiosity of it all was, bearing in mind how it was that the Court interpreted the relevant clauses, I think the view that was held within the trusts part of the profession was, well, hasn't the Supreme Court basically said, there's not a trust here. Basically. Because it just doesn't have the fiduciary qualities.

WINKELMANN CJ:

Although it does say there are some fiduciary qualities.

MR BUTLER KC:

It does. But that, I think, but I don't know –

KÓS J:

Yes, some is not enough.

MR BUTLER KC:

Exactly.

GLAZEBROOK J:

No, but there is something in the point that Mr Watts made that there was, it was certainly not a sham. That was held, it was not a sham.

MR BUTLER KC:

That's correct, yes.

GLAZEBROOK J:

And if he had died the day after he'd set it up, then would you say, and I think maybe not, there wasn't a trust there because there was intention to have a trust. There were beneficiaries. They maybe different from what would happen either under an intestacy or under a Will. Mr Clayton may have

decided that the small amount of property he had left in his own name should go one way.

MR BUTLER KC:

Yes, quite.

GLAZEBROOK J:

Yes.

MR BUTLER KC:

And so, look, there's a number of imponderables there that I can't answer, but that was one of the reasons why those who read the decision said, because this Court put in a pregnant paragraph indicating it couldn't agree on the issue of illusory trusts and the assumption those in the trusts practice, practitioners had made is because the sorts of issues that your Honours are putting to me are inevitably ones that will have popped up I imagine during deliberations. They featured a little bit in the argument at the time, a little bit, but certainly weren't dealt with in the, to the degree that perhaps, if the Court had gone down there, would have like to have.

WINKELMANN CJ:

So, Mr Butler, in summation your argument is that when you look at the provisions of the Trusts Act, and the particular provisions of this trust deed, there are such constraints in terms of the treatment of this property, that it cannot be said that Mr Pinney enjoys incidents of ownership.

MR BUTLER KC:

Correct, and just to respond if I can use that language, to his Honour Justice Williams who said to me, well the advantage that Mr Watts' approach has got is it's a bright line. Well of course it's a bright line, because it's a very thin line. Remember he's the one who's taking the view that its' a thin level of accountability. It suits him to say, hey look the message you need to be sending to trustees, Supreme Court, is these trusts, forget about it, there's no constraints at all.

WINKELMANN CJ:

No, I don't think that's unfair –

MR BUTLER KC:

But I think that is what he is saying.

WINKELMANN CJ:

I think –

WILLIAMS J:

Well he would simply shrink the parameter around which one can operate a trust.

WINKELMANN CJ:

Yes. I think, yes.

WILLIAMS J:

– and then bust everything else

WINKELMANN CJ:

He would say trusts should actually operate as trusts and they shouldn't just be places that you pretend you don't own property and you place it and it gives you all these benefits when you need it, and otherwise you just act as if it's your property and have all the enjoyment.

MR BUTLER KC:

Yes, but if people are doing that, then that's the message the Court needs to send, that is the one thing that advisors say, at least lawyers say, that a trust is not. It is not your property, it's the first thing when somebody comes in the door. The minute you put it in trust it ceases to be your property. You might like certain things to happen to it but once you hand over power to somebody else, it's not yours anymore.

So anyway, I've given you the cases that set the standards and I think what's important is that when you come and look at the cases, as no doubt you will afterwards, have a look at the way in which the style of interrogation that is given to the particular decision.

So, for example, just take *Grand View* for example. So super wide language, super wide language, clause 8 which would allow removal or addition of new beneficiaries, and what the Privy Council said in that particular cases is – effectively it says, ah, this is a classic example by the trustees of looking at the language and being, my words not theirs, mesmerised by the width of the language, forgetting that all language in a trust deeds needs to be understood by reference to its context. So, for example, the language of context, and the context they talk about isn't just the context of the other clauses within the trust deed but also what it was that led to the creation of the trust. That's at paragraph 79. Then also when it talks about wide language it says, well, look, you're just – you're not to be mesmerised by wide language, proper purpose is something that is derived from the objectives.

WILLIAMS J:

You're building quite a lot of fuzziness into the constraints because you're requiring a judge to look at, you know, the background facts, the nature of the family and draw whatever hints, whatever forensic hints one can draw from that. That's –

MR BUTLER KC:

Yes, that's why I say it's a thick version of control, whereas –

WILLIAMS J:

Well, it's a funny one, that's the thing.

GLAZEBROOK J:

I think the worry I have is it applying to independent trustees and it being even more difficult to get independent trustees to act. It's the same sort of criticism that's levelled in respect of directors' duties that you actually get to the stage

where you'll have nobody acting as an independent trustee and then people being obliged to have trustees that are less than optimal perhaps.

MR BUTLER KC:

Well –

GLAZEBROOK J:

I don't mind the argument that says there are constraints, I'm just slightly worried about your expansion of them which would then mean that they're applying to perfectly ordinary, independent professional trustees who are doing their best and they're putting themselves, on your basis of liability, at risk of being held in breach of trust when they've done something that seems perfectly reasonable in terms of the trust deed.

MR BUTLER KC:

Well, all I'm doing is giving you, feeding back what the courts have said in any number of cases. That's all I'm doing. I'm saying here is the heritage.

WILLIAMS J:

Don't shoot me, I'm just the messenger.

GLAZEBROOK J:

Well, I'm not sure they have in the case of discretionary trust. They certainly have in terms of some of the administration aspects of the trusts in terms of – and even that's been criticised effectively. I –

MR BUTLER KC:

All right, well *Scott v National* –

KÓS J:

Well, perhaps the outcome will simply be that trustees act more responsibly. Once they did.

WINKELMANN CJ:

Well, yes, but I think the point that's being made is who would know what's responsibly when you have to look at all this vague material, et cetera, but – and Mr Butler would say, well, that's just what our case law has said so…

MR BUTLER KC:

Yes, and then I think somebody yesterday, it might even have been your Honour the Chief Justice, said, well look, if all these obligations flow, isn't it just a question of tough? Yes, it is tough. I mean the point is when you choose this particular vehicle, known to the law, trusts, certain things flow with it, just in the same way as if you go – if you want limited liability under a company, yes, you get – the shareholders get protection but if you're a director then there's certain things that go with it. I would've thought long-term if Mr Watts is wanting more stuff to be available under the PRA and not in trusts, he'll being going, yay, this is great, this will discourage people from putting stuff into trusts and it means they'll hang on to it in their own hands, yay.

