NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

NOTE: ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF ANY PERSONS OR ENTITIES CONNECTED TO THIS PROCEEDING REMAINS IN FORCE.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESS OR IDENTIFYING PARTICULARS OF APPLICANTS AND RESPONDENTS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND SC 106/2022

I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 8

BETWEEN **A, B AND C**

Appellants

AND **D AND E LIMITED AS TRUSTEES OF THE Z TRUST**

Respondents

Hearing: 13-14 June 2023

Court: Winkelmann CJ
Glazebrook J (via AVL)
O'Regan J
Ellen France J
Williams J

Counsel: D A T Chambers KC, I T K T R F Hikaka, J L Beverwijk and M I S Phillips for the Appellants
A J Steele, M J Wenley and M A B Black for the Respondents

CIVIL APPEAL

MS CHAMBERS KC:
Tēnā koutou e ngā Kaiwhakawā. Ko Chambers mātou ko Hikaka, ko Beverwijk, ko Phillips ngā rōia mō ngā kaipira. May it please your Honours.

WINKELMANN CJ:
Tēnā koutou.

MR STEELE:
Tēnā koutou. Steele for the respondents, Ms Black and Mr Wenley.

WINKELMANN CJ:
Tēnā koutou.

MS BRUTON KC:
Tēnā koutou, e ngā Kaiwhakawā. Ko Ms Bruton ahau, he rōia ahau, mō āwhina e Te Kōti.

WINKELMANN CJ:
Tēnā koe Ms Bruton. Ms Chambers?

MS CHAMBERS KC:
Thank you your Honours.

WINKELMANN CJ:
So just a preliminary indication. The appellant and respondent have not engaged with the arguments that Ms Bruton has put forward significantly I think, or at all in the case of the appellant, but we just indicating we are interested to

hear your response to that, and it's over to you whether you deal with that in your submissions up front or in reply.

MS CHAMBERS KC:

Thank you your Honour.

WINKELMANN CJ:

And Ms Bruton has already engaged with this, but there's also an issue about how the argument as she has formulated it fits with your pleadings or not.

MS CHAMBERS KC:

Thank you your Honour. Thank you for that indication. Now your Honours, one of the appellants is –

WINKELMANN CJ:

And another thing also, have counsel discussed when we should hear from Ms Bruton?

MS CHAMBERS KC:

No. I rather assumed she would address your Honours after the appellants and respondents.

WINKELMANN CJ:

Do you have any issue with that Mr Wenley? Sorry, Mr Steele.

MR STEELE:

No, I have no issue. It doesn't matter to the respondents.

WINKELMANN CJ:

We'll proceed on that basis then.

MS CHAMBERS KC:

One of the appellants is in the courtroom. On 12 November 2014 Robert, a brute of a man, went to his lawyer's office. He was 73. He was unwell. He had cancer. He knew death was stalking him. He'd already told his lawyer in a

previous telephone conversation just prior to making the appointment that he wanted to put his main asset, his house, into a trust, to prevent his family chasing any of his property. He knew who his family were. It was his four children, and we know the structure of the discussion on 12 November 2014, which is now up on your screens. The first thing his lawyer asks him is: "are you in a relationship?" No, he's alone. The next issue is children. No one could be surprised by that, they're the first two questions any lawyer asks when it comes to estate planning and wills. Who is your family? Who do you owe obligations to and need to consider? It's basic human stuff. It's common sense and it accords with social policy and of course our social policy legislation in the area, the FPA. Robert could not say, oh look, I not longer want to be a family to Alice, to Barry, Cliff and Greg. He remained in a parent relationship until his death. He is, in this respect, in direct contrast to the de facto Ms Bruton refers to where the relationship has ended. In this regard a parent/child relationship, we say, is unique, because it cannot be distinguished. In *M (K) v M (H)* [1992] 3 SCR 6 the Supreme Court of Canada, and that's at 601.672 of the casebook said that being a parent comprises a unilateral undertaking that is fiduciary in nature.

1010

Robert tells his lawyer that he's got four children and he says he has no relationship with them for 35 years. His main issue is that he wants to take all necessary steps to avoid any claim including a FPA claim by his children. He wants to disinherit them. That's why he wants a trust and we can see that under issue.

Now Robert knows why he's had no contact with his children for 30 years. He knows he terrorised them.

WINKELMANN CJ:

Are we going to get that document back up because I think you're still taking us through it aren't you? The file note?

MS CHAMBERS KC:

No, it's just that short quote your Honour.

WINKELMANN CJ:

Okay.

MS CHAMBERS KC:

Oh sorry back to, I see what your Honour is saying. I see, I thought you were talking of the case. Thank you. He knows he's been emotionally abusive towards members of his own family, and he knows when Alice was seven he went into her bedroom, or his little daughter, and he raped her, and he knows that he carried on raping her repeatedly until she was 13. He knows he held a pillow over her head, tightly, to partly smother her while he raped his little girl. He knew that he threatened her and he told her, as he threatened all his family, that he would kill her and her mother if she said anything.

Robert knew he'd beaten his son Barry repeatedly and sadistically. He must have been aware he was a violent drunk of a man and that he behaved in accordance with that description with his family, which his abuse dominating their lives. Robert knew that his abuse of Barry was so bad that Barry developed a tremor and shakes and had to be taken to what the family called a shrink. He knew that because he took his son. He was only 11 or 12 years old. And he knew that when Barry when he was nearly 16 finally stood up and punched his father back rather than get another beating, he told his son to get out and never come back, and he never saw his son again.

He knew that his youngest child, Cliff, was brought up in the same abusive household, with emotional and physical abuse. He knew what he'd done. And Robert knew too, although of course he doesn't tell his lawyer any of this, that his family wanted nothing to do with him because of his abuse, particularly of his daughter, because they told him that.

If we got to 301.7 of the bundle, of the case on appeal, the letter Rose his wife wrote to him in 1992 is reproduced and she says "your sexual abuse is unforgiveable, committed by you – her father". The only response is a

threatening lawyer's letter. And Alice writes to her father late in the same year, 301.9. What you have done to my life is horrific. You are capable of knowing the feelings of a sexually abused child as they become adults, and the long-term effects." And of course Robert was working as a psychiatric nurse. And he knew too that his wife had obtained a non-molestation order against him at the end of their dysfunctional marriage, and he knew that he one family funeral he'd turned up to after separation he'd been told to leave.

He also knew that his abuse of his children had had long-term tragic consequences for his children. Drug addiction, serious depression, suicide attempts, inability to obtain sound economic footings. Alice, we know, lived a transient lifestyle socially isolated. The catastrophic effect on Alice of Robert's incest, and wider physical and emotional abuse is all set out fully in the ACC report by the psychologist engaged by the ACC. The key part is at 401.117 of the casebook.

The profoundly emotional damage that's impacted directly on Alice and Barry's ability even to parent their own children. We know that when Robert walked into his lawyer's office, he knew his abuse had been catastrophic for his children. Alice's letter in 1992 couldn't have been clearer as to his role. "You could not even begin to imagine the effect it has had on my life. I suffer because of you." And both Cliff and Barry gave uncontested evidence that Robert was aware of the effect of his sexual and emotional abuse on children through family members, and some of that evidence is at 201.45, but it's all in their briefs. They gave evidence that Robert knew he needed to make amends and had obligations to his children, uncontested evidence, and he knew that Alice especially would need his financial support, and that's at 201.34, and we know that Alice's evidence is, again, uncontested, that family members told him of Alice's struggles, and that's at 201.17. And at that, I'll just slow down a bit so my friend can catch up with me.

So if we go to 201.17 of the evidence, which is Alice's evidence, there is her evidence that family members told him about her struggles, and also this very important incident where she says that Greg, the oldest son who died before

the trial, confronted Robert about his abuse of Alice, and what did Robert say in response? He said he would leave Alice his house. That's his response to the allegation of abuse. He knows. He knows he's got an obligation. He knows that's the one that he can address it, and he said that he would look after Alice. Evidence not challenged in cross-examination or disputed by the respondents. More to the point we know that Robert acted on that. We know he did because the first will he executes in 2001 did leave virtually everything to his children and grandchildren, and it left a life interest in the house to Alice. That is an important document because it shows he knows he did particular harm to Alice and that he knew he had a duty to his children in regard to his estate. That duty was not reliant on contact, as my friend's the respondents argue, because by 2001 when he's making his first will it's 20 years since he separated from Rose, and it's 22 years after Alice moved out of the family home at age 18. He hasn't had contact with his family since then, 20 years, and he knows. He's confronted by his oldest son. He says I will deal with this. I will deal with this by making sure I deal with it in looking after Alice in particular, and he acts on it. It cannot be denied, given that evidence, that he knew he had a duty.

Now what about the children's expectations. Well in my submission there can't be any doubt that the evidence establishes that the children had expected Robert to provide for them in his estate in order to recognise his horrendous actions during his life. They say so. Their evidence, again, is uncontested, and it was not subject to cross-examination. The references are all in the appellant's submissions at paragraphs 13 to 16.

1020

The other factor too is that the adult children, when Robert dies, immediately take steps once they know he's dead because of course he tries to hide that because he knows there could be a scene, and goes to the lawyers and says: "Can we have Dad's Will please?" because they're expecting something in that Will. They expected he would not deliberately put everything he owned in a trust to their exclusion and that he would not use his position to act in a manner so obviously averse to their interests.

So let's go back to Robert sitting in his lawyer's office instructing them to set up a trust to leave his main asset, his house, basically to third parties. I mean he's not even leaving it to his former de facto partner, he's leaving it to oh by the way 30 years ago for three years, instead he's leaving it to her family. So he sets out again, this brute of a man, to make a further step to deliberately inflict a second harm on his children, leaving the one card he's got left over them, the one card, his estate.

So we say when he sees his lawyers in 2014 and again in 2015 to put the shares into the Trust and make his final Will, he was in a relationship with his children that gave rise to an illegitimate expectation that he would not use his position in a way that was adverse to their interests and my submission is that is common sense and it would be contrary to policy and common sense to say otherwise.

It's that moment that the appellants' claim rests on. It's not, as suggested by the respondents, mutton dressed as lamb. It should not be viewed as a claim as his Honour Justice Gilbert said "redressed for the harm stemming from the pre-1974 breaches of fiduciary obligations." It's not the same claim, it's different and you can test that by saying not all men in Robert's position go on, having sexually and physically or in some way abused their children, then take the next step, as Robert did, of putting all their assets into a trust. It doesn't automatically follow from the sexual abuse. It's a new and separate claim.

WINKELMANN CJ:

So you're saying that actually the transfer is itself a breach?

MS CHAMBERS KC:

That's right. The framework is Robert's duties at the time that he transfers property to trust and makes his final Wills and we say but you can't ignore the abuse that has consequences on the children and those consequences both impact on their vulnerability and their expectations.

WINKELMANN CJ:

Can I just ask you to formulate this in terms of the usual concept of the duties owed by a fiduciary, fiduciary duties owed by in a fiduciary relationship, and so I can understand whether you're expanding the scope of those fiduciary duties, because the usual duties that flow out of a fiduciary relationship are said to be loyalty, not to act in a conflict of interest, not to profit, not prefer your own interests over those of the beneficiary of your obligations? So do you formulate this in those terms or do you put the duties more broadly?

MS CHAMBERS KC:

Well I'm going to go on to explain this your Honour but the theory of our case is that we're still under *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 and that's *Chirnside* is the broad umbrella and we fit under it, and if you just applied *Chirnside*, then it is clear that Robert breached, that Robert, that the children had a legitimate expectation on Robert to place trust and confidence in him that the children were entitled to rely on Robert not to act in a way which was contrary to their interests. And then we say that the indicia slapped onto that, particularly under *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834, and the commercial cases don't work and the indicia for non-commercial cases should be *Frame v Smith* [1987] 2 SCR 99. So your Honour we say that we're still under *Chirnside* that we fit.

WINKELMANN CJ:

Yes, well Chirnside is most relevant to find when there is fiduciary duty and I'm just interested in a fiduciary relationship, I'm just interested in the nature of the obligations that flow out of –

MS CHAMBERS KC:

The duty itself?

WINKELMANN CJ:

Yes, and I think you were saying you are taking it a little bit further although – a little bit further because you're saying that Robert owed a duty to act in their interest so it's not a no conflict, no profit type rule but rather a positive duty to act in their interests which is, as Mr Steele will put it, a prescriptive duty.

MS CHAMBERS KC:

Well I can jump to that your Honour.

WINKELMANN CJ:

No, it's okay. I was just trying to get the scope of the argument.

MS CHAMBERS KC:

No, no, I'm happy to. At 106 of the written submissions, of the appellants' written submissions, we proposed quite a wide content of the duty, which is to refrain from acts that would cause harm to his children's practical interests in a manner involving disloyalty, self-interest or abuse of power when exercising his powers and discretions.

But if you go to paragraph 32 of the written submissions, there's a narrower version which works just as well for the appellants and I think maybe answers some of what the respondents complain of in the duty and it's the one based on *KLB v British Columbia* [2003] 2 SCR 403 which was also an abuse of trust case and it is, and it's in 32 of the submissions "to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust."

And of course your Honours know that it's almost trite law to say that well the content of the fiduciary duty is moulded by the factual circumstances, and I accept there's a number of ways you could word the content of the duty, but it's moulded by the facts which is why I'm spending a significant amount of time on the facts and those are the two that we are suggesting and, as I've said, one's broader, one's narrower. They both still mean that Robert breached his fiduciary duties.

GLAZEBROOK J:

Can I just check Ms Chambers whether you say the duty is a positive duty to essentially fix up the consequences of his actions, or is the fixing up the consequences of his actions the remedy rather than the duty?

MS CHAMBERS KC:

The remedy rather than the duty.

GLAZEBROOK J:

Thank you.

MS CHAMBERS KC:

His fiduciary duty was not to act in a way adverse to their interests.

GLAZEBROOK J:

And he did by the abuse, is that the submission?

MS CHAMBERS KC:

No, he did by putting – by stripping himself of all property so that there was nothing left for his children in regard to his estate.

GLAZEBROOK J:

Well then I'm again confused as to whether the duty to fix up the harm is part of the duty or part of the remedy.

1030

MS CHAMBERS KC:

Well the abuse goes to the impact in terms of the children's vulnerability and their expectations. That's where it slots in, we say. So I wanted to look at the concepts of fiduciary duties here, and we all know there's no universal principle. We know there's been –

WILLIAMS J:

Just before you do, I'm going back to the facts briefly, the instructions to the lawyer identify two reasons for the transfer to the Trust?

MS CHAMBERS KC:

Yes your Honour. I looked at that.

WILLIAMS J:

What do you say is the consequence of the fact that on the evidence it wasn't exclusively for the purpose of defeating the children's claims?

WINKELMANN CJ:

Can we have the document up again?

MS CHAMBERS KC:

Well the second point isn't actually a reason, is it your Honour, it's just a note. "A neater main beneficiary Will."

WILLIAMS J:

Well I'm looking at: "Why Trust instead of Will." One, "in case get crook". Two, "also prevents any of his family chasing…".

MS CHAMBERS KC:

Oh you've gone back to, yes, you've gone back to 033. That is true. That is there. However –

WILLIAMS J:

You get the sense that the aim there is in case he's in care, he doesn't want access to these assets to pay for his care.

MS CHAMBERS KC:

Oh I hadn't thought of that interpretation your Honour.

WILLIAMS J:

Well it's a pretty, it's often done, is it not?

MS CHAMBERS KC:

Yes, mmm, yes. The points I make is that the, if you look at the overall documents, and all of his conduct and behaviour, it's clear that his main driver is to prevent his family getting at his property because, remember, he doesn't just put the house in, he puts in all of his shares later, and he even tries to put his chattels in. He tries to put everything in, and that's after he's got the Trust established, and that's got nothing to do with his care. That's got to do with

using the Trust to avoid the FPA, and also he is crook at the time he sees his lawyers, he's got cancer, and he knows he's dying.

ELLEN FRANCE J:

What Justice Gwyn said at 174 was that the evidence showed that at least one of his reasons for transferring the property was to prevent the plaintiffs receiving the assets, but I don't understand there to be a finding that that was the main reason?

MS CHAMBERS KC:

Well I'm suggesting that the evidence – I am submitting that the evidence shows overwhelmingly that that was the main reason, and really what I rely on there is 301.39, at this all important meeting when he's seeing his lawyer, the issue is claim by children.

WILLIAMS J:

What's the second point underneath, I can't meet it.

MS CHAMBERS KC:

[Person X] main beneficiary.

WILLIAMS J:

I see.

MS CHAMBERS KC:

Well he could have done that under a Will, and it is my submission that it stand out overwhelmingly that that's what he was being driven by.

WINKELMANN CJ:

You don't really need to go beyond, on your case though, you don't say you need to go beyond Justice Gwyn's finding, that it was one of the reasons. Would you?

MS CHAMBERS KC:

No, I don't need to go past that, but I want to suggest it's pretty obvious that was his driver.

O'REGAN J:

I mean if he had just changed his Will, do you say that would have been a breach of the fiduciary duty as well? I mean I know the Family Protection Act may have provided a way out of that, but is the fact that he put it into trust, does that have some greater significance than if he just took them out of his will?

MS CHAMBERS KC:

Well, I think, my submission on that Sir is that he would've still been in breach of a fiduciary duties, if he'd just taken them out of his Will in these particular circumstances. But he, the fact that he used a trust means that he falls very clearly into our argument as to the indicia because he was acting so adversely in regard to his children, because the Will, the Trust put it beyond the reach of the FPA, and it may be that, I mean we know if he'd only used a Will the FPA would have stepped in to fix the wrong. So you wouldn't need to rely on fiduciaries because the FPA fixes the wrong. But here, this is a straight equitable case, and equity needs to play its role, and it traditionally has, of fixing contrivances in the common law, and this is a case which shows that very clear, and you can see in the overseas cases, where there is legislation that fixes the wrong, equity doesn't step in. So for example the Canadian case of one of those ratbag Lord Mayors of Toronto, they said, well you're really asking for child support and we've got child support legislation. Here there is no common law remedy other than equitable.

So if we, as I was saying, I'll go back to my synopsis, but we know that fiduciary principles have been discussed ad infinitum, and that there's lots, as indeed Justice Winkelmann has just been discussing, there's lots of different language used for fiduciary duties. If we use that language in this factual situation, and we say, and looking at all those elements that are discussed in our law, we can say that in transferring his property to the Trust Robert breached the trust and confidence of the children. He was disloyal. He put third parties' interests

ahead of his own children and he knew they were vulnerable. He had the ability to cause harm, and he went ahead deliberately and did just that.

By the time he transferred his assets to trust Robert's children were at the mercy of his discretion. He had ascendancy. They were dependent on his actions. That's all the kind of language that your Honour has just been discussing and which we're all familiar with.

As to policy reasons, well, if your Honours look at *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 in our casebook 601.600, this is Justice La Forest, who is widely acknowledged as giving leading judgments in this particular area in the common law world. He says that: "The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions."

Now if you accept that foundation, then there can be little argument that's Robert's conduct was socially undesirable, it's obvious, and in our submission equity should respond to fundamental issues of human rights and interests, and equity should, as I have said, do its traditional role of defending the law from evasions and contrivances, and sticking up to assist the law where it's weak or defective.

WINKELMANN CJ:

I agree with your formulation that the law pay particularly close attention to the nature of the relationship to determine the extent of the duties, but what I'm not really clear from you on is how this relationship is what the extent of the duties you say the father Robert had to the children into adulthood because fiduciary relationships aren't just, you don't act, you don't exist for all purposes as fiduciary normally outside a parent and child relationship, and even I think in the case or even inside the parent and child relationship because parents, of course, are allowed to act to their own interests at times.

1040

And, you know, we've got *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192 which says you can be a fiduciary in some aspects of a relationship and non-fiduciary in other aspects of a relationship. So what in this relationship imposes upon the father an obligation to deal with his own assets in a way which prefers the interests of the children?

MS CHAMBERS KC:

No, not to dispose of his assets in a way which left them with no ability to claim against his estate.

WILLIAMS J:

Isn't your formulation something like this, during the course of their childhood that the essential indicators of fiduciary relationship are inherent in the nature of parent/child relationships and if the level of breach in that context is such as to create an ongoing and I would have said serious vulnerability –

MS CHAMBERS KC:

Thank you, your Honour.

WILLIAMS J:

– then as long as the vulnerability exists and continues to the necessary level of seriousness then the obligation exists to make right?

MS CHAMBERS KC:

That’s right, Sir, that’s it.

WILLIAMS J:

But so that begs a whole pile of questions about what kind of vulnerability, what are its indices because that’s your issue here –

MS CHAMBERS KC:

Yes.

WILLIAMS J:

– the appellant is an adult –

MS CHAMBERS KC:

Yes, that's right, Sir, that is absolutely right.

WILLIAMS J:

– or are adults, right so –

MS CHAMBERS KC:

That's absolutely right.

WILLIAMS J:

That's really if you're going to push the idea that there is an ongoing fiduciary obligation, the breach of which gives rise to the remedy that you seek, you really have to explore what the role of that vulnerability is and the construction of what would otherwise be something like La Forest, I think it's La Forest anyway –

MS CHAMBERS KC:

La Forest I've been told.

WILLIAMS J:

I got told by the former Attorney-General it was La Forest when I said La Forest and I don't know whether the former Attorney-General is a fluent speaker of French but I'm pretty sure he's better than me.

MS CHAMBERS KC:

Justice O'Regan will know.

O'REGAN J:

La Forest I would say.

MS CHAMBERS KC:

I agree, your Honour.

WILLIAMS J:

We can't, even if you're generally correct, you can't hang this on the essence of fiduciary obligations, the utility and promoting and preserving desired social

behaviour in institutions because that's anything and anything the Judge feels is a good idea.

MS CHAMBERS KC:

No, that –

WILLIAMS J:

And equity will not do that.

MS CHAMBERS KC:

I agree. No, that is just the justification, not the formulation.

WILLIAMS J:

Well that's the justification for all law but it doesn't really help us here. We need some pointers that are stronger than that.

MS CHAMBERS KC:

I am going to tackle those issues your Honour and I don't – I completely agree with what your Honour has said and I'm – that was a kind of a general introduction. I'm now going to –

WINKELMANN CJ:

Well can I just before you do.

MS CHAMBERS KC:

Yes, sorry.

WINKELMANN CJ:

Can I ask you, just even as you've formulated it well with the assistance of Justice Williams, you're still going into that area that Justice Glazebrook was asking you about because on the formulation that you've just accepted from Justice Williams what has occurred is that the vulnerability has created an obligation to make it right so it's remedial. As long as the vulnerability subsists then the obligation is to make it right. But you'd have to put it more highly than that, wouldn't you, or else it is purely, it's not a breach?

WILLIAMS J:

I guess a better way of putting that is the obligation not to prevent yourself from making it right, not to render yourself unable to make it right while the obligation continues to subsist.

MS CHAMBERS KC:

Let me say it clearly what we say it is. The children were entitled to repose trust and confidence that Robert, when turning his mind to his Will and estate planning, would not deprive the children, his children, of any meaningful opportunity – oh, maybe I don't need that bit.

WINKELMANN CJ:

Don't you really need to say it was a continuing obligation to support them, which he was in a continuing breach of, and that this was –

MS CHAMBERS KC:

That he wouldn't act contrary to his interests is probably the submission.

WINKELMANN CJ:

That he was in continuing obligation to support them, and this was an incidence of him acting contrary to that and in his own interests.

MS CHAMBERS KC:

We say it was an inherent fiduciary duty, which continued, in this case, as Justice Williams indicated, because of their vulnerability.

WINKELMANN CJ:

So it was delayed coming off because he'd rendered them effectively for the purposes of almost perpetually children.

MS CHAMBERS KC:

Mmm.

WILLIAMS J:

Well, perhaps it might be better to say vulnerable, but in a different way.

WINKELMANN CJ:

As if they, so entitled to the kind of protection that the law would afford children.

MS CHAMBERS KC:

Yes. Or peculiarly vulnerable, is the language usually used.

WINKELMANN CJ:

So there was an inherent fiduciary relationship.

MS CHAMBERS KC:

Yes, but let me develop my argument your Honour, because it does all slot in. So the issue is, that your Honours have been asked to determine, is can a fiduciary relationship exist between parent and child in adulthood. And moving on to the theory of the case, well we know that four judges have had a go at determining the question, and four judges have answered the question in four different ways, and we know there's a degree of novelty in the question, but it is the appellants' submission that this question can be answered by reference to existing case law, tikanga and an incremental development of that case law to reflect the non-commercial nature of the relationship between parent and child.

This is the first case where this Court needs to consider the role of tikanga in a purely common law setting, which is probably not going to happen that often. No legislation. The appellants have submitted that this gives the opportunity for this Court's observations in *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239, that tikanga can provide a helpful and useful perspective for development of the common law, particularly in the family context. Even if you consider Aotearoa is, as Ms Bruton says, in the infancy of our tikanga jurisprudence. It is submitted that this case calls for that decision now. If tikanga does not assist in this case, and therefore is accessible to New Zealand litigants, when does it?

We say, too, that the argument put forward by the appellants doesn't upset the applecart and can be done in a principled and coherent way. So moving onto that we say the starting point is *Chirnside*. It's the umbrella case, I call it the

Starship Enterprise, and it is our submission that the imposition of a fiduciary relationship fits under the *Chirnside* umbrella. The children were entitled to repose trust and confidence in their father.

Now your Honours could just stop there, as *Chirnside* did, and as in fact the Court of Appeal does in *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 and just leave it as the *Chirnside* test with no further indicia, and if you did the submission would be we fit within it. But the lower courts have not approached the claim on that basis. The issue becomes the guidelines or indicia that have clicked on to Starship Enterprise by the Court of Appeal largely, and developed largely in commercial contexts. So those indicia have been recently summarised by the Court of Appeal in *Dold v Murphy* and your Honours will know that the Court of Appeal, I think it's his Honour Justice Kós, listed them, and our case is that those indicia are not suitable for non-commercial relationships, and it's because they're based on proprietary and commercial economic relationships. If this Court just adopts those indicia, then it will mean non-commercial fiduciary relationships won't be recognised and won't be protected because we'll be trying to put a square peg into a round hole.
1050

ELLEN FRANCE J:

Do you say – is there anything in *Chirnside* that indicates there's a difference between the commercial and the non?

MS CHAMBERS KC:

No. Ironically, your Honour, when you look at some of the commercial cases they, you know, there's been arguments saying: "Oh, no fiduciary duties do apply to commercial cases" and yet we've ended up with a law, certainly at the moment in my submission, that really operates to protect commercial and powerful people and isn't operating to protect less powerful New Zealanders.

WINKELMANN CJ:

So what is it about the *Dold* formulation you don't like? Do you want to take us to that?

MS CHAMBERS KC:

My learned junior is going to but it talks about proprietary and economic terms. Let me see if I can find it. It's at paragraph 55.

ELLEN FRANCE J:

So isn't the distinction being made there between the inherent and fiduciary and the other?

MS CHAMBERS KC:

Yes, that's in regard to particular…

WINKELMANN CJ:

Do they look all that different to *Chirnside*?

O'REGAN J:

We should probably leave this if it's going to come up later.

WINKELMANN CJ:

Yes, okay. You are dealing with it at this point, aren't you?

MS CHAMBERS KC:

No, no –

GLAZEBROOK J:

Wouldn't you argue –

MS CHAMBERS KC:

– I'm still doing kind of theory of the case actually your Honour.

WINKELMANN CJ:

Okay.

MS CHAMBERS KC:

So I'm not actually drilling down into the cases at this point. That's the next speaker.

WINKELMANN CJ:

Okay.

MS CHAMBERS KC:

If that's okay.

GLAZEBROOK J:

Wouldn't you argue that the parent-child relationship is just inherently fiduciary?

MS CHAMBERS KC:

I do.

GLAZEBROOK J:

Because inherently you have vulnerability so those criteria there actually don't apply to inherently fiduciary relationships according to paragraph 55?

MS CHAMBERS KC:

Yes, yes, your Honour.

WINKELMANN CJ:

All right, back to your theory.

MS CHAMBERS KC:

So we say that the best option is to click on, another click on to Starship Enterprise and say in non-commercial cases at least the Canadian approach for indicia, if you're going to have indicia, *Frame v Smith*, is the appropriate indicia and those are that fiduciary has scope for the exercise of some discretional power, that the fiduciary can unilaterally use that so as to effect the beneficiary's legal or practical interests and the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the power of discretion.

FRANCE J:

So are you intending to go through those now or –

MS CHAMBERS KC:

No.

ELLEN FRANCE J:

– will you come to those later?

MS CHAMBERS KC:

Yes, we're going to come to those later but I'm wanting to give you the kind of framework that our argument works and how it works. So…

GLAZEBROOK J:

Can I just check, so parent-child is inherently fiduciary and, in fact, I don't think there is any dispute about that between the parties, the dispute is whether that continues into adulthood –

MS CHAMBERS KC:

Correct.

GLAZEBROOK J:

– but that's probably putting it slightly too starkly but effectively I don't think anybody is suggesting that it's not an inherently fiduciary relationship. What duties that might entail even in childhood is another matter but we're not dealing with that in any event. So do you say that because the continuation into adulthood is not inherently fiduciary somehow you have to use the indicia, or are you just saying well it's inherently fiduciary and if it continues and it continues in certain circumstances and this is one of them, then it's just inherently fiduciary and you don't need any indicia?

1055

MS CHAMBERS KC:

No, well I am saying the latter. But I'm saying that the *Frame v Smith* guidelines can be used to help litigants and the Courts to decide when that inherent jurisdiction has continued past childhood into adult children. So the indicia can be used – *Frame v Smith* can be used first of all when you're looking at whether

or not it's a particular circumstance where a new fiduciary relationship exists, and it also justifies why you have an inherent jurisdiction, but it also helps with when does that inherent fiduciary duty get extended in this case in regard to adult children, and it's really that vulnerable, peculiarly vulnerable aspect which underpins it.

WILLIAMS J:

At some point I'd be interested in hearing, you decide or your team can decide when that is, interested in the, developing an understanding of what the nature of that relationship is into adulthood, and what the vulnerabilities or are should be the standards, et cetera, that would ensure the maintenance of the fiduciary relationship because they are obviously key issues.

MS CHAMBERS KC:

Mmm. Okay.

GLAZEBROOK J:

And possibly the extent to which the vulnerability may or may not have to be caused by the fiduciary in the first place, as, of course, it is here.

MS CHAMBERS KC:

Yes, it comes out of the relationship in this one. Thank you. so I'll carry on with the kind of theory of the case, then Ms Beverwijk is going to take you through the cases, I'm going to come back up and apply them to the facts, and then Mr Hikaka is going to address all the other issues so you understand the outline.

So I mean it has occurred to us that you may prefer not to have guidelines and just, and take away the guidelines completely and just do *Chirnside*, which is what this Court did last time, it just gave that overarching umbrella and said we want to keep it broad and these are the tests. But even if you do that then it is my submission that something is still required to confirm that equity protects these kind of relationships, and we say that the Canadian approach is cohesive, coherent and logical, and we rely particularly on the decision of Justice La Forest in *M (K) v M (H)* and that judgment, it's fair to say, has really

been strongly recognised throughout the common law world, it's very powerful, and indeed by Lord Cooke and other members of the Court of Appeal as outstanding, comprehensive, sympathetic developments particularly regard to the area of sexual abuse, and so we do rely heavily on that judgment. But that judgment, as I say, is a judgment which really is being greeted with a great deal of respect. So that is our argument, that really the Starship Enterprise is *Chirnside*. You've got the commercial indicia. We need non-commercial indicia because the commercial indicia are going to stop non-commercial relationships being recognised as subject to fiduciary.

Now you no doubt, the last thing I want to address before I sit down is the floodgates arguments just briefly. You're going to hear arguments, obviously, that this will open the floodgates for children to say, well, their parents are in breach for going on a cruise or buying a new car.

1100

Well first of all we say not all acts by a fiduciary are actionable breaches, and the way that we formulate it, that would not be a breach of fiduciary duties because children don't expect, can't have an expectation that their parents will not go on a cruise or buy a new car but they can have an expectation that in these circumstances they will not – their father will not take steps to deliberately stop them inheriting anything from his estate and that he will not take steps to defeat his children's entire practical steps in receiving provision from him, and in that regard I want to take you to the decision of Justice Hammond in *H v R* [1996] 1 NZLR 299 (HC) which is at 601.388 of the casebook.

WINKELMANN CJ:

The problem with your floodgates argument though is why shouldn't they – why should that duty apply to him giving it away to someone but not to him profligately spending it on, what did George Best say, well I won't repeat it but anyway, profligately spending it in a way which just wastes it, why is he under an obligation to have regard to their interests when he's transferring it to someone else?

MS CHAMBERS KC:

Because here he was deliberately acting against their interests.

WINKELMANN CJ:

So he was – his mens rea is relevant? He's preferring, he's act – he's not only –

MS CHAMBERS KC:

Well even if he didn't intend – if he was – the test is was he acting adversely. He had an obligation not to act adversely against their interests at the point where he's considering his estate and the transfer to trust.

ELLEN FRANCE J:

But not at the point where he's spending – making a decision to spend the money.

MS CHAMBERS KC:

Well –

WINKELMANN CJ:

You've got a note there from your junior.

MS CHAMBERS KC:

Oh, have I? Sorry, I have.

WINKELMANN CJ:

You could say he's actually not only not considering the best interests, he's actively acting against their interests.

MS CHAMBERS KC:

Mmm, mmm.

WINKELMANN CJ:

You might want to look at your note.

