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

SC 32/2026
[2026] NZSC Trans 14

RH & JY TRUST
First Appellant

JOCELYN YVETTE BROWN AS TRUSTEE OF THE RH & JY TRUST
Second Appellant

PERPETUAL TRUST LIMITED AS TRUSTEE OF THE RH & JY TRUST
Third Appellant

v

WORKSAFE NEW ZEALAND
Respondent

Hearing:	28 July 2026
Court:	Winkelmann CJ Ellen France J Williams J Kós J Campbell J
Counsel:	A S Butler KC, S P H Elliott, M D Conaglen and B R Webster for the Appellants

B Finn, T M Williams McIlroy and A Bagchi for the Respondent

CRIMINAL APPEAL

MR BUTLER KC:

Ata mārie e ngā Kaiwhakawā. Andrew Butler appearing with Shane Elliott, Matthew Conaglen and Briar Webster for the appellants.

WINKELMANN CJ:

Tēnā koutou.

MR FINN:

E ngā Kaiwhakawā, tēnā koutou. Ko Finn ahau. Kei konei mātou ko Bagchi, ko Williams, mō te Mahi Haumaru. May it please your Honours. Counsel's name is Finn appearing with Ms Bagchi and Ms Williams for WorkSafe New Zealand.

WINKELMANN CJ:

Tēnā koutou. Mr Butler? So, Mr Butler, we'll give you some quiet time.

MR BUTLER KC:

Thank you.

WINKELMANN CJ:

But before you have your quiet time it would help us, and I address this to both sides, if counsel could really engage with the scheme of the legislation, because the submissions seem to be quite removed from that, and particularly how your conception of the proper interpretation of the legislation plays out through the different provisions, and through the liability of the people involved.

MR BUTLER KC:

I'm happy with that, and your Honours will hear in how I was going to develop my submission, I was going to proceed it down that pathway, if I can put it that way.

So your Honours, just in terms of further housekeeping, so that indication is very helpful, thank you very much. I had a conversation with my friend, Mr Finn, just in terms of timing. The reason for raising that simply is that in the Court below we were, the famous phrase, "done by lunchtime". It was a bit of a run through it would be fair to say, and so Mr Finn has indicated that he would not be surprised if we end up taking the whole day today, and I wouldn't be surprised if that is also the case, but I suppose what we're asking for is an indication from the Court as to your own, what the Court's desire is in terms of us moving through this?

WINKELMANN CJ:

Well, we would like you to move it at an appropriate pace, and it will take as long as it takes.

MR BUTLER KC:

Thank you. So I don't need to feel under pressure that the expectation is that we're to be done by lunchtime.

WINKELMANN CJ:

Yes, you don't need to belabour basic concepts of trust law.

MR BUTLER KC:

No, thank you, that's well understood. In terms, then, of the presentation of the appeal on behalf of my clients, the way we thought we would divide things up is I'll have principal carriage of providing an overview of our case and the main, the high points of our case including working my way through what I consider to be the relevant parts of the statute, and of course there are several statutes in play here with respect. The Health and Safety at Work Act 2015, but also the Trusts Act 2019, and also more broadly the Legislation Act 2019, because the definition we're looking at is a generic one, so I just want to flag that straight off. So I see the statutory work to be relatively wide, that is to be done, so I would have carriage of that and then we would hear from Professor Conaglen in relation to certain aspects of the case, in particular looking at the concept of the body corporate, and the notion of what distinguishes a body corporate, for example, from other forms of structure that is recognised at law. He'll talk through agency and such like, and, then you would hear from my friend Mr Elliott in relation to aspects of criminal procedure and such like.

So that is the way we have conceived of developing the argument. If that's acceptable to your Honours then I would come in as a sweeper at the end.

KÓS J:
A body corporate doesn't seem to be a desperately relevant consideration but I'm sure it will become so.

MR BUTLER KC:
So bodies of persons, I should have been more accurate.

KÓS J:
That's more helpful, yes.

MR BUTLER KC:
Exactly, is what I'm getting at.

WINKELMANN CJ:
Thank you. That's fine Mr Butler.

MR BUTLER KC:
So I've prepared a brief one-page, well one leaf probably is a better, more accurate description, road map, just to give you an idea as to how we're proposing to proceed. Do your Honours have that on your desks in front of you? The registrar handed it up.

WINKELMANN CJ:

Yes, thank you.

WILLIAMS J:

Can we have a soft copy please Luc when you get an opportunity.

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MR BUTLER KC:

Yes, we can send that, you'll be able to send a soft copy through to the registrar, that's great. And so, your Honours, on 17 September 2020 a terrible incident occurred on a farm at Waiotahe in which a young boy, Rozayah Hudson, lost his life. The farm's contract milking firm, Kellisa Farms Limited, has been convicted and sentenced to a fine and reparation as a PCBU that failed to comply with its duties under the Health and Safety at Work Act, which I'll just shorthand refer to as, well, apparently in the lingo it's HSWA.

WINKELMANN CJ:

So Mr Butler, I think the name of the child is suppressed, is that correct?

MR BUTLER KC:

I didn't understand it to be suppressed. I'm sure it was referred to in the courts below, but I'm happy if it is suppressed.

WINKELMANN CJ:

Well, we'll just check that because this is being livestreamed.

MR BUTLER KC:

Okay, thank you, I wasn't aware of that. I'm very sorry.

WINKELMANN CJ:

That was what we'd been informed but I don't know where that would be recorded in our materials. Anyway, proceed and we'll see if we can get it checked out.

MR BUTLER KC:

Thank you, your Honour. Charges were also brought against the farm's owner. Alternative charges were laid reflecting uncertainty about how to charge a trust-related PCBU. This appeal concerns the proper defendants to a PCBU-related HSWA charge, more particularly, can WorkSafe charge X Trust or the trustees of X Trust collectively as an accused PCBU, or can WorkSafe only charge the individual trustees of the X Trust as accused PCBUs in their individual right? We, the appellants, say the latter and WorkSafe says the former.

WINKELMANN CJ:

Which former?

MR BUTLER KC:

They say they can charge either the X Trust or they can charge the trustees of the X Trust collectively. So, the way in which the question arises for determination is a little complex, and it's at this point that I was going to look at the statute a little, so as your Honours well know, I'm old school so I've just printed off a copy of the statute and have it here in front of me. I don't know whether your Honours are doing the same or whether you're just reliant on…

WINKELMANN CJ:

Electronic.

MR BUTLER KC:

On electronic and my team kind of flashing up the relevant provisions on the screen for your Honours' benefit.

So, the first point to note about the statutory scheme, of course, is its "Purpose" provision which is found in section 3. Section 3 says that: "The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—" and then it lists seven subparagraphs of things that the legislation purports to achieve in order to secure that overarching goal, or to put in place that balanced framework: "protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant”.

Then at (b) you’ll see there’s reference to workplace representation, consultation, so that’s very much focused on the worker input into how you go about securing a safe workplace.

Then (c) has a similar sort of a theme: “encouraging unions and employer organisations to take a constructive role in promoting improvements”.

(d) talks about “promoting the provision of advice, information, education”, and suchlike.

(e): “securing compliance with this Act through effective and appropriate compliance and enforcement measures”, (f): “ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act”.

And then (g): “providing a framework for continuous improvement and progressively higher standards of work health and safety.”

Then subsection (2) in the Purpose section talks about when furthering the first purpose set out at section 3(1)(a): “… regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work … as is reasonably practicable.”

So in my submission, there what you’ve got is a purpose expressed as you would expect at quite a high level. It talks about what the aims of the legislation are “protecting workers and other persons against harm to their health, safety, and welfare by eliminating risks ” because the focus on eliminating risks, you’ve got: “(e) securing compliance with this Act through effective and appropriate compliance and enforcement measures.”

As your Honours will be aware the Act has a scheme but whereby it distinguishes between a number of different types of actors. It is an innovation of the scheme. So the Act distinguishes between PCBUs, "persons conducting a business or undertaking", section 17, and we'll obviously come back to the definition of that shortly. Then it talks about officers, so that's section 18 and then it talks about workers, section 19 and within the context of section 19, you have the concept not of just an ordinary worker but also a volunteer worker, that's in subsection (3). Then as the purpose provision in section 3 talks about there's a possibility of other people being at a workplace, people like customers, friends and family, whoever it may be.

WINKELMANN CJ:
But not people unlawfully.

MR BUTLER KC:
But not people unlawfully, quite right. I'm going to come back to the way in which in particular PCBUs and officers are defined shortly, but this I just want to hit some of the key features as I see it of the statute. PCBUs, if we turn to section 36, we see Subpart 2 of Part 2. Let's have a quick look at Part 2, again I'm just looking at the hard copy here. I'm assuming all of Part 2 is in the bundle, yes, beginning with section 30.

You'll see section 30 is part of Subpart 1 of Part 2 which deals with what are called the key principles relating to duties: "A duty imposed on a person by or under the Act requires the person – (a) to eliminate risks to health and safety, so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable. (2) A person must comply with subsection (1) to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate."

If we look at then at section 32, so again we're still within the key principles relating to duties, you'll see that section 32 provides that: "A person may have more than 1 duty imposed on the person by or under this Act if the person belongs to more than 1 class of duty holder." So just stopping there, that means that a person, an individual, can be both a PCBU and potentially an officer.

We then go to section 33: "More than 1 person may have the same duty …" so that's what's expressed, not only in the heading of the section, but also in subsection (1): "More than 1 person may have the same duty imposed by or under this Act at the same time. (2) Each duty holder must comply with that duty to the standard required by or under this Act even if another duty holder has the same duty."

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And then section 34, that is not in the bundle, apologies, but section 34 is the section which talks about the duty of one PCBU to consult with other PCBUs in respect of the same duty. So it's a follow-on to section 33. So where you have more than one PCBU that has the same duty at the same time, there is a duty on each of those PCBUs to consult with each other, section 34.

So then we move to Subpart 2 of Part 2 which then deals with the duties of PCBUs and just as a way of just outlining the way in which the Subpart works is what is called a: "Primary duty of care," that is set out in section 36 of the Act, and then there are what I call and, look, other people may have other words, it's just my word to describe the other duties, but what I call situational duties or more specific duties that sit under and/or complement the primary duty of care.

If we look at section 36: "Primary duty of care (1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of— (a) workers who work for the PCBU, while [there] ... (b) workers whose activities in carrying out work are influenced or directed by the PCBU ... ."

And then at: "(2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking."

And then a little bit more meat is put on the bones, so as to speak, if one looks at: "(3) Without limiting either subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable ..." and then there is a number of items listed there, you will see, in paragraphs (a) to (g).

If you look then at some of the other what I call the situational or more specific duties they are, for example, at section 37 the: "Duty of PCBU who manages or controls the workplace." Section 38 the: "Duty of a PCBU who manages or controls fixtures, fittings, or plant [et cetera] at workplaces." Section 39 the: "Duty of PCBU who designs plant, substances, or structures" and such like.

So I don't think I need to go into the detail of those, but it's just simply to indicate the way in which the statute in a sense unfolds. You have got your primary duty of care and then you have got the more specific what I call situational duties, duties which arise in respect of –

WINKELMANN CJ:
Yes, you can probably go forward to section 44.

MR BUTLER KC:
Exactly. So then we move to Subpart 3 which has a different focus. Here, we are not focusing on the duties of PCBUs as such but rather the: "Duties of officers, workers and other persons." So section 44 deals with the: "Duty of officers (1) If a PCBU has a duty or an obligation under the Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation."

So the duty of an officer is a duty of support or due diligence to ensure that a PCBU meets its primary duty of care and the other duties that I have taken you to in Subpart 2.

Subsection (2) then indicates: "For the purposes of subsection (1), an officer of a PCBU must exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances, taking into account ..." et cetera, et cetera, I don't think I need to take you through those but subsection (4) sets out a sense as to what due diligence might embrace.

Then at section 45, so we're still within –

KÓS J:
But section 44(1) is the prosecutable duty?

MR BUTLER KC:
Yes it is, yes that's right. Section 45 then sets out what the duties of workers are, and then you'll see, if you look at section 46, what the duties are of other persons at workplaces. So that's a person who's not a PCBU, not an officer, not a worker, some other person, but it is interesting and worth emphasising here that the way it's defined is that "a person at a workplace" and then it goes on to say "(whether or not the person has another duty under this Part) must". So again you can be an individual who's a PCBU, and you can be bound by this duty under section 46. You can be an officer of a PCBU, and you're a person at a workplace, and you are bound by section 46.

So then we come to Subpart 4, which is the subpart dealing with offences, and you'll see we've got section 47 which is the reckless conduct provision. "A person commits an offence against this section if the person has a duty under" either of the two subparts I've taken you to, and: "… without reasonable excuse, engages in conduct that exposes any individual to whom that duty is owed to a risk of death or serious injury or serious illness and is reckless as to the risk, to an individual of death or serious injury or serious illness."

Then subsection (3) sets out the penalties on conviction, and it adopts the trifurcated approach that your Honours will see is also adopted by section 48. So: "A person who commits an offence against section 47(1) is liable on conviction for an individual who is not a PCBU or an officer of a PCBU to a term of imprisonment not exceeding five years, or a fine not exceeding $300,000 or an individual who is a PCBU or an officer of a PCBU to a term of imprisonment not exceeding five years or a fine not exceeding $600,000, or both" and then "(c) for any other person, to a fine not exceeding $3 million."

So then we got to section 48, which is the: "Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness. A person commits an offence against this section if—(a) a person has a duty under subpart 2 or 3; and (b) the person fails to comply with that duty; and (c) that failure exposes any individual to a risk of death or serious injury or serious illness."

And here, again, when we come to what are the penalties, the penalties adopt a trifurcated approach. "A person who commits an offence against subsection (1) is liable on conviction,—(a) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding $150,000: (b) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding $300,000: (c) for any other person, to a fine not exceeding $1.5 million."

KÓS J:
Is there any contest that the word "individual" means "natural person"?

MR BUTLER KC:
None. None. That's been agreed the whole way through, and that saves me having to make a point I was going to make. Then you'll see if we look at section 49 there's a further offence of failing to comply with duty. "A person commits an offence against this section if the person (a) has a duty under subpart 2 or 3; and (b) fails to comply with that duty."

WINKELMANN CJ:
Can I just ask about section 49. So that would capture negligent breaches?

MR BUTLER KC:
Exactly.

WINKELMANN CJ:

It's not strict liability in terms of the scheme of the legislation, it's negligent, is it?

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MR BUTLER KC:

That's how I understand, but just give me one moment because this is where Mr Elliott is part of the team because he's the one who does this for a living. So the distinction between the two, so they're both strict liability offences, but the distinction between the two is in the – if you contrast the wording of section 48(1) and section 49(1), you'll see that in section 48(1) there are three elements to the offence, the third element being: "… that failure exposes any individual to a risk of death or serious injury or serious illness." When you look at section 49(1), that element, a failure that "exposes any individual to a risk of death or serious injury or serious illness" is not present. In other words, the offence depends, the difference between the two offences is whether or not an individual has been exposed to a risk of death or serious injury or serious illness.

WINKELMANN CJ:

Yes, I was thinking that most of the duties are to take reasonable care so create a safe workplace, but they're not – section 47 is certainly not strict liability because it requires mens rea.

MR BUTLER KC:

No, that's right. With recklessness per se you would – you're definitely in the area of mens rea there.

KÓS J:

And that's reduced risk, explains the reduced fines.

MR BUTLER KC:

Indeed. So you'll see the way the scheme, it's kind of a cascade, isn't it, that's the way I think of it as a cascade of seriousness reflected in the available penalties. But if you look at section 49(2), it also adopts that trifurcated approach to penalties. So you'll see in section 49(2): "A person who commits an offence against subsection (1) is liable on conviction, – (a) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding $50,000: (b) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding $100,000: (c) for any other person, to a fine not exceeding $500,000."

KÓS J:
Section 47(1)(b) doesn't explicitly refer to failure to comply with duty, but I suppose that's, is that implicit in section 47(1)(b)? Because it's part of subsection (1)(b) in section 48 and 49?

MR BUTLER KC:
Hmm.

KÓS J:
It's not the most beautiful piece of legislation.

MR BUTLER KC:
That is for sure.

WINKELMANN CJ:
Right, well we better move along, Mr Butler.

MR BUTLER KC:
So I thought to answer a question that your Honour put to me at the outset in terms of explaining my theory or our theory of the case, we go then to section 17 –

WINKELMANN CJ:
So there's also the mens rea provisions deeming ones for bodies and corporate and unincorporate, isn't there, which is one – the deeming provision. Are you going to take us to that?

MR BUTLER KC:

Section 160 –

KÓS J:

The definition of “person”.

MR BUTLER KC:

Well, I was going to take you to the definition of “person”, section 17, first before coming to the general provisions. I think, your Honour might have in mind, does your Honour have in mind Subpart 9 of Part 4?

WINKELMANN CJ:

Yes, I do, yes. Subpart 9, section 160.