1500

It's PRA stuff. Do you know what it means, it's in terms of the back and forth. You choose your structure and that's what goes with it, and in terms of dispositive powers, *Clement v Lucas*, *Masters v Stewart*, *Scott v National Trust* they're all examples of exercise of power of distribution. I accept that *Grand View* was a power to add and remove beneficiaries, but in effect it was, that power was exercised at the same time as exercising a power of distribution, and when you look at the case, while the focus was on cluse 8, which is the power to add and remove trustees, sorry, beneficiaries, of course it was looked at in the overall context of a distribution plan, because what happened is all of the Trust assets were cleared out once the old, the original beneficiaries were ditched, and a new beneficiary was added.

Now I'm conscious of the fact that there's a bit of time Mr Walker has some stuff to address you on in terms of appointment and what have you of trustees. Can I just have a quick moment just to see where I'm at in terms of my road map if that's in order.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

I had wanted to just touch on one point which arose in the discussion yesterday, the exchange between Justice Williams in particular and my friend Mr Hikaka, about impact of tikanga potentially, and it goes to this in terms of when one's considering the context or objectives or purpose of a trust, particularly a family trust. The fact that it's a family trust, it seems to me, is something that can be, not always will be, but can be an often will be relevant when considering whether or not relevant considerations have been taken into account, whether legitimate expectations have been met, whether somebody has acted in a way that can be described as being for a proper purpose or in a way that was reasonably open, and I just simply note three things in that regard without asking this Court to determine that issue, because it's not one that you need to determine, but simply to flag it, namely when thinking about family trusts, first of all tikanga might add to the vocabulary or the insight that one has in terms of thinking about how trustees, including a trustee beneficiary, might go about exercising their dispositive powers. It might be relevant to that. It might help one think about it because the idea of family is not, well obviously very strong, and whakapapa extremely strong within the context of te ao Māori, it is not something unknown in the Pākehā world, certainly not where I come from. In fact as some of us who have been there recently will know very well, it's very strong, and in fact you can look at a lot of the literature, plays, and so on, that have been done all about that connection to land. It's important, and in this country, when you talk about, for example, farms and such like, there is a not dissimilar sense of continuity and so on, and it can create issues down the track in terms of who gets what.

WINKELMANN CJ:

Although not in this case, right, because it's a new farm.

MR BUTLER KC:

Not this case. So I just simply want to note that. Second of all, similarly –

WILLIAMS J:
What do you mean “not this case”?

MR BUTLER KC:
So the –

WINKELMANN CJ:
It’s a new farm.

MR BUTLER KC:
Because it’s a new farm is the point that her Honour is making. Of course I would say –

WILLIAMS J:
Connection?

MR BUTLER KC:
The connection goes this farm has been funded through that which came from the grandparents, so in that sense there’s a level of continuity coming through.

KÓS J:
New farm, old assets.

MR BUTLER KC:
Yes, correct. The second element that I can see –

WINKELMANN CJ:
So we’re all very attached to wealth is the long and the short of the position.

MR BUTLER KC:
Yes, but I actually think there’s more to it. In terms of the number of people I'd had to advise with farms where actually the farm is a bit marginal, but actually –

WILLIAMS J:

If you were attached to wealth you wouldn't buy a farm.

MR BUTLER KC:

No, that's correct, at least –

WINKELMANN CJ:

I don't think most New Zealanders would see it that way.

MR BUTLER KC:

No, they'd have to wait a long time –

WILLIAMS J:

Most New Zealanders obviously don't own farms.

MR BUTLER KC:

Correct, have to wait a long time for that wealth.

WINKELMANN CJ:

No, quite.

MR BUTLER KC:

So the other point I would make is that one of the issues I know that has, that people have struggled with is the way in which the Family Protection Act 1955, for example, can be, there's on anti-avoidance provision there when people give assets away and so on, and it's not uncommon for assets, obviously, to be gifted away just, not long before into a trust, for example. Again it seems to me that in a, I can see in a future world, that phrase "reasonably open" or "not reasonably open" if you take an element of whanaungatanga in the context of what contribution tikanga can make, as well as the moral duty concept, it's not directly applicable, but what this Court has shown, and what other courts are doing as foot soldiers, is that when we're thinking about the values of the law we look around within the system to those values, and see which, of any, of them are applicable in a particular context. It seems to me the concept of moral duty when it comes to family protection is

something that might well be relevant if the trustees were to exercise powers to favour only one person within a family, and exclude others in a way that would mean that the family wealth which happens to be held in a trust, the moral duty is not given effect to.

Now we're not there yet, nowhere near it. I'm just saying I can see us getting there under the new regime, and then of course an outcome like that is not necessarily inconsistent with the heritage of equity because of those old cases that I made reference to, *Moseley v Moseley* and *Warburton v Warburton*. I can give you the citations if that would be helpful. They are old cases but, for example, in *Warburton v Warburton* what happened was the Court reversed the decision of the trustees, which was to split the wealth equally saying this was not right because the older son was the one who had the family obligations. It's effectively we would say nowadays it's irrational, it's not right, and they said it's going to go two-thirds/one-third.

WILLIAMS J:

That doe walk you towards the proposition you specifically issued at the start of this afternoon, which is the Court can't be an appellate court.

MR BUTLER KC:

Correct, but you can be a court of review and not substitute your own decision. You can say if there's no provision, that's not acting reasonably. That you can say. That's just simply the point I'm trying to make. There is nuance here, is what I'm trying to make, so the siren call, as I regard it, of Mr Watts, his bright line, I think you should be really wary about that. He is hollowing out, in my view, what the rules of equity are, and what the supervision of the Court of Chancery is.

WILLIAMS J:

What you're suggesting is walking quite briskly towards the very inclusive powers of the Māori Land Court, which are very similar to the scenarios you've just described. Those are the sorts of situations in which Māori Land Court judges would overturn the trust decision.

MR BUTLER KC:

Correct indeed, yes, yes.

WINKELMANN CJ:

You're saying it's the future though.

MR BUTLER KC:

I'm saying it's the future, that's all I'm saying, it's not here yet. It's not here yet. But there are definitely seeds of it in the existing case law, and so what I'm trying to say is, if you look at the two of us walking to a particular direction, or a particular destination, I reckon I'm walking to the destination that's more likely to be correct and reflect the reality within a short period of time. Definitely not where he's trying to take you, with respect.

So your Honours I think I have dealt with most of the matters that I was looking to deal with here, even if not quite in the order I'd wanted to. There was just one point I did think that was important when we were talking about the cases, and that is the cases that my friend made reference to yesterday. You'll remember them, *Dilke*, *Phillips*, and *Triffitt's* settlement. I think it's really important that they're, in the usual way of those cases that, Edwardian and Georgian cases, you know, from the early 20th century, thank God they're not Victorian cases.