MS CHAMBERS KC:

Well also one is effectively an effective abuse what Robert did, the first one isn't necessarily.

WINKELMANN CJ:

Well to pick up Mr Steele's terminology and the terminology used in some of the literature, this is in that he must not actively – it's not that he has to preserve assets for them, it is that he has to act – has to not do things to harm them.

MS CHAMBERS KC:

That's right.

WINKELMANN CJ:

So it's proscriptive.

MS CHAMBERS KC:

Mmm, it is. So just finishing this overview with the decision of Justice Hammond because it picks up some of the themes that we've been talking about and you'll see that he talks about the *KM v HM* [1992] 3 SCR 6 case in the Canadian Supreme Court that I've been referring to as well and he says: "The position of parent and child would be another relatively obvious category." This was a case involving an adult suing for sexual abuse as a child in their early teens but the parties were unrelated and he held that there was tortious, the tortious duty was made out, and doesn't really go on to deal in any width with a finding on the fiduciary duty because he doesn't need to but he does make some comments about fiduciary duty and he says at the second to last paragraph: "Finally, under this head, I should perhaps say that the supposed problems of a floodgate of litigation for already hard-pressed Courts do not unduly deter me. That argument is always made. Indeed, as soon as *KM v HM* was decided in Canada an article appeared in the Lawyers Weekly ... It was authored by ... Predictions were made of a tremendous increase in civil actions. It is not my understanding that such has yet occurred, although the necessary exigencies associated with producing a trial court decision have not permitted full research

on this. In any event, principle is principle: if the claims can be properly made, then Courts must properly respond, regardless of burden."

ELLEN FRANCE J:

In terms of the policy issues Justice Hammond does comment on the effect of the statutory framework?

MS CHAMBERS KC:

Yes.

ELLEN FRANCE J:

And how do you see things like the Family Protection Act fitting into your claim? I mean it's providing a particular approach and your approach how do you say that's consistent with that?

MS CHAMBERS KC:

Well I say it's consistent in that the Family Protection Act social policy and it clearly would say that Robert owed duties, a moral duty to his children, and so that's the social policy in this area which I referred to earlier this morning. And Robert's actions in deliberately avoiding that legislation and the effect of that legislation were, particularly with that background of the social legislation, the background, can clearly be accepted as breach of trust and acting adversely to his children's interests. It is a key background piece of legislation but it doesn't supply a remedy here and, you know, although there's certainly been discussion by the Law Commission of the need for something that goes in that legislation, it hasn't happened yet and it's unlikely to happen for some time if it happens at all and there's another –

ELLEN FRANCE J:

Well that's underlying my question I suppose.

MS CHAMBERS KC:

Yes.

ELLEN FRANCE J:

If it doesn’t supply a remedy here it is –

WINKELMANN CJ:

Is that conscious?

ELLEN FRANCE J:

Mmm.

MS CHAMBERS KC:

Yes, it's not, it's not. I mean no I don’t think it is. I don’t think it's conscious at all. I mean, the Trusts and the abuse of them has developed in part because of equity and the way that, as Ms Bruton talks about, the way that we have allowed trusts to operate, and we have this funny creature of the New Zealand Discretionary Trust which is so broad and so wide and yet it allows people to hide behind it, you know, it's a cloak. You put it on and pretend you don’t own it.

So the fact that the old legislation doesn’t grapple with it doesn’t entirely surprise me because, you know, we have failed – trusts have developed so much and so quickly, we have failed in a number of pieces of legislation to deal with them properly. The PRA is an obvious example. But we know that there's calls to fix that. And there’s one other point here, your Honour, the abolition of gift duty has had a real impact because there's another case, an older case, where a mother did the same thing. She shoved it all in trust actually for her son to avoid the daughter getting anything but the solution was that there was still a big debt outstanding back to her which formed part of the estate and, even though in her Will she’d given that to her son as well, the daughter had property to get her FPA over the line and if gift duty had still existed when Robert did this he couldn't have done it because he didn’t have – you could only gift it at $27,000 a year or pay tax, well he had no real money to pay tax, so it would have still been there. So this is another reason why this area, this particular issue in terms of addressing what the Supreme Court called the preservation of desired

social behaviour in institutions and that's another reason why it needs to be addressed now.

1110

I'll hand you over to Ms Beverwijk who is going to take you into far more detail in the cases. As your Honours please.

MS BEVERWIJK:

Good morning.

WINKELMANN CJ:

Good morning.

MS BEVERWIJK:

Today I will be submitting on the law of fiduciary relationships and in part the Canadian approach to the same. You've heard the basics from Ms Chambers KC and it will be my attempt to go through this with you to demonstrate that New Zealand can and should take the appellants' approach to recognise this non-commercial fiduciary relationship.

Now by way of broad overview the appellants' submission is that, as you've heard, there is settled law in New Zealand for this overarching test of fiduciary relationships, and that's *Chirnside v Fay.* Since *Chirnside v Fay* we've seen a development in terms of principles or indicia for particular fiduciary relationships in a commercial context. We've had acceptance from the Court of Appeal in this case that those commercial indicia are difficult to graft on in a non-commercial context, and it's my submission that this leaves New Zealand somewhat adrift about how these equally important non-commercial types of relationships ought to be recognised and given the protection of equity.

It is further my submission that we can get help from Canada. Their approach to recognising non-commercial fiduciary relationships provides us with a clear cohesive framework to how we recognise these relationships, and that can help us twofold. First, it can help us understand why we say these non-commercial

fiduciary relationships can be inherently fiduciary, and that should, or it's my submission it should help with answering some of Justice Williams' questions about when this vulnerability continues and how the inherent fiduciary relationship can continue, and it can also help us by setting out some guidelines in particular situations for particular fiduciary relationships.

Finally I say that, or I submit that the Canadian approach still fits within *Chirnside v Fay* and will assist the Court in recognising and protecting non-commercial fiduciary relationships.

WINKELMANN CJ:

So I might just indicate for my part it's not so hard to establish a fiduciary relationship, but the hard work that needs to be done is to work out what is the nature of the duty in the particular circumstance, and what is a breach, and then what is the remedy, because this remedy is reaching outside the assets of the person who's breached into their property, and normally you'd only see that in a law, if it's a position of a remedial trust, constructive trust, or a tracing remedy, and so I can see that the Canadian cases provide a nice way of expanding, of conceptualising fiduciary duties outside commercial context, but the hard work in this case seems to me to be in this other area which is what are the nature of the duties specifically in the facts what's a breach and how do we get to this remedy which seems to be quite an extraordinary remedy. Is someone going to address those things? It may not be you.

MS BEVERWIJK:

It will not be me. It will be Ms Chambers mainly, but I'm hopeful that by going through this case law we can start to find our footing in those answers. But I am mindful – I will say that in terms of the nature of the duty, Canada does provide quite a helpful, in my submission, helpful view on how we can have a justiciable duty in this context. I would also want to say that when you look at that duty that Canada approaches, in this context the breach is pretty clear, and as for remedy, again a preliminary comment, and I don't want to step on my learned senior's toes here, is that equity will find a remedy, and Justice Collins has provided a very good remedy in our submission.

WINKELMANN CJ:

Well it's not free-ranging though. You're not just, you know, there are established maximas of equity and there are very established laws but what are, you know, remedy – what remedial response is appropriate, and it's not to be forgotten these assets have actually been transferred out of his ownership.

MS BEVERWIJK:

Of course. Bearing in mind those comments, I will nonetheless suggest that I begin with the judgment of this Court in *Chirnside v Fay*.

WINKELMANN CJ:

Fine.

MS BEVERWIJK:

Now *Chirnside v Fay* is oft cited and never to be forgotten. In terms of the facts it was a joint venture to develop property. Mr Chirnside was tasked with progressing the project. Mr Fay was raising capital. Mr Chirnside did indeed progress the project but decided to exclude Mr Fay. Justice Tipping's judgment for the majority, with Justices Gault and Blanchard agreeing, sets out the lay of the land for fiduciary relationships. So I start at paragraph 73, 601.0062. Here we see Justice Tipping, so starting at 73, that there are two situations where the Court recognises a relationship gives rise to fiduciary duties. We have the inherent, a relationship "which, by its very nature, is recognised as being inherently fiduciary" and we fall into that first category. And the second, paragraph 75, is a situation "… in which a relationship will be classified as fiduciary depending not on the inherent nature of the relationship but upon an examination of whether its particular aspects justify it being so classified." This is what Ms Chambers already talked about. There is no single formula or test that has received universal acceptance in deciding whether that relationship exists.

Then Justice Tipping takes us through a brief summary of principles that show, in my submission, how broad the test really is to find a fiduciary relationship in

New Zealand and further, in my submission, the focus really is on what duties can then attach.

So starting at paragraph 76 his Honour refers to the decision of the Privy Council in *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC) and Lord Wilberforce says: "… that fiduciary obligations will apply '… whether the case is one of a trust, express or implied…'" and goes on to say '… the precise scope of it must be moulded according to the nature of the relationship.'"

And then quoting Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46 (HL): "… 'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general of times and applied with particular attention to the exact circumstances of each case.'"

Then he goes on at 77 to quote the High Court in *Estate Realties Ltd v Wignall* [1992] 2 NZLR 615 (HC). "The word 'fiduciary' derives from the Latin word 'fiducia' the primary meaning of which is trust. Important secondary meanings are confidence and reliance. The cases demonstrate that a fiduciary relationship will arise where one party is reasonably entitled to repose and does repose trust and confidence in the other, either generally or in the particular transaction."

He refers to Justice Casey in *Day v Mead* [1987] 2 NZLR 443 (CA) in the Court of Appeal with the relationship in question, in that case, "generated that degree of confidence and trust which in my view justifies the intervention of equity."
1120

Finally, and perhaps more relevant to where we appear to be landing. The concept of a duty of loyalty, from the Privy Council in *Arklow Investments Ltd v Maclean* Arklow Investments Ltd v MacLean [2000] 2 NZLR 1 (PC), where it was said that the concept of its duty "encapsulates a situation where one person is in a relationship with another which gives rise to a legitimate

expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."

WINKELMANN CJ:

Well none of this is very remarkable is it? It's already summarised by Lord Justice Millett in *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) which is the most famous statement of it which is that, it's set out there, isn't it, at paragraph, it's the most neat exposition of what Justice Tipping has been saying, which is that it's really the nature of a relationship on the need for circumstances to give rise to relationship of trust and confidence and so it's the relationship itself which gives rise to the obligations and that's how you can spot that it's fiduciary. I mean these are all just ways of saying that I think.

MS BEVERWIJK:

Yes, yes, it is. I suppose my, and I didn't want to pre-empt that conclusion of that focus on trust and confidence in an entitlement to repose, but the purpose of going through this really is to show that *Chirnside v Fay* just leaves this so broad –

WINKELMANN CJ:

Yes.

MS BEVERWIJK:

– that we can fill it in. There's no comments about powers or property or even really beyond that concept of loyalty, the duty of loyalty, so when we're recognising a different type of relationship we go back to those grounding principles.

ELLEN FRANCE J:

Sorry, how do you mean we're recognising a different relationship?

MS BEVERWIJK:

Sorry, I mean a different relationship than what has previously been recognised, whether it be inherent or particular, this is one that the Court hasn't had a chance to consider before.

WINKELMANN CJ:

Novel?

MS BEVERWIJK:

Novel.

ELLEN FRANCE J:

But do you mean the continuance?

MS BEVERWIJK:

Yes.

WINKELMANN CJ:

Into adulthood?

MS BEVERWIJK:

Yes. And so, as the Chief Justice has said, the real power, the real conclusion is at 80 and rather than labour that point I will instead head to 82 where Justice Tipping comments that: "Equity imposes an obligation to eschew self-interest when the circumstances require. The obligation does not arise only when expressly undertaken. To hold otherwise would be to confine the powers of equity to situations akin to express trusteeship and would emasculate the breadth of equity's traditional reach by its use of concepts such as constructive trusteeship and its imposition of fiduciary obligations." And that reflects the true principle at 85 that "the circumstances must be such that one party is entitled to repose and does repose trust and confidence in the other."

WINKELMANN CJ:

But not every circumstance of that nature will cause or give rise to a fiduciary relationship will it?

MS BEVERWIJK:

No, it won't but we don't need an agreement or an undertaking –

WINKELMANN CJ:

No.

MS BEVERWIJK:

– or a commercial interest or a proprietary interest to, well that's certainly the appellants' submission.

WINKELMANN CJ:

So it's not contractual. Equity looks at it and says yes this is where a fiduciary relationship exists?

MS BEVERWIJK:

Yes, and when equity says a fiduciary relationship exists that obligation to eschew self-interest is required. Now *Chirnside* was followed by two other decisions of the Supreme Court that also discussed the existence of fiduciary relationships. They're both commercial relationships and they don't do too much to veer off those principles. So that's *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 and *Amaltal* and those are both referenced in the Court of Appeal decision at *Dold v Murphy* at 601.0132 and Lady Chambers has already taken you through that but I will briefly run through the Court of Appeal conclusion at paragraph 55.

WINKELMANN CJ:

Are we in *Dold* now?

MS BEVERWIJK:

Yes, we are.

WINKELMANN CJ:

Right.

MS BEVERWIJK:

That: "The relevant principles can be summarised in this way. Some relationships are inherently fiduciary in nature, involving trust, confidence and a degree of dependence, such as solicitor and client, and trustee and beneficiary. In other cases a fiduciary relationship is only likely to be inferred when the legal relationship between parties involves one, a conferral of powers in favour of the alleged fiduciary, which maybe used to effect the proprietary rights of the beneficiary. Two, the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary. For example, to promote the beneficiaries interests or to prefer the interest of the beneficiary over those of the third parties. Three, the implied subordination although not necessarily elimination of the alleged fiduciary's own self-interest.

So it is my submission that it appears, at least on *Dold v Murphy*, that there's been a development of principles and guidelines both in relation to inherent fiduciary relationships and particular. Now there's a narrower in *Chirnside v Fay* in my submission where you need trust, confidence and a degree of dependence, or the three criteria but is still from a court of course bound by the decision of this Court in *Chirnside v Fay*. So these guidelines must, therefore, be subject to that one overarching characteristic.

WINKELMANN CJ:

So your direct submission is that you don't think they're a right formulation for novel?

MS BEVERWIJK:

Yes, that's correct.

ELLEN FRANCE J:

I understood 55, the indicia to relate only to the second category. Are you saying it relates to inherent relationships that are inherently fiduciary as well?

MS BEVERWIJK:

No your Honour.

ELLEN FRANCE J:

So in this case we don't really need to be concerned, do we, with the second, on your case, the second category.

WINKELMANN CJ:

We do for the adult part.

MS BEVERWIJK:

I would, it's, the case is almost run. Either the parent-child relationship is inherently fiduciary and continues to be inherently fiduciary into adulthood, or it's a particular fiduciary relationship.

ELLEN FRANCE J:

Right, right.

WINKELMANN CJ:

It kind of has to be the second, doesn't it, because you're extending, it's a novel, on any analysis it's novel to extend it into adulthood. There isn't a body of case law extending that relationship into adulthood?

MS BEVERWIJK:

Yes, that's certainly correct. There wasn't any case law, it would be very helpful if there was.

WINKELMANN CJ:

Yes, certainly. But it's novel. It doesn't matter whether you formulate it in the first way or the second day, it's still novel.

MS BEVERWIJK:

Yes, it's certainly still novel but…

WINKELMANN CJ:

It's just, yes, well anyway.

MS BEVERWIJK:

Yes, it's sort of, we're having two –

WINKELMANN CJ:

But your point about *Dold* is that it's formulated too narrowly for the novel situation?

MS BEVERWIJK:

Yes.

WINKELMANN CJ:

Because it's, and I think the case that the Judge is dealing with there is a commercial case.

MS BEVERWIJK:

It is.

WINKELMANN CJ:

He's really shaping that to the commercial case.

MS BEVERWIJK:

Yes.

WINKELMANN CJ:

So it's not wrong if applied in that context.

MS BEVERWIJK:

No it's certainly not wrong if we apply it in that context squarely, but the concern that the appellants have is that if this is all we're ever going to use, and it's a Court of Appeal decision, it's going to be important to most cases unless they come up here, there's going to be an issue, or there could be an issue that equity is no longer responding to non-commercial interests, and this is basically the –

O'REGAN J:

That could only be so if you started to ignore *Chirnside*.

MS BEVERWIJK:

Yes, you would have to ignore *Chirnside*.

O'REGAN J:

Which isn't going to happen, is it?

MS BEVERWIJK:

No, it isn't going to happen, but this is what the Court of Appeal have said the principles are going to be in light of *Chirnside* and in light of *Paper Reclaim* and in light of *Amaltal*. So it's distilled these characteristics –

WINKELMANN CJ:

I think you've got a fair point there, which is that they don't go back to *Chirnside*, even Justice Collins takes this as a formulation, which is –

MS BEVERWIJK:

Yes, there's no cross-check and it is the appellants' concern that faced with that summary of the relevant principle, without that direct reference back to *Chirnside*, we're going to be stuck.

WINKELMANN CJ:

Well we won't be stuck unless people get misdirected by this decision. Right.

MS BEVERWIJK:

And this is, in my submission, what Justice Collins recognised at paragraph 67 in the Court of Appeal. This is at CB 101.0027.

WINKELMANN CJ:

67 did you say?

MS BEVERWIJK:

Yes, it's paragraph 67 of this decision, which I'm sure will pop up any moment. 101.0027. it's probably sufficient for me just to read it: "Not all the principles that emerge from those cases are able to be grafted onto other situations in which a fiduciary relationship may exist, such as between a doctor and patient and where the fiduciary does not benefit financially or economically at the expense of the person to whom fiduciary duties are owed." That's, I understand the Chief Justice to be…

WINKELMANN CJ:

Shall we take the morning adjournment.

MS BEVERWIJK:

That's wonderful thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES:

(audio restarts at 11:51:13)… I noted Justice Collins' comments that not all these principles that we have can be grafted onto the situation that is before the Court today, whether fiduciary does not benefit financially or economically at the expense of the person to whom fiduciary duties are owed. So what does happen when we are faced with a case like this? How do we deal with these fiduciary relationships in a family context and what principles can be applied to identify whether a non-commercial fiduciary relationship exists?

So if we start prior to this case, New Zealand has seemed willing to accept that the relationship between parent and guardian and child is inherently fiduciary in nature without getting into too much further detail. That's referred to in our written submissions. Just by brief summary *S v G* [1995] 3 NZLR 681 (CA) at 601.0713. This was in respect of a free love community where a child was sexually abused. It was held in respect of the leader of the community his fiduciary position and that of the mother must be unquestionable. *H v R*, which

Ms Chambers took you to earlier at 601.0388, when the Court rejected a fiduciary relationship between a sexual abuse victim and an unrelated party. The professional relationship has been a fruitful source of the fiduciary duty. The position of parent and child would be another relatively obvious category so possibly might be close to family relationships such as step-parents. *B v R* (1996) 10 PRNZ 73 (HC), 601.003 –

WINKELMANN CJ:

So I don't think it's disputed that there is a fiduciary relationship in respect of a parent and a child, is there any authority which helps us understand the scope of that duty?

MS BEVERWIJK:

Not in New Zealand, no. So what we have in New Zealand is this blanket statement and acceptance and we further don't really have any authority in respect to adult children but it is the appellants' submission that we can turn to Canada.

WINKELMANN CJ:

So is that as to the content of the duty or not?

MS BEVERWIJK:

It is as to the content of the duty but it's my submission that these Canadian cases, when Canada first started thinking about recognising these non-commercial fiduciary relationships, there was real thought and deliberation and gradual exposition of the principles that justified that relationship and that starts with *Frame v Smith*, which I'm happy to turn to now, and it is my submission that by understanding how Canada imposed these relationships we can better understand the scope of inherent fiduciary duties beyond childhood or we can use it to justify a particular fiduciary relationship in this situation.

WINKELMANN CJ:

So *Frame v Smith* was about whether there was fiduciary obligation owed by one parent to allow access by the non-custodial parent, is that right?

MS BEVERWIJK:

That is correct so that is the Supreme Court of Canada. We can start at 601.0363. At the top of the page: “Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.”

Then we get to what we refer to as there's three indicia, guidelines, criteria: “Relationships in which a fiduciary relationship have been imposed seem to possess three general characteristics: (1)The fiduciary has scope for the exercise of some discretion or power. (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests. (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power” and it's that third criteria that is fundament to the appellants’ case.

Justice Wilson goes on to make a few comments which I will highlight. So just underneath there starting at (e): “Very little need be said about the first characteristic” which is the scope for the exercise of some discretion or power except that unless it's present “there is no need for a superadded obligation to restrict the damaging use of the discretion or power.” Then at (g) the second characteristic, the unilateral exercise: “It is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary … duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary’s vital non-legal or practical interests.”

Then finally just down onto page 601.0364 starting at (f): “The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of

other legal or practical remedies to redress the wrongful exercise of the discretion or power."

WINKELMANN CJ:

That's a very narrow formulation, isn't it, but you're content with it for these purposes? It's very narrow.

MS BEVERWIJK:

I mean I would be happy to hear a wider one but I'm conscious of –

WINKELMANN CJ:

Well *Chirnside v Fay*, you know, *Chirnside v Fay*.

MS BEVERWIJK:

Well yes *Chirnside v Fay* is, as we say, this umbrella test but it is my submission that this element of vulnerability is helpful in supporting that overarching *Chirnside v Fay* analysis because the ultimate question still remains, an entitlement to repose trust and confidence, but why is there that entitlement to repose trust and confidence and in part it's because of this vulnerability.

WINKELMANN CJ:

So and then this is, although Justice Wilson is dissenting, it's picked up in the later case by Justice La Forest and approved of as formulation?

MS BEVERWIJK:

Yes.

WINKELMANN CJ:

I'm still interested to hear what the content of the duty is?

MS BEVERWIJK:

Yes, well in that, I can get to that, I just might take you to just two more cases before I get to that.

WINKELMANN CJ:

All right.

MS BEVERWIJK:

Because there is the framework that I'm suggesting goes before the Court is how did Canada justify these non-commercial relationships and that vulnerability and then once they were settled because, of course, this was a minority possession for a while when it received that acceptance what then did the Court say was the appropriate standard.

1200

WINKELMANN CJ:

I'm just conscious of your limited time.

MS BEVERWIJK:

Of course.

WINKELMANN CJ:

We have read most of the authorities so we can move at speed I think.

MS BEVERWIJK:

Okay, we can move at speed, of course.

WILLIAMS J:

She does, Justice Wilson does suggest some riders, even though this is a strike-out application, doesn't she? For example you look to the behaviour of the non-custodial parent in that case to see whether there's any disenabling conduct.

MS BEVERWIJK:

Yes.

WILLIAMS J:

And you look to the needs of the child, because they're always paramount.

MS BEVERWIJK:

Yes.

WILLIAMS J:

That's kind of sensible, in fact it's in our statute. So doesn't it appear that the nature of the duty is driven by the facts.

MS BEVERWIJK:

Yes, and that would indeed be what equity says about all these duties.

WILLIAMS J:

Precisely.

MS BEVERWIJK:

So I suppose even when I turn to the content of the duty that Canada has accepted, that is in the background of all of our thoughts. That we can talk about the scope of the duty in each case on a case by case basis, but it will be moulded to –

WILLIAMS J:

What we really need help with is indicators, both as to the reach of the duty, i.e. the nature of the vulnerability that might extend it beyond majority, and the counter-indicators that one might look to. We don't need to be convinced about the existence of the duty.

MS BEVERWIJK:

That's a great start. The –

WILLIAMS J:

Well neither do your opponents so…

MS BEVERWIJK:

Sorry, what I'm trying to do, and perhaps not as successfully as I had hoped, was to say that Canada does provide some indicators about the continuing nature of that, because it's saying as long as there's three things in there, as

long as there is a power, there is an ability to unilaterally exercise that power, and the beneficiary is peculiarly vulnerable to the exercise of that power, as long as the vulnerability continues to exist at the hands of that fiduciary, the relationship does continue.

WILLIAMS J:
Mhm.

WINKELMANN CJ:
Well you'd have some trouble with meeting that on these facts, then, wouldn't you? So, anyway. The facts are for Ms Chambers.

MS BEVERWIJK:
Yes.

WINKELMANN CJ:
Because it's so narrowly framed. Anyway. Perhaps you can move on to the next case you want to take us to.

MS BEVERWIJK:
Okay, and I am mindful of the comments that the cases have been read so I will just briefly point out rather than read that *Norberg v Wynrib* [1992] 2 SCR 226 identified *Frame v Smith* in the minority, that's at 701.0641. 701.655 where Justice McLachlin said that the situation at issue in the present case is precisely one that is truly in need of the special protection that equity affords.

Ms Chambers already talked about *M (K) v M (H)* where the *Frame v Smith* test was accepted. So first Justice La Forest accepted it's intuitively apparent that the relationship between parent and child is fiduciary in nature. Goes on to consider *Frame v Smith* at 601.0680. "Even a cursory examination… establishes that a parent must owe fiduciary obligations to his or her child. Parents exercise great power over their children's lives and make daily decisions that effect their welfare. In this regard, the child is without doubt at the mercy of the parents." And at 0679: "… being a parent comprises a

unilateral undertaking that is fiduciary in nature. Equity then imposes a range of obligations coordinate with that undertaking."

WINKELMANN CJ:

Does it say what those obligations are?

MS BEVERWIJK:

Not yet. We're still in the minority here where the Judges are saying there has to be a way that this exists, and I think in – well, primarily because in those cases it's sexual abuse.

WINKELMANN CJ:

Yes. Which is a clear favouring your own interests over another.

MS BEVERWIJK:

Yes, and the Judges are pretty content to stop there and say, well I don't need to go any further on the scope of that.

WINKELMANN CJ:

Still in the category of proscriptive as opposed to prescriptive.

MS BEVERWIJK:

Yes. Now just briefly the respondents yesterday filed and served copies of the decision of the Ontario Court of Appeal in *Louie v Lastman* (2002) 164 OAC 161 (CA).

WINKELMANN CJ:

Which case sorry?

MS BEVERWIJK:

It's *Louie v Lastman*. Mr friend Mr Steele said he's got hard copies of that would be of assistance.

WINKELMANN CJ:

Well it might be actually, yes.

MS BEVERWIJK:

This was filed yesterday, so quite late in the piece, which maybe why it hasn't…

WINKELMANN CJ:

Made its way to the electronic document.

MS BEVERWIJK:

Sorry, yes, this was filed by the respondents.

ELLEN FRANCE J:

So is it in the electronic, do you know, just for Justice Glazebrook?

MS BEVERWIJK:

No. I don't understand the respondents have included it in the supplementary bundle.

WINKELMANN CJ:

Can we have it scanned through?

WILLIAMS J:

Yes it's in the respondents primary bundle. It's the last case.

MS BEVERWIJK:

Now in this case the adult children allege that their father, who they did not know was their father when they were children, and who had previously reached an agreement with their mother, without their knowledge, discharging him of any financial obligations to those children, had a fiduciary obligation to make adequate provision for their support, and it's my submission that this failure must have been in respect of when the children were minors, because it refers to inadequate housing, food, clothing, dental care and schooling. Now the vast majority of this judgment is to apply the majority of *Frame v Smith* which is really what the claim was seeking, was a delayed child support obligation, that this was covered by legislation, and this, of course, is not the case for the appellants because there is no legislative reprieve available to them, and they haven't had

any written submissions from the respondents on this, but if I was to hazard a guess it would be that they will take you to paragraph 29, being the obiter of the Court of Appeal judge, where he said there was no fiduciary obligations because the errant Mayor of Toronto at no time acted, or was called up on to act as a parent, didn't assume power and control, and nor did he dominate or influence their upbringing. Because of the decision of their mother to take that financial payment he had no scope for the exercise of discretion or power over the day-to-day lives of the appellants.

WINKELMANN CJ:

I doubt that they're going to be referring us to that paragraph but…

MR BERNHARDT:

For the reasons of Justice Collins the appellants just say this case isn't relevant. It's not the same facts in what is a distinctly fact-based enquiry, and that Robert was a part in his children's lives and, in fact, had a disproportionate impact on their entire lives, given his actions and the power and control he continued to exercise over them, even in his physical absence of contact.

WINKELMANN CJ:

So in your authorities the last one you've taken us to is *M (K) v M (H)*, I think, is that right?

MS BEVERWIJK:

Yes, yes.

WINKELMANN CJ:

So what's the next case you want to take us to?

MS BEVERWIJK:

Well I'm going to get to the cases about the duty.

WINKELMANN CJ:

So far as you know *Louie* – well, there are no cases then, because you say *Louie v Lastman* is *not* a case about extending the duty into adulthood?

MS BEVERWIJK:

Yes, that's correct. But it is, of course, my submission that even in the cases where we've accepted that they exist, it helps us ground that analysis of how we can continue into adulthood.

1210

Okay so the – there was two companions judgments of the Canadian Supreme Court. The first one is *KLB v British Columbia*, and that's – if we could please go Mr Phillips to 601.0474. Yes. So in this case there was a suggestion that the content of the duty which the Court accepted that there was a fiduciary relationship and they considered the content of the duty, and the suggestion it was just "to act in the best interests of the child". The judgment goes on to say basically, no, it is not. You will see there: "A simple injunction to act in the best interests of the child, however laudable, does not provide a workable basis for assigning legal liability. It simply does not provide a legal or justiciable standard."

But of course, by this time, the courts had accepted that this is a fiduciary relationship that does warrant the protection of equity, and so it is going to mould the content of that duty to be able to respond to the protection of these human, fundamental interests that deserve protection. So if we scroll down please, Mr Phillips.

WINKELMANN CJ:

At 48, isn't it? Paragraph 48.

MS BEVERWIJK:

Yes. "What then is the content of the parental fiduciary duty?" Which is of course the Chief Justice's main question. "This question returns us to the cases and the wrong at the heard of breaches of this duty. The traditional focus" is

on “brief of trust with…emphasis on disloyalty and promotion of one’s own or others’ interests at the expense of the beneficiaries. Parents stand in a relationship of trust and owe fiduciary duties to their children. But the unique focus on the parental fiduciary duty, as distinguished from other duties imposed on them…is a breach of trust.”

WINKELMANN CJ:

The next paragraph down is helpful.

MS BEVERWIJK:

Yes, so if you could scroll down please Mr Phillips. “I have said that concern for the best interests of the child informs the parental fiduciary relationship…but the duty imposed is to act loyally and not put one’s own or others’ interests ahead of the child’s in a manner that abuses the child’s trust. This explains the cases referred to above.” So we’ve got an example of “undue influence”, for “economic matters”, for a parent’s “own gain has put his interests ahead of the child’s, in a manner that abuses the child’s trust in him. They same may be said” for a “parent who uses a child for…sexual gratification, or a parent who…turns a blind eye.” The same. There is no need for a conscious motivation “by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party… It is a question of disloyalty of putting someone’s interests ahead of the child’s in a manner that abuses the child’s trust.”

Now, it is my submission that this still fits within *Chirnside v Fay*. It is loyalty in respect of the trust that has been reposed in that other party.

Then the companion judgment was *EDG v Hammer* 2003 SCC 52, [2003] 2 SCR 459, and if we could go to 601.0193.

WINKELMANN CJ:

This is about a night janitor at a school?

MS BEVERWIJK:

Yes.

WINKELMANN CJ:

Sexually abusing a student?

MS BEVERWIJK:

Yes.

WINKELMANN CJ:

What paragraph are we looking at?

MS BEVERWIJK:

So we're looking at 23. So the Judge says there: "For the reasons discussed in *KLB*", so as I say these are companion judgments, so it is my submission that they should be read together, "the…assertion of a broad fiduciary duty to act in the best interests of the child must be rejected." That "maxim…may help to justify particular fiduciary duties, but it does not constitute a basis for liability. These cases…focus not on achieving what's in the child's best interest, but on specific conduct that causes harm to a child in a manner involving disloyalty, self-interest or abuse of power – failing to act selflessly in the interests of the child."

Now, it is my submission that we read in, given these are companion judgments in a manner that abuses their trust. That was the main theme of *KLB*.

"This approach is well grounded in policy and common sense. Parents may have limited resources and face many demands, rendering it unrealistic to act in each child's best interest", and it's often unclear what those "'best' interests are, the idea" just "does not provide a justiciable standard." "The objective of promoting the best interests of the child", stated generally and absolutely, "overshoots those concerns that are central", being loyalty and to avoid "conflict of duty and interest and a duty not to profit at the expense of the beneficiary." Again, in this context, it is in a manner that abuses the child's trust.

If we could just go down again, Mr Phillips. This is great. Now, I'm just part way through that paragraph at 471: "Fiduciary obligations are not obligations to guarantee a certain outcome for the vulnerable party, regardless of fault. They do not hold the fiduciary to a certain type of outcome, exposing the fiduciary to liability", in this case "whenever the vulnerable party is harmed by one of the…employees", because the Board was being sued for breach of duty in respect of their employee's actions. "They hold the fiduciary to a certain type of conduct." That is our submission on the content of the duty as developed by the Supreme Court of Canada.

WINKELMANN CJ:

Which seems to be a little bit – well, that's again for Ms Chambers.

MS BEVERWIJK:

Now I'm mindful of, I don't think it will particularly assist the Court if I take you through any more of those Canadian decisions, and so unless the Court has any further questions that concludes my submissions.

WINKELMANN CJ:

Thank you very – thank you.