MR BUTLER KC:

Yes, so sections 160 and 161. But I thought if I could just –

WINKELMANN CJ:

Yes, that’s fine.

MR BUTLER KC:

– go to section 17 and just explain how we see PCBU working on our theory of liability of trustees. So if we look at section 48, which is the offence charged here. So you’ll see I recall section 48(1): “A person commits an offence against this section if – (a) the person has a duty ….” et cetera et cetera. So then we look at section17: “Meaning of PCBU (1) In this Act, unless the context otherwise requires, a person conducting a business or undertaking … means a person conducting a business or undertaking – (i) whether the person conducts a business or undertaking alone or with others; and (ii) whether or not the business or undertaking is conducted for profit or gain …” and we say that notion of a PCBU easily accommodates orthodox trust concept. We say that each trustee of a trust can be a person conducting a business or undertaking, either alone if a sole trustee or with others if a co-trustee, regardless of whether the business of the trustee is conducting is for gain or for profit and we say that the application of section 17(1) in this way is consistent with the proposition that more than one person can have the same duty at the same time. In other words, section 33 that I took you to earlier.

The effect of this what we say is obvious application of the PCBU concept in the trust context is that in principle each trustee is rendered into a PCBU, thereby making them subject not to the lesser duties of an officer, remember I took you to that duty which is the duty of due diligence, but rather to the higher PCBU duties, the duties I took you to between sections 36 and 43.

Where the trustee is a human being, so an individual to use the language that you see in the statute, they will be exposed to a fine in the case of section 48, to a fine of $300,000 on conviction, but they will suffer a conviction in their name.

WINKELMANN CJ:

So why are you worried about it being dealt with in this way? I'm not quite sure what the evil in the Court of Appeal's interpretation is on your analysis then?

MR BUTLER KC:

The evil in the approach that the...

WINKELMANN CJ:

What's the mischief?

MR BUTLER KC:

The mischief. The mischief of the Court of Appeal's approach can be expressed in a number of different ways. At its fundamental, what it does is it treats the Trust and note the Trust concept in a way that is inconsistent with what a trust, with what the concept of a trust is.

WINKELMANN CJ:

Yes, but your clients are not really worried about that, they're not worried about the purity of the law. Perhaps they are?

MR BUTLER KC:

Well, they are.

WINKELMANN CJ:

Right.

MR BUTLER KC:

And one of them, as you know, is a trustee company and is very interested in the way in which –

WINKELMANN CJ:

So it's a point of principle?

MR BUTLER KC:

It's absolutely a point of principle and it's a point of principle, as well, for my friends. I mean, do recall it was WorkSafe's application that was brought to have the issue determined and WorkSafe sees it as an issue that is important to it, to understand how it is that it should be going about charging the trustees of a trust.

WINKELMANN CJ:

Yes, but apart from the point of principle.

MR BUTLER KC:

So that's the first, that's the first point of principle, but within the way in which the points of principle reflect the way in which trusts, trustees operate and conduct themselves. So take, for example, a situation, the situation that we've got here, just as an illustration of how things work. So we've got trustees who have been in office for some time and then we've got a new trustee that's come into office, being Perpetual which has come into office I think, if I remember right and did the maths right, something like five weeks before this terrible incident. One of the first things, as your Honour's will have seen, that Perpetual as trustee undertook was to say, well, what are the health and safety issues in relation to this business that need to be addressed and responded to?

Indicated that that was something of concern before it took the trusteeship and then was moving in that particular direction.

So from the point of view of the way in which, what I am trying to say, is from the way in which trustees operate as trustees, what my friends do is they focus on what they refer to as "collective decision-making" of trustees but, of course, the way in which a trust operates is far more complex than simply decision-making, whether done collectively or otherwise.

What this statute does is it focuses on duties and it focuses on conduct in respect of those duties.

ELLEN FRANCE J:

I'm not sure why, given that focus on duties and so on, that the problem you refer to in the way trusts operate arises? Because isn't Perpetual trying to do – trying to carry out its duties? What's –

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MR BUTLER KC:

Indeed, yes.

ELLEN FRANCE J:

I don't understand what it is you're saying about the way trusts operate that mean they can't be responsible for the duties.

WINKELMANN CJ:

Mr Elliott's going to tell you how to answer.

MR BUTLER KC:

Exactly, because at its core, a core principle of the legislation is control and so the issue becomes the way in which trustees operate the trust property is different from the way in which the law says other structures or forms go about exercising control over trust property.

ELLEN FRANCE J:

How is it different?

MR BUTLER KC:

Well, this case is an illustration of that working because, as trustee, you are put into office. You have obligations in respect of understanding what the trust property is and what the obligations you have as a trustee are in relation to that, in relation to that property. They're your duties, not the duties simply of other people. You can't say: "Well, somebody else has done something and therefore" –

WINKELMANN CJ:

It sounds just like the duties of a partner or a director.

KÓS J:

Or director.

WINKELMANN CJ:

They're put into office, and they assume duties immediately.

MR BUTLER KC:

That's right, but then coupled with the way in which you go about discharging your duties is how liability lands for failure to discharge those duties, and the way in which the law treats trustees is different from how the law treats partners, with respect.

WILLIAMS J:

Is this case really about Perpetual's desire to differentiate itself factually from the other trustees because it raised the issue early?

MR BUTLER KC:

So that's one thing that might emerge at trial, for example.

WILLIAMS J:

Why can that not simply be attributable to the trust, and the mitigatory effect is for all, is for the trust, not for one of the individual trustees?

WINKELMANN CJ:

Or for the individual trustee as an officer, so the trust bears the higher level, and Perpetual says, but we, as an individual officer of this trust, did all we reasonably could, therefore we should not be convicted of an offence.

MR BUTLER KC:

It certainly – I can understand, I'm not agreeing with, but obviously understand the proposition that your Honours are putting to me, so that's why I say it's not simply a question, it's the combination of the factors, in other words, the combination of the nature of the way in which trusts operate and how trustees operate, the issue of control under the particular statute, but also how it is that liabilities arise in respect of the operations of a trust. That's why we focus on that question of the fundamentals of what a trust, of how a trust operates and how it is that liabilities attach, not to an amorphous thing called a trust, or the trustees collectively. Liabilities attach, that is the way trusts have always worked, liabilities attach through the individual trustees, whoever they may be, of the trust.

KÓS J:

This still seems terribly abstract. Can we descend to the gutter? First of all, is, on your argument, there a difference in the level of fine that might be imposed? Secondly, is there a difference in relation to the nature of the mitigation argument? I can see those as two practical consequences of your argument.

MR BUTLER KC:

Certainly, I can. So, the way in which we see the orthodox principles of trust law, so cashing out, so to speak, is that you will look in any individual case at what the – take this particular case. So, let's say we're right and WorkSafe are not right, then the alternative charges that they have filed, so you've got the charge against RH & JY Trust, that's their primary charge. The alternative charges that they have filed are charges against each of the individual trustees, and in respect of each of the individual trustees.

So in respect of Ms Brown, for example, so they have in the charging document, they set out what the duty is that they say she had, what the offence is that she's committed, and then say the maximum fine against her is $300,000, because she's an individual.

The same against the late Mr Roucher, and then as against Perpetual Trust, they point out, well, it's not an individual and so the liability is $1.5 million, so in aggregate, if they were to succeed against all of those trustees, then the total would be $2.1 million, that's the – crudely speaking, an available pool, of course –

CAMPBELL J:
So, you accept, even if your argument were accepted, that Perpetual's liable to a maximum fine of 1.5?

MR BUTLER KC:
Absolutely, of course, absolutely. Absolutely.

KÓS J:
Well, there is modest – sorry.

ELLEN FRANCE J:
And – sorry – and what about imprisonment, if you were looking at section 47, for example?

MR BUTLER KC:
That's right, imprisonment would be –

ELLEN FRANCE J:
So they would be liable for imprisonment?

MR BUTLER KC:
That's right, yes.

WINKELMANN CJ:
So I just think there is something odd about your approach to the statutory scheme, because the reality is that trusts do act through – make major decisions through their decision-making processes, as do companies, as do partnerships, and those entities acting at that collective level have imposed upon them under this legislation, putting to one side the Trust for the moment, a collective responsibility to have in place appropriate policies and standards and it's that collective responsibility which is apparent in the scheme of this legislation. So you start with the PCBU and then you move down to the officers. Is your approach sidestepping the collective responsibility?

MR BUTLER KC:
No, with respect, it's not. What our approach does is it takes the concept of "person" at face value and says how do you apply that concept to a trust, to the trust context? We say, well, you apply it as you apply legislation generally speaking to the trust context by reference to that, to the trust concept, except where statute has, for example, as in the case of the Income Tax Act 2007/Tax Administration Act 1994, isolated trusts for particular different treatment that is not entirely consistent with the way in which the trust concept operates at law.

ELLEN FRANCE J:
If, as a matter of fact, the Trust is running and has control over the farm, how do you – what's the differentiation between other bodies of persons? Is it only the sort of underlying trust law?

MR BUTLER KC:
Yes, it's the underlying, it's the underlying trust – and it's not just is it only the underlying trust law. I suppose, from our perspective, we see the underlying trust law as expressing a fundamentally different notion or concept of what a trust is to, in contrast, what a body of persons is and that brings –

ELLEN FRANCE J:

Doesn't that – why doesn't that, then, undermine the Act? Because you have, let's say, if factually the Trust has control, running the farm, et cetera, you're removing that body of persons from the potential for liability.

MR BUTLER KC:

So the difference, I suppose, if I'm trying to isolate the difference between the proposition you're putting to me and the position we adopt, is I don't adopt the language of the trust or a trust, I adopt the language of the trustees and I don't accept that trustees are a body of persons in the relevant sense. So the relevant sense is that the law, the common law and sometimes a combination with the assistance of statute, treats certain types of groups of persons as being, in the relevant sense, a body of persons.

So the law says, for example, that a trade union is a body of persons, a series of contracts between members. It treats companies as a body of persons. It treats partnerships as a body of persons. It treats friendly societies, so Southern Cross.

WINKELMANN CJ:

So what the problem with your argument is, this is a piece of legislation which is asking the Courts to look beyond form to substance. So it is capturing things like associations of people who get together for a particular purpose and have a decision-making process between themselves. Why should trusts, which are a major way in which New Zealand businesses structure themselves, they structure themselves through trusts quite often, why should trusts sit outside this extremely important piece of social legislation?

MR BUTLER KC:

Well, they don't. On my theory, they absolutely sit well within this important piece of legislation. They don't sit outside it at all. That's the point that's so important to emphasise, this is not –

WINKELMANN CJ:

Well, you're saying the individual trustees do?

MR BUTLER KC:

Yes, the individual trustees sit within the legislation –

WINKELMANN CJ:

But the scheme of the legislation is that PCBUs can face liability.

MR BUTLER KC:

Yes.

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WINKELMANN CJ:

So that's a sense of collective responsibility. So even though individuals may be completely free of any blame, say a company, their directors, XYZ, et cetera, say a private company, the collective will still bear responsibility and in this case the collective won't. It'll be the individual trustees.

MR BUTLER KC:

If we take for example a sole trader, so there's no collective decision-making but a sole trader doesn't lie out with the concept of a person conducting a business or undertaking simply because there's no collective decision-making involved. So the statute applies on my theory in the same way, to a trustee, in the same way as it applies for example to a sole trader. So what I'm trying to say is it's not, the statute doesn't pivot off the notion of collective decision-making and more importantly the concept of a PCBU –

WINKELMANN CJ:

It does seem to.

MR BUTLER KC:

– doesn't pivot off the notion of collective decision-making.

KÓS J:

Well, it does surely, because that's the very reason why we talk about a body of persons, so as Mr Finn accepts, a trust with a single trustee would not come within his definition because it can't be a body of persons.

MR BUTLER KC:

That's right. That's his 42 –

KÓS J:

A sole trader isn't a body of persons. It is if it's a legal person, so it's a sole trader who establishes the company. Why isn't – why aren't trustees who owe duties to each other as well as to the beneficiaries, why are trustees, if there are two of them or more, why are they not a body of persons? Not the trust, the trustees?

MR BUTLER KC:

My straightforward answer to that is because that is not how – they don't share the characteristics of what the law has recognised as being the characteristics of a body of persons whether corporate or unincorporate. So our reading of the law is that the notion of a body of persons, if you go back to where did the notion of body of persons unincorporate come from, and the authorities seem to be agreed and the authors seem to be agreed really that the concept of a trade union was the first one to really give life to the notion of a third way. So you previously had – either you had to have legal personality, a company or a chartered organisation or something of that sort, or individual liability.

WINKELMANN CJ:

Was that for unlawful combination purposes?

MR BUTLER KC:

Indeed, but also – exactly. For also, who do you sue, how are assets held and suchlike, and so if your Honours are interested, a case I think that's really very useful, and it's not a surprise, it's a judgment of his Honour of Justice Tipping, is the case of *Campbell v Scott* [1995] 2 NZLR 345 (HC) which I think, in a

New Zealand context, does a really good job of tracing through this concept of what a body of persons is and what it is that the law is looking for when deciding whether or not a phenomenon, I don't like using the word entity, a phenomenon appears before the Court and a decision needs to be made as to whether or not what we've got is a –

WILLIAMS J:

Phenomenon.

WINKELMANN CJ:

That's what a trust is, a phenomenon.

MR BUTLER KC:

– body of persons or not and it's a very careful working through and what really seems to matter and importantly is the way in which for example liabilities are set. Whether there's a separation when it comes to liability, between the identity of the officers/members of the organisation and the organisation itself. That was the point of *Campbell v Scott.*

WINKELMANN CJ:

But there's one way of looking at this legislation, which is that it creates a new concept and it says, we don't care how you describe yourself or organise yourself, but when you actually act collectively to operate a place of business and you have sufficient – so you act as a body of people in operating a place of business, then we are going to say, you as a body of people, have a level of liability and then beneath that, each individual has to answer for their own, as an officer of that body, has to answer for their own conduct.

MR BUTLER KC:

So, again, with respect, I see it differently and if I may, so the primary obligation under the Act is, the greater duty under the Act is that of a PCBU. On our theory of the case, trustees individually wear that duty. They wear that duty, that higher duty and that is by dint of the fact that they have chosen, settlor has chosen, and they have accepted office, the trusteeship, to operate the business through that particular structure. Other people, however, take advantage of the fact that the law distinguishes between on the one hand the individuals who run a business, being the directors or its controlling mind for want of another term, and the form that they use in order to run the business. So a company and its directors/shareholders. In a New Zealand context obviously, often you have people who are directors and shareholders who run the company.

Now, with the PC – with the company being used to run the affairs, how is it that we can make sure that those individuals who have a responsibility for running the PCBU wear at least some responsibility for the way in which the PCBU is conducted? That's the officer liability vision, so the way I see the officer liability is it is designed to, in a subsidiary way, assist and make sure that those humans who are helping that company or the body of persons to operate the business, that they feel some personal responsibility.

In the case of a sole trader, you don't need that because they wear it themselves. In the case of a trustee, if we're right, and obviously I submit we are, then the trustees wear that. That's how the scheme operates to give effect to the underlying purposes. This is not a dodge or a swiftie or something of that sort. This isn't a question of trustees not facing responsibility for their duties under the Act.

KÓS J:

Well, except that if we didn't have Perpetual here, there would be a very large difference between the fine leviable on a trustee defendant, if Mr Finn's right, as opposed to the individual PCBU trustees who are individuals.

MR BUTLER KC:

But here's the problem that I have, with great respect, to the approach of Mr Finn. Mr Finn's approach, with great respect, is all about the money. He just focuses on the number, the dollar figure, and says, aha, there's a difference between 300 and 1.5 million.

KÓS J:

Yes, but I'm trying to work out if that's actually what's behind your argument.

MR BUTLER KC:

No.

KÓS J:

I mean, purity of the law aside, and you know, I'm rather enthusiastic about it in relation to equity.

MR BUTLER KC:

Indeed.

KÓS J:

But it does seem to me the money's rather fundamental here.

MR BUTLER KC:

And so – but when you're looking at the effectiveness of the statutory scheme, what one must recall, of course, is that on our theory a trustee has a personal conviction against their name, so you can't just look at the fine and say, oh well, it's the fine. It's also the fact of a personal conviction. A company, it's a more faceless, nameless, amorphous type of liability.

KÓS J:

Well, in the case of a trust, entirely so.

MR BUTLER KC:

Indeed, so it's amorphous, whereas on our theory of the case, what you have is if you're a trustee, if you're a human being, you own – the $300,000 only arises if you're the human being trustee. You have the personal conviction against your name. Parliament, in our submission, Parliament took the view that where what you're dealing with is an individual, the fact of a personal conviction alongside a lower fine is sufficient deterrence in respect of that individual.

WILLIAMS J:

Why would you have unincorporated bodies of persons in the statute at all, on that theory? It would always be sheeted home to an individual because that's the point in the legislation, you're saying.