WINKELMANN CJ:

The kind of cases you've just been referring us to.

MR BUTLER KC:

Yes, quite, well the cases I've referred your Honours to are much older and much more easily understood as it happens.

WINKELMANN CJ:

Some are, some aren't.

MR BUTLER KC:

But these cases of *Dilke*, *Phillips*, and *Triffitt's* settlement, I think what's very important to understand there, it's really important, again when one understands what was in issue there, in those cases what was conferred on the donee was a general power of appointment. So the donee was given the right to choose whoever they wanted to give the property to. So it was a general power of appointment. The only issue that arose in those cases was whether or not what looked like a general power of appointment was not a general power of appointment because the trustees had to "consent". Now what's important is when you look at those cases, the Judge's concluded, yes, there's a requirement for trustee consent, but what is that, what are the criteria, what are the standards to be applied by the trustees when deciding whether to give consent or not, and the Courts were very clear. It's not a fiduciary obligation. There's no fiduciary obligations which attach to the trustees when doing so.

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In fact they made it plain that for – they said the proper construction of the clauses was as to whether the power to appoint should be exercised, in other words can he exercise it, not in favour of whom can he exercise it. So they really emphasise that the phrase is the selection of the objects was not anything for the trustees to consider, they had no ability, on the true construction of the clauses, no ability to say we like that person but not that person and we're not exercising any selection, they weren't bound by any fiduciary duties, the cases are a million miles away.

KÓS J:

It seems a very arid position to take.

MR BUTLER KC:

Yes.

KÓS J:

So the only question is whether he can exercise the power but we're not entitled to enquire into how he's going to exercise it.

MR BUTLER KC:

Correct. Correct. So a million miles away from what a trustee has to do, the very thing a trustee has to do is to consider – is to make a selection of objects. Unlike my friend, learned friend, Mr Watts, said several times, oh, Marcus can direct. That's the phrase he used several times to describe Marcus. The one thing Marcus can't do is he can't direct. It's the trustees who make the decision, not him, and those cases that reference it being made to are of no assistance, in fact quite the opposite. I say they reinforce the difference between the exercise of powers that a trustee has in a typical discretionary trust because it's for them, the trustees, to choose. These general powers of appointment, every one of them was a general power of appointment, the only question was whether or not it ceased to be a general power of appointment because of the requirement of trustee consent. Answer: no. Moving then to the – I've got a heading. I'm just – I've just got a…

WINKELMANN CJ:

I take it Mr Walker's going to be very brief?

MR BUTLER KC:

He is. I'm trying – I'm literally just X-ing things left, right and centre, of what would be nice to talk to you about, but which I don't need to. Look, I haven't, in my handout I haven't included the exact references to where this Court said in *Clayton* that the deed was unusual at paragraphs 14 and 127, where this Court said that the deed lacked normal constraints, that's paragraphs 64 and 65.

WINKELMANN CJ:

I think we've got those sort of things.

MR BUTLER KC:

Great, and then unrestrained or not constrained, paragraphs 58 and 93. I think I've dealt with the back and forth around the – with the material under the heading how would analysis occur here, so I won't deal with those. So what I'm going to do now is I'll hand over to Mr Walker and then I come back

and talk to you a little bit about relief and do any sweeping that might be required.

WINKELMANN CJ:
You're back again.

MR BUTLER KC:
Yes, is that all right. Very, very briefly just to deal with relief and any sweeping.

WINKELMANN CJ:
All right, it'll have to be very, very brief.

MR BUTLER KC:
Yes, thank you, your Honours.

WINKELMANN CJ:
Thank you, Mr Butler.

MR WALKER:
I will be brief, your Honours. Tēnei e te Kōti. Not brief enough that I won't need a drink unfortunately. I was planning to address two topics, your Honours, but I'll just address one given the interest of time and I believe –

WINKELMANN CJ:
Well, what are the two topics?

MR WALKER:
The two topics were the power to appoint or remove trustees and then the wider contextual point about ignoring weekly fiduciary duties in the context of the PRA. I feel as if my learned senior's already addressed the latter one in the form of exchange between the bench and bar.

In terms of the power of appointment and removal of trustees, as will be very clear, the trustees submit that *Clayton* is distinguishable no matter the view

that the Court takes of this power because of the constraints that are imposed on trustees. But with that in mind the first submission we make is that the power of appointment of removal of trustees, the only one that Marcus holds personally in his own name is prima facie fiduciary. The weight of authorities supports that approach and I will touch on one or two authorities. The power needs to be used for the benefit of the beneficiaries as a whole. In the words of his Honour Justice Williams earlier today I believe, can't use purely instrumentally to benefit yourself. It's a fiduciary power, and those fiduciary constraints operate in addition to the non-fiduciary constraints that are on almost all powers, so it needs to be intra vires, it needs to be for a proper purpose and it needs to be consistent with the fiduciary obligations.

So if your Honours have the road map on the third page, I've listed the authorities that we say support that approach that this power is fiduciary. There's recent appellate authority in New Zealand, there's *New Zealand Māori Council v Foulkes* [2015] NZCA 552, *Brkic v White*, there's a range of High Court authorities that you I won't take your Honours to, there's *Carmine v Ritchie*, *Harre v Clarke* [2014] NZHC 2533, which is obviously a decision of your Honour the Chief Justice in the High Court.

There's another decision of her Honour the Chief Justice in the High Court in *Green v Green* [2015] NZHC 1218 too, which I will just ask Mr Tocher to bring up quickly because I think it's quite a nice capture of the point. So it's obviously an undue influence case but there is also a course of action about whether the power to appoint and remove trustees had been improperly exercised. So if you scroll up, Mr Tocher, to paragraph 504. "The fundamental duty of a fiduciary is to exercise the power conferred upon them in the best interests of, in this case, the beneficiaries," and the statement of Justice Brewer in *Harre v Clark* is adopted: "The power of appointment or removal must be exercised in good faith, for a proper purpose, consistent with the object of the power and in the best interests of the beneficiaries as a whole…" Over the page at paragraph –

KÓS J:

And it's that that adds to what's provided in section 94 of the Trusts Act because –

MR WALKER:

Quite, Sir, because section –

KÓS J:

Because the beneficiaries is the quality that makes a fiduciary.