1220

MS CHAMBERS KC:

So this part of the submissions is applying that – those principles and suggested indicia to this case. On the ultimate question, well the first question is, was Robert in a fiduciary relationship when he disposed of his assets? As we've heard, it's pretty clear that it settled, that his young children there's an inherent fiduciary duty. As adults, as you know, the argument is that in some cases a continuation of that inherent fiduciary duty can continue into adulthood and this is one, or in the alternative it can be a particular fiduciary relationship on a case by case basis between adult, parent – between adult, child and parent.

So turning to the inherent option 1 of fiduciary relationship, we can start with the fact that, as we've been discussing, it seems to be accepted that it's inherent, although there's no analysis of it. I do want to though take you to briefly what some of the Judges have said earlier as to when it stops and they've all said slightly different things. Now in the High Court, Justice Gwyn at 101.120 –

WILLIAMS J:
What's your paragraph, 106?

MS CHAMBERS KC:
Paragraph 107. She accepted that there was a fiduciary relationship while they were children inherent, but she didn't consider that they extended as far as they asserted and the duty – and she gave that that was the content of the duty when they were children. In the Court of Appeal at 101.30 Justice Collins accepted at paragraph 78 that there was an inherent fiduciary duty.

WINKELMANN CJ:
What paragraph sorry?

MS CHAMBERS KC:
Sorry, it should be more at 79. He appears at least to have accepted that inherent when they're children, but his Honour went further and said it could continue into adulthood and he gave the example of the severely disabled child and –

WINKELMANN CJ:
What paragraph, is it in his…

MS CHAMBERS KC:
79.

WINKELMANN CJ:
79, yes, okay. I see what's happened with my judgment.

MS CHAMBERS KC:

And he says: "It is my view, however, that in some circumstances, the inherently fiduciary relationship between a parent and a child may continue after a child becomes an adult. For example, it could not be disputed that a severely disabled child who is dependent upon their parents for care and support as a child may continue to be the beneficiary of an inherently fiduciary relationship after the child becomes an adult. Such cases are best thought of as instances of a continuous relationship that is inherently fiduciary."

And then President Kós also agreed with Justice Collins, and this is at page 101.0050, that it was inherently fiduciary at paragraph 153 and he says that that continued at least for so long as the parent undertakes the care of the child and I think he goes on to say at 1055 his Honour says, he uses the test of when the responsibilities of parental care ended.

WINKELMANN CJ:

Is it in a paragraph number?

MS CHAMBERS KC:

166, at the top of page 55, and you'll see, your Honour, while we're there that there is another formulation of the content of the duty by his Honour which we would also adopt. It's very similar to what we're arguing for: "The duty here was to refrain from acts that fundamentally violated the relationship of trust inherent in a parent-child relationship" and the appellants are perfectly happy with that content of the duty too for this case.

Now you may have noticed that Justice Gilbert didn't really accept that it was inherently fiduciary even for young children and that's at 136: "I make no comment on whether this is a correct statement of the law in New Zealand." So we've still got that sitting there from the Court of Appeal. His Honour didn't accept it but it hasn't –

WINKELMANN CJ:

Well he didn't make a finding on it?

MS CHAMBERS KC:

No. Well…

WINKELMANN CJ:

He makes no comment?

MS CHAMBERS KC:

No.

WINKELMANN CJ:

Okay.

MS CHAMBERS KC:

And this principle has been accepted by the respondent so the issue becomes when does it end, and the appellants' submission is that the inherently fiduciary relationship can only come to an end when the particular peculiarly – the particular vulnerability that the exercise of discretional power ends and that's when there is no longer an entitlement to repose trust and confidence.

WINKELMANN CJ:

You'll have to just wait while Justice Glazebrook is reconnected.

MS CHAMBERS KC:

Certainly.

WINKELMANN CJ:

But I have a question for you. You're back. Can you hear us Justice Glazebrook?

GLAZEBROOK J:

Yes, sorry, you did realise I'd gone. I've just –

WINKELMANN CJ:

Yes, we did. We paused while you – nothing has happened in your absence. So the question I had for you was you say that the inherent fiduciary relationship

can only come to an end when the relationship of trust and confidence, when trust and confidence is no longer reposed, is that what you said?

MS CHAMBERS KC:

No, it's when the vulnerability to the fiduciary relationship to exercise their powers end that this trust and confidence does too, and the fiduciary relationship comes to an end. That is –

WINKELMANN CJ:

Okay, so –

MS CHAMBERS KC:

That is at paragraph 46 of our written submissions which discusses this very issue.

WINKELMANN CJ:

So it must change – the basis of that vulnerability when they're children is that they are children?

MS CHAMBERS KC:

Yes.

WINKELMANN CJ:

So it must change?

MS CHAMBERS KC:

Yes, and in most adult-parent relationships it won't exist but here it did, a peculiar vulnerability.

WINKELMANN CJ:

So the existing – so the nature of the fiduciary relationship changed because at one point it was based upon their vulnerability as children and then at a certain point, and because he was actually in, he was a parent in the household doing the terrible things that he did, at a certain point he leaves home and they are grown up, they grow up, so the basis of the vulnerability changes at some point?

MS CHAMBERS KC:

Yes.

WINKELMANN CJ:

And it changes –

MS CHAMBERS KC:

Well, I mean if you look at our indicia the nature of his discretion and power changes too because, you know, I mean that's – if you go through the indicia it does work out. Does he have scope for exercise of some discretional power? Yes, he does. And what is it? It is dealing with his estate.

1230

WILLIAMS J:

Well if you back up, when the children are adults what is their vulnerability, how can this person be disloyal accepting that acting in the best interests even of an actual child is not an obligation, you've got to grapple with exactly what vulnerability you're dealing with and then scribe your duty. Can you help me with that?

MS CHAMBERS KC:

Right. Well I go back to the facts and the facts that those key points that I made this morning that Robert knew that particularly Alice was vulnerable, he knew of her financial –

WILLIAMS J:

No, tell me about the vulnerability that rendered her at his mercy in fiduciary terms?

WINKELMANN CJ:

Yes, because it's not vulnerability per se, it's vulnerability to abuse of the power by the fiduciary.

WILLIAMS J:

That's right, it's relevant vulnerability.

MS CHAMBERS KC:

It's the evidence about her expectation that the estate would address some of these issues and –

WILLIAMS J:

But most –

MS CHAMBERS KC:

Hang on. But remember –

WILLIAMS J:

Sorry, no back up, back up. I'm not talking about after he's dead, I'm talking about during his lifetime and she's an adult, what's her vulnerability?

MS CHAMBERS KC:

Her vulnerability is that she's living in a car, she can't maintain a job, she's got no house, she's been a solo mother, she's been on benefits, she suffers from depression, she can't keep a job down.

WILLIAMS J:

Okay, I get the biographical narrative. Now tell me about the legal vulnerability?

MS CHAMBERS KC:

The legal vulnerability was that – the particular vulnerability was that she had – she was in a very poor financial and emotional position as a result of his conduct and he knew it and his immediate reaction, his reaction when he's told about it is, I will leave her a house as is what he does.

WINKELMANN CJ:

Yes, but the problem with that analysis is that the essence of – a fiduciary relationship, as we know from law of Justice Millett and also from the Canadian cases, arises because the person is vulnerable to the fiduciary. So how is she

vulnerable to – how is she exposed to Robert exercising his power over her in a way because that's really the essence of fiduciary relationship. There is actually a relationship that requires certain conduct. So she's certainly a vulnerable person because of his conduct but is she in an ongoing way vulnerable to him abusing his power?

MS CHAMBERS KC:

Yes, because she had a legitimate expectation that he would not effectively remove all his assets from any ability to claim against his estate and she's given evidence that she expected to be recognised in his Will and so did the other children and I took you to all that evidence. So she had a legitimate expectation, she was vulnerable if he exercised that power to adversely affect her interest which is exactly what he did.

WILLIAMS J:

Isn't every child in that position?

MS CHAMBERS KC:

No, because if you – because she was – it's because of that peculiarly vulnerable position that she was in, I mean not every child is living in a car because the – I'm getting handed something – because as a result of being a survivor of childhood incest.

WILLIAMS J:

Yes, so I'm trying to get you past the potential accusation against you which is the dad was mean, give her something, which sounds just, as Ms Bruton calls "sounds ticker" but in terms of the test, for this test to work, not just in this case but in lots of other cases, for the dividing line to be clear we have to know what was the father's power over his adult children, how did he abuse that power in a manner which was disloyal or in breach of the relationship that arises? So, first of all you've got to tell me what was his power over her –

MS CHAMBERS KC:

To deal with –

WILLIAMS J:

– that was distinctive in this case as opposed to other adult children, and what did he do in breach of it?

MS CHAMBERS KC:

No – yes, okay. Well, your Honour, I would – it's just the distinctive in regard to other cases. I don't think that's necessary.

GLAZEBROOK J:

Can I perhaps put another possibility here, which is that what you have is a breach of fiduciary duty that happened in childhood that has not been remedied and an argument that there is a continued obligation to remedy it and by putting the assets out of his power to do that he's further breached the requirement to remedy?

WINKELMANN CJ:

Which is –

GLAZEBROOK J:

There's a various other possible formulation which is a formulation that you can't use a Trust to effectively have equitable fraud. Inequitable fraud would include putting yourself in a position where there can be no family protection claim. Issue there is whether you actually need a statutory provision for that or whether equity would have done that absent those statutory provisions that we have in the Insolvency Act and the Relationship Property Act. Now, there are two different ways of formulating there but it just putting those on the table for your benefit but also for the others to think about.

WINKELMANN CJ:

I think it is that sort of wrapping on the theme that Ms Bruton has brought up too in her submissions.

MS CHAMBERS KC:

Yes.

WINKELMANN CJ:

Which is that – but just going back to Justice Williams' question, I suppose the first – the thing that I've asked you and he's asked you but I don't think you've answered is that it is not vulnerability per se that the cases are talking about. They are talking about vulnerability to the particular person such as to give rise to this obligation of trust and confidence and particular kinds of conduct. Given that they are at a distance and there is no caregiving relationship there is no approximate conduct. It is hard to formulate it in this way, in a conventional fiduciary sense, even the extended fiduciary sense that is discussed in the Canadian cases because they are all dependent upon the vulnerability to the – the immediate vulnerability to the fiduciary's actions toward the recipient.

MS CHAMBERS KC:

Well, we – if we start with Alice and how the Court of Appeal described her position, so if we go to 101.34.

WINKELMANN CJ:

Can you give us a paragraph number?

MS CHAMBERS KC:

Certainly, 96.

WINKELMANN CJ:

Thanks.

MS CHAMBERS KC:

So it's Justice Collins. He says: "For Alice to have any semblance of a normal and independent life, she required economic and emotional support from Robert. I am satisfied that, when assessed objectively, Alice was entitled to expect Robert to atone for his abuse and to provide her with the economic and emotional support that she needed to live a normal and independent life, including by providing for Alice in his Will. Robert's egregious abuses of the trust and confidence that Alice was entitled to have to her father to 'do the right

thing' were compounded when Robert deliberately chose to deprive Alice of any meaningful claim against his estate."

WINKELMANN CJ:

Okay so that's the answer to that question. When you look at *EDG v Hammer* you'll see that the formulation by the Chief Justice is as follows: "Fiduciary obligations are not obligations to guarantee a certain outcome for the vulnerable party, regardless of fault. They do not hold the fiduciary to a certain type of outcome, exposing the fiduciary to liability whenever the vulnerable party Is harmed by one of the fiduciary's employees." That was the night janitor case. 1240

It does seem to me that the fiduciary duty that you are seeking to formulate is one which obliges Robert to make good the harm he's done in the past to provide the support, which is more than the law would impose by way of fiduciary duty on parents, because the parent's fiduciary duty is not outcome based. So that's the second concern I have.

MS CHAMBERS KC:

So I really need to jump to content of the duty then, is that what you're saying, your Honour?

WINKELMANN CJ:

Yes. So the first concern I had is whether or not there is fiduciary – there is a relationship giving rise to fiduciary duty, and then yes, even if you get to that, what's the content of the duty?

MS CHAMBERS KC:

Okay.

WINKELMANN CJ:

So right.

MS CHAMBERS KC:

If we jump back again to content of the duty, if your Honours look at the written submissions of the appellant's. The – I took you to 32 of the written submissions and that duty to "act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust" is of course effectively based on *KLB v British Columbia* which was an abuse of trust case, and that one is very similar to President Kós' in the Court of Appeal which you will recall is at 161 of the judgment.

WINKELMANN CJ:

Mmm.

MS CHAMBERS KC:

Either, perfectly acceptable to the appellant, very similar. Then at 106 the appellant's written submissions there's a broader version which is based on *M (K) v M (H)* and it is that: "An obligation to refrain from acts that would cause harm to Alice, Barry and Cliff in a manner involving disloyalty, self-interest or an abuse of power in relation to the exercise of that discretion or power."

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

WINKELMANN CJ:

What para –

WILLIAMS J:

You see, the harm is not that. The harm is what creates the vulnerability. You've got to be arguing for a duty to repair.

MS CHAMBERS KC:

Well I'm happy to do that too, it's – happy to address it that way if you prefer.

WILLIAMS J:

Well that's a different thing you see. That's one, that's prescriptive.

MS CHAMBERS KC:

Yes.

WILLIAMS J:

Maybe that's necessary.

MS CHAMBERS KC:

Well –

WILLIAMS J:

Two, you've got to work out what the scope of that is because that gets you close to those Canadian authorities that say best interest is not an obligation, even for children.

MS CHAMBERS KC:

That's right, yes. Well as we've drafted it, it's prescriptive obviously.

WILLIAMS J:

Yes, but the harm is not the practical harm. The causative harm is the creation of the vulnerability in childhood, not the transfer of the assets.

MS CHAMBERS KC:

Well, except – well you see, that's where we differ. So I, and I think that if you do the analysis in the way that the appellants argue for, then you can say that this is a separate duty, which was really underlying that –

WINKELMANN CJ:

You say it's a further harm?

MS CHAMBERS KC:

Yes, I do.

WINKELMANN CJ:

But those harms must have been going on all the time he wasn't doing all those things, so he's been constantly committing that harm when he's failed to do anything to support his children?

MS CHAMBERS KC:

No, because the way we've drafted it is prescriptive. He shall not actively harm the children's interests, which he knew existed in circumstances where he owed them and recognised that there was a, the Family Protection Act sitting there, and he said "I'm going to take steps to avoid it". He knew he owed them duties and he knew the Family Protection Act was there. He recognised that and he said "I'm going to avoid it". So it's the deliberateness along with the recorded purpose.

GLAZEBROOK J:

Can you explain then why anybody who deliberately tries to avoid the Family Protection Act becomes a fiduciary?

MS CHAMBERS KC:

Well we would say that you work your way through the criteria of *Frame v Smith* and in particular the need for the peculiar vulnerability, and here, and I accept your Honour's point, you could say well all children are vulnerable to parents when they come to their discretion to make a Will. But here we meet the, the appellants meet the criteria of *Frame v Smith* in that they've got a peculiar vulnerability. At least we hope it's peculiar, we hope most children haven't gone through this, and that it was caused by Robert.

GLAZEBROOK J:

Well but why is it, can I just check why it's a peculiar vulnerability because to succeed in a family protection claim as an adult, you probably do have to be vulnerable in some manner, because otherwise you're unlikely to succeed in a claim, are you?

MS CHAMBERS KC:

No, that's not right. There's the recognition of family position. You automatically get 10 per cent basically, in rough terms. It's what the law says at the moment. Adult children get a recognition award. I take your Honour's point in that clearly these children would have a strong Family Protection Act claim because of the abuse and their circumstances. But you don't have to be peculiarly vulnerable. Sorry, you don't –

GLAZEBROOK J:

Sorry, I'm really trying to work out what peculiar vulnerability means in these circumstances. I can understand a peculiar vulnerability that arises from the actions of the fiduciary but were breached during childhood. But if they're peculiarly vulnerable for some other reason, a car accident that happened in adulthood for instance.

MS CHAMBERS KC:

Yes, the –

GLAZEBROOK J:

I'm really trying to work out exactly where you say this duty arises to adult children. It's the same question that's been asked you by the other judges, as I apprehend.

MS CHAMBERS KC:

Yes. Because they had the continuing effects, particularly Alice, of being a sexual abuse incest victim, and the evidence is clear about that, that is the peculiar vulnerability.

1250

WILLIAMS J:

How about this. According to the evidence anyway, the father said to the brother that he'd provide to them on death in particular the house for the daughter. is that right?

MS CHAMBERS KC:

Yes.

WILLIAMS J:

So he's saying at that point I accept an obligation, taihoa, you'll get it out of the estate. Is your argument really that equity, given the ongoing vulnerability from childhood, and his acceptance of a responsibility as fiduciary to make good on the damage done, equity will not allow him to go back on that?

MS CHAMBERS KC:

Yes Sir.

WINKELMANN CJ:

A testamentary promises claim.

MS CHAMBERS KC:

No services rendered. Mmm.

WILLIAMS J:

I'm just looking for a formulation here.

WINKELMANN CJ:

Not quite, but that's the vibe of it.

MS CHAMBERS KC:

Mmm.

ELLEN FRANCE J:

I'm just struggling to understand how that is a vulnerability to the wrongful exercise of the power.

WINKELMANN CJ:

Because the vulnerable of the wrongful exercise of the power in traditional fiduciary law, including all the Canadian cases, actually arises from the relationship.

WILLIAMS J:

Well it might argue, you may argue, there you go Lady Chambers, you may argue that the vulnerable arises from the fact of the nature of the relationships and trauma making it extraordinarily difficult for these individuals to hold into account in his lifetime.

MS CHAMBERS KC:

Yes Sir.

WILLIAMS J:

So you're starting to approach incapacitation sorts of arguments in limitations and laches terms, but there is a flavour of that here.

MS CHAMBERS KC:

Well our argument is Justice Gwyn was right, that the abuse did render them vulnerable and at his mercy, and Justice Collins' formula was the same thing. Alice was peculiarly vulnerable and at the mercy of Robert to atone for his offending. That's at 102 of the Court of Appeal decision.

WILLIAMS J:

I think the argument is it's pretty tough on the principals in a fiduciary relationship who have been promised that if they wait all will come well to them, to then punish them for having believed the promise.

MS CHAMBERS KC:

Yes. Agreed.

O'REGAN J:

Does it make any difference in your analysis whether this is a continuation of the inherent childhood duty or a new one that arises at the time of his disposition to the Trust?

MS CHAMBERS KC:

No.

O'REGAN J:

You say that the content is the same either way?

MS CHAMBERS KC:

Yes.

WINKELMANN CJ:

So Ms Chambers, who is going to deal with the whole point about how we get to what's effectively a proprietary remedy?

MS CHAMBERS KC:

I was going to address that your Honour. I'll just check my notes to make sure I've said everything I need to say on the application of *Frame v Smith* but I think we're moving at a faster pace than that, than what I needed to.

WINKELMANN CJ:

So Mr Hikaka is going to address what?

MS CHAMBERS KC:

I said I'm going to address remedy.

WINKELMANN CJ:

Sorry, what is he addressing? I'm just trying to follow the split up of the roles.

MS CHAMBERS KC:

He is addressing in the submissions, submission 2.

WINKELMANN CJ:

Okay.

MS CHAMBERS KC:

Effectively.

WINKELMANN CJ:

Common law should extend fiduciary duty in these circumstances. Right.

MS CHAMBERS KC:

Would it be helpful before I finally go on to remedies to go through the application of *Frame v Smith* in regard to establishing a particular fiduciary relationship or do you feel as though –

WINKELMANN CJ:

I think that'd be helpful.

MS CHAMBERS KC:

It would be helpful? Okay. So the first criteria and this is obviously – this one's obviously on a case by case basis is that the fiduciary has scope for the exercise of some discretion or power, and you've heard from Ms Beverwijk that both *Frame* and *M (K) v M (H)* establish that it does not need to be narrowly defined, the power of the discretion, and that it does not need to be held on behalf of the beneficiary. That, again, is *Frame* and *M (K)*. It is more akin to capacity to effect someone's interests.

So if we look at the judgments so far we have the High Court, Justice Gwyn, accepting, and this is at 101.0131 at 149, that the power in the this context is more broad than a property right, and the exercise of the "right to alienate his house and shares" was the exercise of a power or discretion. "'His unilateral exercise of that discretion or power had the potential to and did affect the plaintiffs' interests. Indeed, the evidence indicates that it was intended to do just that.'"

Now, Justice Collins in the Court of Appeal at 101.33, paragraph 86: "However, when he decided to transfer his principal assets to the Trust in late 2014, Robert was, in part, exercising his powers so as to frustrate any claims his children might have under the Family Protection Act. To this extent Robert was deliberately exercising his discretion so as to adversely affect the interests of Alice, Barry and Cliff. Robert was effectively depriving his children of any meaningful opportunity to have the courts determine their rights under the Family Protection Act."

Now, Justice Gilbert is at 141 of the judgment, which is pages 101.46-47, and at paragraph 141 and 142 he holds that: "A 'power or discretion' in this context is…one conferred on or held by the fiduciary for the benefit of the beneficiary." Basically, it was not his property – sorry, it was his property, and he had no obligations as he did not hold his assets on behalf of his children. At 144 he says basically that: "Robert was not entrusted to exercise a power on behalf of the respondents with respect to his assets."
1300

The appellant's submission on Justice Gilbert's approach is that it's overly narrow. If we accept that there can be non-commercial fiduciary relationship then the power does not need to be held for the benefit of the beneficiary. The fact that it can be exercised in a damaging manner is enough.

WINKELMANN CJ:
Well –

MS CHAMBERS KC:
That's consistent with the Canadian courts.

WINKELMANN CJ:
Is that so? Because doesn't – don't the Canadian cases really say that the nature of the relationship tells you which powers and discretions have to be exercised in a fiduciary manner? You can see that in a doctor/patient relationship, you can see that in a parent-child relationship, and they are all

cases dealing with quite an obvious exercise of a power of discretion that seem to flow quite naturally out of the relationship.

MS CHAMBERS KC:

Both *Frame* and *M (K) v M (H)* held that it didn't need to be held on behalf of the beneficiary, and they held that quite explicitly. So, if you were adopting their approach then it is my submission that that is also appropriate, that it doesn't have to be held for their benefit. And the broader one that it's – that as long as it's exercised in a damaging manner that that should be enough is more appropriate to non-commercial relationships because it's far less likely to have been, obviously conferred by contract or agreement in a family situation.

WINKELMANN CJ:

Right, so it's 1.02. Do you think we should take the break now, Ms Chambers?

MS CHAMBERS KC:

Oh, certainly, your Honour.

WINKELMANN CJ:

What do we – how are we going in terms of progress? Because I take it you're coming onto remedies, or are you going to do remedies after Mr Hikaka?

MS CHAMBERS KC:

I'm going, I'm coming onto remedies.

WINKELMANN CJ:

Okay. And –

MS CHAMBERS KC:

I think I'm another maybe 10, 15 minutes, then Mr Hikaka and then we're finished, so I think we're going fine for time now.

WINKELMANN CJ:

Okay, so you'll be finished by 3, you're confident?

MS CHAMBERS KC:

Yes.

WINKELMANN CJ:

Right, okay. We'll take the adjournment.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.15 PM

MS CHAMBERS KC:

May it please your Honours. We were at the point of the second leg of *Frame v Smith* which is that the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiaries' legal or practical interests and, as you know, the appellants' position from the Canadian cases is that this only needs to be linked to the power insofar as the power or discretion can be used to affect the beneficiary in a damaging way. That's all that's required and practical interests are just as worthy as legal.

So Justice Gwyn on this point is at 101.137 of the case on appeal at paragraphs 173 and 174 and to some extent, your Honour Justice Williams, her Honour addresses some of the points you've been raising with counsel at 173. The only way, this is last card point that I made this morning, that he could have addressed the vulnerability he created was by providing for them financially and in that way acknowledging them and therefore he had "a duty to recognise them as members of his family and to provide for them from his wealth, due to the vulnerability his earlier breach of fiduciary duties had caused them" and then she makes a comment about it being deliberate.

And then Justice Collins in the Court of Appeal at paragraph 86 is of the view that the interest was their Family Protection Act and that is rights and all claims. At 101.33 he was "exercising his powers so as to frustrate any claims his children might have under the Family Protection Act."

WINKELMANN CJ:

Sorry what paragraph is it in –

O'REGAN J:

86.

WINKELMANN CJ:

86.

MS CHAMBERS KC:

Which is the point Justice France was raising this morning and "Robert was effectively depriving his children of any meaningful opportunity to have the courts determine their rights under the Family Protection Act." I actually think it goes further than that because if the transfer to Trust was valid it wasn't just his estate either, was it? He put himself in a position where he could never address the children's economic status as a result of his abuse because they weren't beneficiaries. So if they had tried to end that vulnerability by going to their father and saying: "Listen, Dad, you've behaved appallingly, you need to help me get a house at least to make up for this" he couldn't have done it. So he put himself in a position where he could never address the effect on the children economically at least or certainly economically.

1420

Now Justice Gilbert says that – I haven't got the paragraph reference – he held – I'm sorry I haven't noted the paragraph reference – but basically the legal or practical interest must link to the fiduciary power, that the interest was economic, the enhance –

WINKELMANN CJ:

What paragraph is that?

MS CHAMBERS KC:

Well…

WINKELMANN CJ:

You don't know?

MS CHAMBERS KC:

I've forgotten to note it down, your Honour. Do you want me to try and find it?

O'REGAN J:

It's 143.

MS CHAMBERS KC:

Thank you, your Honour. "The legal or practical interest at issue must link to the fiduciary power. It is therefore necessary to identify the purpose for which the power was conferred… There was an economic interest – the enhancement of the value of a moral claim…" well it wasn't just enhancement "that would be realised by Robert retaining all his assets to maximise the value of his estate. However, when Robert dealt with his own assets, he was not exercising a power conferred for the purpose of protecting or furthering the respondents' interests generally, let alone for the purpose of facilitating claims they might make against his estate for breach of his moral duty."

Our submission again is too narrow. Non-commercial fiduciary duties recognise the protection of fundamental human interests, including the practical interest in receiving provision from their father's estate, and Robert deliberately went out to defeat those interests, as I set out in the background facts this morning.

And finally, the third hurdle, the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretional power and we know that the fact that the power of discretion could be used to affect the beneficiary in a damaging way makes the imposition of the fiduciary duty necessary and that's what we mean by vulnerable, capable of being damaged and having no other way to hold account. And I have already taken you to their Honours' views about that, with both Justices Gwyn and Collins talking about the abuse, rendering them vulnerable, so this is where the abuse does come in, and the

need for the atonement, the need for Robert to atone for his offending making them particularly vulnerable.

Now Justice Gilbert says well Alice's vulnerability was not to an abuse of fiduciary power, she was only vulnerable because of her, and this is at paragraph 145 "freely informed decision not to pursue any remedy against him until after his death" and that's at 101.48. We say in answer to that well first of all it's pretty gross to describe it as a freely informed decision and there isn't really and there hasn't been a practical remedy in regard to these cases anyway in New Zealand law. The grime reality is they cost so much to bring, the damages are so small, the emotional effect of bringing it and we say, as you know, that Alice in particular remained peculiarly vulnerable. And I'm going to have another crack at this because I don't give up. So we say she was peculiarly vulnerable to Robert and that vulnerability was that if he chose to he could deny them any ability to restore themselves and end the vulnerability he inflicted, and he's the only one that can remedy that wrong. No one else can.

WILLIAMS J:
Why?

MS CHAMBERS KC:
Because by, and it's a tikanga concept as well, as the wrongdoer, if he had allowed, if he'd allowed them the chance to – if he'd provided for them in his estate, if he'd allowed them the ability to claim, that would be a restoration of his position. Restoration of that relationship because it was that – that because it was – it was really effectively the atonement and the balancing of the wrong, had to come from the wrongdoer.

WILLIAMS J:
It's difficult in a practical sense to conclude that he was the only path back because of course there's a whole statutory apparatus for abuse victims, which provides an alternative, and potentially very valuable, path back.

MS CHAMBERS KC:

Through the FPA?

WILLIAMS J:

No, through the – you're talking about them restoring themselves?

MS CHAMBERS KC:

Yes.

WILLIAMS J:

Removing the vulnerability, the trauma et cetera.

MS CHAMBERS KC:

Oh, you're talking about ACC?

WILLIAMS J:

Yes. There is a pathway to healing that need not involve him. They were not peculiarly vulnerable to his power because it was the only power to grant a pathway back.

MS CHAMBERS KC:

Well, your Honour, my answer to that is we know Alice went to ACC. We know she got paid the $10,000 and the counselling. But that doesn't fully restore because, you know, one of the things she talks about in her evidence, and they all do, is the lack of acknowledgement by Robert. The failure to say I'm sorry. The failure to say I need to fix this wrong because I did it. It's that lack of acknowledgement that they talk about throughout their evidence, and then of course even worse not even does he not say it to them, he deliberately takes steps to rub their noses in it through putting everything into a trust. So I think there's an element of fixing the wrong that can only come from Robert.

So – and the other way to answer Justice Gilbert's issues is to go back effectively, just to *Chirnside*, and those broad umbrellas, and those, and do a

cross-check as well, and in that regard I want to finally refer you to 601.576 of the casebook.

WINKELMANN CJ:

Are we going to this? Sorry, what are we going to?

1430

MS CHAMBERS KC:

601.576, and this is *LAC Minerals*, and it's La Forest, and you'll see that he quotes Professor Finn in "The Fiduciary Principle". The what must be shown. And that quote is put in a large number of judgments in this area. For example, Justice Gault quotes it in the claim in *MacLean v Arklow* which is in my learned friend's casebook. It's a well-known quote. It is in accordance with the broad discretion under *Chirnside*, and it brings us back to where we started with our cross-check, which is the children were entitled to repose trust and confidence that Robert, when turning his mind to his Will, and his estate planning, would not act contrary to their interests. So our argument has been to try and fit the circumstances of this case within the existing framework in a way that is coherent and consistent.

But if the Court considers that framework, and I'm talking particularly about *Frame v Smith*, isn't the answer, then we say that broad umbrella still responds in equity under *Chirnside*, and those broad principles that Professor Finn is talking about, and are so well accepted. But there maybe other ways equity can respond to this, and your Honours have been suggesting other ways, none of which I refute. But if equity isn't flexible enough to respond to this wrong then, in my submission, there's a real problem with the way we're applying equitable concepts in New Zealand.

Now as it turns out your Honours, Mr Hikaka is going to address you now, but also on remedy, and I might just say that he may go over my absolute assurance to the Chief Justice that we'd be finished at 3 o'clock, which I gave without talking to him. As your Honours please.

MR HIKAKA:

Tēnā koutou e ngā Kaiwhakawā. My role today is to address the Court on why having regard to the common law method and the appropriate approach to developing the common law –

ELLEN FRANCE J:

Sorry, we've lost…

WINKELMANN CJ:

Right, go ahead Mr Hikaka.

MR HIKAKA:

And the appropriate way to develop the common law as set out by this Court in *Ellis v R*, the appropriate way for the common law to develop is to do so by recognising this claim. Also it turns out my role is also to address your Honours on the remedy, so I will do that.

WINKELMANN CJ:

Life is full of surprises.

MR HIKAKA:

Yes, and I'm happy to do that either at the start or at the end, usually I would probably do it at the end.

WINKELMANN CJ:

The end seems more logical to me.

MR HIKAKA:

Thank you. The, and I say that we are developing the common law here because it is accepted by the appellants that the common law will need to develop as a result of this case because it is novel. Either we are developing the common law to recognise a duty in these circumstances, or we are developing the common law to not recognise the duty and the claim in these circumstances.

The common law method, as pointed out by this Court, proceeds on a case by case basis, having regard to principles and values that emerge from cases and society, and requires consideration of whether tikanga principles or values are relevant. If it pleases the Court I will start by looking at the tikanga matters, tikanga being relevant, and in my submission, helpful in this case.

I particularly pick up on the comments from *Ellis v R* that tikanga might provide a useful perspective or language through which a common law question, and the question of development of the common law, can be approached, bringing that new perspective here, and I think that is very helpful in this case because the ways I have considered the duty from a tikanga perspective are very similar to the ways that the obligations and duty have been framed in suggestions from the Bench today, most notably by her Honour Justice Gwyn and his Honour Justice Williams. They, in my submission, reflect a tika approach, or an approach, sorry, informed by tikanga.

I should also make it clear I'm not seeking to pick up and drop tikanga on this as though this is a question to be determined by tikanga. It is a question about the relationship between tikanga and the development of the common law and how that…

WINKELMANN CJ:
Just pause for a moment.

GLAZEBROOK J:
My video seems to keep turning off. I'm actually still connected. So perhaps unless I let you know that –

WINKELMANN CJ:
You won't be able to let us know, there's a flaw in that plan.

GLAZEBROOK J:
I'll send an email to say.

WINKELMANN CJ:

Okay, send an email to me then.

GLAZEBROOK J:

I'll send an email to you if I'm actually disconnected, but for some reason it seems to keep turning itself off. I've no idea why.

MR HIKAKA:

It might not like the way I look your Honour. So tikanga is being here used to inform the development of the common law in my submission.

So I might start with the two propositions I have about when tikanga should be incorporated which is in this situation tikanga is relevant and tikanga is helpful, and I have four points to make under relevance. The first is that this matter concerns matters of family, and that was recognised by this Court in *Ellis v R* as an area shaped by tikanga concepts and values at paragraphs 173 and 176 of that judgment. Secondly, in my submission, this matter directly engages tikanga values of whanaungatanga, mana, utu and ea in particular, and those values echo the underlying considerations of common law and equity when we're addressing issues of relationships in a non-commercial context, and I have taken that echoing the underlying considerations of common law from paragraph 256 of the *Ellis* decision.