MR BUTLER KC:

No, because what the legislature's done here is to recognise that the common law is at such a state of affairs now that what will often happen is even though what you've got is a body of persons that does not have corporate form, the law, as for example in *Campbell v Scott,* will look to shield individuals from –

WILLIAMS J:

That's a conclusion, though, rather than a reason.

MR BUTLER KC:

No, it is a reason, with great respect, be –

WILLIAMS J:

Why so?

WINKELMANN CJ:

If you could just let him finish.

WILLIAMS J:

Just because the common law has made a distinction between unions and –

MR BUTLER KC:

Yes, exactly.

WINKELMANN CJ:

If you just finish your answer, Mr Butler, because I didn't get the end of your answer.

MR BUTLER KC:

Sorry, so the answer was going to be, say for example what you've got is, well, the law has recognised a trade union, which is an unincorporated body of persons, so you prosecute a union, for example, for some failure of duty, what about the union organisers or the people who run – I've forgotten what you call the top dog at a union.

KÓS J:

General secretary.

MR BUTLER KC:

Secretary, thank you, the secretary of the trade union, so what the law has done through the definition of person and then officer liability, is so that that notion of a body of persons unincorporated, Parliament has recognised, because remember, it's a generic definition that you find in the Legislation Act 2019, and you'll find it as well in the Interpretation Act 1999 and prior in the reference to bodies of persons unincorporated, or incorporated persons, so it acknowledges that the way in which the law appears to approach these associations, or certain types of associations, is that the law will treat them as entities, not as the individuals who make up the entity

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So we recognise that that's just where the law has arrived at. So they will be treated by the law as a PCBU, but those officers must feel, just like directors must feel, the personal responsibility. We get them not by making them the PCBU. but by making them the officers of the PCBU. So that's where –

WINKELMANN CJ:

The difficulty with your argument is that your argument is that this is a body of unincorporated – this is not a trust, it's a body of unincorporated people, which is exactly the language of the legislation.

MR BUTLER KC:

No, I – that's, I suppose, the point of difference that I'm feeling between the Bench and myself. So I say –

WINKELMANN CJ:

But you're saying the Trust is something special.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

They're a phenomena.

MR BUTLER KC:

They're a phenomena, yes they are.

WINKELMANN CJ:

And the law, common law loves them even though –

MR BUTLER KC:

Correct.

WINKELMANN CJ:

Yes, anyway, we'll say it briefly.

MR BUTLER KC:

And importantly the common law and statute has not treated trustees as being bodies of persons unincorporated.

WINKELMANN CJ:

But legislation may.

MR BUTLER KC:

Of course, I cannot deny that legislation may. What I'm testing is the proposition as to whether this legislation has done that. I say that actually when you work through the concept of trusteeship as it, in accordance with its fundamentals, its normal way of operating, there is liability here for the trustees, they are PCBUs in their individual right and they will comply with their obligations and I am also reminding the Court that the words or the definition of "person" in section 16, that definition is generic. So if this Court says here that a body of persons unincorporate includes trustees, where there's, well, multiple trustees, then that conclusion is going to be good in principle for all other scenarios and I –

CAMPBELL J:
No. No, only under this Act.

MR BUTLER KC:
So the decision will be in respect of this Act and the Court may give, I don't know, because I don't know what the Court is going to say, the Court may seek to justify and confine the notion of body unincorporate including trustees to reflect some particular policy of this legislation, but what I'm, my submission is, that's going to be a very hard dam to build, because –

WINKELMANN CJ:
I'm concerned. I was just going to say, I'm concerned with your interpretation because it in some ways doesn't accord with how trusts function. I understand the conceptual framework of trusts and how we normally apply them, but within this legislation it's ignoring the fact that trusts do act as a collective body of people and it's treating it as a disaggregated bunch of individuals and so it is, in fact, you're applying it in a way which is not consonant with how trusts act. Because trusts do act collectively and, in fact, they're required – trustees are required, sorry, trustees do act collectively, they're required to act unanimously when they're acting qua trustee.

MR BUTLER KC:
Right, so if I stop –

WINKELMANN CJ:

To effect the body of the assets of the trust, including its conduct, and the scheme of the legislation is when you’re acting collectively it's the PCBU level. When you’re acting individually, when we think about you individually, it's the officer level.

MR BUTLER KC:
So if I can respond.

WINKELMANN CJ:
Surely.

MR BUTLER KC:
Because I think we got to the nub of the difference between my argument and my friend’s argument in terms of the concept. So there were two parts to what your Honour said which I think are worth separating out and unpacking. But I come to the second part of it which is your Honour talked about there being, well, you’ve got collective decision-making and that’s what lies at the heart of a PCBU. That is why I say that is, with great respect, that is not correct. A sole trader is a PCBU.

WINKELMANN CJ:
Yes, I’m sorry, perhaps I should refine that.

MR BUTLER KC:
But it is, but yes –

WINKELMANN CJ:
It's actually, it's collective. It's collective decision-making which results in control. So an individual does not control, the collective does.

MR BUTLER KC:
But a sole trader is still a PCBU, even though and they are there’s just one of them and that’s –

WINKELMANN CJ:

Because they have control.

MR BUTLER KC:

Indeed, because they have control, agreed.

WINKELMANN CJ:

So the PCBU thing is really control and for a body, the body acts to control it. For an individual trader, the individual trader controls it.

MR BUTLER KC:

I agree an individual trader controls it but it's not because of, I think I might have succeeded in landing at least this point, that it's not because it's about collective decision-making.

WINKELMANN CJ:

No. No and I was correcting myself, you were quite right.

MR BUTLER KC:

Yes, yes.

WINKELMANN CJ:

It's I was making those, collapsing two ideas.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

The point is, the PCBU is because it's something other than an – it's the entity that controls either with others, or on its own, the workplace.

MR BUTLER KC:

Yes, and so then your Honour is –

WINKELMANN CJ:

And the reality is that for a trust, it is collective control, I mean depending upon a trust deed giving individual trustees the ability to make decisions. This Trust is a classic trust, it requires unanimity. So it requires the collective, the collective is controlling it. Although you might say, they all have their individual duties, they still when they act, control, act collectively and that seems to be the concept of why you have different entities at the PCBU level. It's what is the thing that is controlling that workplace.

MR BUTLER KC:

So I say then if I come back to this, so I said I was going to, if I could take what your Honour put, you put it in two parts and I started with the second part and again, I'm grateful for your Honour's indication that it was useful to clarify that second part, if I can put it that way.

WINKELMANN CJ:

Yes, thank you.

MR BUTLER KC:

So the first part of what your Honour has said was about, well aren't trusts bodies of persons. So I just want to stop, your Honour, and I've just forgotten because I was dealing with the discussion we had, but if your Honour goes back and looks at the transcript it's quite a useful part. I can't capture all of the words or remember all of the words that your Honour used, but if we go back and have a look at it, effectively your Honour was saying, well the trustees are, how your Honour sees it is they operate in a manner like a body of persons.

So I want to make a couple of points in relation to that proposition that I think are important. The first point goes to, and you can look at it, this is just the order I've chosen to address, to respond, but others may see it differently. So the first point to make is everything that your Honour said in that part of the proposition you put to me is generic. It is not specific, what your Honour to put me, is not specific to the Health and Safety at Work Act. So the way in which your Honour described how it is the trustees make decisions and therefore why, in the proposition, and I'm not saying your Honours reached a concluded view.

Obviously, I know your Honour is open-minded, but the proposition your Honour put to me as to why one might look at trustees as being a body of persons are generic and would apply in any setting where what you've got is a definition of "person" that includes a body of persons unincorporate. So it's very important, what your Honour said when my view does raise the spectre of what I put in response to the question from Justice Campbell, namely that if it's on that approach that if trustees are a body of persons here, they will be a body of persons in all other settings. So there's the first point to be made about that.

WILLIAMS J:

The question is, why we should be worried about that?

MR BUTLER KC:

Exactly, and here's my, that's exactly I suppose where I'm going to, because that's another fundamental, I think, for the Court to address.

KÓS J:

Let's get your list and responses and then we'll have a crack at them.

MR BUTLER KC:

Certainly, great, thank you. So my first proposition is, it has implications and not just for this statute, it will apply across the board, and it will apply across the board not just in statutory settings, but also in common law settings.

WINKELMANN CJ:

What?

MR BUTLER KC:

Because it will, your Honour, with great respect, it must, because the concept of a body of persons unincorporate, is not specific to statutory law. That is a concept known in a common law. So if you are saying that for the purpose of the statutory definition of a body of persons unincorporate, the trustees are now to be found by this Court, in my submission, for the first time in a common law world that I have been able to find, that the trustees are a body of persons unincorporate.

KÓS J:
Got that one. What's the next one?

MR BUTLER KC:
Great. So then second of all, and in answer I suppose to the question that came from his Honour Justice Williams, what are you worried about. What our concern is, is that it tips the fundamentals of how trust law operate and quite a number of the core propositions, concepts that underline trust law, will in effect be overturned and so because the notion of trustees being a body of persons unincorporate is not consistent, in our submission, with the way in which trustee duties and/or liabilities have been seen down over many, many hundreds of years.

KÓS J:
Okay.
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MR BUTLER KC:
So then the question then would be, why would the Court want to do that when on our thesis the objects of this statute can be achieved more than adequately through an orthodox application of the trust concept within the concept of a PCBU? This is not about saying, oh well, you can adopt a trust and suddenly you're out with the PCBU concept or you can, you know, dodge responsibilities under the Health and Safety at Work Act.

KÓS J:
Right, is that your list?

MR BUTLER KC:

That's my list.

KÓS J:

Okay. Could you pop up section 17 of the Act on the SharePoint? Whatever this thing's called.

MR BUTLER KC:

Yes, Sir.

KÓS J:

If we look at the definition of section 17(1) "a person conducting a business or undertaking". Well, PCBU means a person conducting a business, et cetera. Now, you say that in section 17(1)(a) the word "person" there includes each trustee.

MR BUTLER KC:

Yes, I do.

KÓS J:

Okay. Help me, then, to understand why we couldn't also infer that it includes the organisation, corporate or unincorporate, to which those trustees belong and for whom they're conducting the business. In other words, why not the Trust? I mean, I'm sympathetic to your argument but I'm not certain I understand why, in the statute, it doesn't encompass that wider possibility. The trustees are each individually PCBUs –

MR BUTLER KC:

That's right, correct.

KÓS J:

Why not, then, the Trust?

MR BUTLER KC:

Because then what you'd have the trustees in their own right as PCBUs and then you'd have this amorphous thing called whatever, the Trust –

KÓS J:

Like the Amorphous Friendly Society?

MR BUTLER KC:

Yes, indeed, in which case then what you'd end up with would be quite an anomalous situation where what you would have is you'd have, say for example you had a friendly society, let's just say a friendly society, that's a PCBU but its individual – you know, its board of management is not a PCBU.

KÓS J:

Why not? Aren't they in just the same position?

MR BUTLER KC:

No.

KÓS J:

Why?

MR BUTLER KC:

No, because they would be –

KÓS J:

They're officers?

MR BUTLER KC:

They're officers, yes, they'd be officers, so unless the Court was going to say something, for example, like, well, let's take a company with multiple directors, so what we'll do is we'll make a company a PCBU, and then the board of directors, who are individuals that are not the company itself. The board of directors are PCBU –

KÓS J:

Well, you've just accepted that trustees are PCBUs.

MR BUTLER KC:

I have –

KÓS J:

So why not directors, and why not the directors of the body unincorporate, the friendly society?

MR BUTLER KC:

Because as we understand it, the way the statute works is you identify the company. The company is the PCBU, and then what you do is, where you've got that as the PCBU, then you've got officers of the PCBU and you need to have officers of the PCBU being people like the directors or the partners, in order to make sure that those individuals feel the heat of personal responsibility. In the case of the sole trader trustees, you don't need that. In the case of directors, you don't need to make them individual PCBUs because they already feel the heat through officers, through the officer responsibility and liability.

WINKELMANN CJ:

So have you –

MR BUTLER KC:

And you don't need – sorry, I beg your pardon.

WINKELMANN CJ:

Carry on, Mr Butler.

MR BUTLER KC:

So that the act is sufficiently effective, we say in the case of trustees, by recognising each of the trustees as being a PCBU and if they're a sole trustee, then it's just them. If they're a co-trustee, then that will be something that they will be doing with others, and they will co-ordinate in the usual way with those others who have got liability. So in other words, we say that when you look at the statutory scheme, you know, the concept of trusteeship works easily within the notion of a person conducting a business or an undertaking.

CAMPBELL J:
How does work for, say, Part 3 of the Act, which is about worker engagement, and so under section 83, for instance, a worker can cease work if it’s unsafe, but only after they’ve attempted to resolve the matter with the PCBU?

MR BUTLER KC:
Yes.

CAMPBELL J:
Which would really only work, I would have thought, if the collective actors, to use some neutral terms, are regarded collectively as a PCBU. So let's say there are three trustees, a worker employed by having an employment contract with those three trustees, not three separate employment contracts, surely that worker under section 83 just has to engage with the group as a whole rather than have three separate engagements before being able to cease work? Because your argument is focusing on, say section – but on the duties in Part 2, I think it is.

MR BUTLER KC:
Yes.

CAMPBELL J:
But we have to read the Act as a whole.

MR BUTLER KC:
Indeed. I don’t disagree with that proposition and so but the point is I seek compliance with section 83 in terms of continuing to freeze. There will be a conversation, in the practical sense, the way often these things will work is that, say, on a farm there will be one trustee often, or husband and wife say, or partners, whatever, who are the, let's say, the on-farm PCBUs and then there

might be an independent. So the worker will reach out and have a conversation with the on-farm PCBUs who will then get in contact, as you would expect, with the independent. So there will be an attempt to resolve – the matter will be resolved with the PCBU as soon as practicable after first refusing to do the work.

Like the alternative, I suppose Sir, is okay, well, let's say you just make this amorphous trust the thing, well, how do you know you've actually attempted to resolve the matter with the trust if only one trustee has been involved in the conversation? You haven't.

There's no, like, registered office for a trust as there is in the case of a friendly society or a union or something of that sort. It's why? It's because these bodies unincorporate work in different ways and statute sets up different ways for people to interact with them that are not the same as trusts or trustees.

WINKELMANN CJ:
The concept of control and collective action plays out in reality, though, quite stepping outside the legislation, which is that the legislation assumes this group of people have to work collectively to run the business place, or take steps collectively. So it won't be every individual trustee who will be creating health and safety policies and training people. It will be the trustees collectively deciding upon their health and safety policy and its implementation and I'm concerned with the disconnect between this. So you, the picture you're creating skips, it doesn't accord with that. I suppose it's the same question I've asked you before, really.

MR BUTLER KC:
Yes.

WINKELMANN CJ:
It's that you look at who's got control.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

And here it's all the trustees acting unanimously who actually have control over this place because they are the ones who are going to have to decide what the standards are that apply and you're saying, well, it may be them acting collectively but because of the law of trust we don't look at them as a collective, we just look at them is it a bunch of individuals and there's an artificiality in that which troubles me.

MR BUTLER KC:

So a couple of responses, I suppose, to that. In many ways, the artificiality lies when you're looking at bodies corporate and unincorporate, because there's the artifice, because they are artifacts or notions and the very reason why we have officer liability is in recognition of the fact that the people who conduct the business actually are shielded through the corporate or quasi unincorporate corporate form.

WILLIAMS J:

So are trusts.

MR BUTLER KC:

Where – no, that's not right, because –

WILLIAMS J:

Well, the person is held to be the legal owner but, of course, they can only own for the purpose of the cestui que trust. They have these obligations that equity places upon them.

MR BUTLER KC:

They do.

WILLIAMS J:

It's artificial to say they're actually the owner and that's why equity invented these rules, of course. These are all artifices. And it's an artifice to say that these are individuals not acting as groups when, in fact, trustees make decisions in meetings and pass resolutions, and if they haven't passed a resolution they haven't made a decision. A bit like a committee in a golf club that is unincorporate. In fact, exactly like one. They probably have a bank account just like a golf club do.

MR BUTLER KC:
They will have a bank account, that's exactly right. But the way in which decision-making can be made may differ. The way in which if decisions are implemented may differ. But most important –
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WILLIAMS J:
Or may not.

MR BUTLER KC:
Or may not, or may not, exactly.

WILLIAMS J:
Depends on the deed.

MR BUTLER KC:
Yes, quite, which again would, in our submission, suggests that one then just deals with the trusteeship that you've got in front of you in any particular case on its terms in accordance with the principles of, the fundamental principles, of trust law.

WILLIAMS J:
Well, it's got to be in accordance with the fundamental principles of HSWA.

MR BUTLER KC:
Certainly.

WILLIAMS J:

Because you've got to bring yourself within or find that you are without – out with as you say – the purpose of that Act.

MR BUTLER KC:

Yes, agreed.