MR WALKER:

Quite, Sir, so section 94 reflects non-fiduciary constraints, this adds a fiduciary element to it, and if you look at that, you see that in paragraph 505 over the page. "The power of appointment cannot therefore be used by the settlor for the purpose of advancing his own personal interests or to purse some other collateral objective." So there's a range of other authorities and I would commend the Court of Appeal's decisions in *Brkic v White* and *New Zealand Māori Council v Foulkes* as useful. They explain why this type of power which goes to the heart of the trust, the heart of who makes these important decisions, should be at least prima facie characterised as fiduciary.

So *Legler v Formannoij* [2022] NZCA 607 was briefly mentioned by my learned friend for the appellant and I am mindful of course that this Court has heard argument on the appeal with the decision reserved and so the only very small point I would make on *Legler* is that it did not, we say, concern the nature of the power, that wasn't at issue. It's a narrow question based on the pleaded claim of whether the exercise was for an improper purpose or not.

WINKELMANN CJ:

You're saying it wasn't doubted that it was a fiduciary power?

MR WALKER:

Well, the way the argument, as I understood the argument was run, your Honour, it was solely an improper purpose challenge.

WINKELMANN CJ:

Yes.

MR WALKER:

It wasn't even a breach of fiduciary duty challenge. It could've been both. Could've also have been an ultra vires challenge I imagine too, but it was just a fraud on a power and a fraud on a power constraint is a narrower group of constraints than the fiduciary constraints of course. So the simple submission I make on *Legler* is that it's not particularly relevant to this appeal –

GLAZEBROOK J:

I think Mr Watts would agree.

MR WALKER:

I think he does, your Honour.

GLAZEBROOK J:

Yes, he just says whichever way it goes, and I think your characterisation of the argument is the correct one.

MR WALKER:

Thank you, your Honour.

GLAZEBROOK J:

As it was put to us, yes.

MR WALKER:

And *Legler*'s also distinguishable and I think my learned friend, Mr Watts, agrees with me in terms of the deeds as well, anyway.

The English position is in the second sub bullet. I won't go through the authorities. I would commend *Lewin* of course, leading text. I'll read out the quote from 15-048. "The nature of the power indicates that, prima facie, the power is not conferred for the personal benefit of the person on whom it is

conferred, even though a beneficiary, but for the benefit of the beneficiaries as a whole." The leading case is the quite old case of *Re Skeats' Settlement* (1889) 42 Ch D 522.

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Briefly on *Pugachev*, my learned friend for the appellant said: "I believe that it was close to the facts here." Now, that's not accepted at all. The powers reserved to Mr Pugachev were extreme, they were much more analogous to the ones in *Webb* or in *Clayton* than in *Harre*. In particular, his power to appoint and remove trustees could be exercised with or without cause. He also had a whole range of veto powers over the actions of the trustee.

The terms and context of *Pugachev* are therefore distinguishable to the present case and so we don't say, well we submit rather, that not much guidance can be taken from Justice Birss' judgment and some commentators have suggested that even *Pugachev* on the facts of itself should be read with some caution, and so the authors of *Lewin on Trusts* say exactly that. Justice Birss said, in my respectful view, something that can't be right, which is that fraud on a power didn't even apply to the power to appoint and remove trustees in *Pugachev*, so not even the narrow fraud on a power applied. I don't believe that that's correct and I haven't seen any other cases where that conclusion is reached.

Moving to the Australian position, fair to say it is unsettled. My learned friend for the appellant placed quite a lot of weight on Justice Brereton's minority obiter comments in *Baba v Sheehan* [2021] NSWCA 58. We submit not much can be taken from those comments for those very reasons that weren't central to the finding of the Court.

There are cases in Australia going the other way as well. I've included an example of that in the hand-up, *Re Burton, Wily v Burton* (1994) 126 ALR 557 (FCA), where the Federal Court of Australia said, no, these are fiduciary powers.

WINKELMANN CJ:

So I'm just wondering if there's any need for us to go – because it seems not disputed that it's a fiduciary power for New Zealand purposes in any case.

MR WALKER:

Oh, so Mr Watts, as I understood him, did dispute that it's a fiduciary power.

WINKELMANN CJ:

The power to appoint trustees?

MR WALKER:

Yes.

WINKELMANN CJ:

Okay, all right.

MR WALKER:

So he says it's not fiduciary –

WINKELMANN CJ:

No, not disputed that in New Zealand has been treated as such and you're saying your submission is it's consistent with some overseas authority to treat it as such?

MR WALKER:

Quite, your Honour, quite, and final point I will make on this before I move on from the authorities for that helpful indication, your Honour, is *Montevento*, the High Court of Australia case my learned friend, Mr Watts, referred to. It's entirely irrelevant. It's not an improper purpose case, it's not a fiduciary case, it's a vires case. It was all about construction of the particular power there. So Australian position, which as I believe the strongest jurisdiction for my friend, is very unsettled.

The approach of characterising this power as fiduciary is settled law in New Zealand, consistent with fundamental principles of fiduciary law, and I've referred your Honours to *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 in the Court of Appeal for the factors there which will of course be familiar to you all. What you need to characterise, that if it's not presumptively fiduciary, is an assessment of the terms of the trust and the context. We say here that clause 15 is a conventional power to appoint and remove trustees. Nothing unusual about it. Marcus the sensible person to have that power. Yes, he can appoint himself, which is contrary to some principles of fiduciary law, but he's likely to be an appropriate trustee to do that. Clause 15 doesn't dispense with the need for reasons, includes the second trustee requirement which I'll come to briefly, and Marcus doesn't have any other powers in the same way that the first protectors or consultants did in *Pugachev*, *Clayton* and *Webb*.

So briefly on the second trustee requirement, this, we say, represents a deliberate and meaningful constraint on Marcus' ability to take control of the trust assets for his own sole benefit. So in earlier exchange between bench and bar there was discussion about an alter ego or a tame trustee and I believe the language was a tame trustee has to behave because they're subject to the same constraints as all trustees. An alter ego we say simply could not be appointed. For Marcus to get around the second trustee requirement in clause 15, it's a deliberate attempt to do that. I simply do not see how that could be done honestly and in good faith, let alone consistently with his fiduciary duties. So this is not a trust deed like in *Legler* or the *Montevento* case in the High Court of Australia where it said you can have two trustees or a corporation, but this trust deed doesn't say that. So that second trustee requirement is a meaningful constraint.

WINKELMANN CJ:

So you're saying the second trustee can't be a company?

KÓS J:

No, it could be.

WILLIAMS J:

As long as it's not an alter ego, yes.

MR WALKER:

I'm saying – well, no, it could be a company but not one that is solely controlled and managed by Marcus, your Honour.

WINKELMANN CJ:

Okay. Because it would be his alter ego?