The respondent in their submissions has raised two objections to the use of tikanga here. The first is they say that it is contrary to statute and we say it is not. This area, that a fiduciary obligation is not governed by statute, so we don't have a statutory bar here. The second is that there has been a suggestion it's contrary to binding precedent, and we say it's not. This is a novel situation before this Court, and for the reasons outlined by my learned senior counsel, this is within the rubric of this Court's decision in *Chirnside v Fay*. So we don't have something that prevents this Court from looking at its earlier decision to the extent that this Court would ever be prevented from doing so.

The second point then is why is tikanga helpful in this matter? We say that the nature of the dispute gives rise to considerations of the broad policy import, for which a tikanga perspective may assist in resolving the dispute, again looking at *Ellis v R* at 263. And we say the law is developing and recourse to tikanga principle will assist in setting its future direction, referring to *Ellis* at 264. We say that tikanga here is a helpful and useful ingredient of the common law that should be considered by this Court when it decides how the common law should develop.

We submit that in the context of a non-commercial relationship tikanga is particularly helpful. Tikanga is, in my submission, a paradigm based on whanaungatanga and mana, amongst others, but based on connections and non-commercial relationships. Mana is non-commercial in my submission. It can be enhanced, and it is not a zero sum game. We can contrast that with much of the common law's approach to these matters whereby the relationships between persons and breaches of rights resulting from that are treated in a zero sum gain manner. Damages are there to take or account of profits are there to take from one person and give it back to the other who ought to have it.

1440

Common law's development has primarily been based on the notions of individual property rights and individual autonomy especially bodily autonomy, though it spills into things such as reputational autonomy through the law of defamation and we submit that development does tend to mean the common law has viewed things through a commercial or quasi-commercial lens and so it responds less well to non-commercial and relational matters. Here we say tikanga by its nature can give a perspective that provides for recognition of those non-commercial matters. This is not in any way to diminish the powerful, flexible and principled approach of the common law to matters but we say it is enhanced – we say that the common law will be enhanced when combined with the power, flexibility and principled approach of tikanga. It will enable the law of Aotearoa New Zealand to be even richer and have a wider range of responsive tools able to do principled justice across more cases.

So I might then turn to the question of relevant values and principles of tikanga in this matter if I may and I'd like to start with the pepeha at 601.0718 that comes from the Royal Commission Investigation into the Abuse in State Care. “He rātā te rākau i takahia e te moa”, that the rātā that was trampled by the moa will grow crooked or affected. What I'd like to focus on in that pepeha is its acknowledgement that the abuse suffered by a child can permanently affect the life and growth of that person and our submission is that that aligns with the ongoing vulnerability of those who have been abused by their parents, in this case the children appellants, and it aligns with what we say the law ought to recognise that abuse.

We say the principle of whanaungatanga is engaged here, the family having the closest whakapapa link here. Robert’s action against his whanau were a grievous violation of tikanga and the obligations that inhere in whanaungatanga. And I'm looking here to just apply these principles and values of tikanga. I can take the Court if it's of assistance to where they are set out most prominently in the *Ellis* decision but –

WINKELMANN CJ:

I don’t think that's necessary.

MR HIKAKA:

Thank you. In terms of the actual harm caused by Robert, we respectfully support the Royal Commission’s view that the word tūkino is appropriate to describe Robert’s actions as they set out at 718 to 719, ill-treatment through violence abuse, mistreatment or rape. We agree that the term hara, which is the term that has been used in the *Ellis* decision and is more commonly recognised, is not strong enough to capture the impact and trauma of those who are subject to this kind of abuse and action, again a recognition we submit of the ongoing vulnerability. We say that here mana has been impacted by Robert’s actions. It's somewhat self-evident I submit. We note the Royal Commission’s comments here. “When tūkino has occurred, mana is impacted…” and especially their note on the mana of children. “The mana of children in traditional Māori society, and the great care and affection accorded

most children means that any action that harms a child or fails to respect the child's mana is significant."

That harm, that tūkino, the damage to mana has created an imbalance, and in our submission utu is required to bring about a state of ea to rebalance that harm. Again, recognised by this Court, the principle of utu and ea being recognised by this Court in *Ellis v R* and also recognised by the Royal Commission, and the Royal Commission recognises that it's appropriate that a holistic and holistic approach be adopted that we are, it is more than just harm that is caused to the body, or the mind. You know I touch on somewhat, the question your Honour Justice Williams asked my learned friend Lady Chambers, that we are looking here for holistic redress, as referred to by the Royal Commission, the concept of Puretumu Torowhānui.

Robert's death here did not create ea. We submit utu is still needed to restore balance because tikanga recognises the existence of mana beyond death and the need to address it beyond death. Our submission here is that tikanga would require a remedy here because of the harm that Robert did, the resulting damage to mana, and the imbalance that was created by that, and still exists, and is created by that. An imbalance that we submit, and the harm we submit has resulted in the vulnerability and ongoing vulnerability of the appellants.

O'REGAN J:

Wouldn't it normally have been expected to do this during his lifetime? To seek a restoration of mana from him during his lifetime?

MR HIKAKA:

Yes, I think, yes, except that does not mean it cannot occur after death. Also I submit that the, that tikanga, of course, the redress would not necessarily just be from Robert personally, of course. That his whānau would be implicated in this need for redress, which is where we start getting into difficulties in – and why I do not seek to pick up tikanga and just plonk it on top of this case –

WINKELMANN CJ:

Well, how does tikanga deal with the interests of the third parties, the recipients, the beneficiaries under the Trust? What would it say about that?

MR HIKAKA:

And your Honour hits right at the problem. Tikanga doesn't, to the best of my knowledge and understanding, have trusts. It doesn't have –

WILLIAMS J:

That's a big call Mr Hikaka.

MR HIKAKA:

Well the concepts that underlie trusts are, I believe, reflected in tikanga. Concepts of holding on behalf of a wider group, certainly, but the notion of a trust, as it is used here, which I use the analogy of a sacred circle. If I was to be subject to muru, or more importantly me and my whānau were to be subject to muru because of a wrong we had done, what we could not do is walk out and draw a special circle on the ground and put a whole lot of property into it and say, yes, muru must occur but it can't touch the property in the magic circle. Tikanga would not recognise that. In our submission that is what has happened and what is, and it's, as my learned senior Ms Chambers said, it's recognised by my learned friend's Ms Bruton's submissions, that the Trust here is being used to invoke some kind of protection over this property that would be alien to tikanga in our submission.

1450

So tikanga doesn't directly address the issue of property held by a third party under a trust-like relationship because it doesn't occur at tikanga. If I was to – the property that would be subject to the muru would be mine and my whānau group, because we bear collective responsibility for the harm.

O'REGAN J:

But here the harm is within the whānau, isn't it?

MR HIKAKA:

Yes, but that doesn't, in our submission, mean that it's not harm. The whānau itself –

O'REGAN J:

But there's a circularity about saying the whānau is responsible for harm done within the whānau, isn't there?

MR HIKAKA:

The harm will fall more upon certain members – sorry. The harm will, and thus the obligation to make utu on the balance side, will fall more upon certain members of the whānau than others if it's, the narrower one gets in terms of the harm and it's spread from it. Here, again we are talking about –

O'REGAN J:

Well, I suppose it depends on how widely you define "whānau" but here the whole family, the whole, other than Robert, were harmed.

MR HIKAKA:

Yes.

O'REGAN J:

So there is a circularity in saying the whānau have to restore that, isn't there? Or are you saying Robert's whānau have to?

MR HIKAKA:

We say Robert has to restore that here. Thus we're dealing with this interaction between a tikanga system which did recognise individual autonomy and authority, but within a collective framework, interacting with a system where the recognition is on an individual level, and we submit that the appropriate methodology to address that in this case is to look at Robert as the commissioner of the tūkino and thus the person best placed to provide utu and for the mana of both him, of course, and those whom he has harmed to be restored, that's what we're looking at. Now what's happened is, in my

submission, the second wrong, the placing of things into trust, is an anathema to tikanga, because what Robert has tried to do is create a situation where ea can never be achieved. By deliberate action he has sought to deny one of the very fundamental principles upon which tikanga is based, on which a society governed by tikanga operates, and I say he has done so by the methodology of the magic circle. Something not recognised in tikanga.

Is that of assistance in terms of how those are interacting your Honour, in my submission?

O'REGAN J:

How do you respond to the Chief Justice's question about third party interests?

MR HIKAKA:

In our submission third party interests here are properly and adequately dealt with by the law as it stands with regard to volunteers or recipients of property, bona fide purchases for value. So I'll put it this way. I think that the common law adequately responds to and reflects the interests of third parties in this situation, and we don't necessarily, and that recognition that the common law gives is not one that tikanga needs to add a gloss or any change too. I might not be putting that as well but I'm thinking we have, we already have a series of laws referring to when the law will not unwind a transaction that has occurred. Here, the transaction is the giving of property as effectively a gift because it's without valuable consideration. It's been done by deed, there's been no payment over, no debt back, to volunteers. If the volunteers – if they had been bona fide purchases of value, then certainly there might need to be a rebalance there to address what legitimate interests they had versus the legitimate interests of the children. If they have changed their position as a result of what has happened, then again the common law is able to redress that balance by recognising the change of position and reflecting that in any orders requiring rescission, disgorgement of constructive trust. Here neither of those two are the case and there's a good reason for that, of course, and that's because when Robert put the house in particular into trust and then the shares, it wasn't because he actually wanted the beneficiaries of that trust to use it at that time,

he wanted to maintain the benefit of it but protect it, protect that money by trying to prevent others from having a claim in it, i.e., by saying: “I'm still allowed to use everything in the magic circle but no one else can touch it.”

The respondents in their written submissions in addition to the binding precedent statute matters make two other comments about the application of tikanga here with which we disagree. The first is the suggestion that the non-involvement of Robert means that a tika process can't apply and we submit that that’s not correct. First, we note that matters were raised with Robert but he chose not to engage, indeed, sent lawyers’ letters and, secondly, we say that while tikanga preferred involvement of both sides in the matter and active involvement, a tikanga process could still occur without involvement.

So we do see examples noted by Sir Hirini Moko Mead in his book where there are situations, and also in Te Mata Punenga, where muru have occurred when someone was not actually – when the key wrongdoer was not present at the muru and those are said to be disappointing situations and the usual result is that more is taken through the muru than would normally be the case because the person isn't there to participate in the back and forward on that but the notion that Robert’s death means that a process of utu and ea can no longer occur we submit is not in accordance with tikanga.

The second is a claim that ea was available within the time limit through other approaches and so tikanga has no application and we submit that that actually assumes the question this Court is being asked. The question before this Court is whether or not there is this fiduciary relationship continuing into adulthood, or existing in adulthood, and that there might be a tort claim for battery doesn’t mean that the fiduciary claim is not available.

So our submission ceasing a duty when the child leaves home, regardless of the circumstances, is inconsistent with tikanga and the values of Aotearoa New Zealand. The respondents’ answer to this is to say that counsel is unable to speak to the values of Aotearoa New Zealand or tikanga from the bar without precedent. Well I respectfully submit that I am referring to precedent when I

talk about these things. I'm not asking this Court to believe tikanga is something or the values of society is something just because I say so, that's why I've made reference to the values as elucidated by this Court in *Ellis* and the King and the statement of tikanga attached thereto and why I've made reference to the Royal Commission's inquiry.

WINKELMANN CJ:

I think it's still *Ellis* and the Queen actually, isn't it, because it was the Queen at the time I think.

MR HIKAKA:

Sorry.

O'REGAN J:

No, it was the King by the time we issued the judgment.

WINKELMANN CJ:

Was it?

O'REGAN J:

Yes.

MR HIKAKA:

I'm unable to assist the Court on that.

WILLIAMS J:

Just say *Ellis*.

WINKELMANN CJ:

Carry on.

MR HIKAKA:

Thank you.

1500

WINKELMANN CJ:

That was a diversion. But the way you're formulating it, perhaps you're going to proceed from this, sounds like the duty would apply past, conventional concept of childhood in every situation, because you say assessing a duty when a child leaves home is inconsistent with the value of tikanga in Aotearoa New Zealand.

MR HIKAKA:

Sorry, I can see where the confusion. So in this situation – so I say that –

WINKELMANN CJ:

In this situation?

MR HIKAKA:

Yes, two have a blanket statement that the duty will always cease when a child leaves home we submit that is inconsistent because there will be certain situations, such as this one, where the duty continues because of the harm that was caused by the initial breach, and the vulnerability that stems from there because the tree has grown, and continues to grow, crooked.

WILLIAMS J:

What duty?

MR HIKAKA:

We submit it is a duty to have a state of ea restored.

WILLIAMS J:

Right. So a duty to make good on the wrong?

MR HIKAKA:

Yes your Honour.

WILLIAMS J:

So there can be no doubt that whanaungatanga is at issue because this is a family.

MR HIKAKA:

Yes your Honour.

WILLIAMS J:

Inherently when an individual's mana is at issue and the person has been damaged then mana has been damaged, usually, unless there's something particular about the facts. So that gets us to a point where tikanga, like any other system of law, probably would require some form of redress for this kind of wrong.

MR HIKAKA:

Yes your Honour.

WILLIAMS J:

So tikanga says, there should be redress in these circumstances.

MR HIKAKA:

Yes your Honour.

WILLIAMS J:

Isn't that as far as you get? And whether there should be redress beyond childhood, or even beyond death of the perpetrator, will depend entirely on the gravity of the wrong.

MR HIKAKA:

Yes, in a, to link it back to the framework being discussed this morning, the gravity of the wrong will probably be reflected in the vulnerability and, to use those common law terms, vulnerability of the persons who have been subject

to that wrong, which will also reflect in the gravity of the damage, the harm to the mana that's been caused.

WILLIAMS J:

Right, so if we can assume in this case the gravity if significant, we shouldn't assume that, we can say that, it's been found and no one's disagreeing with it. The question is, is it so grave that in tikanga terms it would last beyond the death of the perpetrator. That's the question.

MR HIKAKA:

Yes your Honour, and our submission is that it would because it is one of the most grievous harms that one could do, abuse of a child, and as I say, with support for that I refer back to the Royal Commission's report about the harm, and the nature of it, and the impact of that harm upon the children, and the sacred place that children hold. Which is, of course, not just within Māori society, of course, I think that's hopefully a general matter, and indeed whilst the Law Commission – sorry, the Royal Commission doesn't refer to it in say Pākehā society, what they do refer to is similar concepts through Pasifika societies and in that using the concept of vā in Samoan society.

Of course going that step further is the further harm that's been caused here is the attempt to mean that ea can never, ever be achieved by putting everything into the Trust, and it might actually leave me, be worthwhile with me there your Honour just going into a little, or your Honours, into a little bit more explanation as to why we say that a tort claim, or ACC really, is not adequate here from a tikanga perspective. My learned friend has addressed it in common law terms but if I may refer your Honours to page 601.0721 and the Whare Tapa Whā model of, which will be familiar to the Court I'm sure –

WILLIAMS J:

0721 did you say?

MR HIKAKA:

Yes your Honour. That ACC, in my submission, is directed primarily to restoration of the taha tinana, the body, and also increasingly the taha hinengaro, the mind through the counselling and the emotional support that goes. It does not, in our submission, address the taha wairua, or the taha whānau, the spiritual or family and social bonds, and we note that the Royal Commission in the paragraph at the bottom of that page notes that taha wairua also accounts for the presence of mana, so that's how they're categorising it within that model, and that taha whānau over on the next page refers to the health of relationships and the wider kinship system.

In many ways the Family Protection Act, though I doubt this was in their minds when it was passed, is a statute that is actually reflective and responsive to tikanga in many ways, in that it is, it's focus on moral duty and the recognition of a place in the family can provide redress for harms to taha wairua and taha whānau. So there is a mechanism available at law for holistic redress to be achieved, and that is the exact thing that Robert tried to prevent.

I'll briefly touch on why we submit this is, this development is consistent with other developments, and all recognising that the law does not progress in leaps and bounds but in an incremental way. We say it's principled and recognising that disposition to trust in an attempt to circumvent other rights and obligations is something that is well recognised by both Parliament and the Courts. Our submissions at paragraph 85 point out a number of situations where Parliament has put recognition, that dispositions to trusts can be abused, and should not be, and the Courts have been very vigilant about preventing the purported use of trusts to deny rights and remedies, and I've set out some cases at 87 of the submissions, and since then, of course, this Court's decision in *Sutton v Bell* [2023] NZSC 65 continues with that approach. We submit that these illustrate a trend in the development of the law to not permit structuring to be deliberately used to defeat claims, and this has been particularly pronounced, both here and overseas, in the context of family matters where they're trying to defeat what my learned friend Ms Chambers said was social legislation, social policy legislation, so –

WINKELMANN CJ:

But those normally are hooked on a statutory provision, aren't they?

MR HIKAKA:

They are your Honour, and we submit that it's appropriate that it doesn't need to be hooked on a statutory provision in order for this to still be subject to the Court's supervision. Use of trusts and breach of fiduciary relationships, both of those matters, both trusts and fiduciary relationships are matters of the common law in equity really, and it is the Court that is primarily responsible for supervision of equity. We don't have, trusts aren't created through statute, they're recognised through statute, and fiduciary relationships aren't created by statute, they're recognised through the common law. We submit that we can't just leave this to the Law Commission or leave it to Parliament to pass a statute where the Court can, in a principled way, address these concerns. We submit there's no excuse to tolerate injustice until the Law Commission decides and recommends and then Parliament implements a change. This is not a multi-faced policy decision with lots of inputs that the Court is reluctant to interfere with. This doesn't have that. This is a relatively straightforward but important decision for the Court –

WINKELMANN CJ:

But you haven't really formulated it in those terms, have you, your claim, in your pleading? You haven't formulated it as if it was an application to set aside a trust because it's being used as an agent of fraud to defeat a statutory claim, or defeat a claim.

1510

MR HIKAKA:

No, but that's because the focus has been on the breach of the fiduciary duty, and the remedy that then comes from it is, in effect, to set aside or rescind what has occurred as a result of that breach of duty. So it comes in at the remedy stage, your Honour, rather than the way in which the duty is framed. And, finally, it's not a radical suggestion we're making. So to…

WINKELMANN CJ:

Well are you relying on a remedial constructive trust for your remedies or what are you relying on?

MR HIKAKA:

We submit that rescission, as noted by his Honour Justice Collins, and I'll deal with this now, now that it's come up your Honour, is the appropriate remedy. As his Honour notes, it's an equitable remedy available at equity including for breach of fiduciary duty and his Honour notes the authorities there. It's also a flexible remedy and what it responds to is where the fundamental basis of the disposition was unlawful it rewinds that disposition and so it will have the effect of seeing the property go back into the estate because it unwinds the Deed of Gift at 301.0074 which was the first one where the house went into the Trust.

Rescission is also a remedy that is capable of taking into account the impact that it might have on third parties. So if a third party is able to show usually in the situation a change of position based on the receipt of the property, then that can be – the rescission remedy can be adjusted to make sure that there's no improper – sorry no inequitable result on those persons who have changed their position relying on the disposition.

O'REGAN J:

So how would it be adjusted?

MR HIKAKA:

So some of the situations, you can see in the cases, is that the rescission might not be for the entirety of the property so the value that has been expended in one sense of the word by the third parties can be adjusted.

O'REGAN J:

It's a house though, isn't it? It's a house. I mean are you saying you would transfer a part interest amount?

MR HIKAKA:

Sorry, I'm just talking about the remedy in general to show that it's flexible. In this particular case the fact that it's a house is, in my submission, neither here nor there because no one has changed their position such that they could raise any defence as to why a rescission would be inappropriate.

O'REGAN J:

Yes, but – so you're saying you could, if you recognised the interests of the third parties, the beneficiaries of the Trust, you would say you transfer some of the house, an interest in the house?

MR HIKAKA:

You could transfer some of the interest in the house. You could make a monetary compensation award to balance out for any loss that's suffered.

O'REGAN J:

Well that's different from rescission though, isn't it? That's not rescission.

MR HIKAKA:

No, no, but that would be an adjustment of rescission. I, to the best of my knowledge, those kind of flexibilities are available. I think that they were carried out in some Australian cases, the names I'll look for, but I can't guarantee this, your Honour, unfortunately. But the other way in which this can be affected, your Honour, in this circumstance, I don't think we need to be worried too much about it, not only because it hasn't occurred, but if rescission is granted and the matter goes back into the estate the final beneficiaries, sorry, the beneficiaries of the residue of the estate is the Trust. So what will happen is that the Family Protection Act claim will be considered and will have an ability for utu to be granted and a state of ea achieved to the extent it can be and then the remainder will flow back to the beneficiaries. And the law has never been too upset that volunteers, who don't change their position in respect of a voluntary gift they've received, might have that gift rescinded where it's been made to them improperly. I submit there's no – that need not cause any concern for this Court that people who have got stuff by way of gift that they shouldn't have

because of the wrong and the disposition to them should have to account for it or that it should be counted back to them. Remembering, of course, that the people who have actually got this are the trustees of the Trust and that the people who would actually effectively potentially receive it have just a mere (unclear 15:15:31), a hope that it'll be exercised in their favour.

If I might wrap up then with an overview on the tikanga lens on this matter. We submit the parent/child relationship is fundamental and abuse of it through a tūkino damages the mana of the abuser, the abused and the whānau in a deep and lasting manner and that tikanga requires that ea be achieved through utu. The tūkino and the damage to mana remains. It is not healed by the passage of time, nor is it extinguished if someone leaves the home. The whakapapa link is not severed and the mana remains unrestored.

These children's lives remain affected by that harm, that tūkino and the loss of mana and that is reflected in the evidence of the hardships they have suffered. At tikanga they could expect utu so that a state of ea puretumu torowhānui could be achieved. The children remained vulnerable to their father. They remained at the mercy of their father to enable ea to be achieved. The restoration of mana needed utu from the father and a recognition not only of the harm to the taha tinana and taha hinengaro but also the taha wairua and the taha whānau. What Robert did was an anathema to tikanga. He sought to deny forever the ability for mana to be restored, utu made and ea achieved. He deliberately sought to use a legal mechanism to prevent that from happening and he didn't do it for his benefit. He did it solely – he did it to harm his children further.

We submit that tikanga would not allow that and it is submitted that common law shouldn't either especially where tikanga is part of the common law. If the respondents' position is accepted, then we submit the values of whanaungatanga, mana, utu, ea and we say justice are being overridden and for what. It can't be certainty, it can't be because the law values certainty above this. The duty, as we've put it, we submit is clear and the breach we submit is clear so that both can be considered by others when they're planning their

actions and the impact on this on third party volunteers is no greater than if the Trust was settled, for example, by disposition of property to – with intent to defeat a claim under section 44 of the Property (Relationships) Act. We acknowledge that this requires a perspective on the law that says it is more than a commercial transaction but we say that is an appropriate development for the common law consistent with tikanga and the values for society which sees law as covering more than just private property rights and individual bodily integrity.

I ask the final rhetorical question that if tikanga is not of assistance to the common law in this case, when we submit the principles and values of tikanga are so clear and so supportive of the development of the common law in favour of recognising a claim, then when would it apply. Is the *Ellis* case with its clear statement about developing the law using common law methodology and tikanga being a part of that, is that to be now confined in those statements put back in the bottle like a genie in the first case where it must be considered post that decision. We submit that would be a retrograde step and would deny justice in this case and it would halt the development of New Zealand law towards being a system that is based on truly shared values, shared by the peoples and systems that reflect Aotearoa New Zealand, both its past, its present and its future. Unless we can be of further assistance.

WINKELMANN CJ:

Thank you, Mr Hikaka. That concludes your submissions?

MS CHAMBERS KC:

It does, your Honour, thank you.

WINKELMANN CJ:

Thank you. Mr Steele?

1520

MR STEELE:

May it please the Court. The appeal from the respondents' perspective poses two key composite questions. Is a parent in a fiduciary inherent or non-inherent relationship with their child while he or she is a minor and in their care, and if so, what's the nature of that fiduciary duty. The second question, the more difficult one, is does the fiduciary relationship continue or does a fresh one arise after the child becomes an adult and is no longer in the parent's care, and if so, what's the nature of that fiduciary duty.

WINKELMANN CJ:

In certain circumstances.

MR STEELE:

Yes. The first question can be answered by direct application of the fiduciary relationship, fiduciary duty principles, applying first and foremost *Chirnside v Fay*, which both parties agree is the leading authority, but that does not mean that the answer that you give, your Honours, will not be controversial. There is still controversy and you'll see in my submissions that I point that out. While such a finding would accord with some of the indications in the New Zealand courts, at a lower level than this, and it would be supported by Canadian jurisprudence, it wouldn't find favour in Australia, and that's a significant consideration for you, your Honours, because obviously when we depart from Australian law that's always going to be significant, especially when we're talking with equitable duties. That will break new ground in that principally, not the prescriptive/proscriptive dichotomy which is probably not relevant here because of Justice Kós' definition of the way he framed the duty, which we support incidentally, the respondents, but that you will be having to give judicial support for the recognition of a protection of a non-economic interest, and that will be new, and that will depart from where the Australians appear to be headed. So it will be controversial, but not nearly as controversial as finding for the appellants.

WINKELMANN CJ:

Well controversial is not a word that really helps us much I don't think. It's either right or it's not right from our (unclear 15:22:53) so…

MR STEELE:

Well we'll be finding, or this Court will be making a determination which is inconsistent with the Australian authorities, and I'll take you through those shortly your Honour.

O'REGAN J:

I thought you were accepting there was a duty?

MR STEELE:

Pardon Sir?

O'REGAN J:

I thought you were accepting that when parents and children, you know, when children are living in the family home under their parents' supervision, there was a duty?

MR STEELE:

We do Sir.

O'REGAN J:

Well why are we having this discussion?

MR STEELE:

I just raise it so that the Court –

O'REGAN J:

There's no point in saying I concede the point but I think you'd be wrong to decide it. You either concede the point or you don't.

MR STEELE:

We concede the point Sir. We support the point.

O'REGAN J:

Okay, well that's all we need to know.

WILLIAMS J:

You just don't want us to get too brave Mr Steele.

MR STEELE:

I suppose, and perhaps it's not my position to do it, but I want the Court to understand where it is going and what international jurisprudence has to say about it.

WINKELMANN CJ:

Yes, I think we have that.

MR STEELE:

Thank you your Honour.

WINKELMANN CJ:

But you prefer the formulation by Justice Kós to that in the Canadian authorities. Justice Kós' formulation seems to be somewhat broader than the Canadian authorities?

MR STEELE:

Yes Ma'am. Yes Ma'am, we do. It's broader, it captures more possible harm, and I will talk to the duties which can be pulled out of *EDG*.

WINKELMANN CJ:

I must say you could, however, just read this kind of loose language and actually make it consistent with the Canadian authorities. Are you explicit in saying you think it should be set broader than the Canadian authorities?

MR STEELE:

We are saying it should be set according to what Justice Kós has indicated in his judgment, Ma'am, yes.

WINKELMANN CJ:

It seems a little bit intentional with your sensitivity about us recognising a duty at all, and then you're saying we should recognise it and go broader than the Canadians.

MR STEELE:

Not a sensitivity about recognising a duty, just understanding that, and I don't want to make too much of the point, but that it's not where the Australians have gone, it's closer to where the Canadians have gone, but the formulation by Justice Kós is what the respondents would say would be the appropriate formulation. Which as you say, Ma'am, is wider than refrain from doing harm, it's a boarder formulation.

WINKELMANN CJ:

Well you'll come onto telling us why you think that's a better formulation, will you?

MR STEELE:

Yes Ma'am. The second issue that – or the second composite question is a very different proposition Ma'am.

WINKELMANN CJ:

So is that the kind of overview of what you're going to say about the content of the duty?

MR STEELE:

No Ma'am. I'm going to break these two composite questions down and work my way through them.

WINKELMANN CJ:

Okay.

MR STEELE:

The fiduciary relationship sought in regard to an adult child who is no longer in the parent's care, to start with is not reflected in any case law that our researchers could find, your Honours, either in New Zealand or internationally. It constitutes a brand new cause of action, and we say not an extension of existing principles, something wholly new. It's not a claim against the estate, or against Robert as such. It attacks his disposition and its purpose is to replenish the estate to enable a Family Protection Act claim, and there is no authority that we could find that comes anywhere close to such a duty and such a principle.

The second fundamental issue, and I'll be expanding on each of these your Honours, is that what the appellants require is for this Court to deem the existence of a relationship between two parties, when in fact there is none. So we have over 30 years of estrangement, 30 years of no contact, and yet the expectation nis that during all of that time there is a fiduciary relationship of the type, of the nature reflected in *Chirnside* and all of the other cases where, as I think your Honours have alluded to, have all of the duties that have arisen out of relationships, have all arisen out of relationships that exist, including *Frame*, *EDG*, *Chirnside*, they're all relationships which have subsisted when the powers, the duties, the discretions have arisen. There is no case that our researchers, our research could discern where a duty has arisen of a, where a fiduciary duty has arisen after the relationship has ended, and there's no ongoing contact or relationship between the parties. We could not discern one. We found –

GLAZEBROOK J:

What about the view that it actually arises out of the original breach, which was an egregious breach and therefore a requirement to remedy, which then just continues and is not brought to an end by the fact that the relationship is finished. Because it would be odd to say, just because in *Chirnside* the joint venture's at an end, no redress is given.

MR STEELE:

Well the appellants have suggested that, our submission is that there should be no redress. That is not our submission. We say that when the breach occurred then the obligation to remediate that breach arose in law, and the appropriate remedy is compensation. That's what all the cases say. The nature of the breach is analogous to battery and assault, although we say that tort, when we go through the authorities which we'll take you to your Honours, doesn't come close to defining the proper nature of the egregious breach that took place. But nevertheless the remedy is compensatory in nature, and once the cause of action crystallises, and that can be an issue of, I'm reluctant to use the word "controversy" but it does crystalise and then once it has crystallised then the appellants have a time period with which to bring it under the Limitation Act.

1530

WINKELMANN CJ:

So you're saying that we should be arguing – that this case should be being fought in the area of whether or not there's a legitimate excuse for the extent of the delay and then all that could be sought was compensation against an estate which has no assets?

MR STEELE:

That's correct, your Honour, and of course the estate wouldn't have been an estate, it would have been an individual, who would have had assets if the claim had been brought in time.

WINKELMANN CJ:

But today I mean.

MR STEELE:

Yes, yes, Ma'am, and of course that brings us back to the fact that the appellants made an election not to pursue the father, Robert –

WILLIAMS J:

It's a tough judgement to make, isn't it?

MR STEELE:

Well it's a just judgement because the cause of action exists. It can be pursued and when we did the research on all of these cases the issue of limitation, your Honour, crops up in nearly all of them, *M (K) v M (H)* –

GLAZEBROOK J:

Are you saying that the only remedy here is to sue in tort and that there is no equitable remedy in terms of the breach of fiduciary duty because that – just because there is a remedy in tort doesn't usually mean you don't have other causes of action, does it? It does mean you can't recover twice but it doesn't mean there are other causes of action, not other causes of action.

MR STEELE:

No, your Honour, I don't say that. I say that there are two causes of action and although there are authorities including in New Zealand where the cause of action and tort has been said to supplant the action and fiduciary – breach of fiduciary, that is not our submission. Our submission is that there are two causes of action and in fact it's the breach of fiduciary duty that supplants the tort because it, in the words of the *Norberg* case, it more properly describes the nature of the wrong because what we have here is not just an assault and a battery, we have a breach of loyalty, we have a breach of reposed trust, we have all of the elements which *Chirnside*, *Frame* and all the other cases point towards. They're all roughly consistent. There's no real disagreement between them. They all exist and they all subsist while Robert is in the home with these children looking to him for loyalty and discharge of his parental responsibilities, fiduciary responsibilities and when he breached them, on one view of the matter, the breach caused the creation of the cause of action but as the cases tell us and the Limitation Act tells us and how it's been interpreted that cause of action is delayed. It's delayed until – well firstly until the child becomes an adult but it's delayed until they become an adult, are no longer a minor, and they understand the wrong and the damage that's been done to them. That's the

position of the law both in Canada and here and they're in a position to, basically in a position, it sounds awful, to elect what they do with that cause of action and it was recognised in the Court of Appeal by Kós and by Gilbert that –

WINKELMANN CJ:

Justices Kós and Gilbert.

MR STEELE:

Pardon?

WINKELMANN CJ:

Justices Kós and Gilbert.

MR STEELE:

Yes, yes, I'm not sure what I said.

WINKELMANN CJ:

We're not on a surname basis.

MR STEELE:

Sorry.

WINKELMANN CJ:

It's all right, Mr Steele.

MR STEELE:

My apologies, no disrespect intended.

WINKELMANN CJ:

No, no, I knew that.

MR STEELE:

Justices Kós and Gilbert that – well they didn't analyse it in great detail. They just said be it laches, laches albeit Limitation Act which is applied by analogy of course to similar subsisting common law cases. It's set out in the

Limitation Act. The time for the action had expired and I suspect not a lot of analysis was put into it because we have a statement in the evidence of the appellants that they elected not to bring their cause of action when they knew they could have brought it and it kind of puts the nail in it in terms of their election.

WILLIAMS J:
What's the timing of that?

GLAZEBROOK J:
What do you say about the promise that the father made to the brother?