WILLIAMS J:

Which is probably why the world won't end if you need to look at the Resource Management Act 1991 to see how unincorporated bodies of persons should be dealt with under that legislation, or indeed the common law, because you have to take a purposive approach to all of those and if it fits within HSWA it doesn't follow that the conclusion in HSWA will apply in the common law, because you have got to take a purposive approach for that question.

MR BUTLER KC:

I accept, obviously, the proposition that one must adopt a purposive approach to the interpretation of the particular legislation. The proposition I am advancing, however, is that when one looks at the definition of "person" in section, whatever it is, 16 of the Act, that definition is a broad generic one which you find in lots of legislation. Put it another way, in –

WILLIAMS J:

Yes, you don't need to convince us of that.

MR BUTLER KC:

Yes.

WILLIAMS J:

But you interpret those words in their context.

MR BUTLER KC:

Accept that.

WILLIAMS J:

And the common law deals with this, you know, in venerable cases, deals with this very issue and applies its rule to unions, because it wanted to bring unions to book.

MR BUTLER KC:
Yes.

WILLIAMS J:
In fact, if you look at one of the cases you cite, *Wise v Perpetual Trustee Co* [1903] AC 139 (PC).

MR BUTLER KC:
That’s right, the French Club in Melbourne.

WILLIAMS J:
The French Club, yes, the French Club.

MR BUTLER KC:
Yes.

WILLIAMS J:
They refer to the committee as trustees.

MR BUTLER KC:
Yes, in terms of how they held the property, that’s right, but –

WILLIAMS J:
Exactly, as lessees they were trustees and the members were the cestui que trust.

MR BUTLER KC:
Yes, yes.

WILLIAMS J:
So these ideas are muddled even by judges.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

Even by judges.

MR BUTLER KC:

And what, I suppose, my submission, so I'm trying to save the Court from further muddling of those concepts, because I say that you can apply the standard orthodox notions of trusteeship to this statute and make sure that the purposes of the statute are achieved notwithstanding that.

WILLIAMS J:

One of the dangers, in my mind anyway is, interested in your response to this, is by separating the trustees you create potential divisions of responsibility and culpability and perhaps a professional trustee might be very interested in achieving that. What do you say to that?

MR BUTLER KC:

I very much doubt that that would be the case, and remember in the case of a corporate trustee, and we have one here, the fine that it is subjected to, on our theory of PCBU, it is subject to a 1.5 million fine in its own right. So it is not evading responsibility whatsoever as a PCBU in this particular context.

WILLIAMS J:

Yes, I'm not –

WINKELMANN CJ:

That's not his point.

WILLIAMS J:

That's not really my point. It is –

WINKELMANN CJ:

Upstream of that.

WILLIAMS J:

Yes, it’s upstream of that. It is in this way a corporate or professional trustee can differentiate itself from the lay trustees that pay it, because it has corporate disciplines the lay trustees may not have and so can evade responsibility or responsibility to the same trustee as the – to the same level as the lay trustees who haven’t, for example, taken the advice of the corporate trustee here.

WINKELMANN CJ:

Another way of asking that is that if you impose duties that ignore the collective responsibility, if the way the trustees act, must act unanimously in this particular Trust, if you apply the Act in a way that ignores that, will you actually – will that have implications for how they must conduct themselves? Does it undermine that collective?

MR BUTLER KC:

No. No, I think, I don’t see it as doing that at all, because each individual trustee will be a PCBU in its own right.

WINKELMANN CJ:

That's the point.

MR BUTLER KC:

Yes.

KÓS J:

Shall we go back to that, seeing as we’ve still got section 17 up on the screen.

MR BUTLER KC:

Thank you.

KÓS J:

And look at your officers theory. So if we move down to 17(1)(b)(i), a PCBU does not include a person to the extent that person is engaged solely as an officer of the business or undertaking.

MR BUTLER KC:

Yes. Thank you. I knew there was something in the statute that was a partial answer to the question your Honour put to me about differentiation between officers and PCBUs.

KÓS J:

Yes, and so the focus there seems now to be on the business or the undertaking. So it seems to anticipate that it's going to be – that the business or the undertaking should be the PCBU, and then you have subsidiaries, subsidiary officers. Now officers of a PCBU and PCBU seem to be liable for the same fines, but that does seem to be slightly different from the argument you're advancing because that would suggest that perhaps the thrust of the Act is towards making the business or undertaking the relevant PCBU, therefore they're a person we're looking for who has control.

MR BUTLER KC:

I do wonder whether this is, your Honour made reference to the unhappy, let's put it that way, drafting of the legislation, and it seems to me the point your Honour is trying to draw from the use of the language "the person or undertaking" or, which it appears in (b)(i) but also appears again, I see, in (b)(iv). But it –

KÓS J:

It's in (a) as well, "business or undertaking" is core to it.

MR BUTLER KC:

Yes, yes, quite.

KÓS J:

And in (1), chapeau, almost a chapeau.

MR BUTLER KC:

Because as I see it, all it's trying to do is just separate out the notion of the business or undertaking and then identifying who is the person that is conducting that business or undertaking. So it's separating the two out, and in terms of the aligning of the notion of an officer to PCBU, seems to me that is affirmed by the chapeau to section 18 in this Act, "unless the context or otherwise requires, **officer**, in relation to a" not in relation to a BU, but in relation to a PCBU. So it seems to me it's just a – there's nothing, in other words, I say to be read into the fact that the words "person conducting" doesn't appear in (b)(i).

WINKELMANN CJ:
So, Mr Butler, it's 11.27.

MR BUTLER KC:
Oh right. I hadn't realised that we were moving at such a rate.

WINKELMANN CJ:
A slow pace.

MR BUTLER KC:
No, no, it doesn't, when you're standing here it doesn't feel slow at all to be honest.

WILLIAMS J:
Yes, we're moving quickly but not in one direction.

MR BUTLER KC:
Yes.

WINKELMANN CJ:
Your movement through your submissions might not have been what you'd hoped for though.

MR BUTLER KC:
Yes. Look, in terms of where I was at in terms of the points that I wanted to cover, we've actually covered quite a lot of the ground that I wanted to cover. Your Honour said at the outset, look, you don't need to spend much time on

trust fundamentals. I might like to, with respect, because it seems to me those, at least some of those propositions are quite important to the argument I'm advancing.

WINKELMANN CJ:
Well we do understand them. You may feel we're being sacrilegious in the temple of your faith but.

MR BUTLER KC:
Well I know your Honour is open-minded so some of the propositions you put to me certainly would be characterised that way.

WINKELMANN CJ:
May I just ask you this question though. You've told us that we'll do terrible violence to legislation and the common law and I was looking at the Legislation Act at some unincorporated body, which is slightly different. I'm not sure if there's a significant difference between unincorporated body and body of persons unincorporated. Perhaps it is, given the context. But where do you say – if this is truly such a major significant thing, has it not been addressed by the courts in other legislation?

MR BUTLER KC:
No it has not. That, I suppose, is one of my core points is I've not been able to find an example of a case where a court, in this country or overseas, has found trustees to be an unincorporated body of persons. I might remark, just again for your Honours' benefit, that the number of enquiries and communications I've had with people in relation to this appeal rivals only the level of communication I had in relation to the case I did for Lucretia Seales. Again, that's simply to indicate the level of interest that the Court of Appeal's judgment has generated, not just in this country, but also overseas in terms of the interaction or implications for the approach that might be adopted.

KÓS J:
One of Mr Finn's footnotes lists a large number of District Court cases.

MR BUTLER KC:

Yes.

KÓS J:

Which has held trusts to be a body of persons in the context of the RMA.

MR BUTLER KC:

RMA, yes, so the answer to that, Mr Elliott was going to deal with it but I might since your Honour has raised it. First of all as I read those cases, they do not actually address the question of whether or not a trust is a person –

KÓS J:

You mean the point's not taken?

MR BUTLER KC:

The point's not taken. First point. Second point, that would, with great respect from our perspective, reflect regional practice. If you look at those cases they're all from Otago. That's not to say they do things wrong in Otago, it's just simply to say it's not reflecting a national –

WINKELMANN CJ:

But the only problem with your kind of sweeping submission that we're going to unpick the space-time continuum if we do this in this particular piece of legislation, as Justice Campbell said, is to show us somewhere where it would be problematic in another piece of legislation, which would not be distinguishable because it isn't a social policy piece of legislation which is aimed at dealing with businesses which are conducted through many, many different forms, and New Zealand is in some ways sui generis because of the national obsession with sticking assets into trusts, which is not something that is seen elsewhere. So that's your challenge for after morning tea.

MR BUTLER KC:

It’s 11.30, thank you, and we’ll regroup in terms of thinking about who addresses various submissions through you, if that’s in order.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MR BUTLER KC:

So we have done a little regroup over the tea break so –

WILLIAMS J:

And brought some supporters.

MR BUTLER KC:

I should have charged at the gates.

WINKELMANN CJ:

These are people who have been sending you emails Mr Butler.

MR BUTLER KC:

Yes indeed, exactly, and have arrived on time, the cavalry. So I'll box on with a number of the arguments, and we’ll just see, as we said, we’ll need to stop by lunchtime, but there’s a number of the arguments that I need to get on with. So it maybe that you hear a little bit less from Professor Conaglen and from Mr Elliott than had been planned. We’ll just see how we go with the issues on which you might hear from them will be a little bit more confined.

So I said just before the break I might at least have the opportunity to advance some of what we consider to be important trust fundamentals and see how they, what they add or how they might play out, as I said, and that’s all in support of a thesis that the proposition we’re advancing, namely that the law does not treat trusts in the same way as the law treats, or has treated, bodies of persons, whether they be corporate or unincorporate, and our fundamental proposition is in fact that the law has cleaved the idea that trusts are something different, and that their liability needs to recognise the difference that the law has explained over the years.

So a couple of propositions that I'm going to advance, or that I've extracted from the cases that I think are important. So in the case of *Re Graham Pitt Track & Bennett* [1891] 9 NZLR 617, the then Chief Justice Prendergast said: "There is no such thing … as the trustees have an identity different from themselves individually." "There is no such thing as that trustees have an identity different from themselves individually."

WILLIAMS J:

Who was the second party in that please? Pitt against?

MR BUTLER KC:

So it's called in *Re Graham Pitt & Bennett*, and in the road map I've handed up the, if you see in the cross-reference column, and it should be in our supplementary bundle which we provided to the Court. I can't remember which tab it's in.

CAMPBELL J:

The first one.

MR BUTLER KC:

Then the proposition which your Honours will be familiar with, but does bear repeating, taken from *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 271, a Privy Council decision. "A trust is not a legal person." Trustees "are not agents for the beneficiaries". So that is *Investec* at paragraph 59(i).

In *Lewis v Condon* [2013] NSWCA 204, the New South Wales Court of Appeal said that to suggest that a trust is a legal person is a false notion. *Investec* at paragraph 59(iii) –

KÓS J:

Well a legal person is whatever a statute says.

MR BUTLER KC:

Yes.

KÓS J:

If that's the question. I mean none of these cases actually answer that, that issue really. Orthodoxy says a trust is not a legal person but this statute may make them so. It's entirely capable of doing so.

MR BUTLER KC:

And I cannot and will not deny that of course a statute can, if it wishes, act inconsistently with the fundamental principles of trust law.

KÓS J:

Yes.

MR BUTLER KC:

So the question here really comes down to, as we know, whether or not this statute has done so, and I say, as you know but it needs to be said again, that through the generic definition of "person" it is, and including within the generic definition of "person" the concept of a body of persons unincorporated is not said what the – it is not assimilated, trusts and trustees to a body of persons unincorporated.

KÓS J:

Do you get any support from those statutes that do expressly do so?

MR BUTLER KC:

I say I do, and I say do –

KÓS J:

Could we have a look at those at some point?

MR BUTLER KC:

So I say that what's interesting about those statutes is that they take an extra step to bring within their scope the concept of trusteeship in a way that it might not otherwise be expressed.

WINKELMANN CJ:

Sort of like the principle of legality. Putting trust law into that concept. It has to speak plainly if it wants to apply to trusts.

MR BUTLER KC:

Because it's such a fundamental structure, and so my basic proposition is, for example, when you're looking at a, let's got out of this legislation and look at some other legislation and the word "company" or the word "director" is used, you would generally speaking expect a court when interpreting or applying the statute to a company or a director, to apply it in accordance with the common law notion of what a company or a director is, unless there is something that is particular to the statute that says, no, in this case, you should have a different view of what a company is or a different view of what a director is.

My simple proposition is the same approach should be adopted to trusteeship and what is it in the statue here that says you should depart from those principles. It can't be, I say, the definition of "person", because that definition of "person", which includes "body of persons unincorporate", that is a generic definition. The concept of a body of persons unincorporate is a generic concept which has not been applied to trustees and there is no indication in the statutory, on the face of the statute, I say, nor of importance in my view, in the statutory, the legislative materials which indicates that Parliament intended this Court or any other court to depart from the application of ordinary trust concepts when the question what is a PCBU, who is or isn't a PCBU, when that applies. There is nothing in the statutory materials that supports that proposition.

KÓS J:

What is the legislation that expressly incorporates trusts as a body of persons?

MR BUTLER KC:

So an example would be, under the Tax Administration Act, or the Income Tax Act. So the Tax Administration Act, section 3(b).

WINKELMANN CJ:

Well, there is an obvious immediate point of distinction there, isn't there?

MR BUTLER KC:

So you've got – exactly. So you've got "offshore person means" and if you look at subsection (b): "for a body corporate or an unincorporated body of persons, including a trust or a unit trust, a person who would be an overseas person …"

WINKELMANN CJ:

Well, the point of distinction is that this is specialist legislation where they're thinking about legal entities a lot.

MR BUTLER KC:

Precisely, that's –

WINKELMANN CJ:

That cuts both ways though.

MR BUTLER KC:

Almost all arguments, I suppose at this level, cut both ways.

WINKELMANN CJ:

No, no.

MR BUTLER KC:

So, I'm going to cut it my way.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

Obviously, and the Court will take its own view on that, but it seems to me that this is evidence of the fact that Parliament when it sees an issue with the application of the core trust concept to the fulfilment of the statutory purpose, will make a decision whether to include it or not, within the concept of a body of persons.

WINKELMANN CJ:

It's interesting, isn't it though.

MR BUTLER KC:

Parliament can do that.

WINKELMANN CJ:

They actually say "unincorporated body of persons includes a trust".

MR BUTLER KC:

Yes.

CAMPBELL J:

That reads as if it just is spelling out what is there anyway.

MR BUTLER KC:

Yes, and so again, I can understand somebody putting that proposition to me, I say it's just a drafting technique because, in my view, when you look through the statute, you'll see phrases like body of persons and so on and so it's a shorthand to indicate what, at least for the purpose of this statute, is included within that concept but with great respect, it's not setting out a proposition that is generic and says that you can just depart from the ordinary application of the trust concept in a statutory context. Of course, with respect, if I make the obvious point, if Parliament disagrees so if I'm right, if the Court were to accept the argument that's advanced on behalf of the appellants here about the correct –

WINKELMANN CJ:
You've lost your audience.

MR BUTLER KC:
I have. Tax, generally speaking, tends to have that result. Nobody wants to hang around and listen to issues about tax.

WINKELMANN CJ:
It's a buzz killer.

MR BUTLER KC:
A point that can be made and I should make it just at this particular point when we're talking about interaction with statute is that, I accept obviously, we're in a statutory interpretation exercise, I accept that, but if Parliament were to conclude that the argument that I've advanced, and which I urge obviously the Court to adopt, namely just apply the ordinary concepts of trust law when determining who or what is a PCBU.
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If for whatever reason Parliament thinks that's not what we're trying to achieve in terms of the statute, of course it lies with Parliament to be able to respond to that, if it sees that as being a gap or a mischief. In other words, I say that when you're looking at the process or the act of statutory interpretation, the approach that I adopt does work with, it's not contrary to the statute, it works with the statutory scheme, it delivers an effective – it delivers on the goal of effectiveness in securing a safe workplace. If, however, Parliament were to see that it's different when it wants something that assimilates trusts to bodies unincorporated, then that's a step that Parliament can take on a considered basis and, for example, through language like this. So, I just make that point at this point, because I'm going to make it at some stage, so I might as well just make it here.

KÓS J:
So, on your approach, the trustees are PCBUs in their own right?

MR BUTLER KC:

Yes.

KÓS J:

I keep coming back to this, what seems to me fundamental. What is the disadvantage to trustees of their being PCBUs as opposed to officers of a PCBU?

MR BUTLER KC:

When your Honour says what is the disadvantage to trustees…

KÓS J:

Well, in other words, effectively you have elevated the trustees from their comparator, which would be in a friendly society, committee members would only be officers. Well, trustees are comparatively committee members, but they are PCBUs in their own right, on your approach.

MR BUTLER KC:

Yes, they are. I accept that they are.

KÓS J:

Now, does that carry with it a disadvantage for them?