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MR WALKER:

It couldn't be his alter ego because that would be him using a fiduciary power for the deliberate –

WINKELMANN CJ:

So how do you say it's distinguishable from the cases?

MR WALKER:

So *Legler*, for example, it said you need to have two individual trustees, and one of them needs to be independent, unless you have a corporate trustee, and then I believe it was clause 27.2 of the deed in *Legler* said, if you have a corporate trustee it doesn't matter that one of those people are also, that the people in charge of that are also a beneficiary.

WINKELMANN CJ:

It's not quite what was said in *Legler* but it's okay. We understand your point.

MR WALKER:

Okay. So to draw those threads together we say clause 15 is precisely the type of power that should be seen as fiduciary. Has been in New Zealand for some time now, and that this is an additional cumulative reason to say that the powers reserved to Marcus are not tantamount to ownership. The only power he has personally is heavily constrained.

Since it's been a whistlestop tour through the power of –

WINKELMANN CJ:

It seems quite thorough to me.

MR WALKER:

What was that sorry?

WINKELMANN CJ:

I said it was very thorough. You did a very good job with conveying that.

MR WALKER:

Whistlestop and thorough your Honour.

WINKELMANN CJ:

No, it was good.

MR WALKER:

So I'll hand back to my senior to finish off on relief perhaps. Unless there are any further questions from your Honours.

MR BUTLER KC:

Thank you your Honours, and just one issue which arises out of the topic just that you raised with my friend Mr Walker. I'm not sure whether he covered it or not. If I'm repeating it it's only simply because I wasn't hearing well, but one of the questions that was asked was whether or not he can appoint a company as another trustee. That actually raises a tricky point of interpretation, can I explain why? So at the time at which this trust was settled, of course, the Trustee Act 1956 was in force. The provisions of section 43(2)(c) of that Act says: "On the appointment of a trustee or trustees for the whole or any part of trust property… (c) it shall not be obligatory to appoint more than 1 new trustee where only 1 trustee was originally appointed or to fill up the original number of trustees where more than 2 trustees were

originally appointed; but, except where 1 trustee was originally appointed," not our case, "a trustee shall not be discharged under this section unless there will be either a trustee corporation," stopping there, a trustee corporation is Māori trustee, Public Trust or one of the statutory trustee companies, "or at least 2 individuals to act as trustees to perform the trust…".

So when the trustee talks about the power of appointment of trustee given to Marcus by clause, sorry I've left my copy, 15, and talks about the statutory power of appointment, which is what it makes reference to, that's what it's referring to, so it seems to me that there's an additional constraint. It is not possible to appoint a company, what the statute is clear was that it needed to be an individual. So I think that's a way of resolving that issue in terms of the company.

That then brings me just quickly to the question of relief. So it seemed to me, so I'm dealing with this in my hand up, distribution to a non-object. The point I'm trying to make here is that effectively what's being asked is that distribution to a non-object. It appears to me that the appellant's case is that MP, so that's Mr Pinney, has a general power of appointment arising from his power to appointment and remove trustees, and the relief must surely reflect that. So effectively what he is saying is the way, in order to give, to bring to realisation that which he says Marcus has got, then the logic is, right, well, the Court would be saying, well, since you do have a power to appoint yourself, and since you have a power to appoint a tame trustee. We say, of course, you don't, and I'm just walking it through just to highlight why this is not a general power of appointment or anything comparable to it, and you require them to assume control of the Trust, and exercise their dispositive powers. But of course, as I pointed out to you, clause 17 only opts out of the self-dealing rules, not the self-benefit rule, and I should have given you paragraphs where that's reflected in the decisions below. That's paragraph of the Court of Appeal 112, and then in the decision of her Honour Justice Clark of 91.

1530

So I say that when you actually work your way through you'll see it's a good cross-check, in my submission, as to whether or not what you've actually got here is something that's tantamount to ownership. Because if you did him to occupy the role, the clause would say, the trustee would say, well, you can't do it.

Then one last point I had meant to raise, just the question about tame trustee. This was a matter that was considered, so if we're looking at the facts of the case, this was a matter that was considered and raised before her Honour Justice Clark in her judgment, and she concluded on the basis of the evidence that there was no evidence of tame trustee here. Paragraph 85 of her Honour's judgment.

Your Honours, it's 3.29 and 55 seconds. I have left –

WINKELMANN CJ:
Admirable.

WILLIAMS J:
No, it's 3.30.

MR BUTLER KC:
It is.

WINKELMANN CJ:
Well it was by the time you'd said that.

MR BUTLER KC:
Quite your Honour. Is there anything else that I can assist your Honours with? If not can I thank you on behalf of our team for the opportunity to present to you.

WINKELMANN CJ:
Thank you Mr Butler.

MR WATTS KC:

Thank you your Honours. The trustees generosity then was all of a fit with the generosity of the respondents that we saw this morning. One brief point about, before I turn to the main things I want to say, the cases on, while they're fresh in my mind, on general powers of appointment that Mr Butler responded to, in my view, they are cases, many of them, where there was a genuine dispute as to whether there was a power of appointment or not. *Mills* and *Penrose* were both cases where it was not clear that a general power of appointment was intended, for instance, and I don't think it's so obvious in the other cases either, *Triffitt's* and so on. Mr Butler didn't say he thought the cases would not be available to New Zealand after the Trusts Act, but I infer they might be because the trustees were the people who had to give their consent, they were, a proper trust, I think they were named as trustees, and yet they still found a general power of appointment under traditional English trust law. So there may be a difference with the Trusts Act, and I'll come to that.

I think the starting point remains the wording of the Trust document is more important than the particular intentions as to purpose. You can't ignore the intentions but the wording is key, and the question remains, how are the powers conferred in this case, so different from those in *Clayton*? It is submitted they're not and yet *Clayton* held that there was a general power of appointment.

I have dealt with most of the clauses. Clause 7 was focused on this afternoon, the clause 7 in *Clayton.* The ability to remove beneficiaries. It's submitted that such a clause is not in any way inconsistent with a general power of appointment. It's only significance is that it might be used to remove challenges. So, you know, you don't have to put up with people who might start a challenge, you know, annoying litigation. Well if you're going to challenge me, I'll remove you, but that's its only, it seems to me, its only weight in the present context. It doesn't, in any way, bear on whether there's a general power of appointment or not, other than tangentially. It certainly doesn't bar it and it's certainly not a convincing basis for not extending

Clayton to, I submit, to our fact pattern, where the need for *Clayton* to apply was never more graphically demonstrated, as I've hinted, than by this morning's submissions.