MR STEELE:
If we go to the evidence in regard to the decision not to bring the action, you'll see nothing in there which is suggestive of reliance on anything that was said by the father to the brother, both of whom are deceased, of course, and so if we're trying to think of – if my learned friends are trying to raise the spectre of some kind of an estoppel or some kind of a representation which was acted on to detriment, forbearance to sue or something of that nature, the evidence isn't there to support it. The decision was made to break contact with the father because they just wanted to break contact with the father which is perfectly understandable but that's the evidence that we have before us Ma'am.

WILLIAMS J:
Can you tell me when the children expressed their election?

MR STEELE:
Yes, your Honour. It happened in 1984 and the evidence, there's a couple of places you can find it, the first one is at CB 201.0015, paragraph 64 of *Ellis*, paragraph 64 of the brief. There it is.

WILLIAMS J:
So do you mean '94?

MR STEELE:

Yes, 94, Sir, 1994. There's the specific date of that meeting doesn't appear to be there –

WILLIAMS J:

It doesn't matter.

MR STEELE:

– but I surmised it was around about that time. It's also reflected in another place, your Honours, when you're ready.

WINKELMANN CJ:

Yes.

MR STEELE:

The other place is at CB 201.0042 at paragraph 27 of – this is one of the brother's briefs.

WILLIAMS J:

We don't, at least not in what you've shown us, have any suggestion of the reason for that? Were there reasons given?

MR STEELE:

Only what I can see there, your Honour, but there is one other place that I could take you to so – because I found three places but –

WILLIAMS J:

Thank you.

MR STEELE:

– these are the only places. The other one is actually just in the next paragraph 28 there's reference to it in that brief.

WILLIAMS J:

You see what if she decided that because she couldn't face it?

MR STEELE:

Well firstly there's no evidence of that, that would be, with respect, conjecture and second –

WILLIAMS J:

I doubt it. We've run into a few of these, Mr Steele.

MR STEELE:

Yes, Sir. And what happens is the evidence is normally given of – it focuses in on, and you see in these cases, as I'm sure you have, your Honour, it focuses in on what were they aware of, how did they become aware of it. There's quite a lot of evidence, quite a lot of cross-examination and what appears to be the case here and overseas is it's only through the course of therapy and understanding that the wrong that was done to them, even if they perceived something was wrong, they get the therapy because it's affected their lives in the profound ways that we've heard about it and then the penny drops during the course of that therapy and the Courts have logically, sensibly and reasonably have taken the point well it's not fair to make time run until that point. 1540

But once time runs at that point you do come up against the Limitation Act and the underlying policy principles of the Limitation Act which balances plaintiff and defendant and that's why, your Honours, I put that little extract of the Law Commission Report on Limitation Act in the bundle, not that you needed to be reminded, but even sexual predators, even the worst form of defendants still get the benefit of the Limitation Act and that can give rise to some tough outcomes but there are good public policy reasons, and all the common law countries have the Limitation Act, for these stipulations and it's six years. Now they're quite sophisticated provisions in our Limitation Act to deal with the tortious claim of sexual incest and it throws very much this back at the Courts to do what is reasonable in the circumstances but they've already been doing that in the way that they're not going to ask anyone to make an election or be deemed to have to make an election until they at least know what's being done to them and fully comprehend the wrong. But then they're in the same boat as

everyone else with a civil or equitable cause of action. And yes it's tough and the outcome may be that they miss the boat but that is our system of justice and there are good reasons why we have that Limitation Act and that's why I added in the Law Commission papers to show that there are good policy reasons.

But I don't – the respondents do not want to be taken to have been said that there is no cause of action here. We believe there was a cause of action in tort and there was a cause of action in breach of fiduciary duty and we fully support the recognition of that by this Court and have done from the very outset. And my learned friend, Mr Hikaka, mentioned that there's no statutory obstruction to the cause of action and the statutory, perhaps the submission was a bit loose, as I'm apt to do, but the statutory restriction I was talking about is the Limitation Act. This whole claim, in our respectful submission, is designed to sidestep the Limitation Act because without fiduciary relationship and fiduciary duty arising 30 plus years after any relationship on any view of the matter has ended is absolutely necessary to get around the fact that the initial breach, which was actionable, there's been an election not to pursue it and so something fresh, something new.

WINKELMANN CJ:

Which is why you say it's focused on the – the transfer of the assets is a breach of duty as opposed to what, some other –

MR STEELE:

Compensation is no good, your Honour, because that leaves them in no better position. It has to focus on the transfer of the assets and so the duty seems unusual but when you look at it from that perspective it's the only one that will work for the appellants. But it emphasises how result-led this particular cause of action has been and the law of fiduciary relationship sets itself against result-led creation of principle.

We have exceedingly good authority in *Chirnside* and all the other cases that have come out of the Supreme Court and below and they're all consistent.

You have a relationship, you can see it when you see it, how one party, Mr Chirnside, or Mr Fay has put his faith in Chirnside, they've divided up their labours, they're relying on each other. One is vulnerable because the other has a power to do their part in the venture and it's been abused. But in all of these cases they all have subsisting relationships and you always have that imbalance, you always have that necessity for loyalty which is the, you know, the keystone of these actions. It's missing in this case because, as in the *Louie v Lastman* authority, and I heard the Chief Justice say: "Well he won't be referring to that part of it." I can't remember quite what it was –

WINKELMANN CJ:

It was paragraph 29, I think, which seemed to be the paragraph that was most against you.

MR STEELE:

Yes. Ma'am, it's a very applicable decision actually, a Court of Appeal –

WINKELMANN CJ:

Sorry, I was only saying you wouldn't be referring to that one paragraph.

MR STEELE:

Right, right, Ma'am. Because what happened there is the mayor had an affair, children were born, the mother had not disclosed that to them and then many years later they discovered that they had a father and they brought a fiduciary duty, breach of fiduciary duty claim, saying that he owed them responsibilities as a parent and it was obiter the discussion on fiduciary duties but it's a very simply, practical application of it. He had no relationship with them. There was nothing between them. He was their father to be sure but, as the cases tell us, it's not the character of the parties that make the fiduciary relationship. That has nothing to do with it and I'll get onto that later when I talk about the disabled child analogy. It's the nature of the relationship and all of the judgments say the same thing. It's the nature of the relationship as it subsisted –

GLAZEBROOK J:

Why is the relationship of father not enough to say you have a duty to your child?

MR STEELE:

Because unless he had –

GLAZEBROOK J:

But it's actually a very odd, to me it's an exceedingly odd proposition and not one that actually relates at all to our statutory framework in terms of making parents responsible whether or not they wish to be responsible.

MR STEELE:

Well, Ma'am, what I would say is that fiduciary relationships are not about enforcing the moral obligations of a parent. They're about enforcing the obligations of someone who has expressly or impliedly or objectively or it's been imputed to them responsibilities for those people they have made a commitment to –

GLAZEBROOK J:

Well that's not quite right for inherently fiduciary relationships, is it? I mean you probably have to go back and say what you say the content of a duty is because the fact if it's inherently fiduciary then you don't need to have taken responsibility because you're made to do so, in fact, just because of the nature of the relationship.

MR STEELE:

Well it's not the respondents' case that because a parent is a parent they owe a fiduciary duty. They owe a fiduciary duty, for instance, if they gave the child up for adoption, which I think is one of the (audio glitch 15:47:24) that was in the *Louie v Lastman* case, if they gave the child up for adoption and now someone else had taken over the responsibility to care for them and concern themselves with their welfare, then the parent drops out of the picture.

WINKELMANN CJ:

I'm not sure how this case helps you.

GLAZEBROOK J:

But that's statutory, they do drop out of the picture because they're no longer parents at that stage because parental has shifted to the adoptive parents –

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

– who presumably then take on that inherently fiduciary relationship.

WINKELMANN CJ:

I'm not sure how this case helps you because I don't think you'd rely on it to submit that he did not have a fiduciary duty not to sexually abuse or physically abuse the child, would you, because he's signed an agreement with the mother and has no day-to-day relationship because this is what the cases that are dealing with fiduciary relationship between a parent and a child are predominantly focused on. They're focused on the proscriptive aspects where you're actually favouring your own interests over that of a child in an intimate kind of a way not some distant economic way.

MR STEELE:

Well I think – I'm not sure whether it was, I think Louie was the mayor in this instance, I think Louie had his own family out here and he was sort of like the avuncular giving of gifts to the children but he had no day-to-day care and responsibility for those children. He had no say in their day-to-day lives. He had no ability to abuse any power they vested in him because they never vested any in him and so, while I would say if he was to sexually molest them, he is liable as a tortfeasor for assault and battery but is he liable for breach of fiduciary duty? In my submission, Ma'am, no.

WILLIAMS J:

Wasn't that a case where there was an agreement between the mother and him that he'd have no role.

MR STEELE:

That's right.

WILLIAMS J:

So really the mother had taken over the fiduciary obligation and he'd been released from it by mutual agreement?

MR STEELE:

Yes, your Honour, but I'm not sure that makes a difference because even if they didn't have that agreement if he had, he had fallen out – if he had started up with another family and they'd had no such agreement and she just didn't look to him, the position would be unchanged. I don't think the agreement plays a significant role in it in my submission.

WILLIAMS J:

Well perhaps, I'm not sure that that's been tested, and any way there'd be a statute that covered his responsibilities but in the absence of that I wonder whether that would be strictly true.

WINKELMANN CJ:

Anyway it's a long way from where we are.

WILLIAMS J:

It is.

1550

MR STEELE:

Yes, Ma'am. Another issue which I'm going to touch on in more detail is the fiduciary relationship. Fiduciary duty which the appellants seek to have this Court uphold means that it can never be brought to an end irrespective of the

relationships of the parties. It wouldn't have mattered if Robert had lived on the other side of the world, he would still, you would still have to deem him to be in a fiduciary relationship and that fiduciary relationship attaches solely to the fact of the lack of remediation which goes back to the harm that he did back when he was – when the children were in his care and he owed an obligation to remedy that breach at that time which sounds in compensation. But we say that the fiduciary, the relationship between them, there was none and so if there was no relationship then it can't be a fiduciary relationship. That's not to say he doesn't owe them, he does. He owes them for the breach that occurred but the fact that he hasn't remediated it, and I'll develop this submission later, your Honours, doesn't mean that a fresh harm occurs. And we've had a recent decision out of the –

GLAZEBROOK J:

So can you – so the submission is that as soon as a child becomes an adult there is no relationship between them which is again an exceedingly odd submission. I mean there might not be a fiduciary relationship between them but to say that that's because there's no relationship between them seems to me exceedingly odd.

MR STEELE:

No, I'm not saying that, Ma'am, and of course at a moral level there's always a relationship but we are talking about fiduciary relationships with all the – with the imposition of fiduciary duties as –

GLAZEBROOK J:

All right, so you say as soon as they become adult there's no fiduciary relationship, is that your submission?

MR STEELE:

Not, no, even then not necessarily, Ma'am. It depends – it goes back to the nature of the relationship and here we have the – take the severely disabled child analogy. If the severely disabled child remains in the parents' care, then the argument for a continuing fiduciary relationship is very strong because all

the indicia that you expect in a relationship between those two are there; the reposing of the trust, the fact that the disabled person is vulnerable to a misuse of that trust by the parent who's taken responsibility for the care in the way an agent takes responsibility for the interests of the principal. But once the child becomes an adult and leaves the home and they become parent and emancipated child, adult child, then in my submission there cannot be a fiduciary relationship. Something more is required to convert it into that. Of course, there's a relationship, there's a love and affection relationship but that's nothing that sounds in law and this Court, in my submission, wouldn't create an obligation of any kind to force a parent to have that kind of relationship. In fact, the Courts certainly in Canada are against the notion of positive best endeavours, best interests kinds of duties of care because they're not justiciable and whereas one that focuses on not harming a child who's in your care clearly is justiciable because you can see they're in your care and you can see the harm that's being done but how does one discern the correct way to act in a positive way in the best interests of the child. In *EDG* La Forest said it was not judiciable, is it judiciable, I was hoping I wouldn't have to use that word –

WINKELMANN CJ:

Justiciable, justiciable.

MR STEELE:

Thank you, your Honour.

WILLIAMS J:

And Justice La Forest too.

MR STEELE:

Justiciable. Because the problem is different judges would have different views, different parents would have different views and it becomes hopeless. Whereas the way Justice Kós framed it, and it is broad, is justiciable because you can see when you've harmed a child that's in your care.

WINKELMANN CJ:

Yes, but the problem with how he's framed it is it's as broad as almost the best interests, isn't it, because an obligation not to harm I mean goes into the sort of underlying duties of a parent to look after a child and none of the cases, Canadian cases, put it that broadly. Those duties to look after your children arise from a variety of sources but the fiduciary duty is not to prefer your own interests, not to prefer others' interests to act with loyalty et cetera to your child.

MR STEELE:

Well it goes back to the nature of the reliance and trust reposed in the fiduciary and –

WINKELMANN CJ:

Yes.

MR STEELE:

Yes, and the child, the child relies on the parent not to take them to McDonald's or send them to a good school, it relies on them not to do – to conduct themselves in a way which fundamentally breaches their duty to them in relation to the trust that's been reposed in them and that would include not just the horrendous conduct that we see here but would capture other forms of serious disloyalty where, and when we're talking about not putting your interests in front of the child's interests, it's a little difficult in this particular way. You can frame the parent who sexually abused their child as saying their interest is self-gratification but you can harm –

WINKELMANN CJ:

She's back, carry on.

MR STEELE:

Sorry, I'm getting carried away, someone had a question?

WINKELMANN CJ:

No, we thought we'd lost Justice Glazebrook but…

O'REGAN J:

No, it's all right, we momentarily lost Justice Glazebrook but she's back.

WINKELMANN CJ:

Off the screen that is as opposed to the other sense.

MR STEELE:

So the broad definition captures other forms of harm and assault and battery is limited in this way too because of the nature of the tort but why should this Court limit the kind of harm, the kind of fundamental breach of the obligation which has been taken up by the parent, and you may say involuntarily taken up because they had the child, but they may have adopted the child, that's the same duty, and so –

WINKELMANN CJ:

It's not necessarily limiting it, it's actually just making clear what it is, is what I'm thinking.

MR STEELE:

Yes.

WINKELMANN CJ:

And Justice Kós' formulation has left the land of fiduciary duty is my thought but…

MR STEELE:

Yes, it's flexible, Ma'am, for sure and –

WINKELMANN CJ:

And it doesn't necessarily do any more good work, it's simply just another way of saying the same thing which might not be or else – and if it's not then, it's actually more than a fiduciary duty has previously been recognised which might be fine but I'm just identifying that.

MR STEELE:

Well, your Honour, when is fiduciary relationships and fiduciary duties especially in this context going to come back before this Court. This is the opportunity to frame it in a way which captures as much as possible, and what I was going to refer to you when we were talking about the public policy aspect, because there is a public policy aspect to this, and this is where the tikanga could play its part, and that is what we're looking at here is not about unconscionability, it's about loyalty, it's about ensuring those that take on the responsibilities for others in whatever context, as long as it meets the indicia, there's a public policy ensuring that those people are complying with those obligations and because what else will control them and constrain them to not act against those interests especially in favour of their own interests. And so Justice Kós' formulation is broad but –

WINKELMANN CJ:

Well the existing fiduciary duty formulation would do that, wouldn't it?

MR STEELE:

Would it be broad enough though, your Honour, because –

WINKELMANN CJ:

Well it prevents them favouring their own interests over the interests of their child.

MR STEELE:

Do not harm the child, yes, but it's – would it capture all forms of abuse? Will it capture the mental abuse of a parent who takes it too far, who locks their children, like that fellow, the wizard under the stairs, would it capture those sorts of abuse, Harry Potter, yes.

WILLIAMS J:

Harry Potter.

MR STEELE:

I knew, I knew, Lady Deborah –

WILLIAMS J:

Well he's probably worth suing.

O'REGAN J:

Oh that fellow.

MR STEELE:

Lady Chambers would know. And so at first blush, yes, it seems broad but it seems apt.

WINKELMANN CJ:

All right.

WILLIAMS J:

So your argument is really that the fiduciary duty arises only in childhood and during the course of dependence-based vulnerability and the cause of action lasts through adulthood until the limitation period ends.

MR STEELE:

No, Sir. The duty lasts or the fiduciary relationship lasts while the parent is in that position within the relationship. Once the chap leaves home, and it doesn't matter why he left because I think in my learned friend's submissions there was an issue about how he left, whether he was forced out or whether the children kicked him out or whatever it was, it doesn't matter, the relationship has come to an end and so do the responsibilities. The obligation to remediate any breaches he has done don't. They continue but that's the right to bring an action and to seek a remediation. That continues for as long as the Limitation Act allows it to continue. That's my submission.

WILLIAMS J:

Well on that analysis the departure itself could be a breach?

MR STEELE:

It could be.

WILLIAMS J:

An ongoing breach.

MR STEELE:

Well no.

WILLIAMS J:

At least during the minority.

MR STEELE:

No, not in my submission.

WILLIAMS J:

If it's true that the parent is not allowed to do anything that harms the child, departure itself may be harmful.

MR STEELE:

I accept that but not an ongoing breach and that's why I've included the case of –

WILLIAMS J:

But the harm would continue?

MR STEELE:

Well no, no, with respect, your Honour, that's not our submission and that's why I've included *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, which is the recent Supreme Court case which only came out a week or two back, involving an oil spill and oil all went up onto the beach and the time limitation had taken its toll on the cause of action and there was no right. So what went before the Supreme Court was well the oil is still on the beach, your Lordships, it's still killing the seagulls and it's causing all sorts of continuing and escalating harm because it hasn't been remediated and what the Court was

asked to do is say: “Well it's tort,” and when I take you to that judgment you’ll see that they made a statement of general application to torts in general, that you look for the event and the event was the oil going up on the beach. From that point on, you had your occasion for your cause of action arose and the harm that followed afterwards, even though it took various forms, was something that should be compensated for at that point in time and you call evidence –

WILLIAMS J:

You think you can transfer that scenario into the scenario of an intimate family relationship without any questioning about whether that’s appropriate?

MR STEELE:

I do question whether it's appropriate and in my submission it is because if you – when one looks at all the research and all the cases you can see that’s exactly what's happened. There’s been a breach of fiduciary duty, often by sexual molestation by a parent or a guardian or the janitor of a school and a whole range of different – and when the relationship is over then the question is well when this person, when should this person bring their claim and the Limitation Act informs us –

WILLIAMS J:

Yes, but the janitor is a different situation, isn't it? We’re talking about let’s say the father, the father leaves in circumstances where for argument’s sake there's an ongoing fiduciary obligation to not harm the children psychologically, for example, and the impact on the children is devastating and continues to be such, just on the evidence, I'm just talking about an evidential situation.

MR STEELE:

Yes, yes, I understand, Sir. The damage caused by the father’s actions don’t start and finish on the day that he commits his breach. There's no argument about that and when one reads the evidence of *Ellis* one can see that. It's horrendous, it's ongoing and it takes many different forms but as a matter of, as a matter of legal principle. The breach has occurred on a day and then they’re

compensated up to when the Limitation Act allows them, allows the claim to be brought and they should be quantified on that day. To suggest that, yes Sir, to suggest that there is a new harm caused every time the effects of the original breach are caused is to run against the very, the very dicta or the very policy which the Supreme Court of the United Kingdom rejected and if I take you to those, Sir, you could see that there's two ways of thinking. There's the practical way of thinking and that is that this harm regenerates as time goes by, like the oil on the beach continues to cause damage until it's remediated, as compared with the legal way of thinking and that is the harm that's caused on a day and what happens afterwards is something that you seek compensation for. It is not a fresh harm and that was the ratio of the *Jalla* case which – and in our submission that applies in this context. Not just a nuisance as that was that, it applies to all torts and to equitable causes of action which, by analogy under the Limitation Act, the Limitation Act applies.

WINKELMANN CJ:
Right, well we had better take the adjournment.

WILLIAMS J:
Well –

WINKELMANN CJ:
Did you have a follow up question?

WILLIAMS J:
No, no.

WINKELMANN CJ:
All right, so how much longer do you think you'll be Mr Steele?

MR STEELE:
Longer than what's left in today.

WINKELMANN CJ:

I know that and that is why we're adjourning.

MR STEELE:

Perhaps an hour or two, your Honour, but we haven't dealt with my learned friend, the amicus' submissions, neither of us, so I'm not sure.

WILLIAMS J:

An hour or two? That's a general band.

WINKELMANN CJ:

A considerable range but you'll be finished by midday, then say Ms Bruton is an hour?

MS BRUTON:

I'll fit in.

WINKELMANN CJ:

Well shall we give you an hour and a half Mr Steele or do you need two?

MR STEELE:

I'll do my best for an hour and a half.

WINKELMANN CJ:

Okay, well set yourself a timeframe.

MR STEELE:

Thank you, your Honour.

WINKELMANN CJ:

Right, and then that gives you time to reply on what Ms Bruton has to say. Okay, we'll take the adjournment.

COURT RESUMES: 4.05 PM

COURT RESUMES ON WEDNESDAY 14 JUNE 2023 AT 10.04 AM

WINKELMANN CJ:
Mr Steele?

MR STEELE:
Thank you, Ma'am. I alluded to it yesterday, I got to paragraph 2 of my submissions and things sort of ran away from me your Honours but I'd like to take you to, and I mentioned the Limitation Act Law Commission Report extract in the bundle at 701.259. The second half of paragraph 21 but perhaps you might like to read all of it.

My learned friend Lady Chambers yesterday told your Honours that the evidence wasn't contested and examination had no effect on the evidence against Robert and his conduct. Now don't fear that I'm going to try to suggest that the evidence isn't fixed or the findings of fact aren't fixed, they are, but my submission is that the election by the appellants in 1994 not to pursue their father for what I would call a traditional compensation claim for fiduciary breach, fiduciary duty breach, has given rise to the kind of consequence that the Law Commission alerted us to and that is 20 years elapses, the offender dies and yet he's been accused of conduct, which is as heinous as one can conjure up, and the determination which finds him effectively having committed that conduct is effectively performed as a formal proof hearing because he can't give his evidence of course and he can't point to other corroborative evidence or other witnesses that might have assisted him in his defence.

And so that goes to the issue of the Limitation Act and later in my submissions your Honours what I'm going to be saying is that this, the Limitation Act, does loom large, this claim is out of time, as the majority in the Court of Appeal held, and what you are seeing before you is a stretching of the concept of fiduciary relationship and fiduciary duties way beyond where it has ever been before and it has absolutely no jurisdictional support anywhere in the world that we have

been able to locate. It is truly novel and is almost not a fiduciary relationship case at all in the respondents' submission.

I'm going to touch on one or two issues that were discussed yesterday your Honours because we went at it at quite a pace and I covered far more ground than I had intended. The second –

WINKELMANN CJ:
Well that's not a bad thing.

MR STEELE:
No, your Honour, and yes my carefully laid plans went array. The next place I would take your Honours to is a quote in *Norberg* which, and I don't mean by taking you to CB 701.661 paragraph (c), I don't mean to focus in on this point and to suggest the rest of that judgment is not worthy of your consideration. There is a lot of gold in that judgment in terms of the law of fiduciary relationships but the bit I wanted to highlight for your Honours is at paragraph (c) –

WILLIAMS J:
What's the page number, not the case report page.

O'REGAN J:
295.

WILLIAMS J:
295, thank you.

MR STEELE:
In this case which is, this is the one where the doctor abused his position to exchange sex for in exchange for drugs, you can see there: "This is not a case where the traditional equitable remedies of restitution and account are available." It's just not possible. The loss is not economic and the respondents don't take any issue with that. The remedies are not available. The equity is

always compensation in their stead and that is what Justice Kós, I'm very careful to ensure I use the Justice today your Honours, Justice Kós made that in very strong terms in his judgment.

WINKELMANN CJ:

Well it's pretty straightforward, isn't it?

MR STEELE:

Yes, it's straightforward.

WINKELMANN CJ:

There's no possibility of counter-profits in this scenario is there. So no property involved, it's compensation.

MR STEELE:

It's true, Ma'am, but in the appellants' case you have a cause of action which they can pursue and Justice Collins accepted that they had that cause of action and they could have pursued it but they elected not to, for compensation arising from those earlier breaches and now they are seeking from this Court to affirm a different cause of action for the effectively – and a new form of relief for the same conduct still asserting a fiduciary relationship breach and as a matter of policy we say that is unsound and unprincipled.

1010

WINKELMANN CJ:

So just to put that in legal terms, are you saying that the remedy that they're seeking, are you building something out of the remedy they're seeking which is effectively it's a constructive trust, isn't it, it's a remedial constructive trust?

MR STEELE:

Well it was a constructive trust in High Court, Ma'am, but I think it's turned into a – if they want to pursue the argument of Justice Collins, it's turned into a rescission argument but it's not entirely –

WINKELMANN CJ:

Something has to underpin in a rescission though, doesn't it?

MR STEELE:

It does, it does, Ma'am, and they're pointing to a breach of fiduciary duty.

ELLEN FRANCE J:

So, sorry, are you saying the remedy sought is unprincipled or the change in approach is unprincipled?

MR STEELE:

Both, both are unprincipled. *Chirnside v Fay* needs no extension, amendment or superimposition of any other considerations. It sets up when a fiduciary relationship exists and it can be applied directly. The only hesitation is that it doesn't address the issue of should fiduciary relationships cover non-economic as opposed to economic but I think we've moved past that from what I heard from your Honours yesterday that –

WILLIAMS J:

I thought you had?

MR STEELE:

Pardon?

WILLIAMS J:

I thought you had?

MR STEELE:

Yes, yes, well I have but I'm happy to go back –

WINKELMANN CJ:

Well you seem to have a bet each way on it.

MR STEELE:

Well I hope I didn't say that your Honours because we – the respondents' position is that fiduciary relationships and fiduciary duties should cover both economic and non-economic interests, which is precisely what Justice Wilson said in *Frame*, and it hasn't been doubted by the judgments that we have in New Zealand thus far and it supports the majority position or at least Justice Kós.

WINKELMANN CJ:

So what do you say about the conventionality of what Justice Collins, the brevity he directed?

MR STEELE:

I'm sorry, I don't understand.

WINKELMANN CJ:

Well do you say it's an unprincipled remedy or a principled remedy?

MR STEELE:

That the appellants are seeking?

WINKELMANN CJ:

I mean it seems quite an unusual remedy to me.

MR STEELE:

The appellants' remedy they are seeking?

WINKELMANN CJ:

Yes. What Justice Collins said he would have been prepared to do which is…

MR STEELE:

Well Justice Gilbert called it not only novel but unprincipled which is a striking statement. We hold the same view from the respondents' perspective because it's, for all the reasons that were set out there, it hangs on an abuse of in a power which didn't arise out of the relationship.

The father had the power to do what he wanted with his assets to be sure but he never had that power. That power wasn't reposed in him by the children. The assets themselves have no connection with the children. They were created afterwards and they had none of the classic *Lankow v Rose* [1995] 1 NZLR 277 (CA) contributions or no kind of constructive interest in them. They just see them as a group of funds which, if they can produce a breach of duty, might enable them to bring some sort of claim but it raises a whole host of issues, one of which, an important one, is just exactly what is this legal hold over these assets. Is it a constructive trust? No. Is it an equitable charge, equitable lien? No, no. Because there's no jurisprudential underpinning for these commonly understood basis upon which equity can hold an asset but nevertheless he can't do what he wants with it. He can't give it away. If he wishes to spend it, even if he wishes to go to the Sky Casino and spend his money with the intention of thwarting his children, he can't do it. And then the Court will presumably be asked to issue an injunction saying he can't spend his money and then –

GLAZEBROOK J:
Can I just –

MR STEELE:
Yes.

GLAZEBROOK J:
As I understood the argument of the appellants, it was that there was a negative duty on him, if you like, not to get in the way of a Family Protection Act claim so the breach, if you like, and that arose out of the original sexual abuse and the ongoing issues that that had caused so the ongoing sexual abuse by his – sexual and other abuse by him and the ongoing issues caused. So the duty was not to do that and if he had a duty not to do that, that being a negative duty and quite a narrow duty, then there would be an ability to undo what he had done in breach of that duty. That's what I understood the argument to be and I may have misunderstood it.

MR STEELE:

We understood that to be the argument too but the undoing of the duty, the atonement, the remediation, it can be called whatever it is, but in our submission the appropriate award is compensatory damages. It always has been. It is in every single case which is before your Honours.

GLAZEBROOK J:

Well, but the family protection claim could take into account those issues, I think is the other side of that, so that is it necessarily a remedy in respect of them but it is an available legal outlet for getting some kind of compensation. So that's as I understood the argument.

MR STEELE:

Family Protection Act, I'm glad you raised that because I might have forgotten, your Honour, yesterday one of your Honours, and I can't remember who it was and I apologise, raised the issue of well someone is, someone has been harmed and that is one of the reasons or a reason someone will bring a claim under the Family Protection Act. I may have misquoted that but the gist of it is there. Of course the – and I think my learned friend Lady Chambers said something along the lines of well recognition as a member of the family isn't a harm based thing. But of course the reason someone brings a claim under the Family Protection Act is because they do not believe that the provision made for them is adequate in terms of maintenance and support and supports the recognition of the family in both counts and it's not for claimants to divide them up. They bring both claims and then the Court sort of works out, my learned friend talked about a tariff of 10%, I'm not sure it's that straightforward, but they come forward because inadequate provision has been made for them, for both, and so they have been harmed.

Now the Family Protection Act claim, when I'm trying to make sense of the appellants' claim, it looks like the kind of claim that you bring when you wish to bring a Family Protection Act claim under the Property (Relationships) Act and you seek an application from the Court to seek a division of relationship property to replenish the estate. It has that feel about it but it's kind of a dogleg claim

which stretches fiduciary relationship law beyond anything seen in the cases. It's a brand new cause of action. Of course this Court sets out what equity and the common law is for us but it can't be, in our submission, sensibly argued it's a natural incremental extension of existing principles. This is something quite uniquely novel.

GLAZEBROOK J:

Can I just go back to – I just, I don't think I quite understood your point about the Family Protection Act. I mean I think you're probably quoting my – what I said yesterday in that most of the people who are making Family Protection Act claims are adults are saying, or certainly if they get a large claim under the Family Protection Act, it would be on the basis that they are vulnerable still and have not had adequate protection under the Will, leaving aside whether you just get 10% or not and of course there are lots of issues with that percentage thing and I think they've been gone into now but I didn't quite understand – you were saying that that wasn't – because of the many issues that you could seek a family protection or you could launch a Family Protection Act, it's not related to fiduciary duty or what was the point? Sorry.

MR STEELE:

I say it's completely unrelated and –

GLAZEBROOK J:

Okay, thank you, that's all right.

MR STEELE:

It's completely unrelated and the considerations of the Judge under the Family Protection Act stem from the guidance within section 4 itself and what the Courts have said about what support and maintenance mean and we've had lots of appellant authority decisions on it. No one is any doubt about it but what connection does that have and, of course, those rights were never previously replicated in my understanding in the common law or equity and they aren't replicated prior to the death of the – well it's not I'd say the Will maker, it applies to intestacy as well but it doesn't apply pre-death.

1020

There's no, to my understanding, there is no common law right to have the kinds of considerations, which the Court is empowered with under the Family Protection Act to be applied, before a person dies. To do that is a serious incursion into understood property rights, individual property rights about what you can do with your property when you're alive and that's not to say legislation hasn't gone there, it has gone there. The Insolvency Act clawback, the Property Law Act clawback, support for children, there's a number of different things, all parliamentary incursions into property rights but there's nothing there at the moment, although the Law Commission under the succession law review is considering what my learned friend Ms Bruton says about trusts, which thwart what would otherwise be done under the Family Protection Act, and we don't shrink from that.

We accept that many practitioners, in fact when settlors are getting older in life and they wish to create a trust to manage what happens to their property after they die, the Family Protection Act comes up and sometimes they wish to avoid it or sometimes they wish to control the mechanism but it's quite a complicated matter. It's not just a simple matter of thwarting the Family Protection Act. You are making a decision, you are choosing trustees who have your interests at heart. You direct them on how they should have those interests. You are sometimes looking after family members, sometimes not, sometimes people that would have a moral claim but not a legal claim under the family. It's a very complicated thing but the appellants are effectively saying this Court should go in there and change the understood legal matrix in order to do justice in this case but this is where the floodgates really comes in. It's not about will there be floodgates by children who have been horribly abused by their parents and wish to have compensation.

We don't, like Justice Hammond said in his case, if the shoe fits or the hat fits, whatever the expression is, wear it, justice will meet that claim and of course it will and we support that but it's a very different proposition which has been put to you here basically telling people how they can spend their money, not just

on the brink of death but at any time. I remember my aunt talked about going on a GI holiday. I said "what's that?" Grandchildren's inheritance. Well my learned friend was saying we don't mean to touch the inheritance of people if someone wants to go on a holiday but it's a difficult line to draw in my submission. In actual fact, a finding in favour of the appellants in this case is really going to open people's eyes as to what can be claimed and there will be claims and not just ones where you can demonstrate the intention of the settlor of the trust, as in this case, and there are issues about that which I'd like to talk to you about your Honours, but let's say for the moment it's an intention to thwart the children's claim but what about if the intention isn't so easy to discern and yet they've still shuffled off their property on the brink of death. Any rule that will be created will presumably be an objective test and people will be saying "Look, there's only one obvious reason why this property has been shuffled off and settled on a trust, it's to thwart the family's claims" and there's been bad blood in the past and so there's the floodgates and there will be claims aplenty if the appellants are successful in the way they've framed their case. I'd like to move onto another proposition unless you have any further –

WINKELMANN CJ:

No, go ahead, Mr Steele.