MR BUTLER KC:

Yes and no, I suppose, is the answer.

KÓS J:

Well, let's look at the yes first. What's the yes?

MR BUTLER KC:

Yes, so the disadvantage to them is they have the obligation of being a PCBU and therefore, if we look in terms of duties, so they have the duty under section 36 in their own right, which they would not otherwise have. On WorkSafe's thesis, the section 36 duty sits with the amorphous trust, whatever that is.

KÓS J:

Section 36, you say?

MR BUTLER KC:

Yes, and the other duties within that subpart, which is –

KÓS J:

So those would be duties different from an officer?

MR BUTLER KC:

They would be bare duties. Yes, so they're higher or tougher.

KÓS J:

Correct, and an officer can to some extent disclaim responsibility, if they act responsibly individually.

MR BUTLER KC:

Yes, if they say, I applied due diligence, then they've met their, broadly speaking, broadly speaking… of course, the note has gone the furthest it possibly could go underneath my lectern. I inelegantly need to get down and grab that.

WINKELMANN CJ:

So, can you just recap? Can you state succinctly ups and downs of this?

MR BUTLER KC:

Yes, so the first one is that if you're a PCBU, you're subject to all of those duties that are applicable in subpart (2), so you've got that primary duty of care and all the other duties that go between sections 36 and 43, I think it is, isn't it?

WINKELMANN CJ:

And you're subject to jeopardy of imprisonment, penalty of imprisonment?

MR BUTLER KC:

So then if we lose – so that's the duties, just let's focus on – sorry, I think that's a bit casual. I don't mean it that way.

WINKELMANN CJ:

Okay, all right, so duty.

MR BUTLER KC:

If we just look at the duties first, so that's – so those duties, and if you look at the duty, the PCBU must ensure the health and safety of, so far as is reasonably practicable, so it's quite a – I'd describe it as being a higher duty, there's a higher obligation there, whereas in contrast, section 44: "If a PCBU has a duty or an obligation under this Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation." So, it's what I'd describe as a supporting or subsidiary duty, so –

KÓS J:

So, trustees would not have that opportunity, in your theory?

MR BUTLER KC:

So, they would not have that, the due diligence, but they would have the higher duty of, the primary duty of care, and so what I'm again engaging with you, and I think in the terms you want me to engage with you, Sir, some trustees might see that in terms of a personal obligation that they've got as being something, well, I might not wish to have. I might just want to simply have a due diligence duty. So that's, to answer your question.

KÓS J:

Which would be what a director would normally have.

MR BUTLER KC:

Which is what a director would have, exactly, that's right.

WINKELMANN CJ:

Because it did occur to me that the position you are arguing might not be a position that other trusts and other trustees might wish to argue, because you're an incorporated trustee and when I look at –

MR BUTLER KC:

I'm a mix, I'm actually a mix and I've got humans, and I've got corporates.

WINKELMANN CJ:

Right so aren't you arguing for, you're creating far more jeopardy for trustees in terms of the harshness of penalties, including imprisonment.

MR BUTLER KC:

Can we just work our way through them and so –

WINKELMANN CJ:

I was just trying to cut through them, in terms of time.

MR BUTLER KC:

I know, I do understand. So the first one is the nature of the incidence of their duty and then there are the penalties, and we'll take the one that we're dealing with here in particular section 48. So if a trust is a legal person or a person, sorry, is "any other person" under subsection (2)(c) as my friends for WorkSafe would argue, then the fine is 1.5 million.

ELLEN FRANCE J:

But you do accept if we were under section 47, it would be liability for imprisonment?

MR BUTLER KC:

Yes, I do.

WINKELMANN CJ:

And an incorporated trustee would not be liable for imprisonment?

MR BUTLER KC:

Correct. So obviously where you've got a mix, so you've got a corporate and a human, so the human is subject to –

WINKELMANN CJ:

Which is Justice Williams' point.

MR BUTLER KC:

Yes, but I'm just answering question in terms of the detriment –

WINKELMANN CJ:

I know, but my question to you, Mr Butler, is that you're arguing for a position that other trustees might not think should apply. They might not be in favour of being elevated up to being individually PCBUs.

MR BUTLER KC:

Certainly.

KÓS J:

I'm not sure the penalties make it different here as between an officer and a PCBU, looking at section 48 – section 47(3).

MR BUTLER KC:

Exactly. So if you're looking at an individual –

KÓS J:

So that may not be a point of difference?

MR BUTLER KC:

Exactly. So if you're looking at an individual as a PCBU, the fine is 300. If you're a director, an officer of a PCBU, the fine is the same. And again, so there's, in my, there's an equivalence so as to speak there but it is –

KÓS J:

So we've got a disadvantage and an equivalence, where's your advantage?

MR BUTLER KC:

Exactly, so some people, again, just to your point, some people may see there being an advantage, I'm not – this is my friend's thesis, that oh well, if what we've got is we've got two human beings as trustees, then that's $300,000 times two is 600,000 which is less than 1.5 million, right so that's what my friend says would be the advantage that would be being conferred by dint of the approach that we urge upon the Court. To which I say, well, it's not much of an advantage at all because, of course, the person will suffer, the individual trustee will suffer the imposition of a personal conviction against them.

WINKELMANN CJ:

So far I'm struggling to understand the mischief, which is one of my opening questions to you, I mean I know that it offends trust lawyers and it offends their concepts.

MR BUTLER KC:

It does.

WINKELMANN CJ:

But Parliament is free to look through trusts, really.

MR BUTLER KC:

Yes, I agree. No disagreement.

WINKELMANN CJ:

That's particularly, going back to my point, it's particularly an issue in New Zealand when so much in the way of New Zealand's wealth is owned through trusts, and in New Zealand, probably distinctly from the rest of the world, so many small businesses et cetera are conducted through trusts.

MR BUTLER KC:

But it's a curious, I don't, I can't, and I don't disagree with any of that. question is whether or not Parliament has here chosen to depart from the application of ordinary trust concepts in order – and to me, a response to the proposition your

Honour has put to me, if trusts are such a well-known phenomenon as they are in New Zealand for the holding of wealth, including businesses, is it not curious, he asks rhetorically, that when Parliament came down to talk about officers in section 18, the definition of “officers”, no reference is made to trustees as being officers. If the intent was to capture trustees by this statute in contradistinction to other statutes which apply to incorporated bodies of persons, if it was that was the goal of this statute, why is trustee not identified as being an officer of the PCBU?
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WINKELMANN CJ:
So Mr Finn has raised issue of legislative history in that.

MR BUTLER KC:
Yes.

WINKELMANN CJ:
And I think you’ve added some legislative history material, so what is the point you want to make about that?

MR BUTLER KC:
Yes, certainly, so the legislative material, so what it is, is it's the report of the officials, so and it's the MBIE officials’ report, the so-called departmental reports, just stopping there, I need to note that it is not usual for the Court to rely on departmental reports for the purposes of statutory interpretation. So I’m just – but your Honours will see that the Court of Appeal for its majority, for its part, put quite some weight on it. So it can be found in the supplementary bundle of authorities we have produced. The report is at tab 83 and 84, so that’s pages 1,346 is Part A and then – so Part A, the way the departmental reports, I don’t know how familiar your Honours, I know one or two of you will be from previous lives.

WINKELMANN CJ:
Yes.

MR BUTLER KC:

So Part A is where you deal with the big issues, so as to speak, and the major concerns, and Part B is the little bitty, the bitty things.

WINKELMANN CJ:

Is someone putting this up?

MR BUTLER KC:

And so if we look at tab 8 – oh.

WINKELMANN CJ:

You don't have it?

MR BUTLER KC:

Electronically.

KÓS J:

What page, we do?

WINKELMANN CJ:

It was sent to us today, so.

MR BUTLER KC:

Oh, I'm so sorry, your Honours, I had thought –

WINKELMANN CJ:

That's all right, we can find it. It was only sent to us this morning.

MR BUTLER KC:

Right, so I can take you to a part in the respondent's bundle of authorities, I am sure, where the part that they rely on is identified. So I just, the reason I want to take you to the supplementary bundle of authorities is just to show you how big the report was that the officials were preparing in relation to you.

WINKELMANN CJ:

So it's the – which pages is it? Because it's broken up into two amounts.

MR BUTLER KC:

So it was at 1,048 from memory, oh, there you go.

WINKELMANN CJ:

Really?

MR BUTLER KC:

46.

WILLIAMS J:

Is this in the supplementary?

MR BUTLER KC:

It's in the supplementary bundle, yes.

WINKELMANN CJ:

We don't – only have up to page 290. Did you say it's at page 1,300?

WILLIAMS J:

Yes, you run it on from – yes, okay.

MR BUTLER KC:

Yes, so I think it begins at 1,346 and so the point simply is to show –

WINKELMANN CJ:

Oh, okay, all right, I see, yes.

MR BUTLER KC:

Is to show so how this report works. You've got a Part A, that deals with the big issues, then Part B deals with some of the drafting issues, all right.

And so the part that my friend relies upon is in the – is his, if you want, we now have it electronically, so it's no problem? Okay, good. So if we go to page 1,437 of the bundle. So you'll see that what's being dealt with here are various clauses within the statutes and so at page 1,436, so the previous page, do your Honours see there's a heading: "Meaning of PCBU," do you see that in blue? In light blue, sky blue? So again, so that's what we're dealing with, what the meaning of PCBU is.

And you'll see if we go to the next page which is 1,437, so what's done here in terms of how departmental reports work is a submission is made by an interested, you know, whoever has submitted on the Bill and then there's the official's response, so this is the official's response and not, you know, a comment by Parliament or MPs or anything of the sort.

So you've got at 142, if you look at the left-hand column you see a number 142 on that page, do your Honours see that? And then, so the submission made is: "Guidance is needed on how this applies", so that's the PCBU concept applies, "to different types of business structures, such as trusts, schools and authorities, as well as who are the PCBUs and how they discharge their duties, including in multiple PCBU situations."

So, an issue is raised as to, well, what about trusts, and the answer is noted, one of WorkSafe's functions is to prepare guidance on the new legislative framework. No change necessary. Okay? So even though the question is raised about trusts, the response from the departmental officials is there'll be guidance, no change necessary.

KÓS J:
But that doesn't tell us anything.

MR BUTLER KC:
And so that's my point.

KÓS J:
And I agree.

MR BUTLER KC:
It's neutral on the point. It shows that submitters raised it as an issue during –

KÓS J:
I mean, it doesn't tell us whether they intended to include trusts or not include trusts.

MR BUTLER KC:
Indeed, that's exactly why, whereas for the majority in the Court of Appeal, they seem to regard this interaction as somehow supportive of its position.

ELLEN FRANCE J:
Well, I suppose it doesn't say it doesn't apply to trusts.

MR BUTLER KC:
No, I accept that, but again, if you go back to the argument that I was proffering, about well, *if* it was the case that the statute *was* going to apply to trusts, and therefore is, in response to your Honour the Chief Justice's argument, you know, because it's – trusts are so big in the New Zealand economy –

WINKELMANN CJ:
It's not an argument, Mr Butler. It's an observation.

MR BUTLER KC:
Sorry, proposition, sorry, quite right, sorry.

WINKELMANN CJ:
Yes.

MR BUTLER KC:
I've been trying to be very careful and your Honour, I've slipped. The proposition that your Honour put to me about, you know, how significant

trusts are, wouldn't the definition of "officer" make that clear? Because it would just be obvious that that's one of the purposes –

KÓS J:
A person? Person?

MR BUTLER KC:
It would say officer, so it would say – because if you look at section 18, we actually, I don't think we've actually gone to section 18, which is the definition of "officer". Probably useful if I go there.

KÓS J:
Well, this is under the heading of "Meaning of PCBU."

MR BUTLER KC:
Indeed, I accept that.

KÓS J:
So, section 17.

MR BUTLER KC:
Yes, I accept that, I accept that, but the only point I'm making is somebody having raised the fact that it's not clear how this concept would apply in the case of trusts, my only – the argument I'm making is well then you would say well, maybe we can make that clearer, for example, through how we define the concept of "officer", and it just occurred to me, I haven't actually taken you to the definition of "officer", and I should have done.

So: "In this Act, unless the context otherwise requires, officer, in relation to a PCBU,— (a) means, if the PCBU is— (i) a company", a partnership, a limited partnership, "a body corporate or an unincorporated body, other than a company", blah-blah-blah, and so the point I'm trying to make is, if the idea of this statute was to make sure that applies to trusts, I think, in my submission, your Honour would have expected that in the list here would have been added, in the case of a trust, it's trustees. It's just a simple point to make, there's no particular magic, it's just typically just another argument you would typically make in the context of a statutory interpretation argument. And just while I was at that page –

KÓS J:
Just as a matter of interest.

MR BUTLER KC:
Yes?

KÓS J:
What about section 18(b)?

MR BUTLER KC:
Yes. Again, that –

KÓS J:
Back to my obsession with business or undertaking as the operative functioning.

MR BUTLER KC:
That's right, and that focuses there on the management of the business or undertaking, so it's looking at that stage, insofar as an officer is concerned, you're zeroing in on the fact that there is a business and undertaking, and what role do you play within that business or undertaking? You may or may not have a direct relationship, in other words, to the person.

KÓS J:
That would seem to describe a trustee in relation to a business but of course you've still got to find that there's a person who's a PCBU.

MR BUTLER KC:

That's right and on my thesis, you don't have that worry because the trustees are the PCBU, so I say it's a straightforward, I know, I'm repeating myself now so I'm going to try and stop doing that.

WINKELMANN CJ:

It does kind of look like a definition that's trying to capture everyone it could possibly capture.

MR BUTLER KC:

Yes, I don't disagree with that. Back then to where I was in terms of fundamentals, briefly, just conscious of time. An important point goes to the liabilities of trustees and how liabilities are created when what's in play is a trust and so one of the fundamentals as your Honour well know is, and here I'm just using the language from the *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 268 CLR 524 case, and it's in our submissions and a similar point, so that's at, and I'm thinking of paragraph 129 of that judgment, and the same point is made in *Investec* at paragraph 59(iii), the proposition that: "The liability of a trustee remains "emphatically personal", rather than being confined by the office of trustee." And the related proposition that liabilities do not attach to trust property. That's a point made by *Investec* at paragraph 59(iv) and also in the *Octavo Investments Pty Ltd v* Knight (1979) 144 CLR 360 at page 367, there's quite an extensive discussion of the relevant authorities and I'm just making that pinpoint reference for your Honours benefit.

So what's the significance of that? The significance of that in order to be able, the way trustee liability works and I do feel I'm telling your Honours to suck eggs but it's important that it's emphasised, is liabilities do not attach to the trust property as such. The way trusteeship works is unlike bodies of persons. You don't differentiate out the liabilities of the body from that of the members or the managers of the body. Trusteeship is relatively unique in terms of the way in which it identifies liabilities sitting with the trustees. Liability is personal. The liability is against not just the assets of the trust, it's not confined, it's their own personal assets are open to being executed against. You don't execute against the trust property. You access, you make – liabilities arise by dint of the personal liability of the trustees. In some cases, obviously, the creditor is able to access the trust property by dint of the right of subrogation and using that indemnity but it's important to understand that the notion of the, I think the Court of Appeal said it at paragraph, I've forgotten now which paragraph it was, just one moment, 51 when, because I'd raised an argument around enforcement, that "… the obligations of the trust would be enforceable by action taken against the individual trustees as the representatives of the trust."

But that's not a correct way, in my submission, of understanding how trustee liability arises or more importantly from the point of view of actually getting the money in the Crown bank, how you make, how you pursue that liability in order to get execution of judgment. The proposition I put to the Court of Appeal was, at the end of the day, the reason people go to court is to get orders, enforceable orders. In the case of a fine, the process is to go through the Summary Proceedings Act 1957, Part 3 and then if the offender doesn't pay then the civil process takes over and you got through the execution, through the civil process.

The civil process for enforcement is a civil process which works on the basis of individual liability of trustees. So again, I say to you, if you're looking at how you're thinking about the phenomenon here is more consonant with the effect of enforcement to approach trusteeship and trustees in the manner in which I have suggested, because then there will be clarity, yes, there is an order made against this person in their own name, there can be execution against them if you wish to subrogate to the assets of the trust and that can be done in the usual and appropriate way. There's no complications of execution if what you have got is an accused or a defendant that is described as being the trust.

WINKELMANN CJ:

Just repeat that submission again, Mr Butler? I'm not quite sure what I'm thinking of what you are saying.

MR BUTLER KC:

What I am trying to say is, at the end of the day, you know, so a fine is imposed, somebody decides not to pay, how do you execute and obtain the fine? The way in which you make the fine, you know, cash out under Part 3 it is of the Summary Proceedings Act is through the civil enforcement of and execution of judgments process.

KÓS J:

Sure, but that would be the same for a friendly society, too.

MR BUTLER KC:

And that's my point. If you look at the Friendly Societies and Credit Unions Act 1982 it tells you how, in the case of that form of unincorporated association or body –

KÓS J:

All right.