As to the specific Trusts Act points, we do not accept that section 31 and the power to self-benefit are not excluded in the present case. Those powers can be expressly or impliedly contracted out from. The Trusts Act is clear on that. So I'm not saying we don't, wouldn't use clause 17, but I don't think we need to rely on clause 17 of our trust deed. It's the overall context and the closeness to *Clayton* and the construction of the document as a whole that suggests that the power to self-benefit. After all they're one of the main beneficiaries, and it's absolutely clear they were intended as a main beneficiary, the respondent. Impartiality too can be impliedly excluded and is.

WINKELMANN CJ:

You mean in case law? Case law establishes that, is that your point?

MR WATTS KC:

Yes, and the Act is express about it. It's one of the, all those clauses, all those sections can be expressly or impliedly excluded.

GLAZEBROOK J:

So you say it's impliedly excluded by the fact that it's a discretionary trust with one of the main beneficiaries being someone who can and in fact is a trustee, and was from inception.

MR WATTS KC:

Yes your Honour. Then briefly section 95, that's the removal, review of removal of a trustee. Our submission is that section 94 is not inconsistent with self-interest, and if you've got a general unqualified power of removal, and remember our clause says without giving reasons, "without reasons", you could be stronger, you could be stronger put, and perhaps you can say, well it hasn't gone quite far enough in this case, but in terms of general principle that

you're addressing, it would be very easy to widen that slightly, or to have a case where it's slightly wider and…

WINKELMANN CJ:

So what are you submitting?

MR WATTS KC:

That the power of removal in our case is without reasons. You don't have to give reasons for the removal, and I say that's a strong enough indicator, it could have been put more strongly, I admit, but it's a strong enough indicator in the context of this case to say there were not fiduciary obligations intended to be attached to it, and if you –

KÓS J:

But nonetheless section 94 and section 95 can be applied, can be used in response to exercise of that power. Reasons or not.

MR WATTS KC:

Yes, that's true Sir, but I don't, I say no because in the context of all the clauses of the deed, this is so close to *Clayton*, that it is not bad faith and it is not an improper purpose to exercise it entirely selfishly.

WILLIAMS J:

That provision seems to suggest you'll need some reasons somewhere. Someone has to prove consistency with it.

MR WATTS KC:

Well your reason is, I've done exactly what was intended. I…

WINKELMANN CJ:

I think you're saying your reason is that I'm asking you to distribute that property to me – I'm asking you to use your powers as a trustee to distribute that property to me, and that is a proper purpose and therefore your failure to

do so is, I can't recall the words of section 94, but it's necessary for the proper management of the Trust, and inconsistent with its purposes not to do so.

MR WATTS KC:
Yes your Honour.

WINKELMANN CJ:
But would it ever be, is there any case in which it has been said that, isn't there another principle that stands in your way, which is that a trustee may not just act on the direction of another?

MR WATTS KC:
Yes, but that's impliedly, in our submission, not an improper purpose, or a breach of duty. If it's clear enough in the context of the overall deed, then you couldn't be sued. I'll come, I have a fallback position on some of those things, as we'll come to shortly.

We're told that the Trusts Act as a whole is so important in making trust law more accessible, and how great it's going to be for trustee, but how does the Trusts Act make the law more accessible for a trustee who reads their trust deed, and reads the words absolutely and unrestrained. What is it in the trust deed that says it's a breach of trust to appoint to the respondent, or to any other singe beneficiary, when it's consistent with the wording of the trust deed, and we know from *Kain v Hutton* that you can distribute, and it was conceded I think, to a single beneficiary.

What is the basis for implying constraints and to the power to appoint trustees absent the Trusts Act provisions without reasons. Really *Clayton* is not very far from the present case at all. There was emphasis on the assets coming from the settlor in *Clayton* again today. Justice Kós seemed influenced that that was the problem in *Clayton*. Sure that undermines the Property (Relationships) Act, but this case, where assets came from elsewhere, also undermines the Property (Relationships) Act. It undermines

the operation of section 9A, which does allow separate property where it's improved to be dealt with under the Act.

1540

So it's simply not true that *Clayton* was a case where they were avoiding the whole, you know, the Act and that's not what's going on in this case. It's undermining section 9A that that approach is going to drive people back on to *Lankow v Rose* constructive trusts and it was our submission yesterday that that is not necessary to force people back into *Lankow v Rose* constructive trusts when the Act provides, properly construed with a broad definition of property, a solution.

Even if the Trusts Act has altered the starting point after *Clayton*, which we of course deny, then that will put New Zealand law out of line in our submission, not just with *Clayton* but with *Webb v Webb*, *Pugachev* and such approaches taken in other jurisdictions or by judges from other jurisdictions at least.

I now want to take your Honours briefly to section 5(2)(b)(iii) of the Trusts Act.

GLAZEBROOK J:

Can we have it up? Thank you.

MR WATTS KC:

This is a fallback submission in our written submissions and I'm now possibly putting more emphasis on it.

WINKELMANN CJ:

You're elevating it.

MR WATTS KC:

I'm elevating it. "Trusts to which this Act applies…a court may, where necessary or appropriate, apply the provisions of this Act to any of the following that are governed by New Zealand law…(iii) a trust that does not satisfy the definition of express trust but that is recognised at common law or

in equity as being a trust." So my submission would be, if necessary, after all in my view the moral merits are so clear, not everybody would agree of course, if necessary there's no reason why if the case law I have put before the Court shows that a general power of appointment is consistent with a trust and the cases show that for a long time across possibly way back into the 1700s, but general powers of appointment have been around for 200 years, and then why wouldn't we apply section 5(2)(b)(iii). There's a – the Act –

KÓS J:
Well, that's sort of what happened with *Clayton*, isn't it?

MR WATTS KC:
Yes.

KÓS J:
I mean there could be an argument about whether *Clayton* was an express trust in terms of the Act, but nonetheless it wasn't invalid at it.

MR WATTS KC:
Yes, and that is what we'd be using here and I would put the hook for it on section 5(2)(b)(iii).

KÓS J:
And that helps you how?

MR WATTS KC:
Well, it helps me because the drafters of the Trusts Act were at least clever enough to know that they may have gone too far and we might need – or least, you know, there might be situations of express trusts that shouldn't be governed by the – all the type provisions of the Act for instance. They've certainly preserved the possibility of express trusts recognised at common law, or in equity, lying outside the Act.

KÓS J:

But doesn't this bring those more informal trusts into the purview of the Act?

MR WATTS KC:

No, all it does is say that we can – where you think that they – it might be useful but you certainly wouldn't be obliged.