MR STEELE:

Thank you. *Breen v Williams* [1996] HCA 57, (1996) CLR 71 I'd like to take your Honours to and the case reference is CB 701.0078.

ELLEN FRANCE J:

So what's the proposition?

MR STEELE:

The proposition is that Justices Gaudron and McHugh said that "fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy" and the common law duties they had in mind was assault and battery which, of course, while we say that this is a breach of fiduciary duty first and foremost of this conduct, it is directly analogous to and

would be assault and battery if it wasn't someone in a trusted position that that would be the cause of action and so this is the sort of fiduciary law should not be used as a mechanism to improve the remedy and, in our submission, that is more or less what is happening here.

WINKELMANN CJ:
Well, it should be used where it applies, shouldn't it?

MR STEELE:
Pardon, your Honour?

WINKELMANN CJ:
It should be used where it applies to improve the remedy. That's the whole point of fiduciary duty and the law of equity that they can give you remedies that aren't available at common law. So this principle, that's not particularly helpful because equity gives you lots of remedies that are similar common law, cause of action won't in the various situations. It's been recognised it can do so and there's a discussion of that in the case you just took us to in *Norberg*.

MR STEELE:
Yes, and obviously I agree with that, Ma'am, but the kind of remedy that I'm talking about is the remedy of rescission to replenish an estate for the purposes of bringing a Family Protection Act claim.

WILLIAMS J:
So do you say rescission is never available even if a fiduciary relationship exists?

MR STEELE:
In the context of this, of the nature of the breach of duty in this case the –

WILLIAMS J:
I'm not talking about this case, I'm talking about generally.

MR STEELE:

No, rescission would be an available remedy for the Court of course but –

WILLIAMS J:

Yes, so your argument is fact-specific based on the argument that this stretches fiduciary relationship and therefore duty beyond what it's built for?

MR STEELE:

Thank you, your Honour, that is what I'm saying, yes.

O'REGAN J:

So what was the issue in *Breen v Williams*? Was it the difference between common law damages and equitable compensation?

MR STEELE:

It was – well they were – it was a…

WINKELMANN CJ:

I mean *Breen v Williams* really turns upon a refusal to recognise fiduciary duty in circumstances where it's been recognised in Canada, doesn't it, that's its relevance?

MR STEELE:

It was and it was about disclosure of medical records. It's a far cry from what we have here but –

O'REGAN J:

Right, okay, no don't worry about it.

MR STEELE:

Now I can see that or I perceive that your Honours are still concerned about the broad definition of the duty as promoted by the respondents. Do you want to hear any more on that because we had a bit of a discussion about that yesterday and all I would do is point to other formulations but really I think you've summed them up when you said it was to avoid harming the child in your

care but the respondents don't – well they don't give up on the Kós, Justice Kós, my apologies, Justice Kós formulation which –

ELLEN FRANCE J:

So why do you advance that as opposed to the Canadian?

MR STEELE:

Well the Canadian one's very focused on the specific harm and in our submission it doesn't need to be that focused. Without opening the floodgates you can have a test which is broader and gives flexibility to the Court, fundamentally violate the relationship of trust, it sounds a little nebulous but I don't think it is in my submission. The Courts will see something like this and they will recognise it when it happens.

WINKELMANN CJ:

The problem that I have with it is – well I feel there's some internal inconsistency in your position because for most of your argument you're advancing fiduciary orthodoxy but now you're advancing that we basically scrap the recognised characteristics of fiduciary duty in favour of something which I don't think Justice Kós was intending to recast the fiduciary duty because that's broad enough as he's expressed it to encompass negligence.

MR STEELE:

Wow, I hadn't contemplated that, your Honour. I would see the test that Justice –

WINKELMANN CJ:

I don't intend – think that he intended to convey that. He would think it would be read with the fiduciary patina.

MR STEELE:

It would be trundled out in the context of a fiduciary relationship and, of course, you know that our submission is that it needs to be a subsisting relationship, it might have come to an end, but the breach has to occur during its subsistence

and then you would, if it was a novel, one of the ones that aren't inherent but of course we're saying this is inherent, but if it was one that wasn't inherent, you'd look at the various indicia. Once you realise you had the necessary, I won't go through them all with you, then you would say "well okay what did this chap do?" Was loyalty breached at the end of the day, was the power vested in the – 1030

WINKELMANN CJ:

Duty to prefer their interests over their own, in the context of the particular relationship. So only when they're moving the context of that relationship, and they're not inconsistent, it's just that the Canadian test seems to me to be more recognisable as an expression of fiduciary duty in this, in operating in this non-economic sphere, and I expect that Justice Kós probably had in his mind that it would be, what he had said was going to be read in the context of that, so I don't imagine he was intending to overthrow the law of fiduciary duties.

MR STEELE:

Well Ma'am, I'm happy to have this discussion but the reality is from the respondents' point of view it doesn't matter whether it's the narrower or the broad.

WINKELMANN CJ:

Well no, and I think the appellants are happy, yes, the appellants are happy with the Canadian formulation I think. Anyway, carry on. It is helpful for us to have a discussion in a way because as you say, Mr Steele, we have to make a decision which is important to New Zealand's law, so.

MR STEELE:

I feel some trepidation going here because I know it was discussed yesterday about the duty that we have in mind does not guarantee a certain outcome, and I know your Honours are already onto this topic, and it is mentioned in some detail in *EDG v Hammer*, and I know your Honours have read that case. I'm happy to skip it but of course it is pivotal to our case that the duty not be cast as a duty to guarantee a certain outcome. It's not justiciable, the word I had

trouble with, but that is what the appellants seek, if you strip it away. They wanted Robert not to favour his new family and make a disposition in their interests. They wanted him to think about his own family, for the reasons which have been given to you, and act in their best interests. Now that is new and is not consistent with principle. That is the submission in a nutshell, and I would point to *EDG* which I'm sure your Honours will read, and it's already there.

I know there's pressure so I will keep moving along. Another issue that I spoke briefly about yesterday is the fact of the need for a subsisting relationship when the alleged breach is said to have occurred, and this is crucially important because the breach that the appellants want happened 30 years later and if we look at the cases, how the cases have addressed it so far, we've seen that what they say is, and it makes the point that intermittent contact between the alleged fiduciary and beneficiary, and you see it when the uncle down the road is at the beach property and he comes over for a dinner and he sneaks upstairs and acts in an abominable fashion to somebody, that judges have said, yes, of course it's an assault and a battery, but does it also meet the test set out for fiduciary relationships, no it doesn't, and why doesn't it, it's because the kind of trust envisaged by fiduciary relationship law isn't there because the contact is intermittent, and consistently that has been the case, and that is something which the appellants run into head on because for 30 plus years there has been nothing between the appellants and Robert other than an accusation that he did what he did, and a robust denial from him by his lawyers that he didn't do it.

There has been really no other contact, certainly nothing that would constitute a subsisting relationship and that is, in our submission that is an insurmountable hurdle for the appellants, and as Justice Kós says, the relationship, the fiduciary relationship which he accepted ended when he left the home, and as Justice Williams said yesterday, the actually departure from the home might constitute. If the fellow's job was to look after the children that night and he just walks out, of course that's a breach of fiduciary duty, but when everyone knows and understands that the relationship is at an end, and no one looks to him for anything other than the subjective expectation he might leave something in his

Will, but we say it's untenable to suggest there's a relationship beyond that point.

I have some, I've referred to them in my map book and in the written submissions, that the cases say that when the relationship ends, generally speaking, the duties end too.

Now I mentioned *Jalla* yesterday your Honours, and I'm going to ask for your patience because I want to take you to that case and highlight some passages for you.

WINKELMANN CJ:
Sorry, which case?

MR STEELE:
Jalla. It's one that was added pretty late in the day but my learned friend…

WINKELMANN CJ:
How is it spelt?

MR STEELE:
J-A-L-L-A, and I think it should be on your screen now your Honour.

WINKELMANN CJ:
Right.

MR STEELE:
You can see that the ink's hardly dry on this your Honours. It involved an oil spill. The oil went up on a beach, and I mentioned it yesterday and it gave rise to continuing harm. Harm of different types but continuing harm, and the question was does the cause of action arise and crystallise on the day it goes up on the beach, or does the continuing harm give rise to fresh breaches because what we have in this situation is a harm on a day and then there's the suggestion that they, well, not that there's another harm, but there's some sort

of harm in the future which relates back to the original harm and in my submission this case is authority for the fact that the general rule is that damages for a cause of action must be recovered once and for all and if I take your Honours to paragraph 20 of that. Then paragraph 24 your Honours.

WINKELMANN CJ:

Is there anything else you want us to read other than 24?

MR STEELE:

Unfortunately yes Ma'am. I'd like to take you to paragraph 31. I would talk to these but I don't think I could improve on it.

WINKELMANN CJ:

Well can you tell us what you are taking out of them?

MR STEELE:

Well that the harm that occurred in this case happened during the course of the relationship, and that the remedy according to the Limitation Act laches and how the Courts normally approach these things, and I don't bring it up because it's well established how they do. The claim should have been brought between the allowable time period the Court allows, and finds, or when the knowledge of the wrong –

WINKELMANN CJ:

So what does the Court say about the continuing nuisance and the commencement of the cause of action in this case?

MR STEELE:

Well we say there is none.

WINKELMANN CJ:

No, in *Jalla*? What does it say?

MR STEELE:

It says there is none. It says that like any other continuing tort or civil wrong the action occurs at a point in time and the continuing harm, even if it's different in kind, the harm that creates afterwards goes to damages not to creating fresh causes of action.

WILLIAMS J:

Where is this, at 31?

MR STEELE:

At 31 and onwards. The whole case, it's a very succinct case.

WINKELMANN CJ:

So it accrued from the first spill'?

MR STEELE:

Yes, that's correct.

WINKELMANN CJ:

And it didn't matter, they all kept on washing up?

1040

MR STEELE:

That's right Ma'am. So at paragraph 37 and 39, the last two that I'll refer you to, 39 what their Lordships said was that to accept the submission of the person who wanted a continuing or fresh harms to arise, I won't mention his name, would be to undermine the law on limitation of actions, which is based on a number of important policies, principally to protect defendants but also in the interest of the State and the claimants, and that is why I took you to the Law Commission's report at the very beginning because the Limitation Act is being sidestepped, undermined, overcome by the clever way in which the appellants' counsel have framed their case.

WILLIAMS J:

So I see the *Coventry* case [*Coventry v Apsley* (1691) 2 Salk 420] confirms that false imprisonment is a continuing trespass.

MR STEELE:

While the person was imprisoned your Honour, yes.

WILLIAMS J:

That's right. So is that a more useful analogue than oil on a beach?

MR STEELE:

Perhaps. It's equally as applicable. But that still requires that control over the person who's locked up, and the case also mentions things like roots under properties, which are not relevant to our case. But when you're looking at a discrete piece of harm which gives rise to consequences, the policy in our submission is that it shouldn't give rise to fresh causes of action, however they're framed. The remedy should occur in relation to the action and this offence wouldn't be a breach of fiduciary duty case if this neighbour next door had committed these awful acts, rather than the father. It would be a simple – well not simply – it would be a case of battery and assault, and it would be dealt with the same. It would be in compensatory damages, ACC aside.

Basically you don't commit another breach because you haven't remedied your earlier breach. In a nutshell.

WILLIAMS J:

Unless, and this is the argument isn't it, that there's something inherent in the duty that requires a putting right, and you say there isn't, and the appellant says there is, and so did Justice Collins.

MR STEELE:

If there's a duty to put right, then the respondents have a problem.

WILLIAMS J:
You say there isn't?

MR STEELE:
We say there isn’t.

WILLIAMS J:
That’s an attempt to turn damage into a fiduciary duty.

MR STEELE:
It is. An atonement, however you wish to frame it, it’s about remedy. The appropriate remedy is compensation. The availability of rescission isn't to the point because the nature of the breach doesn’t point to that as the kind of remedy the Court should have for the breach within the relationship as we’ve framed it.

Justice Collins says the categories are not closed. I'm not sure if you want to hear me on that your Honour, but since an imminent judge made that comment, I will comment on it. In our submission what it means when the categories is not closed is exactly why this case is here. Not that we’re seeking remedies outside of established principles. Not so that this Court should rewrite the law in that area. But that the categories of the relationships which might be considered inherent are not closed and never will be closed. Once the Court has a good look at it, it will decide whether it’s inherent or not, and of course a child born into a family has no choice about its parents. Its parents are there as their caregivers. While that situation remains it’s hard to imagine it not being inherent. They can't shuffle off their responsibility, they have it. It comes with the job just as a trustee’s responsibility comes with the job of having legal ownership but not beneficial ownership, or the beneficial ownership is inchoate, and principal, and all of the inherent ones, principal and agent and partners. They can't shuffle off those responsibilities, it’s not surprising that they’re accepted as inherent, and nor can the parent and the child.

WINKELMANN CJ:

Can I just ask where we're at on your road map because I'm tyring to follow the structure of your argument. Is it linked to your road map at all?

MR STEELE:

That's the very question I was hoping you wouldn't ask your Honour. I would say that I am about, talking about Justice Collins' reasoning –

WINKELMANN CJ:

Which is the bottom of the second page.

MR STEELE:

But I am not talking to every point. I have comments on every point, but I'm not talking to every point your Honour. I'm trying to be frugal.

WINKELMANN CJ:

I mean, well, you've actually covered most of it haven't you I think. "A duty to atone is merely a label for then obligation to pay compensation."

MR STEELE:

With the Court's leave I'd just like to throw up some mud in the water.

WINKELMANN CJ:

Because what you were going to come to, I think, was the facts, which is…

MR STEELE:

I was going to talk about the difficulties with how the Court deals with the kind of duty and relationship which you are being asked to affirm as part of our law, and I've already mentioned some, how is the duty to be enforced, especially before death is complicated, and I've thought about it, but there's just problem after problem. What order would the Court make against a father during their lifetime. How does the Court frame the equitable –

WINKELMANN CJ:

So your point is that this could notionally, this duty if the children had note of it, this duty could notionally therefore have required, have granted an injunction.

MR STEELE:

It would have to Ma'am. It would have to. And against what. Shuffling off his assets to a trust is only one way to divest himself. It opens a can of worms.

My learned friends' submissions say that, well, we're not trying to control his testamentary, you know, what he does with his assets, you know, in terms of his Will or however else, but it's difficult to see how that can be so. This is a direct control over what he does with his assets, all of them assets which he made and the children, except for this duty, would have no interest and the Family Protection Act, the notions of the Family Protection Act in my submission should not be imported into the law of fiduciary relationships. It's a statutory discretion given to the Courts with constraints attached to it, and there's nothing equivalent during someone's lifetime, and itself is under review, and there's no consensus about what should happen to it, and there's no consensus about avoidance trusts, as my learned friend Vanessa Bruton talked about. Everyone's got a different view, and the appellants want the Court to get in there and make it a fiduciary relationship. Resolve the matter that way. It would pre-empt the Law Commission.

I'm getting close to the end your Honours, you'll be pleased to hear that. The appellants float the idea of the appellants' subjective expectations and Justice Collins' subjective expectations are never very favourable in the Court's eyes in my experience, and Justice Collins rejected that and said, no, we're looking at objective expectations. But expectations, other than the expectation that the fiduciary won't abuse the trust that's been vested in them in the relationship, they have no role. Expectations to remedial relief is something quite different, and it's more akin to a *Lankow v Rose* kind of an expectation, but of course it can't be that because there's been no contributions by these beneficiaries to these assets. No effort, no contributions direct or indirect, so that can't be it. There's been no representation. We looked yesterday about

why there has been no contact with the father. There's no evidence before this Court that any kind of estoppel could be created, so what part does expectations play. It's simply an expectation that there'll be a remedy. It doesn't add anything. Of course they have an expectation, but that's why they can bring their claim, fulfil the expectation.

ELLEN FRANCE J:

So the progression in the Wills, so initially making provision and then not, you cant draw anything from that?

1050

MR STEELE:

You shouldn't draw anything from that, Ma'am, and if I can take you to the Will after Alice had her child, if my learned friend Ms Black could bring the Will up immediately after the birth of that child.

WILLIAMS J:

What date is this?

MR STEELE:

I'll tell you in a very short space of time, your Honour. So Alice's son was born on [redacted] 1996. She was on the DPB. She was in need at that point, supplementing with childcare, teaching, cleaning. The Will of 21 December 2001 is the one and it's at 301.0011. And if we go down we'll see the rocking horse is left to Alice's son, paragraph 4, and an occupation interest to Alice.

ELLEN FRANCE J:

But those change, don't they?

MR STEELE:

They do, they change but what is to connect this disposition to a wish to atone as opposed to a wish to help one's daughter who has just had a child who needs assistance to buy a house and things changed over time. Wills change. He did

a number of Wills. Interests changed. His interests moved to his new family and who knows why that may have been but he's decided to, maybe the child has grown up and the – it's pure conjecture but to tie this to an intention to atone for his past sins is asking a lot from this Court because the evidential basis for it is not there.

I suppose what I'm saying is the evidence is equivocal. It can be – they may be right but they may be wrong and it's just as probable that for that period in time that Robert believed he was assisting a person in need because they had a knew family and needed some assistance.

But as time went by his focus turned to his new family and who knows the dynamics of that relationship but there is an attack on the dispositions by my learned friend, Ms Bruton, saying that well they aren't real transfers but if one looks at the transfers they all tick the legal boxes and they're supported by a memorandum of wishes. This is no trust which appears on the face of it to be a sham and indeed I believe Ms Bruton says that. He's actually thinking about what should happen to these assets in quite a considered fashion and everyone can have a view about the moral position about who we should be supporting but for the Court to enter upon it and say that there can only be one view, in the absence of the kind of authority that the Court gets from the Family Protection Act. is a bold submission in the respondents' position and unsupported by principle and truly novel.

O'REGAN J:

But you're not questioning the finding of fact that one of the reasons for the trust was to deprive the appellants of access to a Family Protection Act claim?

MR STEELE:

Well I would just adhere to the – well no we're not contesting it. It was one of the reasons but there are other reasons and the other reasons shouldn't be diminished. This man has done what so many before him have done and are doing all the time is deciding for themselves what should happen to their property and they use a trust because if they don't a Family Protection Act will

unravel what they do with their property and you will see and the Court of Appeal authority that was in the bundle at *Pollock v Pollock* [2002] NZCA 331, obviously not binding on this Court, but nevertheless that's what the Court of Appeal is thinking. They are saying well it may look ill on the testator that he's turning his back on those that have a moral claim on his estate and we can all have a view on that too but the law as it stands doesn't prevent him unless there's a major, major change and it will have, it will get the attention of every lawyer up and down this country, that's for sure.

O'REGAN J:

That's not a bad thing though necessarily.

MR STEELE:

As every judgment that comes from this eminent Court does.

WINKELMANN CJ:

Nice.

MR STEELE:

I have finished my submissions unless you have any questions your Honours. I have some comments on tikanga but whether you wish to have a cup of tea before you…

WINKELMANN CJ:

No, we don't normally break until 11.30. Do you think we need a cup of tea?

MR STEELE:

No, not at all, not at all, I love the sound of my own voice. Before I get onto tikanga, I just would like to draw the Court's attention, and I'm sure the Court is already aware of it, section 180 of the Senior Courts Act 2016 and it's short so I'll say: "This section applies to proceedings in a senior court, another court or a tribunal where equitable jurisdiction may be exercised" and subsection (2), there's only two subsections: "If there is any conflict or variance between the

rules of equity and the rules of the common law in relation to the same matter, the rules of equity prevail."

Now that is consistent with *Ellis* and I'm sure was on your Honours' minds when *Ellis* was – because it reflects the passage in *Ellis* which says that tikanga is not there to overturn understood and established principles of the common law. It supplements the law and this case is a good example of how lawyers are grappling with how that should occur and any guidance from your Honours will be gratefully received but this case exemplifies the difficulties of approach which lawyers are having to try to reconcile common law which has taken centuries to be created and where tikanga comes in. Does it create a fresh cause of action at some time? It doesn't appear to be the case. It's part of the common law but where it fits in is difficult to understand. So our submission is actually quite short on this. My learned friend Mr Ikaka –

WILLIAMS J:
Hikaka.

MR STEELE:
Hikaka, my apologies. Mr Hikaka is another person who's such a beautiful advocate I could listen to all day but…

WINKELMANN CJ:
That's a nice recovery I think.

MR STEELE:
He says look your Honours we haven't picked up tikanga and plonked it on this case. It's been considered but actions speak louder than words. This argument has not been raised at any level. It wasn't even raised in the application for leave to appeal to this Court or in the submissions and so it looks a little bit like it's been picked up and plonked on it, with due respect to my learned friend, because if it is truly a mandatory consideration in the circumstances of this case, as my learned friend says, and it is relevant, then one would have expected it to appear at every avenue, not to be brought in here and for

submissions to be made from the Bar about quite complicated principles of tikanga which may be new to many of the ears in this courtroom although they may be very familiar to your ears your Honour –

WILLIAMS J:

You should have been in the *Ellis* hearing. That's the problem counsel face, isn't it, that was in, *Ellis* is relatively recent and it has in this area changed the game.

MR STEELE:

It's changed the game.

WILLIAMS J:

And counsel are grappling with that as are you Mr Steele.

MR STEELE:

It's changed the game but people have heard the message loud and clear and tikanga is, everyone is looking to see where tikanga can take – to be applied in the spirit of what this Court has guided us to think about and in this case, when we're considering whether or not a duty should be owed between a parent and a child when they are a minor and under their care, now that's not merely a tikanga issue, everyone in New Zealand is concerned about that and our statistics on child abuse, if one goes into the Ministry reports on it, is not great and anything the law can do to uphold that as a society value and as a value reflected in tikanga, which it certainly does, there's no dispute about that, is to be welcomed and we, as the respondents, would certainly not oppose that.

1100

But what we do oppose is the use of tikanga to fundamentally alter the understood principles, the principles of *Chirnside* and all the cases that have followed but principally *Chirnside*. Changing those principles to create some new form of action, we do not believe that tikanga does that and we do not believe that *Ellis*, that the comments in *Ellis* support that kind of approach. Your Honours' use of tikanga in *Ellis* was instructive. It guided the Court in a

difficult area of law where legislation appeared to have a lacuna. We had an overriding objective of the Senior Courts Act to assist but there was a lot left. There was a big gap there about exactly what should happen in the very peculiar circumstances of that case and you can see how tikanga can have a, it can have an important part to play and it did in well a number of the judgments.

WINKELMANN CJ:

Well what about here where you're actually on board with the notion of developing the protective jurisdiction of the Court's exercise in the fiduciary realm to protect non-economic interests, do you think tikanga can help us at all with that?

MR STEELE:

We do because there too is a gap in the law and it's the gaps in the law, it's the areas where discretions are to be considered and the Court can consider widely that this important area the law can be looked at and no one better than Mr Hikaka can explain the difficult concepts and their interplay, how that might assist this Court but – so all I say is in terms of the Limitation Act and in terms of the existing principles in *Chirnside*, which for the thick end of 20 years everyone has considered to be pretty much set in stone and there's nothing coming out of any of the other jurisdictions or this jurisdiction to suggest there's anything wrong with that judgment. It's a solid, the Starship Enterprise my learned friend said, but I prefer Rock of Gibraltar because, you know, you start with that case and it has served New Zealand well but there is a gap here on non-economic interests and I think the Court has already made a decision about that but I think tikanga supports it for all the reasons that my learned friend –

WINKELMANN CJ:

We haven't made a decision about it yet Mr Steele.

MR STEELE:

Well, I'm getting quite a bit ahead of myself here.

WINKELMANN CJ:

So you're accepting that Mr Hikaka's submissions on tikanga are generally supportive of the extension to protect children through the development of fiduciary duty in that way –

MR STEELE:

Yes, we do.

WINKELMANN CJ:

– but you don't accept that they support the development into adulthood in a way which flows out in breaches in childhood?

MR STEELE:

Precisely, Ma'am, precisely.

WILLIAMS J:

It seems to me that the question is would tikanga have given a different answer to the question you should have raised this when he was alive?

MR STEELE:

It would be – it's difficult to know how it would have played out if an action had been brought while he was alive.

WILLIAMS J:

But it would have played out?

MR STEELE:

It would have played out and tikanga – if tikanga is to apply in this circumstance in the way the Chief Justice just mentioned then why shouldn't it have applied when he was alive. We can't have one for the living and one for the dead.

WILLIAMS J:

Well that – yes my point is a different one. Would tikanga say after he's dead it's too late?

MR STEELE:

Well I think well *Ellis* –

WILLIAMS J:

Well perhaps would tikanga have a problem with the limitation period? Those are the –

MR STEELE:

I think tikanga would have a problem with the limitation period.

WILLIAMS J:

Why?

MR STEELE:

Because the harm has, in the appellants' argument, has not been remediated and there's truth in that because the action wasn't brought within the time periods under the Limitation Act or application of equitable laches.

WILLIAMS J:

So do you agree that tikanga requires remediation in all cases no matter what?

MR STEELE:

Well the one in which the appellants have applied tikanga here, this sort of pick up and plonk down, is the danger that we're going to see in a lot of causes of action because those principles are so broad you can do that on just about any civil cause of action because someone's been wronged and someone wants remediation in some shape or form.

WILLIAMS J:

So but my question is, what do you say about tikanga, not –

MR STEELE:

Well I'm going to limit myself to this case, and I say that the principles of tikanga, as enunciated by the appellants, supports what the Chief Justice said in regard to the narrow category of a fiduciary relationship and a parent with a minor child,

but it's still, that action, even though it's supported, that supports the notion of a non-monetary protection of equity, but it doesn't – but tikanga does not allow that person to bring their claim outside of the Limitation Act.

WINKELMANN CJ:

Mr Black has just passed you a note. Or Mr Wenley.

MR STEELE:

With respect from my learned colleague the submission is essentially that tikanga can't be used to override legislation, but I think your Honours are well onto that point, and of course it was stated in *Ellis* very clearly and I don't think anyone disputes it.

So those are my submissions your Honours, unless you wish to say anything. I have lots to say about my learned friend Ms Bruton, but whether you want to hear that first. I think we decided that the appellants should have the opportunity to speak last because it just seemed fair in all the circumstances, but it's up to your Honours.

O'REGAN J:

So you'll respond to Ms Bruton after she's made her submissions?

MR STEELE:

Yes your Honour, and then my learned friend.

WINKELMANN CJ:

And the appellants are content with that?

MS CHAMBERS KC:

Yes.

WINKELMANN CJ:

Right, okay.

MR STEELE:

But of course we're up to –

WINKELMANN CJ:

No, that's fine, thank you Mr Steele.

MR STEELE:

Thank you, your Honours.

MS BRUTON KC:

Sorry, it's a complicated system with my glasses. Ata mārie e ngā Kaiwhakawā. Now I first wanted to check, well I've checked with the registrar that my road map has made its way into the Court bundle, and I also wondered whether any of you would like a hard coy of that because I'll be speaking to it primarily, and I might ask you to make a note.

O'REGAN J:

Yes, we've all got it.

MS BRUTON KC:

Thank you. So your Honours, as I said in my opening submissions, there's something not tika, or quite right about a man who 16 months before his death decides to divest himself of all of his assets to avoid claims by his four children at that time whom he has egregiously abused and given the wealth to not quite strange as the other family played a part in his life, but certainly were not, were somewhat remote in his life than being the children and grandchildren of his partner of three years, some many decades earlier. His natural children will have sat there in the High Court, the Court of Appeal, and this Court listening to judges and lawyers pore over the most intimate details of their life and abuse as they struggle to understand the law which on their view will just not seem right to them.

1110

What those children have endured through life and through the court process, now eight years after their father's death, requires fortitude and courage. But we must also acknowledge that the respondent beneficiaries will have been told that at law they're on strong ground, they are perfectly entitled to the

deceased's largesse and should not give an inch even though that is anathema to many other people's sense of tika, morality or basic human decency. This is a rare opportunity for this Court to straighten out that law, to reflect what is tika, provided that can be done in a way that is principled, coherent and does not create a whole host of legal problems for us all in other areas.

It's also an opportunity for this Court to provide for the attributes of good succession law recognised by the Law Commission which I set out at paragraph 5 of my written submissions. First, simple, clear and accessible law that meets the reasonable expectations of all New Zealanders, second, appropriately balances sustaining mana and property rights including testamentary freedom with obligations to family and whānau in order to promote whanaungatanga and other positive outcomes for families, whānau and wider society and, thirdly, promote efficient estate administration and dispute resolution.

In my submission your Honours this is a rare and golden opportunity. We have to wait far too long for Parliament to straighten things out and now is the time. And so if I can just take your Honours through the first page of my road map and talk about context.

WINKELMANN CJ:
Is your road map just two sides or is it –

MS BRUTON KC:
Yes.

WINKELMANN CJ:
Good.

MS BRUTON KC:
So undoubtedly, your Honours, what we have in this situation and these "trusts" spawn so much litigation, and I'm going to take your Honours through a number of recent decisions that are either, including this one, that are either before you, before your Honours or recently decided. So it's the use of these trusts which

have created, in my submission, a real mischief in the law and they are the modern day discretionary New Zealand family trust. They became –

WINKELMANN CJ:

It's an approach that's quite unique to New Zealand, isn't it, the absolute proliferation of trusts?

MS BRUTON KC:

It is, your Honour, and it all – they became the rage, to put it in colloquial terms, post – and you might like to note this date – post 17 December 1992 when death duties were abolished. So prior to that time in a trust absolutely, like companies are legitimate property owning structures and serve a very useful purpose in society but before the abolition of gift duty the ways trusts were structured was there was a clear separation of interests. So in a family situation you might have mirror trusts but the husband would be settlor and appointor of one trust of half the property, not a beneficiary, conversely the wife in respect of the trust of which she was a settlor. So there was no way that the settlor/trustee/appointor could ever benefit from the property.

Now that completely changes post the abolition of gift duty and I started practising law in 1995 and I'd hear these ads on the radio by a couple of Auckland lawyers saying, yes, put your property in trust, you won't have to pay rest home fees, and that was the genesis of this whole swathe of trusts.

My parents got a trust. They had no idea what a trust was but my dad was so proud to have a trust and all that went into the trust was their house and they were just illustrative of so many New Zealanders generally who got trusts. It was a bit of a status symbol. They didn't actually understand nor were they told that to have a valid trust you actually have to divest yourself of ownership of the trust property and it is no longer yours and the way these trusts were all framed is the settlors were trustees, beneficiaries and held the power of appointment and removal of trustees and sometimes beneficiaries. They were all told that they had to get an independent trustee and that independent trustee was invariably, along with them, with the husband and wife if it was a couple,

that independent trustee was invariably their accountant or their lawyer or a family friend. Now the lawyers and accountants would be predisposed, and this isn't really a criticism of them, but they'd be predisposed to go along with the settlor trustee's wishes in any given situation because they had the client relationship and they didn't want to lose the client and they wanted the fees and in many of these situations, and I'll come to in this case, was the co-trustee being the family friend. The family friend had absolutely no idea what a trust was and they were also likely or predisposed to go along with the settlor trustee's wishes because they just assumed that the property was still the settlor's property anyway.

And this is where I think the law has gone a little bit off-piste, with respect, because the question that the Court has been considered, and I'll come to this and I know Justice O'Regan and Justice Glazebrook were of course on the bench in *Official Assignee v Wilson* [2008] NZCA 122, [2008] 3 NZLR 45, which actually I think lays the framework of how I'm suggesting to your Honours that the law perhaps developed, but the question for the majority in that case was did the settlor intend to settle a trust. And if you ask my parents, any of these New Zealanders who settled a trust, they would say "yes of course I intended to settle a trust" but in my submission that's not the correct question. The question is, did the settlor intend to part with beneficial ownership of the trust assets and in my submission, and I'll develop this argument in this particular case, they did not. They continued to have use, benefit, control of the trust assets, treating them as their own and in fact believing that they were, had been and remained their own.

WINKELMANN CJ:

So, and there was some discussion in the law for a period of time as to whether the notion of an illusory trust as opposed to –

MS BRUTON KC:

Yes.

WINKELMANN CJ:

– a sham trust could meet this and I think that didn't find favour, did it?

MS BRUTON KC:

No. Well I think what happened was – well there was alter ego trusts because the, and this is all covered quite nicely in *Official Assignee v Wilson*, there were alter ego trusts which were valid trusts not sham trusts and they were the product of Australian law but of course Australia has its specific statutory provisions which –

WINKELMANN CJ:

No but the notion of illusory trusts which I think was the decision of the High Court Judge in *Clayton* was that they were – that they looked like a trust but actually there had been such a failure to in the legal structure that it wasn't actually departing with the control of the assets to a sufficient extent?

MS BRUTON KC:

Exactly, your Honour, and I actually call those trusts Clayton's Trusts and that was the result of *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 and we've got counsel here in the Vaughan Road Property Trust because on the face of that trust deed, you looked at that trust deed and the settlor he still retained all the powers and couldn't be held to –

WINKELMANN CJ:

Isn't there a recent Court of Appeal decision where they've effectively resurrected it?

1120

ELLEN FRANCE J:

Possibly the *Pinney* one.

O'REGAN J:

We've got an application for leave.

WINKELMANN CJ:

Yes.

MS BRUTON:

Yes, and I'm going to talk about that one, but in my submission *Clayton* was an easy case. I mean none of these cases are easy, but that was easy because you're got to look at the trusts –

O'REGAN J:

It wasn't that easy actually but anyway.