MR BUTLER KC:

How you execute, because it distinguishes between the liability of this body of persons unincorporated and its members and its board of management as –

WINKELMANN CJ:

Don't go down the friendly societies. There's lots of unincorporated societies that don't –

KÓS J:

Okay, yes. No, I have fallen into your trap. Let's try a partnership then.

MR BUTLER KC:

Yes and so again, so then if you look at the Partnership Law Act 2019.

WINKELMANN CJ:

Let's go to an unincorporated body which is not governed by a piece of legislation.

MR BUTLER KC:

Yes, so in that case what the common law would say is it, because it does recognise that the body, that unincorporated association being the club, has an identity different from, it's not incorporated, but it has an identity that is different to its members and so it allows for those, for that identity to be reflected in the way in which you execute.

WINKELMANN CJ:

So I still – can we –

KÓS J:

Well, in the first place it allows a charge to be laid against that body, but the process of recovering the fine may be different.

WINKELMANN CJ:

Can I take you back to the point that I asked you to explain to me, because you never got to explain it.

MR BUTLER KC:

Yes, sorry.

WINKELMANN CJ:

Restate the proposition?

MR BUTLER KC:

So the proposition is that liability and how trustee liability functions is an important indicator, I say, as to how the Court ought to go about interpreting that phrase of PCBU when it comes to trustees.

Ultimately, let's say a fine is imposed against my friends, what I am obviously pejoratively characterising as the amorphous trust, I think you understand why I characterise it that way, to try and emphasise the point I am trying to make, well, how do you go about executing and recovering the fine? There is no such thing as, in my submission, the amorphous trust for the purposes of giving effect to that judgment.

So what you would, the Court would be saying, is there’s a new form of execution of liability in respect of trusts, all right, so that you – one would have to take that step because you can't proceed against the trustees individually because the whole point of what WorkSafe is trying to achieve is that the trustees are not individually liable. That’s their whole thesis. So how then can you – how do you execute the judgment and recover the fine if the civil execution process doesn’t recognise what it is that you’re trying to execute against? What the civil execution process recognises is individual trustees? That’s our proposition.

WINKELMANN CJ:
How does your approach fix that?

MR BUTLER KC:
Because my approach says you name the trustees and you execute against the trustees in accordance with ordinary trust principles, and they’re liable in the usual – sorry?
1230

CAMPBELL J:
How about if you took Justice Harvey’s approach which is that –

WINKELMANN CJ:
Same thing.

CAMPBELL J:
– it's the group of trustees that is the body and the fine is executed against, in this case, originally three trustees, does that difficulty that you’ve identified disappear or not?

MR BUTLER KC:

It doesn't, it doesn't disappear, in my submission.

WINKELMANN CJ:

Why is that?

MR BUTLER KC:

Because you don't have a group of trustees against whom you can civilly execute. You execute against individual trustees.

WINKELMANN CJ:

Well, I mean, that's an individual trustees in a group.

MR BUTLER KC:

No.

WINKELMANN CJ:

So, well, what's the – can we go back to what Justice Harvey said?

MR BUTLER KC:

Certainly, I mean –

KÓS J:

The difference here, which we were just exploring before, is between the criminal process and the civil process.

MR BUTLER KC:

Yes.

KÓS J:

It may be you can lay the charge against an unincorporate body in the name of that, just as the unincorporate body or the trust can go and buy a cow, I'm sure.

MR BUTLER KC:

Sure, I accept that.

KÓS J:

You know, please deliver a cow for the XYZ Trust, please.

MR BUTLER KC:

Yes.

KÓS J:

When it comes to actually paying for it, you have got to go and find a trustee to pay for it.

MR BUTLER KC:

Sure, I agree. Obviously I agree with that but my point is, like, is there not an irony against – second time asking a rhetorical question – is there not an irony in that what undergirds the position of my friends for WorkSafe is the need for an effective enforcement mechanism, otherwise without effective enforcement mechanisms they say the HSWA can't function, and yet when it comes to the fines and how you actually can recover them it falls down? That's the proposition I am seeing. Whereas on my thesis –

KÓS J:

That seems – that's a straw man argument.

MR BUTLER KC:

Well.

KÓS J:

On their part as well as yours.

MR BUTLER KC:

Well, I've put – I've made the submission. What I say, what I – the reason I advance the submission the way I do is I see that our approach enables a, can I call it this, a cradle-to-grave approach that's seamless. That's how I am looking at it. Without difficulties, that will be met. The scheme works. It works at all levels. It works at the level of duty and position, it works at the level of deterrence, it works at the level of charging, it works at the level of execution, without complication.

KÓS J:

All right, let's go back to the question where I asked you before, if it's an unincorporate body and let's say it's not governed by legislation.

MR BUTLER KC:

Yes.

KÓS J:

It's charged in the name of the unincorporate body?

MR BUTLER KC:

Yes.

KÓS J:

Because that's essentially what the Act provides for?

MR BUTLER KC:

Yes.

KÓS J:

But when it comes to actually levying the fine, you can't do cradle-to-grave, you have got to jump into the civil system and fine the office holders or the members of the unincorporate body to pay the fine, don't you?

MR BUTLER KC:

No. So, because the law recognises that the unincorporated club or association as having an identity of its own, it says you can prosecute them on its own, so that's like that English case, *R v L* [2008] EWCA Crim 1970, [2009] 1 All ER 786.

KÓS J:

R v L.

MR BUTLER KC:

So you can charge, in that particular case, and then when it comes to execution, because the common law recognises that there is a separation between the body of persons and the proper –

WINKELMANN CJ:

Where does it recognise that, Mr Butler?

MR BUTLER KC:

That's just what the common law does. It has done it in a case like *Campbell v Scott*. It has done it in a case like *R v L*. It did it in *Taff Vale Railway* which – a trade union case. That is how it has gone about it and that, in my submission, is the orthodox approach to how liabilities are done. All I'm, in a sense, all I'm arguing for is the application of orthodoxy. Deal with charge and deal with and execute against bodies corporate and unincorporated bodies as you do in accordance with the general principles of law, proceed against trustees in the way in which you do in accordance with the general principles of law.

WINKELMANN CJ:

So can I ask you, on your analysis, where the trustees are PCBUs individually, how – you enforce against them individually.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

And then what do they do? How do they – do they just pay that out of their own pocket?

MR BUTLER KC:

So their first obligation is to pay out of their pocket, obviously, that's the nature of trusteeship. That's why lots of people need to get a serious health warning as to whether or not you want to take on trusteeship.

WINKELMANN CJ:

So that's rather contrary to the purpose of the legislation though, isn't it, which is it's a business, the business is the first port of call for carrying the cost and, you know, although I have said that in New Zealand it's distinctive, that trustee use so much, it's not all – it's not epidemic that trusts are actually trading in this way. Trusts are primarily just passive trust asset holders.

MR BUTLER KC:

Property holders, yes.

WINKELMANN CJ:

Here, where they are trading actively, why should the assets of the trust which benefits from the business, why should they not be exposed to the fine?

MR BUTLER KC:

And of course, in the ordinary course of events, they will be, as everybody is, as everybody has accepted the whole way along, because of the trustees' indemnity – indemnity, but the right of resort to the trust fund and priority to the rights of beneficiaries.

WINKELMANN CJ:

You need to address that point then, don't you?

MR BUTLER KC:

Yes, I do. So, the broad proposition is, broad case is set out in our written submissions, and it's a fundamental of trusteeship that trustees are able to have resort to the trust fund to meet their liabilities incurred in the course of office.

WILLIAMS J:

Only while acting reasonably.

MR BUTLER KC:

Sure. Normally –

WILLIAMS J:

So, there's a question about whether offending is inherently unreasonable, and I'm not sure of the answer to that, but you've got situations where trustees go rogue. They'll be exposed personally, by and large, with or without the indemnity.

MR BUTLER KC:

Sure, as you would hope they would be if they're going rogue.

WILLIAMS J:

Quite, quite.

MR BUTLER KC:

I would have – in terms of the statutory purpose, one would hope, and the fact that they face personal liability, convict – you know, if you're reckless, you're going to jail, and you've got a significant fine that you're going to be exposed to is, in my submission, a pretty strong message to trustees. Because of that personal exposure, they don't have, like other officers, they don't have the protection of the corporate shield.

It's worth recalling, it's not a point I've made earlier – I've been going to leave it to Mr Elliot to make when he was going to talk about the purpose of the Act, but I apprehend I'm going to be the one on my feet still by lunchtime, just letting them know that's probably the way it's going to pan out – but under the old legislation, the Health and Safety in Employment Act 1992, the focus was on the relationship between the employer and the employee, and one of the problems with the old legislation is that the employer was in corporate form, as typically they are, then the liability was typically that of the corporate, so that the notion of the personal responsibility of directors and such like was not as acute as it is under the legislation.

So, one of the innovations of the legislation was to say, look, you can't have a corporate form or an unincorporated equivalent and think that gets you off the hook. The innovation is this notion of PCBU and officer liability, so if you take that as your starting point, which I think your Honours can, you can see that again, the approach that we're adopting is not inconsistent with the philosophy and policy of the legislation. It's back, then, to the indemnity.

So, this was something which has been raised at all levels of the Court, as I said, the proposition that trustees have resort to the trust fund in order to meet liabilities they incur in the course of offices.

WINKELMANN CJ:
And what do you say to what the Court of Appeal says about the application of a provision which strikes down indemnities of insurance?

MR BUTLER KC:
So, first of all, the language of indemnity – so first of all, section 29(1)(a), can I just quickly pull it? I can find my copy – is focused on an insurance policy or - so at 29(1) is focused on "an insurance policy or a contract of insurance". Then subsection (2) is you can't enter into a policy, and a person must not indemnify another person for the person's liability to pay a fine or an infringement fee under this Act.

So just stopping there, if I'm a sole trader, let's just use that as an example just to test how this works. If I'm a sole trader, I of course can look to my assets in order to meet the fine. That seems to me an unarguable position, and I am not being indemnified by myself for meeting my fine out of my assets. We say the same applies in respect of a trust because the assets are the trustees. Nobody else is indemnifying, they're not getting an indemnity from any other person.
1240

The way the indemnity arises is by operation of law, not by grant. The indemnity, you know, and again is even this right to resort to the trust fund, that's the long language I'm using. Really, the sort of indemnity that is within the intendment of section 29(2), I doubt it, but let's just play with it. The indemnity is not granted by any other person that operates by dint of operation of law. Again, if you adopt my notion of a cradle-to-grave approach, it does mean that there is going to be, in practice, an ability to make sure that the trust assets respond to the imposition of a fine and when this issue has been raised in Australia, it's been, and we have a footnote in our written submissions to this effect, everybody who has been dealing with trustees who appear in front of the Court say, of course I'm going to have regard to the trust assets as indeed you would expect. So I don't see this issue being in terms of again practicality of enforcement. I don't see it being a problem at all and indeed, from our perspective again, it works, the section works seamlessly with the fundamental principles of what trusts are.

If you're looking for a useful description of how the indemnity works in its proprietary nature and the fact it's not by grant, then your Honours I could do not much better than just refer you to the *Carter Holt* case, paragraphs 133 to 137.

WINKELMANN CJ:

Paragraphs 133 to 137.

MR BUTLER KC:

Yes, those paragraphs. I think it's, from memory, the judgment of Justice Gordon, because I think it's a useful description of – there's nothing in the other judgments that is inconsistent with what she says there.

So if I round back to the core propositions that are being advanced on behalf of the appellants here, a number of points should be noted. My fundamental proposition is the statute can work perfectly well on our thesis. You don't need to treat trustees in a manner inconsistent with the way in which that structure is regulated by law. There is a good fit with the concept of PCBU and with the notion of effective enforcement mechanisms, effective duties that we'll ultimately remember what we're about here is making sure that health and safety of workers and other persons at workplaces is realised. Nothing in our view of the world, in my submission, changes or alters or detrimentally affects the effectiveness of that policy. True it maybe that the way in which the policy is realised where what's in play is a trust, so trusteeship, may look just a little bit different. It may or may not, depending on the particular facts.

The provision that you're being asked to rely on to achieve inconsistency with the notion of the ordinary workings of trust concepts is generic. It's not specific to this statute. I say it will have, inevitably have an impact as to how the concept of body of persons unincorporate will apply to trustees outside this particular statute.

Can you be sure, therefore, that that is the purpose or the goal that Parliament sought to achieve when it used generic language in the context of this statute? There's no particular or unique policy, no HSWA-specific policy that says we can do it here but we don't need to do it in other contexts. There's no statutory indication of a desire to depart from ordinary principles of trust law. There's nothing in the materials for the departmental report that says the policy goals of this statute can only be achieved if trusts are assimilated to bodies of persons unincorporate.

Our approach works, on my submission, on the cradle-to-grave approach. Our approach will enable the court and the system, the full statute book, when the whole of the way the law works and interacts will maintain consistency with the core features of trust law, including the approach to duties, liability, and indemnity. My friends suggest if the Court were to adopt our approach that somehow that would facilitate, my pejorative terms, probably, would facilitate less effective compliance with the goals of the statute and people will look to form trusts so as to avoid liability that might otherwise be occasioned. That would be surprising indeed, particularly if, on our thesis, the way of reducing the $1.5 million fine is to put two human beings in as trustees who will then be personally liable and have a personal conviction against them.

WINKELMANN CJ:

Well, that does bring you back to the point, which is that there may be many people who are trustees who would not be particularly happy with the construction you're suggesting.

MR BUTLER KC:

But then they can respond to that, your Honour, I suppose, is the point that I'm making. I'm just taking the statute and trusts, so there's any number of reasons – this is a subsidiary reason why you shouldn't be a trustee or you shouldn't be a trustee in your own name, but the bigger picture is –

WINKELMANN CJ:

Underpinning that, though, is that this is an unusual intersection with trust law. It is the two-tiered level of liability is an unusual construction to place on top of your – on top of a classic conception.

MR BUTLER KC:

No, I think not. I mean, that's why I resort – or not resort, go back to the generic nature of the definition of "person," because this notion is available in respect of any other statutes.

WINKELMANN CJ:

But the double liability, you're saying they're doubly liable, are you? Or are you just saying they're singly liable as PCBUs?

MR BUTLER KC:

I'm saying they will be singly liable. There is – I can't and won't rule out the possibility that they could, for example, that's why I stopped for a moment on section 46, I think it is, of the Act which is another person at a workplace, so you could be Andrew Butler, who is liable because you are the trustee of your trust, of my trust.

WINKELMANN CJ:

And because you're on site.

MR BUTLER KC:

And because I'm on site, so there's any number of different ways in which you could be liable, depending on the individual facts.

WINKELMANN CJ:

But you say not as an officer? Not as an officer.

MR BUTLER KC:

Not as an officer, unless there is something about your conduct, for example, which would fit within, to come back to the – I think it was a subsection that his Honour Justice Kós made –

WINKELMANN CJ:

Not as an officer qua trustee, as an officer because of your involvement in the business?

1250

MR BUTLER KC:

Exactly correct. Or because you're a worker, do you know what I mean? Sorry, I shouldn't say do you know what I mean – or you know what I am trying to say is that there are any number of labels that can be applied to an individual depending on how they interact with the business or undertaking. That's the nature of the statutory scheme. Our way of looking at the statutory scheme in accordance with trust fundamentals works fine. More than fine, works really well with the variegated duties, the variegated people recognised by the statute and the way in which penalties can arise and be imposed.

And if, to your point, Ma'am, if there is somebody who as a result of our thesis being accepted as obviously I urge it should be, but that is a reason, another reason, to perhaps not be a human being trustee then that is a decision that they will take and make in accordance with their advisors.

WINKELMANN CJ:

So may I ask you this, if you – so individual responsibility of trustee, each trustee is PCBU.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

But then do you say that they have equal responsibility, because they act unanimously, or then do you say that it's then each trustee can make their own case that they are actually arguing for better policies and et cetera, et cetera, what’s the situation?

MR BUTLER KC:

So again, it's always a difficult thing to get into because, of course, human conduct is so variable.

WINKELMANN CJ:

No, no, I think this is a point of law, I’m asking you would you accept then just, you know, there’s no issue, this is what, there was a common agreement between them all, you know, this is the health and safety.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

So they’re a PCBU, this is their health and safety scheme, do they then start all making their individual pleas as to what, how liable they should be, or is it are they commonly liable?

MR BUTLER KC:

So each would be, because they’re individual accused, each would be entitled obviously to respond to the charge as they saw fit. Somebody might just say, do you know what, I’m just going to plead guilty, whatever. Another person might say, well, I don’t think that’s right and this is what – I’m not, I really am not trying to be difficult and not answer your Honour’s question, but imagine a scenario where the trustees agree, let's say there’s a piece of defective machinery on a farm, let's just take that, right, and so they agree we’re going to do something about it, right, we’re going to do that, who’s going to look after that? So that’s typically the way and that’s perfectly legitimate way in which trustees function, who’s going to look after that? Andrew, I’ll look after it.