WINKELMANN CJ:

But it wouldn't be a trust if it was outside the Act.

MR WATTS KC:

Yes, it would.

KÓS J:

Yes.

WINKELMANN CJ:

Because it's where they don't fulfil the –

KÓS J:

Wouldn't be an express trusts in terms of the Act.

MR WATTS KC:

Not in terms of the Act, but it would be an express trust at common law and equity. So this is saying, well, we can use them but it's not saying you can't have them. We can use the provisions of the Trusts Act, I'm sorry, but it doesn't say they don't – you can't have express trusts outside the Act. It's very – and obviously in my view it would be much cleaner if one didn't have to have this parallel set of provisions for dealing with *Clayton v Clayton* type situations. But frankly you're faced with overruling *Clayton* or saying it's been abrogated by statute, and that seems to me an extremely unappetising position for the Court to be in.

I mean there's a further fallback position there as well of course, just to say that, well, it isn't a trust. We haven't – it's true that we've conceded that the

sham doctrine and illusory doctrine don't apply to our fact pattern, but I don't think it's true. Certainly the written submissions have not conceded that there is a trust, it's a fallback position that if there wasn't a trust in *Clayton* then the Court is open to say there wasn't a trust here. It doesn't require –

KÓS J:

I'm still puzzled how this helps you Mr Watts. I mean the, Mr Butler made a great deal of the constraints represented by the Trusts Act, and you are saying here that if this is not an express trust in terms of the Act, it nonetheless could be treated as such, in which case those constraints would apply to it.

WINKELMANN CJ:

I think you're saying, aren't you, that if it doesn't meet the definition of "express trust" which has those implications that Mr Butler took us through, then it requires, it doesn't follow the Act applies immediately, the Court has to actually decide to extend the provisions of the Trusts Act to it.

MR WATTS KC:

That's exactly right.

WINKELMANN CJ:

So it carries on operating as it had.

MR WATTS KC:

It's possible for the to take what they like from the Trusts Act, but they don't have to.

KÓS J:

Correct. But one response here would be to say, well actually those constraints do apply.

MR WATTS KC:

Yes, it would, well it would be, but why would you do it when it was, when you're construing a particular document, and there is a body of law that says these things are trusts, and there aren't controls on them of the sort that are in the Trusts Act because it contains a general power of appointment.

KÓS J:

Well we might do it because section 5(2)(b) invites us to.

MR WATTS KC:

Yes you might, but you're not obliged to.

KÓS J:

No.

GLAZEBROOK J:

Well your first argument isn't it anyway is that such constraints as there are, and you conceded I think that there could well be a constraint to say that you can't take it down to the, without appointing it to yourself first, you can't take it down to the TAB and gamble without being in breach of trust. So there are certainly – your first position is that the only constraints are at most to consider the interests of the other beneficiaries, but you say that doesn't operate here because by implication it's been excluded under the trust deed.

MR WATTS KC:

Yes.

GLAZEBROOK J:

But which it can be under the Trusts Act.

MR WATTS KC:

That's right.

GLAZEBROOK J:

That's, as I understood what your argument…

MR WATTS KC:

Yes.

GLAZEBROOK J:

Your primary argument is.

MR WATTS KC:

That's right, and then fallback on section 5(b)(iii) and then fallback on, well –

WINKELMANN CJ:

A further fallback.

MR WATTS KC:

Further fallback is the *Clayton v Clayton* question, there doesn't have to be a trust on this fact pattern, and it could fall with *Clayton* for the same reasons. If the wording is close enough, and I had – and we did not concede that that aspect of *Clayton* didn't apply. The only concession has been that it is a valid document. It's not they have tried to say something they didn't believe in.

WINKELMANN CJ:

But you conceded it's not a sham?

MR WATTS KC:

It's not a sham.

WINKELMANN CJ:

You haven't conceded that it's not a properly constituted trust.

MR WATTS KC:

That's right.

WILLIAMS J:

Or that it is.

WINKELMANN CJ:

That, yes.

WILLIAMS J:

He hasn’t conceded that it is.

WINKELMANN CJ:

Yes, you haven't conceded the argument that it may be an improperly constituted trust.

MR WATTS KC:

Yes your Honour.

WINKELMANN CJ:

I was getting my negatives wrong.

ELLEN FRANCE J:

It would at least be against the drift of the argument.

MR WATTS KC:

It would, it would, certainly. But it’s always been preserved your Honour, yes.

KÓS J:

Justice France is very keen on the vibe.

WINKELMANN CJ:

I did think that earlier in your argument someone, it was just calling out for someone to make the point that your argument was the vibe of the thing.

MR WATTS KC:

Well I hope I've got more than a vibe.

WINKELMANN CJ:

That’s quite a lot, in law anyway.

MR WATTS KC:

We're also content to make this clear, to fallback on Justice Miller's weakly fiduciary position, if that is necessary.

WINKELMANN CJ:

Which in itself turns on paragraph 64, is it paragraph 64 of *Clayton*, I think. Yes, well that's where he's footnoted it too.

MR WATTS KC:

Yes, so –

GLAZEBROOK J:

So few constraints that it amounts to none at all I think or something.

MR WATTS KC:

Yes.

GLAZEBROOK J:

Or accountability or something of that nature.

MR WATTS KC:

We also maintain the submission that the two trustee rule is not a complete answer to *Clayton*. It's not correct to apply those first instance New Zealand cases to the power to remove and appoint trustees as if they were of general application when the whole overall context of the setting is the same as *Clayton*. There's no more reason to apply fiduciary duties to that power to remove and appoint than there was to the powers of distribution of the assets. 1550

So we maintain that it is necessary for the Court to send a signal that if you, in the context, a main beneficiary, intended main beneficiary and have the power to appoint and remove the trustees, then there is not a sufficient meaningful distance between the beneficiary and the control of the assets to justify not applying the principle and policy behind and in *Clayton*.

Construing – to move back a little bit onto in defence of the English cases that I've relied on and against my learned –

WINKELMANN CJ:

Mr Watts, can I just enquire, how much longer do you think you'll be?

MR WATTS KC:

I probably will go to the four cap you made, your Honour.

WINKELMANN CJ:

Yes, sure. At that point, a trapdoor will open up under you and you will drop into shark-infested waters.

MR WATTS KC:

Right. I must – yes, well, there are – learned counsel have made a lot of points of course.

WINKELMANN CJ:

Yes.

MR WATTS KC:

So construing a general power against the background of the then law and equity and strict fiduciary duties has not fazed the judges of English chancery for centuries in finding general powers of appointment. Strictness of equity rules were just as established when general powers have been found and I re-emphasise that this is a question of construction ultimately.