MS BRUTON:

You could actually look at the trust deed, scratch your head and say, well this isn't a real trust because he can actually self-benefit. It say she can act in the face of a conflict of interest. He can get rid of the all the beneficiaries. Give it all to himself, and on the face – and he was the sole trustee, so on the face of that deed easy. But where these cases become more complicated – so that's your illusory or Clayton's trust, all the ego trusts, and in *Wilson* Justice Glazebrook left open the idea of perhaps maybe allowing alter ego to come back in family situations, so we'll come to that. But then you have your third area which is really hard, and what we're dealing with here and I'm asking this Court to try and sort out the law is, what we call sham trusts, and I accept that on the *Wilson* analysis bilateral intention is required but I think the question should be not did both parties intend to create a trust, because clearly the settlor did, but the more correct question is, did the settlor intend to part with beneficial ownership or not, and then in terms of your co-trustees intention accepting that common tension is required, was the co-trustee either complicit in the settlor's intention not to part with beneficial ownership, or was the co-trustee reckless as to the settlor's true intentions.

WINKELMANN CJ:

So you're just lowering the mens rea for the co-trustee.

MS BRUTON:

I think that's right. I think that's right and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), the UK decision, supports that, as I'll come to. I think Justice Glazebrook actually left the door open somewhat on that analysis.

WINKELMANN CJ:

But that's different to a Clayton's trust.

MS BRUTON:

Correct.

WINKELMANN CJ:

Because a Clayton's trust no one's, everyone's intending to act in accordance with its terms and conditions, it's just that its terms and conditions are not such as to create a trust relationship.

MS BRUTON:

Correct, and this is where it is a trust relationship.

WINKELMANN CJ:

But you're saying that everyone's, there's an indifference or an agreement to –

MS BRUTON:

Well what I'm actually saying is when you really drill down into it, there's not a trust relationship and the trust is a cloak for –

O'REGAN J:

But how do you know that when the trust is created?

MS BRUTON:

Well we'll get to that.

O'REGAN J:

I mean you sign something which says, I transfer it to the trustees.

MS BRUTON:

Yes, and there has to be much better advice. Look, I don't think the sky is going to fall in with what I'm proposing here, but what it means is this industry of every man and his dog having a trust, when the trust is really, functions in the settlor's premise –

WINKELMANN CJ:

I think it would fall in actually, Ms Bruton, because in fact a lot of people own a lot of assets in this way and trusts have, until very recently, had a very favourable taxation status, haven't they.

MS BRUTON:

Well they have, but that's gone now.

WINKELMANN CJ:

I know, that's gone now, but their tax status –

O'REGAN J:

It hasn't completely gone.

WINKELMANN CJ:

It hasn't, because a lot of people have been paying –

MS BRUTON:

Yes, apart from income spreading, but rest home protection is gone. Protection from FPA claims may or may not go after this. What this Court will have to grapple with if it grants leave in *Cooper v Pinney* is protection for relationship property purposes. But – so, yes, there will certainly be some arrangements affected but the reality, if people want to have trusts the law should be, that is absolutely fine but it is on the basis that you no longer own the assets and that there is a proper separation of all the interests and powers, just like we had –

O'REGAN J:

I mean if this Court going to do that, wouldn't it be better to do it in a case where we have the benefit of a High Court and Court of Appeal decision and full argument from the party.

MS BRUTON:

Ideally, yes, and so your Honours have to balance that with how you do justice, if you decide that's an aim, which of course it is in this particular case, when the point wasn't pleaded or argued. So I understand that completely but one solution that might be, well that is open to your Honours, is to send it back down and what you would – and give some indications that your Honours are considering the law in this area and that will no doubt result in this case settling as it should have done long, long ago. So –

GLAZEBROOK J:

Can I just check what the submission is here because if you are able to have a discretionary trust where the settlor is a beneficiary of that trust, or are you arguing you can't have that, because if you are able to have that, in this case if you leave side the reasons it was put in the trust but if in fact he wanted to set up a structure that gave some flexibility down the track in terms of who of his chosen beneficiaries might wish to – might be benefitted after his death depending on what happened over the however long period those assets were in existence then – and he could be a beneficiary of the trust, the trustees could legitimately say he can stay in the property, he's got a limited amount of time to live, he can stay in the property in the meantime because he, as a beneficiary, has need of that property, what's wrong with that?

MS BRUTON KC:

It's a question of him holding – well my focus is on intention but to answer that question, your Honour, if that was the legitimate intent that he was provided for, but he no longer owned the assets and didn't have control of them, the sensible way to deal with that is he's a beneficiary but he's not a trustee and he doesn't have the power of appointment.

GLAZEBROOK J:

Well that might be the case but the point about it is, is that what is the submission here because you intend to do what the documents do and if the documents effectively take away your control because you have passed it over to a trust and the trustees have those duties, which if they're breached they can be held to account, then you've intended to do what the document does.

MS BRUTON KC:

Yes.

GLAZEBROOK J:

How do you overlay that you didn't really intend to do what the document does unless you're going to have some rules like say well you can't do that if you're a beneficiary, you can't do that if you're a trustee but, I mean, many people might want to be trustees of their trust because – but without necessarily wanting to breach the terms of the trust.

WINKELMANN CJ:

So – well go ahead and answer that question. I was just – but I was going to say –

GLAZEBROOK J:

Well I mean say you've got a trust that I mean you intend to get rid of your assets into a trust because you're looking long-term and wanting long-term solutions in respect to the beneficiaries –

MS BRUTON KC:

Yes.

GLAZEBROOK J:

– so you intend to do that, you remain a trustee, you may or may not remain a beneficiary, you probably do under these discretionary trusts, I'm just trying to work out exactly what you say you can and can't do.

MS BRUTON KC:

Well for the purposes of today's argument my – what I'm submitting to this Court is the test, and if I can use the Chief Justice's term, the mens rea on intention needs to be lower so – lowered or be a little bit more flexible or nuance particularly in these discretionary family trust situations. Now, I know that the Court is concerned about the –

GLAZEBROOK J:

Articulate, can you articulate what that flexible or nuance mens rea is then?

MS BRUTON KC:

I think it is asking the right question as to intention. First of all did the settlor intend to part with beneficial ownership of the trust assets, not, did the settlor intend to settle a trust and then in terms of the co-trustee or the trustee, the co-trustees, did the co-trustees intend to accept ownership of assets of the trust on the basis that they were constrained by fiduciary duties to act in the interests of all the beneficiaries and not at the direction of the settlor.

WINKELMANN CJ:

Or were they reckless as to that?

MS BRUTON KC:

Yes.

WINKELMANN CJ:

Or some formulation of it. The death duty provision that used to exist before death – it's 11.30, I was going to ask you about the drag back provisions under the old law and whether that's a model for what you're talking about but we can come back to that after the morning adjournment.

MS BRUTON KC:

Yes, and the other, just the other part of the legislative history and changes too, was October 2011, gift duty was abolished so, I think as Ms Chambers said yesterday, this didn't rear its head so much earlier because you'd often be left

with a significant debt back where people have disposed of their assets soon before death, but that's gone now so now we have this real problem which I'm asking this Court to grapple with.

WINKELMANN CJ:

Right, thank you. We'll take the morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.50 AM

MS BRUTON KC:

So where we left off before the break your Honours, gift duty gets abolished from 2011 and so from that point the settlors have very little, if anything, left in their personal estates, depending on the definition of "trust" that we use, but the Trust property they continue to treat as their own. They control it, live in it, spend it, use it as they see fit, and the "independent" in quotes trustee does nothing to stop or check that. So they treat the property all as their own still, nothing changes, except when a creditor comes calling and specific provisions to deal with those, or there's a relationship breakdown, or a Family Protection Act claim, although they'll be dead by that time, and then all of a sudden none of its –

WINKELMANN CJ:

So what was the provision that death, in relation to death duties that enabled clawing back of inter vivos dispositions.

MS BRUTON KC:

I actually –

WINKELMANN CJ:

You don't know?

MS BRUTON KC:

I don't know and I –

WINKELMANN CJ:

It did have something that actually created something like the Clayton's type –

MS BRUTON KC:

Yes, the person that will know is probably Ms Ammundsen so I'll check with her and let the Court know. So we have this situation where the trusts, for some purposes, when there's trouble, but when there's no trouble it's as though a trust doesn't exist.

GLAZEBROOK J:

Can I just check. I mean I just do have some difficulty with the test you're suggesting because I have difficulty with how you would discern whether there was that intent or not, because again if you are allowed to be a beneficiary of a trust, and you continue living there, and one can understand why you might allow somebody who's dying to continue as a beneficiary to live in a house, but maybe the more productive line is to say, well, you were not allowed in equity to use a trust for what are essential dishonest purposes, and if you're intention is to defeat a family protection claim, then equity would step in, in the same way that statutorily it would step in with issues in relation to creditors and issues in relation to relationship property. Now the fit gift duty and the death duty were somewhat different in that there were structural limitations that were actually within the death duty legislation, so I'm not sure it's totally analogous, but, I mean, it's a long time since I looked at any of that and so therefore any assistance we can be given on that historically might be interesting. But I'm just putting that to you as the alternative effectively a clawback. Now Mr Steele would say that has to be but statute, in fact does in his submissions, but just an issue as to whether equity would – well normally equity would not allow you to come to unclean hands and to use it for what would be seen as fraudulent purposes, and I'm talking about fraud in an equitable sense not in a common law sense.

MS BRUTON KC:

Look, your Honour, I haven't considered it from that angle, and I think part of my initial reaction, and I would need to give more thought, is that you can

imagine all sorts of arguments about what dishonest purposes means. So, yes, in this case how can it be dishonest, and you say equitably dishonest, to use a trust when you can actually dispose of all your property in your lifetime. Similarly is the case that I'll touch on, *Cooper v Pinney*, where leave to appeal to this Court has been sought. In that case the husband was a beneficiary of the father's domestic trust, if I can call it that, and his accountant had said to him, you need to ensure that any distributions you receive are protected from relationship property claims by your partner or wife, and so it was on that basis that once he received his share of the father's trust assets that he settles the wealth on a new trust and wife is not a beneficiary, he and his children are. So could you, do you say that that is a dishonest purpose when he was actually advised to do that and legitimately could do so, and that's why I think in a case like that as well the more appropriate test is looking at intention but in a more nuanced way than has happened so far. Because what has happened so far is that after *Wilson*, and Justice Robertson who wrote the majority judgment in *Wilson*, he said, and we'll go to that judgment, but he said words to the effect that the co-trustee Mr Wilson is a professional person and he wouldn't have been a party to a sham. So then, and as I say, and then the finding of Justice Robertson was there was a broadly an intent by Mr Reynolds to settle the Trust. So as I say I think not the right questions were asked, but as the law has developed this intention test hasn't really been challenged in New Zealand.

Then what we have had is a couple of decision of the Court of Appeal on the nature of the power of appointment, and *Carmine v Ritchie* [2012] NZHC 1514, (2012) 3 NZTR ¶22-023 and *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337, and they have said the power of appointment is fiduciary, and as a result of that Clayton Vaughan Road Property Trust [*Clayton v Clayton*] is largely been confined to its facts because that was a very unusual trust deed, and then in all these other cases what the Courts have said is, well, the trustees are constrained by fiduciary duties, the power of appointment is a fiduciary power so therefore the claimant has no luck. So in my submission, and look it's a shame this hasn't been dealt with in the Courts below, I fully acknowledge that, but we're looking at how we start to set the law straight and stop this mischief, in my submission, the better approach is to ask

the right question, did the settlor intend to part with beneficial ownership, then say what's the position of the co-trustee on that front, and then in my submission we are more likely to avoid, or we'll start to undo the injustice that these situations create. So Justice Glazebrook, I think it certainly warrants consideration your point about dishonest use of trusts –

O'REGAN J:

But doesn't all this tell us that this should be done by the Law Commission, not the Supreme Court as a first instance court?

MS BRUTON KC:

Yes, well that's not a yes I agree.

GLAZEBROOK J:

Can that question be repeated because it didn't come through to me?

O'REGAN J:

I said doesn't this tell us that this is a job for the Law Commission, not the Supreme Court effectively sitting as a first instance court.

MS BRUTON KC:

So I think in answer to that, Justice O'Regan, yes, in an ideal world the Law Commission would deal with this, but we are a long off –

1200

WILLIAMS J:

It is dealing with it or it has as you say.

WINKELMANN CJ:

Yes, it has dealt with it. It's made comments, hasn't it, about the Family Protection Act and a provision.

MS BRUTON KC:

Yes, but what it's actually said on that is we haven't formed a view on whether or not there should in fact be a Family Protection Act but if there is to be one in

force then perhaps there should be a clawback provision. This is wider than just Family Protection Act obviously. So since I'm here, since we're here now, I might just continue working through my road map.

WINKELMANN CJ:

Yes.

MS BRUTON KC:

So –

GLAZEBROOK J:

I still have difficulty, what do you say the indicia would be, and let's use this case, in saying there wasn't an intent to divest of beneficial ownership because there certainly was after his death, wasn't there, because he'd be dead?

MS BRUTON KC:

Well, let me take you your Honours to the evidence so we've heard a bit of –

GLAZEBROOK J:

Well, I suppose I'm not really asking specifically in this case, I'm just seeing whether you can give me a really easy test to say whether you intend – it's just I have great difficulty in seeing how you could work through that because there'll be lots of people who don't fully understand what that means when they set up a trust and that would be any sort of trust that they set up even if they're not a beneficiary of that trust. I mean I'm just thinking that case where there were – it was the *Cooper v Pinney* case. Mr Cooper continued to treat all of those assets as if they were his own but he was actually in breach of trust in doing so. It's not that he didn't have a trust, he was actually just in breach of the terms of the Trust that he had set up.

MS BRUTON KC:

Yes, and I recognise the debate around breach versus a valid trust existing but to have a valid trust in the first place there must be intention to settle a trust in terms of parting with beneficial ownership and I don't, with respect, think it's

good enough to say well many settlors or people involved with trusts don't know what a trust is. The job of the Court is to recognise legitimate structures and if there hasn't been a disposition of beneficial ownership to the Trust that is not a legitimate structure.

So, I have been thinking over the break about general indicia that might help the search on intention. Now, if the settlor and the trustees are all alive they obviously need to be cross-examined at trial on what their intentions are. As the Court said in *Wilson* sloppy administration, not complying with the terms of the Trust can either be evidence of breach of trust, it can also be evidence of absence of intention so that would need to be examined.

And the third possible indicia I think is actually the terms of the trust deed and the powers and interests that are reserved. So if, for example, you have your old fashioned trust where settlor/appointor is not a beneficiary that's very good evidence of intention to create a trust. If you have the settlor having all those powers and interests as trustee, appointor and beneficiary then that may tend to suggest that there was no intention to part with beneficial ownership of the Trust assets but I accept that that would ordinarily require cross-examination. What we have in this case is cross-examination of the lawyer and I wanted to take your Honours to that. That's at paragraph or page 201.0092 of the bundle.

WINKELMANN CJ:
Is someone doing the bundle for you Ms Bruton?

MS BRUTON KC:
No, I've got the hard copy here.

WILLIAMS J:
That's good for you.

WINKELMANN CJ:
Who's doing your – who's operating ClickShare for you?

MS BRUTON KC:

Ms Black will do it.

WINKELMANN CJ:

Right, will she?

MS BRUTON KC:

201.0092.

WINKELMANN CJ:

So this is the third indicia and what is the third indicia, can you just remind me, because I got lost in my notes?

MS BRUTON KC:

The third indicia was the actual terms of the Trust so if you've got the separation of interest and powers that's probably a long way on intention but if they've all maintained by the settlor less definite on intention. And so then you actually have to look factually at what happened and when this – do you have that Ms Black? Oh, there's an issue with the screen apparently.

WILLIAMS J:

Yes, it's gone blank. Can you give us the number?

WINKELMANN CJ:

It might be that someone else – it might be that the administration hasn't – oh, that makes no sense.

O'REGAN J:

Here it is.

MS BRUTON KC:

201.0092.

O'REGAN J:

Here it is. We've got it now, thank you.

MS BRUTON KC:

Now, this is cross-examination by Mr Phillips of Mr Willis the lawyer who assisted with settlement of the Trust. Now, when Mr R settles the Trust he is 72 years old, so he's beyond the age when one might settle a trust for creditor protection purposes or relationship property claims or whatever, 72 years old. So you say why is he doing it, and if your Honours go to line 15, and there's a discussion about that file note that came up yesterday: "It's recorded half way down: 'Why trust instead of Will? In case get crook, also prevents any of his family chasing any of his,' and there's a blank" and then if your Honours go down to line 23: "So you were aware that if the property was transferred to a trust, that is the house property at [redacted] Road was transferred into a trust and the value or price was forgiven at the same time then in effect Mr R would have no asset in the form of either a debt back or the property and the Trust would have the property?" Answer: "Yes." "And if anybody, a creditor, or anyone else was going to make a claim against Mr R, the cupboard would be bare, wouldn't it?" "Yes, yes." "And that was the plan, wasn't it?" "Yes."

So, in my submission, that is strong evidence that at least on the part of the settlor there was no intention to part with beneficial ownership of the Trust asset, the house, he just wanted to ensure that the cupboard was bare so as to avoid claims by his children.

O'REGAN J:

Well it shows that he wanted the cupboard to be bare but it doesn't show that he didn't want to part with beneficial ownership, does it?

MS BRUTON KC:

Well the next part in the story, Sir, is the Trust is settled on the 22nd of December 2014. He stays living in the house. There's a resolution passed saying that he can do so provided that he keeps paying the rates, insurance and maintenance. So, in my submission, the inference is yes that from his point of view he intended to keep ownership and use of the house as though it were his own.

O'REGAN J:

Well he intended to keep use of it. Why do you say intended to keep ownership?

MS BRUTON KC:

Because nothing changed from his point of view and I think that's where the debate lies and it's a very crunchy question.

O'REGAN J:

Well, are you saying that if a trust is created and the settlor continues to live in the house that's transferred to the Trust, then it's a false, well it's an illusory trust?

MS BRUTON KC:

Not always.

O'REGAN J:

I mean that, you know, well that's what you're asking us to infer from this, isn't it?

MS BRUTON KC:

No, what I'm actually saying is that these are the arguments and they may need to go back to the High Court to be properly tested because if I had been –

O'REGAN J:

Well except he's dead now.

MS BRUTON KC:

Yes, so the Court –

O'REGAN J:

How do you test them?

MS BRUTON KC:

The Court draws inferences and the Court applies a worldly realism.

O'REGAN J:

But the case has already been argued. The facts have already happened. The cross-examination has already happened. The findings of fact have already been made. We can't make people go through the whole process again, can we? I mean we can't just say well because we've thought of a better idea, the whole case has to be argued again. That's just not the way litigation works.

MS BRUTON KC:

Well with respect, Sir, I take your point completely but I've been appointed counsel to assist, as I'll come to, try as I might, I cannot see a basis for a fiduciary duty arising in the circumstances.

1210

O'REGAN J:

But well you're counsel to assist, that's fine, that's what you're telling us. You don't have to take a position for one party or the other, quite the contrary. So if that's your position just tell us that's your position.

WINKELMANN CJ:

So there is another difficulty with formulating it this way, isn't there, Ms Bruton, which is the pleadings?

MS BRUTON KC:

Yes.

WINKELMANN CJ:

And there is a principle in litigation I suppose which is what Justice O'Regan is referring to which is finality which is people don't get to reformulate their claims, come round and round and round again. I appreciate what you're doing which is you're asking us to think more tangentially and we are interested in the ideas so – but as Justice O'Regan says there's only so much we can do –

MS BRUTON KC:

Yes.

WINKELMANN CJ:

– at this level and only so much that's appropriate for us to do. So perhaps if we could just proceed through this part quickly.

MS BRUTON KC:

Okay.

WINKELMANN CJ:

We are interested to hear what you have just got to say about those cases but then on the – to go back to the beginning of your written submissions where you do deal with the fiduciary claim.

MS BRUTON KC:

Yes, yes, okay, well I'll finish off this part, thank you for that. So what I submit at point 5 and I take your point that maybe this isn't the claim to do it in since it hasn't been pleaded or argued but in an ideal world the Courts would work on stopping the use of trusts to cause what I submit is inequity where people do in fact think they still own the assets except where there are claims against the properties and at point 7 what I submit there is that that requires a more nuanced approach to questions of intention, a lessening of the mens rea on co-trustee intention and also adopting, with perhaps a more worldly realism, the question of whether powers are truly fiduciary or not powers of appointment, powers as trustee combined with the settlor maintaining their position as a beneficiary.

So, what I have on the next page of the table is just four cases which show this Court's development of the issues in this area. *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651, I think all five or your Honours were on the bench in that. That was quite a significant development in the section 182 area, which has proved very useful in practice with getting these claims settled on a sensible

basis, even recognising trusts that were created pre-relationship and assets that were transferred pre-relationship.

Then the next one in the series is *Sutton v Bell*, the judgment came out on the 1st of June, less controversial and difficult but in that case your Honours upheld the earlier Court decisions which said that even though the house was transferred into a trust just before the party started living there, there were – that was a disposition that was caught by section 44 of the Property (Relationships) Act.

The next one, as I understand it, an application for leave has been made but hasn't been dealt with yet, is *Cooper v Pinney* and in that case there will be – it's another case which I mentioned where the husband gets the farm distributed to him in a trust, wife's not the beneficiary but she has two children, lives and works on the farm, works in the business run from the farm and then the relationship ends and husband says "off you go" with absolutely nothing. She doesn't have a section 182 claim because they weren't married so she is left to try and get some relief and, as I understand it, in that case that's where an extension of *Clayton* is being argued and then we have this case here of course. So, what I would be submitting for this Court, of course, recognising principles of pleading and finality, it's an opportunity to actually keep moving the law in the right direction so trusts aren't used for what I submit are improper purposes.

So those are my broad submissions on the Court's task, but I do recognise the constraints in this case.

So turning to the breach of fiduciary duty claims in this case, as I have listened to the appellants' submissions and tried to work out exactly what the alleged relationship and breach is, what I got to yesterday was four points.

So point 1 – your Honours might like to note these down – point 1 was that a fiduciary relationship exists between parent and child whilst the child is in the parent's care.

Point 2 is with that relationship there is not a duty to act in a child's best interest but there is a duty to either, to use Justice Kós' terms, not to cause harm, not to violate, or in the Canadian terms, a duty of loyalty, not to put one's interests ahead of the child's in a manner that abuses the child's trust.

So I think we're all agreed on that. No problem with the childhood fiduciary relationship and no problem with the childhood fiduciary duty.

Now as I understand the appellants' case, and this is the point too, is that in the circumstances of this case there's an ongoing fiduciary relationship into adulthood, including when the child or the children have left home.

Then point 3 out of that, and this is why, in my submission, the appellants' case cannot succeed on fiduciary duty, is, as I understand the appellants' case, the duty arising out of the continuing fiduciary relationship is the duty not to give all assets away to strangers effectively when you're making your Will and that, of course, is a different duty from that which subsists in the parent/child childhood relationship and that in fact is a remedy. So I do not think, well, my submission is that the appellants haven't been able to frame an ongoing duty that fits within the context of a continuing fiduciary relationship, and the law must proceed on a principled basis, not, what I think has happened here or what the claim is here, to seek atonement or a remedy and then try to fit the fiduciary relationship and the duty into that to achieve the remedy.

1220

What I said under paragraph 14 of my written submissions is the indicia of fiduciary relationships which I submit at 15 don't exist in the parent and adult-child relationship. Once adult's children make their own way in the world, parents can do whatever they like with their property. They can gamble it, spend it or give it all away before they die.

WINKELMANN CJ:

As indeed they can when the children are small?

MS BRUTON KC:

Indeed, indeed. And what I've also grappled with, and I do this at paragraph 18 onwards, is actually how the reasoning of the two Justices that would have found in favour of at least Alice fits because Justice Gwyn in the High Court said in the egregious circumstances of this case there's an ongoing duty to all three children but Justice Collins seemed to confine the ongoing duty to Alice alone and I think what that demonstrates is the difficulty, the particular difficulty of ascertaining where the circumstances, where the duty starts and end, and then I've also given quite a bit of thought starting at 25 whether this case can be confined to its own particular facts. So you say that the harm at least Alice suffered is so egregious that at least she should receive a remedy but you still run into that same problem that we had with defining the relationship and the duty in childhood, and even if you accept that there's an ongoing fiduciary duty relationship into adulthood because of the egregious circumstances, what's the duty and there's never a duty even in childhood to provide financially for your children beyond the basic criminal standard and child support standard.

So, I don't think it's possible to confine the finding of an ongoing duty to the particular facts of this case and then if the duty were to be framed more widely, as I've identified in my written submissions, it's again hard to see where you would draw the line in other cases.

So, those are my submissions on the fiduciary duty aspects of the case. I mean I would say because the law is so difficult on trusts generally for the reasons I have outlined, then I think what we are seeing here and what we are seeing in constructive trust cases also is attempts to find a remedy in situations where it seems obvious that there should be a remedy but one is difficult to find as the law presently stands.

So, that those are – so unless your Honours would like me to, I don't propose to take you through the detail of my written submissions.

WINKELMANN CJ:

No, I think we've all read them, thanks Ms Bruton.

MS BRUTON KC:

And I would also say in terms of the general scheme of the law there is, I agree with my friend Mr Steele's points about we have a statutory system and limitation periods for bringing claims, which is important in terms of balancing the rights of plaintiffs and defendants, and looking ahead to I think on the evidence in this case, it's clear that there was abuse but you do get cases where it's not at all clear and the deceased person is no longer around to defend themselves. So, even if you were to say well in the egregious circumstances of this case we'll somehow find a duty of some sort in respect of sexual – a fiduciary duty in respect of sexual abuse, you can see the possible difficulties down the track where the abuse isn't clear and the injustice that that would create and difficulty that would be created with the passage of time, absence of evidence and absence of the accused being able to defend themselves.

And then finally on the tikanga aspects –

O'REGAN J:

Just before you do that, the duty, the – I mean the sort of more orthodox way of expressing the duty is the one about not preferring your own interests over –

MS BRUTON KC:

Yes.

O'REGAN J:

I mean I know in this case whatever the duty is he beached it so there's no…

MS BRUTON KC:

Yes.

O'REGAN J:

But Justice Kós' formulation does seem to be slightly wider than that, do you agree with that or do you –

MS BRUTON KC:

Oh, I agree with what the Chief Justice said that he has said that I think against the background of the traditional indicia of the duty.

O'REGAN J:

So, there's no real difference between that and the way it's formulated in the Canadian cases?

MS BRUTON KC:

No, I don't think so. And on the tikanga aspects, I think this is a case where tikanga principles, as they apply, are just properly part and parcel of the law of Aotearoa but the basic tikanga principles of aroha, manaakitanga, whanaungatanga are not startling in any way. They're just a reflection of principles of human decency or even Christian principles so I –

WINKELMANN CJ:

Consistent with Christian principles?

MS BRUTON KC:

Yes. So, in my submission, we don't need to get too – tikanga in a case like this has to be applied and considered in the context of existing common law and equitable principles but it's not, with respect, adding anything startling so – and I don't understand my friends to say well it creates a whole new cause of action. You just – it's just another layer on trying to create law that is – reflects a just outcome but if – so that's all I need to say on tikanga.

WINKELMANN CJ:

Thank you.

MS BRUTON KC:

So those are my submissions unless your Honours have any questions.

WINKELMANN CJ:

Thank you, Ms Bruton.

MR STEELE:

Your Honours, when we hear the amicus, and I'll call Ms Bruton the amicus from here on, talk about conduct which is so egregious that a remedy should be produced and that in her view the matter is not right, not tika, these are siren calls in our submission to try to avoid the application of principle in a difficult case. Hard cases make bad law is the colloquial expression. The principles of law are tested in cases as tough as this and so these personal views are not in the respondents' submission of assistance to the Court.

What we say, the respondents say, is that we need to carefully analyse the principles to see whether the circumstances of this case give rise, applying traditional principles, give rise to the relationship and if it does what is the duty and – but to look at the egregiousness of the conduct and to be persuaded to stretch the laws for that reason is unsound conceptually. Having said that, when the amicus explains her views on the appellants' case for fiduciary relationship, we take no issue with it because of course it's favourable to us.

1230

WINKELMANN CJ:

Well you say in the kind of cases where it's egregious conduct, it's not tika, is the kind of cases that the law – that tests the mettle of the law and I think implicit in that submission is that we should apply conventional principle and stand strong against trying to respond to the cause for justice which is not a particularly attractive submission. Is the submission that you really wish to make is that the law did provide avenues and that to respond to the justice of the case and we shouldn't distort it to meet the difficulty that those avenues weren't pursued?

MR STEELE:

That's correct, your Honour, and that's why the concession was made from the very beginning in this case for a fiduciary relationship giving rise to a viable cause of action. There is a relief available and through the election of the appellants, and they may have good reasons, I don't judge it in any shape or form, but through that election an opportunity is lost to try to cure it by stretching

existing principles is unprincipled and, as the amicus says, conceptually unsound.

And I inserted in there actually the maxim of equity will not suffer a wrong to be done without a remedy. It's probably not helpful. I extracted it from Andrew Butler's book and that book referred to *Avondale Printers & Stationers v Haggie* [1979] 2 NZLR 124 (HC) which is, yes, but the point was here is Lord Denning trying to use the constructive trust to right a wrong that he perceived had been done and Justice Mahon very carefully went through those, tested that and looked at all the comment that had been made about what Lord Denning had done and it wasn't sound in principle and it got savaged. And so I put that case in there because what the applicants are proposing is something which cannot be reconciled with existing principles and the respondents would clearly – well we are against it.

Now, I'm going to move on, your Honours, and I'll be very quick because I take the view that the idea of a sham, not being pleaded, not being argued, not being raised by the appellants isn't something the Court perhaps wants me to address. *La Dolce Vita v Zhang Lan* [2022] SGHC 278 was added sort of late in the day by the amicus. It's basically a sham case. The Judge took the view that Mrs Zhang had not intended to convey a beneficial interest There was a whole host of evidence to support that finding but we don't need to go to Singapore High Court to find out about sham when we have clear and concise direction from this Court in *Clayton*.

We don't need to look further afield and so in this case looking at the facts it can't be a sham, or there's no evidence of a sham, because we have a clear gift, we have conditions of the gift, it's there in the bundle, your Honours are already alive to it, and the conditions are set out there. It's all orthodox, done by deed, a trust is set up, there's even a memorandum of wishes. Yes, Robert understood that his life was coming to an end, he wanted to provide for others and it's a carefully set out structure to achieve that but to suggest a sham in those circumstances there's simply not a shred of evidence of that and, indeed,

the appellants have not even tried to argue that. So, that's all I would say on that.

I added fairly late in the day the case of *Cooper v Pinney* and I'll be careful because there's leave to appeal but I don't intend to get into the reasons why there's leave to appeal in that case but I was alert to the statement in paragraph 106 by the majority, and I suspect the minority would not have had an issue with it, but it's a statement which I'm not bold to tell your Honours because I'm a mere practitioner but here are two judges from the Court of Appeal saying: "The Court has not been given the power to ignore or 'look through' valid trust instruments in order to achieve what they may perceive is a just outcome in a given case involving the distribution of property. Parties are entitled to expect that they may arrange their affairs in accordance with reasonably settled principles of law and that these arrangements will be respected." Now that's a statement that I wish I owned. That is the statement of the Court of Appeal. It's not binding on your Honours of course but it's true, it's patently true and that is what is happening and that is what has happened in this case and he died thinking that his wishes would be respected and on the basis of law to date that was not an unreasonable belief.

I'll just quickly flick through because I think our written submissions, well our written submissions don't cover it, but if the amicus' submission was that the Court simply has the power to take a transfer which, on the face of it, is legal into a trust or to anywhere else and just say in the interests of justice we're not going to recognise it, I think –

WINKELMANN CJ:
I don't think that is her submission.

MR STEELE:
Well you said that – well one of your Honours said that the sky would fall in.

WINKELMANN CJ:
It was me.

MR STEELE:

And the respondents, our entire agreement with that, not simply because you're the Chief Justice but it's entirely sound. It would fall in if that was the test for setting aside such disposals.

WINKELMANN CJ:

Ms Bruton's submission was that the current state of the law allows a trust to be used as an engine for a fraud effectively.

MR STEELE:

Well –

WINKELMANN CJ:

And the Court in the absence of Parliament, this is her submission, should be looking to see what it can do to correct that a little. And Justice Glazebrook had raised a question whether defeating a claim under the Family Protection Act might be said to be a sufficiently dishonest purpose but Ms Bruton was not minded to accept that it could be.

MR STEELE:

No, well nor do the respondents obviously. But unless you have any questions I don't think that I can add much.

GLAZEBROOK J:

Well, I think your submission is rather that if you have a clawback provision like that, like there'd be in say section 44 of the Property (Relationships) Act, then it has to be by statute.

WINKELMANN CJ:

Yes.

MR STEELE:

Yes, Ma'am, and New South Wales have such a provision. It came out of the Law Commission which looked at the issue but it's interesting that the other

States in Australia did not adopt it and our Law Commission is most definitely looking at it and they're recommending it. My learned friend tells me that that report has been tabled at Parliament. Unless there are further questions Your Honours.

WINKELMANN CJ:
Thank you Mr Steele.

MR STEELE:
As the Court pleases.

WINKELMANN CJ:
Ms Chambers, are you doing your reply?

MS CHAMBERS KC:
I am, your Honour. Your Honours, if I could address Ms Bruton's submissions first and then come to my learned friend Mr Steele's submissions and I want to start with Ms Bruton's submissions on the fiduciary duty issue and her written submissions really make the claim that the appellant's argument is not coherent or is unprincipled.