WINKELMANN CJ:
So the normal trust law.

MR BUTLER KC:
Yes.

WINKELMANN CJ:
Is that you would be common – you would each be liable for the obligations.

MR BUTLER KC:
Of another? No, that's –

WINKELMANN CJ:
Of the trust, of the trustee, if a trustee enters – trustees enter into obligations, then the trustees are equally liable for them.

MR BUTLER KC:
If they have done it jointly, correct.

WINKELMANN CJ:
Through the unanimous control.

WILLIAMS J:
Or failed to do it jointly.

MR BUTLER KC:
And so if they don't do it jointly, of course, let's say two out of the three make a decision to enter into a contract for a trust and don't include, for whatever reason, the third one, then the two who entered into the contract are liable on the contract, the third because they weren't involved or excluded is not liable. But that's contractual liability. Here, what we've got, we're dealing with –

WINKELMANN CJ:
No, no, I'm asking you, I'm just wanting to test it.

MR BUTLER KC:

Sure.

WINKELMANN CJ:

So if the system of work is in place, is a result of the trust's actions, so this is a trust has directors who talk about the health and safety system, talk about how they're going to monitor, et cetera, it's their system, then you would accept that in accordance with normal trust principles they'd all be – they couldn't be saying –

MR BUTLER KC:

It's a system of each of them, yes, correct.

WINKELMANN CJ:

Yes, they couldn't say, oh, I complained about it, et cetera.

MR BUTLER KC:

No, if they've adopted, if they have adopted it and that person has participated in the adoption of it, then that responsibility sits with them. The only example I was going to use is, you know, one step further which is to show why you might need just a – you just need to think through about how human beings are and the little variations that can arise. So you could have a situation where people agree, yes, this is the health and safety plan, we're going to do this, there's a problem with a piece of machinery, who's going to look after it? Right, that's typical and normal. Great, Andrew puts his hand up and says, I'll deal with it, and then doesn't.

WINKELMANN CJ:

So this is, brings us back to what Justice Williams was saying, so it opens up the possibility if they are dealt with as Justice Harvey did, then they would all be equally liable.

MR BUTLER KC:

They wouldn't all be. We don't even know what the trustees of X trust collectively means. There's actually not a charge before the Court which actually expresses what that means.

WINKELMANN CJ:

But on the other approach, on your approach, they could all make their individual cases.

MR BUTLER KC:

But their starting point on the facts that I have done is, well, here's the health and safety plan, you go back to the nature of the duty. So that's, the point is, I don't really feel comfortable answering a question in the abstract because I don't think that's right, because I, you know, I appeal –

WILLIAMS J:

There's quite a bit of abstraction here.

WINKELMANN CJ:

I don't think it is the abstract, Mr Butler. I'm asking you how you see – this is the opening question to you, how you see the scheme of the Act interacting, because you're saying we have to be guided by trust law.

MR BUTLER KC:

Sure.

WINKELMANN CJ:

So, you know, you can't pick, you know, what is it, run with hounds and –

MR BUTLER:

No.

WINKELMANN CJ:

Run with hares and hunt with hounds.

MR BUTLER KC:

Yes, quite and I'm definitely not trying to do that, so it's because of my –

WINKELMANN CJ:

So I'm asking you, how in your conception, trust law interacts with the scheme of the legislation. So when we've got these PCBUs who are being individually charged, what are they going to say about the fact that, you know, that everything they did was pursuant to a unanimous –

MR BUTLER KC:

So they would say, yes, we sat around as trustees and we did, we adopted X, we adopted this health and safety plan. We put these measures in place.

WINKELMANN CJ:

So your client might have to accept that when they accepted it, when they accepted appointment, they looked at the system of work before they accepted appointment which would be basic due diligence.

MR BUTLER KC:

Correct. Again, I'm not wanting to get into what might happen at trial because we're not there. I don't know, I'm not instructed in relation to all of that, but –

WINKELMANN CJ:

But one of your arguments was how trusts operate on the ground.

MR BUTLER KC:

Yes, correct. So my point is, is that the basic proposition that your Honour or scenario your Honour is starting with, I completely agree with. So if the trustees have participated, they've adopted a health and safety plan, then that is their plan in the sense that it is the plan of each one of them for which each of them is responsible. Right? So the only variation, because I'm wanting to be fair, you know, is to say, well, what happens if there's a plan agreed and one of the trustees does something that's inconsistent with the plan or rogue. I am saying to you that, you know, in that situation you can anticipate that WorkSafe might say, well, actually we can see the person to go after is that PCBU because let's say there's three trustees, those three PCBUs did a fine job, that the health and safety plan was really good, but that trustee by doing something inconsistent with it, you know, not implementing it, that person is a PCBU, not just an officer, they are a PCBU and they are criminally responsible for not implementing as they'd agreed to do, whatever step was to be taken on the farm. That's the only point I'm trying to make. That's just reflective of the duties and how their duties are expressed.

Can I just have a moment just to check with my colleagues to see whether there's anything that I have in my endeavour to engage directly with your Honours that I have in my enthusiasm failed to address that should be addressed in the two or three minutes I have got. Is that in order, your Honours?

WINKELMANN CJ:
Sure.

MR BUTLER KC:
Thank you. Mr Elliott had helpfully prepared a cheat sheet for when he might have been on his feet which alas is not going to happen now and the cheat sheet really was in response to, I can't remember which one of your Honours, I'm so sorry, I can't remember who it was –

WINKELMANN CJ:
That's all right.

MR BUTLER KC:
– who raised the issue about prosecutions, there being some prosecutions which my friends had referred to under the RMA and trusts and suchlike.

WINKELMANN CJ:
Yes. *Otago Regional Council v Bloem* [2010] NZRMA 322 (R).

MR BUTLER KC:

So it's *Otago*. So what Mr Elliott has done is he's prepared a cheat sheet which just lists them and gives you a bit more of a description around them and just confirms that those cases don't deal with the issue, but it's just designed to be informational more than anything else. Would it be of assistance, your Honours for us to have that handed up?

WINKELMANN CJ:

That would be, thank you. That's very helpful, thanks, Mr Elliott.

MR BUTLER KC:

Great. So what I might do is since we're at lunch, I might just give it to Mr Registrar and then have it distributed obviously to your Honours and then to my friends so they can see it and if they have any comments on it, then they can. Can I just check if there's anything else?

WINKELMANN CJ:

I was wondering about coming back at 2 o'clock. We suggest coming back at 2 o'clock since we've run over a little bit and give Mr Finn –

MR BUTLER KC:

Certainly, yes. So your Honours, those are the submissions. I apologise to you, because I'm sure you will have been looking forward to hearing from Mr Elliott and from Professor Conaglen, so I apologise –

WINKELMANN CJ:

We probably have to share some responsibility for that.

MR BUTLER KC:

Yes, and I can say on their part that they were very much looking forward to interacting with your Honours as well, but we just had to make a call on the hoof that in order to be done by lunchtime that I just had to carry on forward so.

KÓS J:

We've had cases, Mr Butler, where dividing it has caused problems and it's been much better to have a direct answer from you.

MR BUTLER KC:

Thank you. Well, what I do want to acknowledge is the substantial contribution and help that I have had, obviously myself and Ms Webster have carried the case through from the District Court in Ōpōtiki the whole way through, but we have been –

WINKELMANN CJ:

But then the heavy hitters joined you.

MR BUTLER KC:

Then we have been greatly assisted and I just don't want the Court to feel that them not getting to their feet in any way minimises the contribution that they have made to the collective thinking, or that they would not have enjoyed the experience that I have had on my feet, it's just been a question of time.

WINKELMANN CJ:

Thank you, all right.

MR BUTLER KC:

So thank you, your Honours.

WINKELMANN CJ:

Thank you. Thanks, Mr Butler. We'll take the luncheon adjournment.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.02 PM

WINKELMANN CJ:

Mr Finn?

MR FINN:

Thank you your Honours. I don't have a written road map, but I'm going to tell the Court the form our address will take. First I'll make some introductory comments, similar to those of my learned friend Mr Butler, just setting out where we're coming from.

Secondly, I will address what I'm going to call fundamentals. I'm riffing a little bit on that term based upon my learned friend's submissions. Those are fundamental of the Health and Safety at Work Act, fundamentals of trust law, and fundamentals of criminal law, and as I've said those submissions are framed with my learned friend's written submissions in mind.

Thirdly, I am going to talk about what WorkSafe says the definition of an "unincorporated body of persons" is or should be for the purposes of the HSWA. Then I'm going to talk a little bit about officer liability, as that matter has come up and is central to the scheme of the statute.

Finally, my learned friend Ms Bagchi will address the Court on section 29 of HSWA, then –

WINKELMANN CJ:

Can you stop calling it HSWA?

MR FINN:

I am so sorry. Just the Act?

WINKELMANN CJ:

Yes, the Act would be good.

MR FINN:

Certainly. So that's where I'm going to go your Honour.

WINKELMANN CJ:

So what was three, sorry, I got distracted by HSWA.

MR FINN:

Introduction, fundamentals, what WorkSafe says the definition of –

WINKELMANN CJ:

Yes and the next one?

MR FINN:

Officer liability and how it should work, and finally section 29. I had a miscellaneous section but we're a bit short on time so I think that's going by the wayside.

So with that in mind I start with my introduction. I'll keep it brief. This is a case about statutory interpretation. The primary focus must be on the purpose, the text, and the scheme of the Act, that is the Health and Safety at Work Act.

The majority of the Court of Appeal found that the orthodox position in trust law is relevant but not determinative when interpreting the Act, and the key reason I submit for them doing so was the scheme of the Act: its purpose, including ensuring effective enforcement as part of securing compliance with its terms; its intended brief; and its related focus on what I'm going to call substance over form, particularly in the definitions we're concerned with, "person," and "person conducting a business or undertaking," which are of course linked.

Finally, its approach to enforcement and its system of higher penalties compared to the previous Act, the Health and Safety in Employment Act, and its differentiated approach to sentencing for individuals and collective bodies. Our core submission is, of course, that the majority is correct in its reasoning and that that is because the purposes and the scheme of the Act indicate Parliament intended to depart from the orthodox treatment of a trust. As I think your Honour Justice Winkelmann said at one point, we say the Act does intend to create a specific regime or different approach.

We say the majority's approach is more consistent with the Act and its scheme than that that has been put forward on behalf of my learned friends, and we say that trusts or trustees collectively are not so different from other bodies of persons that express words including them as PCBUs in this Act are required. They are, in many places, a collective body of persons, as contemplated by this Act. Our argument stands and falls on those basic propositions.

Ultimately, I say this. We do seek clarity in the law. My learned friend rightly pointed out that this was a point of principle that WorkSafe had advanced in the original context of a section 147 application. It did so mindful of the need for clarity for all persons, the regulator, the trustees in this case, and everybody else affected by the Act. I need to make this clear. I do not propose, for my part, that the interpretation of "PCBU" or "person" that I am proposing goes beyond this specific Act. I am not asking this Court to draw that conclusion. I am keeping my remarks purely focused on this Act. So –

WILLIAMS J:
Mr Butler says you can't do that, so at some point you're going to have to address the unintended wash effect, if there is any.

WINKELMANN CJ:
Or how he can do that.

MR FINN:
I understand your Honours, and if in the course of my address I haven't sufficiently done that, please pick me up. My basic submission is that it's statutory interpretation. The way in which this particular Act works is the whole reason why there can be such a specific definition of a person conducting a business or undertaking that permits its extension to trust. That's it in a nutshell, but I can come back to that in due course. So, fundamentals.

KÓS J:
I'm just not sure I can see what distinguishes this from any other social legislation that involves a prosecution, and where the same definition's been given. I mean, it's obviously been used word for word in other circumstances. Why would it not apply to those? How do you distinguish them?

MR FINN:

You're quite right, of course, your Honour, and you're talking about this definition of "person." I say that it's the Act itself, its surrounding provisions, that give that colour. The word "person" itself, you're right, appears in the RMA, I must have said that, and other provisions, I think, of the Legislation Act, something very similar appears, but the meaning of that particular word takes on its force or its extra meaning in the context of the definition of a "person conducting a business or undertaking". That's what I say is special, rightly or wrongly.

So, fundamentals. Of course, I accept my friends are right, the orthodox legal position is a trust is not a legal person, but of course, we also all agree that the orthodox legal position can be shifted by statute. I must accept that the Act does not expressly state that a trust is a person or a PCBU, but nor does the Act expressly exclude a trust from its definition of a PCBU, and up on –

KÓS J:

Well, I think you'll have to explain why it necessarily implies that a trust is a person. Why is that a necessary extension?

WINKELMANN CJ:

Although Mr Finn is entitled to his quiet time as well.

MR FINN:

A perfectly reasonable question. Hopefully once I get through some parts of my address, I will have addressed your Honour's point sufficiently.

WINKELMANN CJ:

Because this is still your introduction, isn't it?

MR FINN:

I'm on to fundamentals here.

KÓS J:

I thought we'd moved to fundamentals.

WINKELMANN CJ:

All right, fundamentals.

MR FINN:

So, look, I can't complain about some interruptions at times, in fairness, but I do hope that I will get to the point that your Honour's raised, and please tax me if I don't.

1410

Back to what I was on before, the Act or at least section 17 does not expressly exclude a trust from its definition of a "person" conducting a business or undertaking and my key point is this, that definition, and it appears on our screens right now, it is deliberately broad and open-ended as this Court has noted, the definition of "person" that has a bearing on it is also found in the RMA and the RMA definition of "person" has been the subject of case law in this court and the Court of Appeal. The case of *Cometa* and the case of *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 1. But I accept outside this case, no New Zealand court has yet considered whether that definition can extend to trusts in the way that we are now considering or trustees collectively.

CAMPBELL J:

Do you actually draw a distinction between those, that is between the trust and the trustees collectively. The majority below said, no real distinction, it's just semantic. Whereas Justice Harvey was of the view that it's not the trust, but rather the group of trustees.

MR FINN:

We invited the majority to reach the conclusion it did so I adhere to that approach, albeit I can obviously see the force in his Honours reasoning which picked up on one of WorkSafe's submissions. If it's not the trust, then we say it’s certainly at least the trustees collectively and I do accept that it may be semantics as to how one describes it.

It's not in dispute that unincorporated bodies have been prosecuted in New Zealand. In *Cometa* it was obviously such a case under the Resource Management Act.

KÓS J:
So there is obviously a fundamental difference though.

MR FINN:
There is indeed between the statutes, your Honour.

KÓS J:
No, no between those two concepts. One involves a legal person or sorry, several legal persons and the other, the trust, does not.

MR FINN:
You mean in the case of *Cometa*.

KÓS J:
No. I’m not talking about *Cometa*. You – it’s back to Campbell J’s question.

MR FINN:
I’m sorry, Sir. Do you mind repeating it?

KÓS J:
All right, well you said that it may be a semantic difference between a trust and a group of trustees collectively. A trust is not a legal person.

MR FINN:
Correct.

KÓS J:
A group of trustees collectively is a group of legal persons.

MR FINN:

Very well. I submit to this Court that the trustees collectively as a body of persons are arguably the better description of what we are dealing with here. But it is the features of the trust that must be taken into account when defining that body. I hope that makes my –

KÓS J:

Okay.

MR FINN:

Okay, I'm sorry not have been clearer.

KOS J:

No, that's all right, thank you.

MR FINN:

Now another thing we know is that trusts have been prosecuted under the RMA in New Zealand, although I take the point that nobody took the point at the time. The significance I attach to that is simply that I know there is a suggestion that this will, the interpretation that we invite the Court to take will somehow lead to widespread and problematic change. Well, at least so far as the RMA prosecutions, mostly decided by Environment Court judges, I think in Otago are concerned, that hasn't happened.

Finally, to state the obvious, we know that we all agree that trusts are routinely used in New Zealand, not only as property-owning structures, but as vehicles to own and operate businesses and particularly farms, similar to this case, and I mean I haven't got my learned friend's very helpful physical document, which was just handed out, but my suggestion is that tends to confirm that.

So what I'm going to do is talk about these fundamentals and I'm going to start with what I call the Health and Safety at Work Act fundamentals. I've already mentioned some of them in my introduction, including the Act's purposes and its very broadly worded duties and definitions, and at this point I do think it may be useful to look in the respondent's bundle of authorities, page 62, at the case of *WorkSafe New Zealand v Dong* SH Auckland Limited [2020] NZHC. It's at paragraph 28 of that decision. So put very simply, this was an early appeal heard under the Act that went to Justice Downs. The issue was whether or not a contract was required to render a particular company, a PCBU, in respect of a, I suppose I'd call it a construction project, and at paragraph 28 his Honour, after analysing the provisions of the Act, said: "Four things about all this stand out. First, the breadth of the duties created by the Act … emphasis of its purpose, including through creation of the principle that workers and others should be given the highest level of protection … the breadth of the concept of a PCBU. Specified exemptions alleviate a wide-ranging definition … emphatic rejection of form in the advancement of purpose."