WINKELMANN CJ:

When general powers have been found within a trust deed.

MR WATTS KC:

Yes. There's been much emphasis on the Court sending a signal that fiduciary duties are serious things and if the Courts will hold – and the Courts will hold you to account. With respect, often that's going to be very forlorn. Who is going to challenge from within the trust and with what resources often.

As for section 126 review, you've still got to establish an evidential foundation under section 127, and as Justice Williams pointed out, it's very easy to create an evidence trail that would frustrate a review action brought under section 126, and of course it's not open to a creditor to do that, it's not open to the spouse to do that, you've got to have some dissatisfied beneficiary, and that – my learned friend's position leaves creditors and other third parties totally exposed to this notional judicial review by the children or relatives, while allowing the debtor beneficiary largely to stay in charge of everything and to self-benefit.

Remember too, your Honours, that at the time that the trust deed in this case was established there were no children. What if a notional couple had never had children but spouse had done a lot of work to improve the trust property through a long relationship and there was one another named beneficiary, a friend. The respondent's arguments assume that people in my client's position would still find equity, provided them with an indirect solution, but I respectfully suggest that this is using all the strictness of the new Trusts Act as a – going to shut down a lot of trusts is rather hopeful.

The appellant's case is therefore obviously not an attack on the concept of the trust or on discretionary trusts and settlor intention is fundamental, but there's no reason in our submission to allow participants to engage in a game of now you see it, now you don't, acting like the Angora cat that I mentioned yesterday. There's got to be an established distance between the person who's a beneficiary and control over them, and that is in our submission the import of *Clayton*.

So those are the broad points. I want to make a few, in the remaining time, as many as I can of perhaps lesser points. There's been a hammering of the dynasty point from the respondent one way or another, whether we use that word or not, and in my submission this just digs the respondent into a bigger hole. Effectively the argument is whether we were happy to have spouses produce offspring but we're hellbent on not letting them get out – get dynastic

assets if they left the whānau. If you don't put the necessary distance between the respondent and the assets, then it seems to be that argument is not going to get you anywhere: oh, we intended they wouldn't be there. But you're still blowing hot and cold and that's the objection.

The stronger point might've been that the settlors didn't – or the people – the trustees of the former trust didn't trust Marcus' or the respondent's financial abilities, but there are two points in reply to that. First, if they really didn't trust his abilities, and this point has been touched on, why did they give the respondent the power to remove and appoint trustees without reasons. By the way, Mr Acland and Mr Elworthy were never trustees of this trust, they were trustees of the earlier trust.

Secondly, the evidence is that while some form of minutes for the trust were kept, the degree of supervision that had been in place under the old trusts was not implemented under the new trust, at any stage at the same degree of monitoring, and it fell away very quickly. See the judgment of Judge Grace, paragraphs 69(d), (e) and (g) of his judgment, paragraphs 69(d), (e) and (g), and the judgment of Miller J at paragraph 89. There were no trustee meetings and as from 2016, that was two years after the relationship had finished, the only trustees were the respondent and his sister. I accept that one starts by construing a trustee with the evidence at the date it is declared, but in a situation such as the present it is submitted that the Court is entitled to take account of the fact that if the respondent's tendency to profit is the, was the major factor in the settlement this trust, made it absolutely essential that there be two trustees who didn't keep much pressure – who kept pressure on the respondent, and the evidence was that did not happen, and Justice Miller's judgment says that all the trust assets by the end of – well, not long before the hearing, Justice Miller's judgment at paragraph 89, all the income was going to the respondent. It's just now how things played out.

Still a couple of minutes. I want to turn briefly to the valuation issues, the global valuation point. It's submitted that it's clear that it is appropriate to look at individual items of property as if they were held by the respondent

personally, and on that basis there's no basis for including separate property debt. You only look at individual assets. It's not a global process. The land and the shares are separate assets. The fact that the shares didn't make any value, although the company is still trading I understand, but whatever, whether it's insolvent or not. The company shares are a different asset, and have to be looked at separately. If through their work they didn't make anything out of the businesses, doesn't mean that in relation to the land that same effort, or similar efforts, didn't make a difference to the value of the land. They've got to be treated separately.

We note, this is an interesting and quite technical point, which I've got a minute and a half. The general power of appointment that we assert did not come from the old trustees. The only thing that came from the old trustees were the specific assets. The general power is created by the new trustees, one of whom is Marcus. So he participated in the creation of the general power.

Final point, I think I might just get it in. Section 9A(1) and section 9A(2) obviously work differently, we accept that. Judge Grace at first instance admittedly did not differentiate between the two, so it's not really possible to be sure that he thought that there were direct contributions, financial contributions to the asset, but it's open, and this morning this Court was invited to reopen the findings of fact. It's not ideal, I concede, but it's possible that he made a finding under both subsections, he just didn't refer to the section. It doesn't mean that there wasn't evidence that lay behind the findings. But even if one had to fall back on section 9A(2) it's our submission that it's far too late in this Court to be reopening the 50/50 sharing. Those are the submissions for the appellant.

WINKELMANN CJ:

I just wanted to ask you though about your response on Mr Butler's point regarding, about the power, the remedial, his very last point about the remedial response?

MR WATTS KC:

Well if it's a general power of appointment it's, you don't have to go through a general power to direct the power to appoint and remove beneficiaries. You have a general power of appointment over the assets. The power to appoint and remove trustees is only, is really ignored for that purpose because it was there as a disguise –

WINKELMANN CJ:

Yes, but his point was that we really have no, the trustees couldn't do what the Court wants them to do without being in breach of duty.

MR WATTS KC:

I don't accept that submission your Honour. There's no breach of duty. The trustees are obliged if, on our view, there was a general power of appointment, to follow the instruction. I want the assets. And if necessary they could be brought to court to force them to do it. But an order directed at the respondent to exercise the general powers of appointment ought to bind the trustees before the Court today, and know about it, but it's not got anything to do with having to go through changing the trustees.

GLAZEBROOK J:

So he would exercise it in his own favour in order to have funds to pay what he's obliged to pay, is that…

MR WATTS KC:

Exactly your Honour. There was mention of the bank debt, but obviously they'd had, the bank would have a fierce lien, but there's been no suggestion that there are inadequate assets to pay out the debt, and the claim that's made in this case.

WINKELMANN CJ:

Thank you Mr Watts. Thank you counsel for your very helpful submissions. We will take some time to consider our decision.

COURT ADJOURNS: 4.01 PM