We say no. We say we took the Court carefully through how it was coherent and principled and we showed that it was consistent with New Zealand law, in particular *Chirnside*, and well-established Canadian principles and tikanga which must also be a principled approach in my submission Tikanga would result in a – in the appellants' position being recognised. That must be a principle for this Court in my submission.
1240

To say, well, you're not principled, even though we are relying on a Canadian Supreme Court decision which has been well-regarded throughout the Commonwealth, and taking those principles to apply here, it cannot be correct, in my submission. The fiduciary argument that we've put before your Honours

is also consistent with other developments in the common law where trusts have been used to achieve nefarious purposes.

WINKELMANN CJ:

Various purposes? Oh, nefarious purposes.

MS CHAMBERS KC:

Yes, nefarious.

WINKELMANN CJ:

You mean the "nefarious".

MS CHAMBERS KC:

So we do not accept that broad argument that my learned friends put forward. Turning to paragraph 18 of Ms Bruton's submissions. This is the argument that: "Parents can do whatever they like with their wealth – they do not hold it for the benefit of their children," and that: "It is illogical then to say that the exercise of a personal power can be found on the basis of a fiduciary relationship." It is my submission that is overly narrow. Again, perfectly acceptable in the context of a commercial relationship, but it doesn't reflect the circumstances of a non-commercial context.

It's correct that parents can do whatever they like with their wealth. Again, that is proprietary-based. The appellants' argument isn't that they have a right to the underlying property. It's never been that argument. But we do say that Robert could not use the control he had over that property to use it in an abusive way as an abuse of trust.

Fiduciary is all about relationships and his actions, and whether he acted abusively in terms of his duties and contrary to his obligations of trust in particular in this case. So, the fiduciary relationship, and this is in our written submissions, is not argued to be over the assets, it's in respect to the relationship between Robert and his children at the time, that the assets – when

the assets were disposed of to trust, it is that relationship that imposed the fiduciary obligations and can lead to actionable breaches.

GLAZEBROOK J:

Can you just explain what the relationship was at that time that creates that?

MS CHAMBERS KC:

Yes, your Honour. The relationship – well, I go back to *Frame v Smith*, effectively, your Honour. I go back and say, did he have a power of discretion? Could he use that adversely against them? And were they peculiarly vulnerable?

GLAZEBROOK J:

The power of discretion is to dispose of his property. Is that right or is it something else?

MS CHAMBERS KC:

Yes, that's right, your Honour. Paragraph 33 of my learned friend's submissions submits –

WILLIAMS J:

Which of your friends?

MS CHAMBERS KC:

Ms Bruton. I'm still dealing with Ms Bruton, your Honour. That: "It would lead to an odd result that those who never took on obligations to act in another's interest could find the exercise of their personal property rights saddled with fiduciary duties." Well, my submission is that that's not odd at all. *Chirnside* recognises, *Chirnside* does, not to mention the Canadian case, that that's exactly what can happen with fiduciary duties, and I'll refer your Honours to page 601.0063, which is this Court's decision in *Chirnside* at paragraph 82. I note –

GLAZEBROOK J:

Why does your formulation therefore not apply to any parent who, during the child's childhood and when they're living with them, in fact did everything that was tika, if you like, in relation to those children?

MS CHAMBERS KC:

The peculiar vulnerability test?

GLAZEBROOK J:

Well, but that might arise because the child has later had a car accident or something of that nature. Nothing to do with the parent. Or has become mentally unwell.

MS CHAMBERS KC:

Well, your Honour, it's fact-specific, and the duties-fact specific. But perhaps there is a parent whose child has become physically incapacitated and mentally incapacitated due to a car accident, and they take steps like Robert to put everything into a trust to avoid that incapacitated child being able to make a Family Protection Act claim, and they give it to remote third parties. That could satisfy our test as we formulated it.

GLAZEBROOK J:

Do you need a fiduciary relationship there or do you go the much simpler route that I've been suggesting, and say you actually have a clawback provision in those circumstances that would be similar to section 44 of the Relationship Property Act? Now, the question then is can you only do that by statute or do you say, well if you specifically do something to avoid a claim which has a statutory claim, it could – you can't say that's fine?

MS CHAMBERS KC:

In my submission, your Honour's alternative approach is certainly an answer to the problem that this case kicks up, and – I'll just find my notes on that because I was going to come to that as part of answering Ms Bruton's points about the trust.

GLAZEBROOK J:

Sorry, if you're coming to it, it's fine. I was just asking why we needed to add a fiduciary duty where I think there probably are some issues as to how far that arises and how far it doesn't and whether you need it, although as I understand it, what arises out of your fiduciary duty is just not to – is a negative not putting those assets out of range of a claim, which is fairly narrow and doesn't stop you spending the assets because once they're spent, they're gone.

MS CHAMBERS KC:

That's correct, your Honour. I mean, your Honours could say – Ms Bruton didn't really address this – you could say, well, it shouldn't be so wide. We don't want it too wide. Then you probably prefer the analysis of a particular fiduciary relationship. A particular fiduciary relationship arises in these circumstances, these particular circumstances, and this is what it is. Rather than inherent. I mean, the duty's still the same, but if you find particular on these particular circumstances, you're limiting it to – you could give a – you find a fiduciary duty, but it doesn't have the broadness that could include cases which your Honours think should not be included under the fiduciary umbrella of *Chirnside*.
1250

But going, you'll see obviously that paragraph 82 of *Chirnside* specifically says, it warns against a contractual flavour, because it's equitable, and it says: "The obligation does not arise only when expressly undertaking. To hold otherwise would be to confine the powers of equity to situations akin to express trusteeship and would emasculate the breadth of equity's traditional reach by its use of concepts such as constructive trusteeship and its imposition of fiduciary obligations." Express or implied is acceptable. So paragraph 33 is wrong on the law, in my submission, and paragraph 34, children is very different. It's commercial. They are both working in a JV together, and they develop a piece of land pursuant to an agreement or an undertaking. So it's got a proprietary aspect to it.

WINKELMANN CJ:

The fundamental issue you have to address is that the whole way that fiduciary law is structured is that the vulnerability arises by virtue of the nature of the relationship, so the trust that is reposed in the relationship. So the vulnerability arises because you're reliant on that person to take care of some issue for you traditionally and that just doesn't in this case it's a different paradigm. So you're vulnerable for misusing the power. That's, I think, the fundamental issue that lies at the heart. Because the vulnerability you're referring to actually is sourced elsewhere, outside the relationship, whereas fiduciary relationships, the law of fiduciary is to do with protecting you, protecting a person who has a vulnerability by virtue of a relationship in terms of how it operates. So if, for instance, in this case the father was looking after the assets for the children, and I know that's an economic picture, but that's the kind of scenario.

MS CHAMBERS KC:

Well, as you know your Honour, we say the vulnerability does arise out of the relationship, the peculiar vulnerability arises out of that abuse that Robert inflicted on them, and that's why the fiduciary concept does apply here. That's what we say. That is our argument. And just finishing the fiduciary issue, Ms Bruton also said, well, it's unfair that, it creates unfairnesses that Robert's not here to answer, but of course all Family Protection Act claims, all testamentary promises claims the key person is not there, and we deal with it, and I've made the point that Ms Bruton doesn't discuss in her concerns the alternative of a particular fiduciary relationship.

As to the, Ms Bruton's preferred approach, it is fair to say that this, and her submissions in particular highlight this issue of, is it acceptable in 2023 for people to use trusts to avoid the FPA, and that is now one of the few uses of trusts where they work because, you know, the rest home example, for example, that Justice Williams raised with me yesterday, well that no longer works because MSD doesn't hesitate to go into the trust and say you are paying your rest home fees. It doesn't work for child support. Largely doesn't work for PRA. This is one area where it does work and what the Law Commission really needs to do is say, what is a valid use of trusts in 2023. That's the question.

Is anything valid. Is it valid ever to use a trust to avoid obligations everybody else has to comply with.

WINKELMANN CJ:

Certainly we have a very uniquely New Zealand problem in this area which is a result of a combination of developments over a period of time.

MS CHAMBERS KC:

I agree your Honour, and I also accept, the appellants' accept the conceptual argument put forward by Ms Bruton, that this issue of, well did the settlor really actually intend to give away their property, is something that has not been emphasised enough in trusts, and certainly we argue that in *Clayton*. It's not in the pleadings but I do draw your Honours' attention to cause of action number 2, which Justice Glazebrook's approach in my submission is consistent with, which is a fraud on a power. That is within the pleadings and that would recognise your Honours suggested approach that equity should not allow Robert to use a trust for the equitably fraudulent purpose, that is to avoid the FPA.

WILLIAMS J:

You do run into the perhaps practical problem of the Law Society's publication that says it's quite a good idea to use trusts for exactly that purpose.

MS CHAMBERS KC:

No it's just, mmm.

WINKELMANN CJ:

Yes, perhaps we move on from that.

MS CHAMBERS KC:

Well, I mean, you are, if you say that the FPA is social legislation, and Parliament says that you must, you have obligations when you do your Will, and you must look after these categories of people, which includes the appellants, and you have moral duties to consider them when you write your

Will, how is that you can – is it acceptable that you can say, well, 16 months before I die I'm going to pop it into this magic circle, and that's going to stop the FPA. You could say, well, do we agree with the FPA, is it valid, is it a good piece of legislation. Well, that's a different question. We have it, that is our social policy in this area of Will writing, and can and should New Zealanders just be able to opt out by putting it into the magic circle.

WILLIAMS J:
I guess the contrary view is that in the other key areas of social intervention the claw backs are in there.

MS CHAMBERS KC:
Yes.

WILLIAMS J:
And the FPA, perhaps because it's old, it doesn't happen.

MS CHAMBERS KC:
Yes your Honour.

WILLIAMS J:
The question then is what is the legitimacy of the Courts in this area.

MS CHAMBERS KC:
Well governments aren't hesitating now, are they? When they create a hole in the net of their fiscal policy, they say, well, we'll just pass legislation to get at trust assets.

WILLIAMS J:
This one might be a bit more difficult.

MS CHAMBERS KC:
Yes, yes. But it does seem very odd, doesn't it, that you know, you don't have any responsibilities when you make a decision to pop it into a trust, you know, 10 days before you die in your hospital bed, and you've got no moral obligations

then and you can just do it by signing a piece of paper and thus avoid the obligations which would otherwise have affected that property which is in legislation. It seems incredible. Trusts are, of course, a create of equity and you're sitting with a case which is an equitable case. So your Honours could do this in terms of, particularly Justice Glazebrook's approach in my submission, as making equity work in regard to trusts, and it does address the issues raised by Ms Bruton. I think that, you know, that the abuse of trusts is something that lawyers practicing in the trenches see so much of that we become very cynical, and it's because what we've all been discussing, the New Zealand trust is so discretionary. It really hasn't had controls around it.

WINKELMANN CJ:
Yes.

MS CHAMBERS KC:
So your Honours I want to reply to my learned friend Mr Steele.

WINKELMANN CJ:
Move on, so after lunch perhaps, and you'll probably be about half an hour do you think?

MS CHAMBERS KC:
Yes your Honour.

WINKELMANN CJ:
We'll come back at 2.15 then.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:
We have not got Justice Glazebrook. It might just be that she's not turned on yet, Mr Registrar? Ah, there we are.

MS CHAMBERS KC:

Your Honours, to win, Mr Steele needs to show two things. First, that in the circumstances of this case, the inherent fiduciary relationship between Robert and his children ended when they left home, and that there was no particular fiduciary relationship in these circumstances between Robert and his children when he disposed of his assets to trust in 2014. But he says, well, he agrees with the appellants, that there is an inherent fiduciary relationship, and he agrees it applies to non-economic interests.

WILLIAMS J:

Only at childhood though, he says.

MS CHAMBERS KC:

Yes. Well, let me rephrase that, your Honour. I take your point. He agrees with the appellant that there's an inherent fiduciary relationship when children are minors, and he agrees fiduciary relationships can apply and should apply to non-economic interests. He goes further, arguably, than the appellants in regard to the content or scope of the duty and considers that the widest duty is appropriate. But he says it all ended basically due to lack of contact, and he talks about the lack of contact being a real problem for the appellants for 30 years.

The counterfactual to that, I suggest that argument is pretty undesirable; that is, for Alice to have a claim, she was required to stay in close or some contact with her incestuous father. That can't be right.

WINKELMANN CJ:

Well, he says it's ended by virtue of lack of contact and adulthood. Adulthood as well.

MS CHAMBERS KC:

Yes, well, that's a separate argument, but the – maybe I have misunderstood his argument. I understood –

WILLIAMS J:

I think that's what his argument was.

MS CHAMBERS KC:

That it was –

WILLIAMS J:

They were collateral arguments, adulthood and lack of contact, one or other was sufficient to end a fiduciary relationship.

MS CHAMBERS KC:

Let me deal with contact first of all as a factor. I understood him to be saying there was no relationship because there was no contact and that was my counterfactual argument to that. We say further the contact itself is not a basis for an entitlement to repose trust and confidence or have a legitimate expectation. We say you can have a fiduciary relationship with someone you haven't spoken to for 30 years because there was an inherent fiduciary relationship originally, and I think everyone's agreed on that, it didn't come to an end because they moved out of the home or didn't speak to each other because they remained peculiarly vulnerable. So –

WILLIAMS J:

Can you tell me what you mean by that? "Peculiarly vulnerable"? Because it's one thing to say, let me use the general word because I can't think of a better one, "harmed", "damaged", "traumatised", et cetera.

MS CHAMBERS KC:

So your Honour's –

WILLIAMS J:

But you have to make the next step, and say "and therefore vulnerable", and I want to know in what way is it that that continues a fiduciary relationship, if it does?

MS CHAMBERS KC:

That's the same question effectively as the Chief Justice before lunch, isn't it?

WILLIAMS J:

Perhaps.

MS CHAMBERS KC:

So the question as to their peculiar vulnerability and as to how it came out of this relationship is the test I gave yesterday towards the end of my oral submissions, which is the vulnerability was that if Robert chose to, he could deny the children any ability to restore themselves and end the vulnerability he inflicted.

So the reason why every parent isn't under a fiduciary duty when they come to do their estate, on our argument, is the *Frame v Smith* final hurdle which is this, particularly vulnerable, and here, the test I've given you is the one we're advocating for. It's the abuse and its impact resulting in a legitimate expectation that they would receive an interest in the estate, which is what their father said 20 years after they last had contact with them in the earliest Wills he did.

WILLIAMS J:

The difficulty I have though with that is that a legitimate expectation is not a vulnerability. I mean, it is something.

MS CHAMBERS KC:

No, I agree. I agree.

WILLIAMS J:

It's just, to describe it as vulnerability is not really very apt.

MS CHAMBERS KC:

No, I accept that, your Honour. That's why I have particularly given you what I'm suggesting, their particular vulnerability; that is, the ability for him to deny any chance to restore themselves.

WINKELMANN CJ:

So you said here, Mr Steele needed to show two things, and the second thing was that there was no particular fiduciary duty. So you're not saying it was a continuing fiduciary duty, you're saying it arose at the point of the transfer, are you, I think? I didn't think that was what you were saying, but you were saying Mr Steele needed to show that there was no particular fiduciary duty that arose when Robert disposed of his assets. Is that what you're saying?

MS CHAMBERS KC:

No.

WINKELMANN CJ:

The opposite of that, of course.

MS CHAMBERS KC:

The case for the appellant is on two alternative options. Inherent where it continued, or particular, that it particularly arose when he walked into that lawyer's office in 2014.

WILLIAMS J:

So you say their vulnerability?

GLAZEBROOK J:

And the inherent is, as I understand you, you say there was an inherent fiduciary duty that arises during childhood and it continues while there remains that vulnerability?

MS CHAMBERS KC:

Yes.

GLAZEBROOK J:

Is that it's been caused in childhood?

MS CHAMBERS KC:

Yes.

GLAZEBROOK J:

Is number 1?

MS CHAMBERS KC:

Yes.

GLAZEBROOK J:

And then the second one is even if it finishes at the end of childhood, there's a particular fiduciary relationship that arises at the time of the disposal to the trust?

MS CHAMBERS KC:

Correct, your Honour.

GLAZEBROOK J:

Is that – so there's two bases: one, it's a continuing relationship as long as the harm hasn't been – well, it can hardly be fixed up, but as long as something hasn't been done to ameliorate the harm, or, alternatively, there's a particular one that arises later?

MS CHAMBERS KC:

Correct. That's correct, your Honour.

WILLIAMS J:

The vulnerability is a powerlessness in the fiduciary context, right?

MS CHAMBERS KC:

Yes. Well, yes.

WILLIAMS J:

So your suggestion is that this vulnerability continues through adulthood which means it must mean they are powerless to vindicate the wrong.

MS CHAMBERS KC:

Yes.

WILLIAMS J:

But they weren't. I mean that rather neatly lines it up with the incapacity exceptions to laches in the Limitations Act, but beyond that they weren't, at least we don't have any evidence that they weren't. They chose not to vindicate their rights.

MS CHAMBERS KC:

I want to address that now, your Honour, because the submission that effectively they sat on their hands, that…

WILLIAMS J:

I don't think it's fair to say they sat on their hands.

MS CHAMBERS KC:

Well, I think that was the language used, or they elected not to make a decision to make a claim.

WILLIAMS J:

One can understand why that decision is made. I can perfectly understand why that would be. I'm not sure I'd want to sue an abusive father and bring all that back up to the surface. But it is not a powerless decision. In a sense it is a decision taking power.

MS CHAMBERS KC:

Well, your Honour –

WILLIAMS J:

It's not in the same sort of style as a child who simply can't feed themselves and so is powerless without the parent providing the necessities of life.

MS CHAMBERS KC:

Let me answer your question, Sir, with two aspects that I want to draw your Honours' attention to, and the first is the evidence of Alice herself in regard to how she was feeling about her father, and what I'm going to be suggesting

to you is that the problem with Mr Steele's argument is that it doesn't make any allowance for the evidence that wasn't challenged and the social and scientifically accepted position in regard to victims of incest. So I want to take your Honours to page 201.2, paragraph 8, of Alice's brief.

WILLIAMS J:
201, sorry?

MS CHAMBERS KC:
Point 2, or .0002, and she says: "Disclosing what happened to me during my childhood, a time when I was at the mercy of my father, is very difficult. I have always had to be incredibly protective of myself concerning the consequences of disclosure, because of what it does to me, as well as what it does to other people, in how they respond and treat me. Also, until the day he died, I had always believed my father was capable of killing his family. I never forgot this and even as an adult, it was always at the back of my mind whenever I thought about disclosing what I have been through," and paragraph 60 at page 17 she says that she told her mother in 1991 of the full extent of the sexual abuse. She contacted a lawyer about that and what the options might be. "I was not in a state to be part of this procedure and it was all too much for me. I was 30 years old with no self-confidence or support system. The thought of sharing what happened to me with lawyers and police, it was too much to bear."
1430

In paragraph 76 Alice gives evidence that: "I made the decision to attend his funeral. Until the day he died, … believe that… was capable of killing me or killing his family. I knew that he had guns that he admired and I was always afraid that he would use the guns on us. It was only on seeing his casket at his funeral that I now know that this will not happen."

And her cross-examination is at the same volume at page 67, lines 10 to 20. "Do you think part of that was that during your life you'd never actually, never been able to resolve anything as far as [Robert] was concerned?"

Answer: "I don't know how we would resolve incest. He just never acknowledged it and he showed no goodwill to his children in all those years. It's his lack of acknowledgement and the continual treatment when he left home…"

Question: "And you have said up until [Robert's] death you believed that he was capable of raping, abusing and killing others?"

Answer: "I do and I did. To the day he died he was capable, I know, I felt of murdering his family and yes, that Teresa Cormack one, I certainly believe it could've been my father."

Question: "And you believe the same as far…"

So I don't need to worry about the rest of it I don't think. But I can then take you to page 68, over the page, lines 15 to 20:

Question: "So why would you want [Robert] to tell you that you'd made it up? I'm just curious…"

Answer: "No, imagine a father who though this daughter had made stuff up would be consoling her and helping her in whatever recovery was needed and we do see people in the new who say that their daughters may have made stuff up and they're really supporting them, so [Robert] just had no response, so if I did suffer mentally, my father still didn't care about it."

And she goes on to talk about the letter. So I am submitting to the Court that it's a gross understatement to say, well, as a victim of incest she has failed, she failed to make a claim, and in this regard I also want to refer you to Justice Thomas' decision in *M v H* (1999) 18 FRNZ 359 (CA), which is in my learned friend's casebook at page 701.0578. This was a Court of Appeal decision and it was about limitation in a sexual abuse case and his Honour was in the minority, and he weas arguing fiercely for, and I mean fiercely, for the law to change in regard to when limitation periods started for childhood victims of sexual abuse. Now what's significant here is that my friend quoted the 2000 Law Commission saying you've got to do a balance here and limitation periods are important. What he neglected to mention was, of course, that he limitation, the new Limitation Act, which came in in 2010, has a specific clause for victims of sexual abuse and incest, which says the Court has a discretion to disregard

the Limitation Act when it comes to claims of this type. So the Law Commission's report was not adopted by Parliament, and Parliament saw clearly that these type of claims are in a quite different category –

WINKELMANN CJ:

I think he did acknowledge that provision in the Act, but carry on.

MS CHAMBERS KC:

Well – yes, with Justice Thomas' decision the reason why I point to is that his Honour not only strongly endorses *M (K) v M (H)* but he goes on to talk about the, at paragraph 149, at page 583, he says: "Speaking of incest, although the same can certainly be said of sexual abuse in a family situation such as the present, the learned Judge pointed out that the victim's silence is attained through various insidious measures." As it was here. "Actions of the perpetrator condition the victim to conceal the wrong from herself. The fact that the abuser is a 'trusted family authority figure' in and of itself makes the wrongfulness of the conduct in the child's eyes…"

He goes on to summarise standing back he calls it, at page .585, a searing indictment, in his view, of the way the Court has treated largely women in this area the Courts have.

WILLIAMS J:

What paragraph are you…

MS CHAMBERS KC:

Paragraphs 163 and 164. It seems Parliament agreed with him. Finally on this point, your Honour, I want to – I take from that this Court should be very slow to say for an incest victim, limitation stops you bringing your claim because –

GLAZEBROOK J:

I don't think that's the – the argument was that there were claims but in compensation and the Limitation Act applies, and if that, I mean if the claim was

brought in compensation then there'd be the arguments about the, whether in fact the Limitation Act applied, wouldn't there?

MS CHAMBERS KC:

Yes.

GLAZEBROOK J:

Or whether the period should be extended. But I'm not sure where that gets you on a fiduciary claim.

MS CHAMBERS KC:

Well I understood Mr Steele to be saying there was a breach of fiduciary but you were out of time for it.

GLAZEBROOK J:

Well I think that was on the basis that the only remedies were compensation and they, and the claims weren't for compensation, these claims weren't for compensation, and if there had been a claim for compensation, the Limitation Act would have applied.

MS CHAMBERS KC:

I didn't, well, I'm happy, if that's what he was saying, that's fine, but I understood him to say that he accepted that a breach of fiduciary duty could result in an order for rescission.

WINKELMANN CJ:

He does accept that, in the particular, some circumstances.

MS CHAMBERS KC:

So –

GLAZEBROOK J:

Except not in these circumstances is what –

MS CHAMBERS KC:

Yes.

GLAZEBROOK J:

Yes.

MS CHAMBERS KC:

I understood him to be saying that there was a breach of fiduciary duty which was actionable under equity, but you're out of time.

WINKELMANN CJ:

Yes, and what he is saying is that you, and you can't, and you're subverting the provisions of the Limitation Act by trying to fiduciarise what is actually a remedy that's being sought for –

MS CHAMBERS KC:

Yes, that's what I understood him to be saying too. So finally on –

WILLIAMS J:

But it does seem to me then the essence of your argument is that the vulnerability you're now describing by reference to the evidence, is the sort of vulnerability that would've delayed the commencement of limitations.

MS CHAMBERS KC:

Now, under the new Act.

1440

WILLIAMS J:

Yes.

MS CHAMBERS KC:

It would be, it would allow a court to have a discretion whether or not to apply limitations.

WILLIAMS J:
So that the –

ELLEN FRANCE J:
Although –

WINKELMANN CJ:
But under the common law also.

ELLEN FRANCE J:
Yes, and that the section does say matters that the Court is to take into account, which includes the extent to which prompt and reasonable steps were taken after they became aware that they were entitled to make the claim.

WINKELMANN CJ:
Also the Act's really just codifying, isn't it, the position that common law had moved towards in terms of –

MS CHAMBERS KC:
Had moved towards, I agree.

WINKELMANN CJ:
Towards, yes.

MS CHAMBERS KC:
Yes, I accept. Finally on this point before I move on, 601.0729 of the case on appeal is the report of the Royal Commission of Inquiry into abuse in care, and they, too, refer to this issue and I refer you to the last paragraph on page 729: "We are guided by the need to be trauma-informed in responding to survivors of traumatic experiences such as abuse in care. This requires us to recognise all the impacts of trauma on the way survivors experience the world, and to respect the autonomy of survivors, including in choosing their own path to restoration." It carries on: "Trauma has neurological, biological, psychological, spiritual, social and cultural impacts. Many survivors find talking about their

abuse traumatic and distrust authority. Anyone working with survivors must be sensitive to the impacts of trauma and not do further harm. The trauma informed approach asked what has happened to someone, not what is wrong with them." Further down: "Trauma" – that will do. I'm sure that's the gist of it.

So that, I say, is also relevant to the reason why the claim wasn't taken after realisation because of the father's response and the fear factor. The allowance needs to be made because socially and scientifically, it's accepted that this dynamic that we have before the Court is the result of trauma.

WILLIAMS J:
So what you're really saying here is that at least one of the children, perhaps all, is so damaged and afraid that they couldn't face – well, actually, no, I think the narrative would work like this. The most injured individual was so damaged and afraid that she could not face suing, and the siblings respected that. The vulnerability is that only the father could fix that.

MS CHAMBERS KC:
Yes.

WILLIAMS J:
If she couldn't seek vindication through the usual channels, then a voluntary vindication by the father was the only way that she would get it.

MS CHAMBERS KC:
Yes.

WILLIAMS J:
Well, isn't that the vulnerability you're arguing for?

MS CHAMBERS KC:
I think that's very similar to how I framed it, Sir.

WILLIAMS J:

I wasn't understanding it that way, but I think I follow it now.

MS CHAMBERS KC:

I want to move on to the second issue that Mr Steele's argument rests on, that this is mutton dressed as lamb in respect of the fiduciary relationship in breach, and that accordingly, it's time-barred; that is, that this is a continuation. The appellants' position remains that this is not the same breach as the abuse in childhood in that there are two separate conducts. Not all sexual abusers stick all their property in a trust to avoid a claim on their estate, and it's not like oil pollution on a beach which continues to cause problems because the oil remains on the beach. Here, something else separate has occurred. That is, he has decided to put everything into a trust to avoid the Family Protection Act.

Jalla is a case about accrual of a nuisance claim when there was one spill on the beach, it all doesn't get cleaned up, and the plaintiff said, well, the oil's still sitting on the beach and they claimed it was a continuing breach. That, we say, is quite distinguishable because here, this action by Robert of putting his assets into a trust to avoid their claim is a separate action independent of the abuse. That must be the case because it's 30 years later. The abuse created the duty not to do it because of the vulnerability it created, and in this regard, I also want to take you to Alice's evidence which is again at page 202.0029.

O'REGAN J:

201 it must be, I think.

MS CHAMBERS KC:

Yes, sorry, 201. You're right, your Honour. Sorry, 0029. Sorry, 201.0019. It's paragraph 84: "I live in poverty. None of us can ignore that fact. I have poor health. At times I can hardly move because of my arthritis, and over the last few years, with the PTSD my health has really suffered. I have experienced incredible stress since childhood, and will continue to experience such, if I cannot have opportunities of safety and security. I am effectively homeless and poor. I cannot understand, after all I have gone through, why [my father] would

want others, who have homes of their own, to have a rental home for the next generation. Why would he want them to have more money to spend, when his own daughter, who has been suicidal so often in her life because of his actions, has no money and no expectation of any support from anyone else in her life? Why would he think that the [other] families could not provide for their own children? Why would he single out one child only – was he making", da-da-da-da-da. "Why would [he] not provide for his own children, who have such significant needs? Why would he not honour his promise to [Greg] about me having a home? I have two close friends who have both been through childhood traumas associated with alcohol, one of those with incest, neither of whom saw their parents for thirty years, yet their parents fully recognised their obligation to their adult children and left everything to them to help make life easier. What made [Robert] different?"

Now, paragraph 86 aligns with the duty that the appellants say existed, and it's also fair to say that we have struggled to find cases that are similar to this factual scenario; that is, an abusive parent who puts everything into a trust to avoid a claim. Alice's evidence indicates that many of these people recognise their obligations when they come to do their estate, and it suggests that in fact others in this situation have considered such an action to be beyond the pale.

In regard to Mr Steele's submissions on tikanga, well, all parties agree that it should inform the development of the law and the outcome in this case. Everyone's agreed with that. Would tikanga have required something to happen during Robert's life so it can't happen now after death.

1450

Well we say no, it can happen after death because the damage to the mana survives death. Death and this Court has already accepted that principle in *Ellis*. We accept that ideally on tikanga principles it should have occurred during life, but again it did not because of all the issues I've just addressed with your Honours, and the fair and the factors in the Law Commission report. In this case the appellants submit that the damage to mana and the gravity of the harm

has created such an imbalance in ea that tikanga would nevertheless require that rebalance occurs even after death.

Now my learned friend also relied on an argument that the appellants' case is outcome based. We reject that and we draw your Honours' attention to what Justice Collins said in regard to this argument in the Court of Appeal, and it's at paragraph 103 of the Court of Appeal decision where he says: "It is not an adequate response to argue that finding fiduciary duty in the circumstances of this case is unprincipled and outcome driver. Rather, it is an example of equity responding to an unprecedented situation by applying the established indicia of a fid relationship."

So just summarising, it is my submission that this is not a stretch of existing law, but it does seek a development of the law, and as Mr Hikaka submitted, this Court can either choose to develop it or not. if the Court chooses not to develop the law, there will be an injustice, blatant and acknowledged, wrecked on these children. If all the tools of equity specifically designed to address injustice does not respond, equity has failed, and especially where the very thing that created the inequity is a structure created by equity. A discretionary trust. Equity will become, or would become a tool, not of justice, but a tool of injustice.

Those are the submissions for the appellant unless I can be of further assistance.

WILLIAMS J:

I just have one question. The evidential material that you've taken us through as to the daughter's reluctance, at least inability at best, to confront litigation in this area. Did Justice Gwyn make any findings in those regards?

MS CHAMBERS KC:

Let me have a look your Honour.

ELLEN FRANCE J:

I think it's 197 is the relevant paragraph I think. On her approach you get to the later date.

MS CHAMBERS KC:

Yes. Yes, that's right, which has been our approach too, which is why I started with the day Robert walked into his lawyer's office. But is there any other comments in terms of the points that –

WILLIAMS J:

0174 is a general statement. No reference to the particular evidence.

MS CHAMBERS KC:

And there's 0112, your Honour. In paragraph 31, I'm being told as well. Thank you, Mr Hikaka.

WILLIAMS J:

Of the judgment?

MS CHAMBERS KC:

Nothing else we can find at the moment.

WINKELMANN CJ:

So did you want to make any submissions on cost? Because I don't think the parties have addressed them in their submissions.

MS CHAMBERS KC:

Could I just have a moment, your Honour?

WINKELMANN CJ:

Yes. The question is whether there's a standard in following the event.

MS CHAMBERS KC:

I apologise, your Honour, for not thinking about this before I got up here because I know that it's normal to address it at the end of argument, and I should've thought of it.

WINKELMANN CJ:

That's all right. So the Court of Appeal just made a standard cost order.

MS CHAMBERS KC:

Yes. I do think there's an argument that it's an unprecedented case involving impecunious litigants. Your Honours are aware that it's a pro bono case for counsel in regard to the appellants. If in terms of costs in the event the appellants have been unsuccessful, then it would be my submission that other than disbursements to be paid to the respondents in the circumstances of these two families, that would be the appropriate order. Otherwise, just normal costs, I suppose. As your Honours please.

WINKELMANN CJ:

Mr Steele?

MR STEELE:

Just the normal order for costs in the discretion of the Court to counsel. We've all got multiple counsel. We're pro bono, too, so if that factors in the Court's thinking, it's equal. Well, at least I am.

GLAZEBROOK J:

If counsel are acting pro bono, what exactly are the costs then?

MS CHAMBERS KC:

Just disbursements, your Honour. We filed a –

GLAZEBROOK J:

No, sorry, I understand that, but the basis of costs except for unrepresented litigants and I know that the –

WINKELMANN CJ:

Rules Committee.

GLAZEBROOK J:

– Rules Committee is looking at that at the moment, but the basis is that you have incurred costs, counsels' costs. But if everybody is acting pro bono, then no costs have been incurred.

MS CHAMBERS KC:

Yes.

GLAZEBROOK J:

In fact, on either side.

MS CHAMBERS KC:

Yes, I wasn't aware that was the position of the respondents as well. I accept, your Honour.

WINKELMANN CJ:

I think Mr Steele might need to qualify that.

MR STEELE:

Yes, your Honours. I am pro bono for my sins, and my colleagues are not.

WINKELMANN CJ:

Okay. All right. Thank you very much, counsel, for your submissions, and thank you Ms Bruton for your assistance to the Court. We will take some time to consider our decision.

COURT ADJOURNS: 2.59 PM