He goes on to say: "To elaborate … it matters not if the duty holder is an individual, a company or a body corporate; whether the worker is an employee, contractor or subcontractor …" and so on and so forth.

So these paragraphs were quoted by the majority in its decision, and no one has yet suggested that his Honour's early interpretation of the Act, its breadth, and its intended scope was not correct. Nor has anyone suggested that his statement about basically favouring substance over form, or purpose over form I think to paraphrase what he said, is anything other than correct.

The other fundamental of the Act, I say, is its focus on who has control over work activities and work-related risks. Although I know the word "control" has been used a lot, it could equally be control and influence because that word also appears in some sections of the Act, particularly sections 30 and 33 of the Act. So whether one calls it control or control and influence, those are the pivotal concepts that underpin it.

The origin of the Act, well it's in the explanatory note to the Bill. That can be found at page 68 of the bundle of the appellants. I'm not going to read it all out but what we know is that there was the Pike River mining disaster. There were two effective reports into the Act, in particular the Independent Taskforce on

Workplace Health and Safety, and the Royal Commission on the Pike River Tragedy, and it says here in this section that, about a third or half way down: "The Bill is part of a package of major changes to the health and safety system that has already resulted in the establishment of WorkSafe." And it goes on to talk about a new regime, one which is based on the Australian Model Work Health and Safety Act 2011, but with modifications for New Zealand context. It then goes through in the bullet points essentially what became the purposes of the Act in section 3.

The point I make by focusing on that is to submit to the Court that this was not legislation that was ill-considered or rushed through. There were two reports into the need for major change.

WINKELMANN CJ:
Well wasn't it relatively rushed through?

MR FINN:
I've seen no evidence of that but I'm happy to be corrected.

WINKELMANN CJ:
But it wasn't subject to full consultation, wasn't that point made? Perhaps I'm imagining it.

MR FINN:
Look I stand to be corrected.

WINKELMANN CJ:
No, carry on Mr Finn.

WILLIAMS J:
Well a couple of enquiries anyway, before –

MR FINN:

A couple of enquiries anyway and obviously we also, I know we have on top of those, we don't have those reports, but we have the officials' report, which my friend referred to at one point whereby members of the public were consulted, stakeholders made submissions about individual portions of the Bill, as it was, and those were taken into account as part of forming its provisions. So my respectful submission, whether it's accepted or not, is that it wasn't rushed through, it was considered, and it was part of a decision that there needed to be major change, and a new regime, and this new regime included these very broad definitions, and very broadly worded duties.

1420

Another change, which I think my friend remarked upon, significantly increased penalties compared to the 1992 Health and Safety and Employment Act, and a tiered penalty system differentiating between individuals and bodies of persons as part of what I say was an attempt to have a more effective enforcement regime. The short point was, that following the Pike River mining disaster it was perceived that the previous Act wasn't functioning well from an enforcement perspective, so this system with greater penalties and a tiered form of culpability was introduced. That was a very deliberate decision.

KÓS J:

The definition of "person", which came first, the RMA or the Act? We're not allowed to acronym it, to contract.

MR FINN:

The RMA is 1991, so –

KÓS J:

Well, I'm not sure that provision was in it?

MR FINN:

None the less, I think in *Cometa United Corporation v Canterbury Regional Council* [2007] NZCA 560 which is 2007.

KÓS J:

Yes, okay, so proceeded, thank you.

MR FINN:

And look, I am going to say it without being able to find a reference, but in my friend’s supplementary – well, actually, I will find the reference. My friend’s supplementary bundle, thank you, in the official’s report, could we go to page 1403 of that bundle. I just want to hopefully address your Honour’s question in a little more detail, perhaps helpfully, perhaps not. Stop there, thank you. So, there is a specific reference there to *Cometa* as part of the consideration of unincorporated bodies being prosecuted. So look, RMA and *Cometa* came first was considered. And, pardon me, I’m just going to get back to my submissions.

So those are what I say are the fundamentals of the Act. I turn now to trust law fundamentals and I won't be long, having heard the dialogue between Bar and Bench. My friends have set out in their written submissions what they say the fundamentals of trust law are and, look, fair enough, I would not dispute their expertise in saying what they are, but I say that there are some trust law fundamentals that either have been omitted or perhaps need more emphasis and I will list them briefly.

First, the requirement that trustees act unanimously, something that has been discussed in this Court verbally and something which is generally required, noting section 38 of the Trusts Act and, of course, the common law.

Secondly, the fact that trustee’s liability is ordinarily joint and several.

Thirdly and relatedly, that is why the law does not ordinarily approach trustee liability based on whether one trustee is active and another is passive. That would go against the grain of what trustees are bound to do by taking on the role that they do.

Fourthly, the fact that trustees’ actions are normally governed by a common document, the trust deed, they act in respect of common property, the trust assets, for a common purpose or object which is initially set by the settlor and normally included in the trust deed.

Fifthly, I think it is, a trust is not a temporary gathering of unconnected people. It is intended to be an enduring institution. I very respectfully submit that those further fundamentals are potentially significant because they indicate hallmarks of a trust or trustees collectively as a body that make it logical to treat them as a collective body of persons, at least in this context as we are talking about it.

Thirdly, criminal law fundamentals. My friends in their submissions have set out some criminal law fundamentals and the main one that I discerned was that criminal liability is meant to be about individuals. Look, I do very respectfully depart from that as a general proposition that should be taken as read and the definition of a "defendant" in the Criminal Procedure Act 2011 is any person charged with an offence, and person is not separately defined in that Act. The Legislation Act definition of person is, well, it's wide. It includes a corporation sole, a body corporate, and an unincorporated body, so look, that would tend to count a little bit against this idea of individual liability being the definitive feature of criminal liability.

I also, at this point, have to briefly refer again to *Cometa*. I'll try not to be long. Again, in the appellant's bundle, my learned friend's bundle, excuse me, at page 587, thank you. So this is in the Court of Appeal's judgment when considering the Resource Management Act, another regulatory statute that creates offences for non-compliance with its provisions. Not identical, but there are some similarities, and there the Court goes through why it is it found that an unincorporated group such as the defendants in *Cometa* qualified for prosecution, and so it said, well: "In other words, given that the unincorporated group must be capable of being described as a 'body of persons' in order to be subject to the RMA, the attribution of actions which breach the RMA to the body as opposed simply to particular individuals is feasible."

So the point is simply this, that it has previously been submitted to a reasonably high appellate court that, look, you can't have an unincorporated body being liable in criminal law, at least in this area of it, and the answer is well, yes, you can, depending upon the statute. So, I do not accept that that is the case, and in fact –

WILLIAMS J:

What do you say to the point that that Act had a specific set of provisions, including procedural provisions, for ships because apparently the Marine Pollution Act 1974 wasn't doing the job it needed to do and that there is no such infrastructure in the context of terrestrial offences?

MR FINN:

Is this about service and other practical issues that your Honour's raising, or simply –

WILLIAMS J:

Those kinds of fundamentals, yes.

MR FINN:

So my understanding of the ratio of *Cometa* was that it wasn't just about, as I understand it, the fact that another Act wasn't doing the job. I think there the issue was foreign ships dumping oil in harbours and wanting to address that. It was the sheer breadth of the RMA and its intended effect, it wasn't just about foreign ships, though I appreciate that was one aspect of the reasoning of the Court of Appeal. Does that answer your Honour's question?

WILLIAMS J:

Well, is the distinction of any materiality? The fact that there is infrastructure under the RMA for precisely that situation, and there is no infrastructure in this case for this situation.

MR FINN:

And when – I do apologise, when your Honour says "infrastructure", are you referring to practical matters?

WILLIAMS J:

The procedures that are provided in the RMA for dealing with ships breaching the Act.

MR FINN:

And look, again, my understanding of what the Court of Appeal has said here is that it acknowledged a submission from counsel that there were some specific provisions relating to ships' agents that may have made the task easier, but it said notwithstanding those, even if there weren't, I think that around paragraph 35 here, talking about – I'm going to call it the practicalities of enforcement: "In our view, this meets [counsel's] submissions based on the absence in the [Summary Proceedings Act 1957] of provisions dealing with unincorporated bodies. He was correct to say that the [Summary Proceedings Act] applies to prosecutions under the RMA." But the Act "clearly contemplates the prosecution of unincorporated bodies. We do not consider that this evident parliamentary intention should be frustrated by the absence of relevant provisions in the [Summary Proceedings Act]."

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Then referring to Ormerod, a learned author: " … the proper approach is that, in the case of unincorporated bodies that constitute 'bodies of persons', the courts will, where necessary, adopt processes analogous to those that apply in the case of corporations."

WINKELMANN CJ:

So Mr Finn, at some point could you address on what I understand is the nub of Mr Butler's argument which is that you can just give effect to usual trust principles within the scheme of this legislation without doing any violence to it?

MR FINN:

Yes.

WINKELMANN CJ:

Okay.

MR FINN:

Is now a good time?

WINKELMANN CJ:

Well, whenever suits you.

MR FINN:

Thank you, Ma'am.

WINKELMANN CJ:

But I think we've got *Cometa* pretty much in our back pocket.

MR FINN:

Thank you. Do you mind if I just make a note about that, your Honour?

WINKELMANN CJ:

What, *Cometa*, do you want to come back to it?

MR FINN:

No, about your Honour's point and how best I can address it within the context of my address.

WINKELMANN CJ:

Yes.

MR FINN:

So, can I first make what may be an obvious concession in relation to that argument. It is possible to treat the trustees as separate PCBUs and that must be so, because look, we've charged them in the alternative in that way, so I must accept that that is a possibility. What I am advancing to this Court is that it ought not to be the only possibility, given the way that the Act is framed, because in substance it is a collective body of persons that are operating the business when a business elects to operate through a trust and I am going to hit the point that I was going to come to later. Why we say or what we say defines an unincorporated body of persons for the purposes of this Act, collective decision-making.

I mean, where in substance and reality and practice it is the trustees as a collective that are taking and implementing the decisions about the business, its work and its risks to its workers and others, then it would be consistent to impose the duty on them collectively as the person conducting the business or undertaking. I say that is logical. I say that is consistent with the scheme of the Act in circumstances where trustees are normally expected to act unanimously.

I also note that trustees, like other bodies of persons, operate in an organised way through an internal structure that enables them to do this, to make collective decisions. They have formal documents that dictate what they do up to a point and how they do it. As I said, we start with a trust deed and the settler's wishes.

So what I say is this. Adopting a substance over form or legal form approach to the definition of PCBU is more consistent with the Act's scheme in focusing on who in reality is managing the business, the work and the risks that arise from it.

WINKELMANN CJ:

So can I ask you the same question I asked Mr Butler but in a different context, what's the mischief then of his application if that's the approach that is taken, that you may only ever proceed – that the duty is only attached to individual trustees, they don't attach to them acting collectively in a unanimity type position?

MR FINN:

Yes, your Honour.

WINKELMANN CJ:

And that they may only be punished for breaches of their duties individually, what's the mischief of taking that approach?

MR FINN:

Well, for a start I say – and I'm sorry to be a broken record – it doesn't, it's not consistent with reality because they're acting collectively and that the Act focuses on that.

But secondly, I say relatedly, we are effectively and artificially disaggregating what is truly a body acting collectively and that jars somewhat with the Act and its focus on ensuring that duties are sheeted home to those who are actually making the decisions or, I think, I'm sorry, I may be paraphrasing your Honour Justice Williams, not making the decisions that relate to work-related risks.

Disaggregation of what is truly a collective body seems at odds with the way that the Act is framed and what it is intended to achieve. So that is my first and, frankly, major point.

WINKELMANN CJ:

Is your point –

WILLIAMS J:

What's the practical effect of that, though? Who cares if you can charge them all individually and get the same result, or does it matter, if you're not going to violence to Mr Butler's precious trust law in taking that approach?

MR FINN:

I hear what you're saying, your Honour. I suppose you could say, who cares? Well, when one is analysing the evidence of what occurs within a body of trustees when governing a business, we may then be forced to adopt a reasonably artificial analysis and say, well, okay, it seems that, yes, they made a joint decision or failed to make a joint decision in respect of one particular aspect of work activity which resulted in a risk, but we're actually going to analyse them individually even though they are acting as a collective.

So, the first thing I say is that that doesn't really make sense when, if I'm correct and, look, I may not be, that this Act is intended to focus on collective decision-making.

WINKELMANN CJ:
Well, it's intended to focus on control as exercised through the collective decision-making.

MR FINN:
Sorry, you are correct.

WINKELMANN CJ:
So it focuses duties and consequences on those who have control. So you can make the legitimate point, well, to take each individual trustee as a PCBU is artificial, because, in fact, they don't individually have control, they only have control when they're acting as a collective. But what's the, to use the expression we used earlier, up-stream consequence of that? Would it, you know, when you're looking at the duties, how might that impact upon the duties as they bite, as they're understood by trusts and, well, by the trustees?

MR FINN:
Well, for a start, it would make the application of the primary duty of care under section 36 potentially a little more challenging. What one might be left with, if we're dealing with separate trustees as separate PCBUs, notwithstanding that they're all operating the same business, is catching them for a failure of collective decision-making through another provision, section 34, which I think my friends have referred to, but that has a lower maximum penalty and is solely concerned with consultation and coordination. It is not the primary duty of care which is, frankly, the key, apex duty. I mean, it is a primary duty, that's what it is called in the Act. So it makes the application of a key provision of the Act less –

WINKELMANN CJ:

Can we just look at that. So you're saying this is when you’ve got two PCBUs in charge of an area, is that what you’re talking about, two or more?

MR FINN:

Because for section 34, yes.

WINKELMANN CJ:

Section 34.

MR FINN:

Yes. We’ll just find it, sorry, your Honour. Thank you. So this is the other means by which different PCBUs and on my suggested approach different PCBUs who are by nature, by definition, operating different businesses, not the same business, can be captured and I say is a less effective and less appropriate enforcement tool when dealing with a failure to basically take care of workplace-related risks than section 36, the primary duty of care.

So that is one way in which I say that interpretation, my learned friend’s interpretation, is less consonant with the Act, together with the others that I have outlined.

WINKELMANN CJ:

Well, less consonant with trust law, because it is not a duty – well, or consonant with trust law. So the duty there: “... each PCBU with the duty must, so far as is reasonably practicable, consult, co-operate with, and co-ordinate activities with all other PCBUs who have a duty in relation to the same matter.”

MR FINN:

So...

WINKELMANN CJ:

Additional trust law? Reflective?

MR FINN:

To my mind, it just, it seems highly artificial to talk about separate trustees conducting the same business as though they're the same – or sorry, separate PCBUs and this is not an apt provision for making them liable for what would be a failure. So, that is one example, I would say, of –

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KÓS J:

If your primary charge is against the Trust and it is your primary charge, because the other charges against the trustees were brought in the alternative, looking at the charging documents. How many PCBUs are there here? Because I would've thought that on the theory of your charge, it is the Trust and that the trustees will be in the nature of officers –

MR FINN:

That is exactly right.

KÓS J:

– under section 18.

MR FINN:

I'm sorry, Sir. That is exactly right. So we obviously brought this case knowing that this issue was highly contentious but if, and this is entirely hypothetical, if the Court were to say, yes, look a trust or a group of trustees is, in fact, a PCBU, then I entirely agree, and I'll come to it now if it helps that the more natural reading of what trustees are is officers.

KÓS J:

Right.

MR FINN:

Because if one takes away or if one adopts my learned friend's approach, it is very difficult to see what role officer liability would have where one is charging the PCB – sorry, the trustees as separate PCBUs.

WILLIAMS J:

But do you have to charge them separately? Why can't you have multiple individuals not treated as unincorporated bodies or an unincorporated body, as a PCBU? Given section 33 isn't it, that says, "More than 1 person [can carry the] same duty."

MR FINN:

Yes, it would be, look, it is possible to charge them separately, I'll go back to the concession I made at the start. I simply say it's not consonant with the way in which the Act was intended to work.

WILLIAMS J:

But if you can pluralise a PCBU, *a* PCBU, and treat a collection of individuals, whatever their corporate or unincorporate status, as sharing a PCBU's duty as reflected in section 33, what does it matter?

MR FINN:

As in, if we can do it the way that my friend says, why would you bother doing it our way, is that the essence?

WILLIAMS J:

Why create, why do you need to create the collectivity when there is a pathway through the Act which allows you to bring a proceeding naming all of the trustees as a number of people having the same duty under section 33(1) as a single PCBU, without having to argue about unincorporation?

MR FINN:

I may be being daft here, Sir, sorry, are you suggesting that we would charge all the trustees using one charge? I'm sure they'd be –

WILLIAMS J:

No. "More than 1 person may have the same duty imposed by or under this Act at the same time."

MR FINN:

Yes.

WILLIAMS J:

If the duty is the duty of a PCBU, there's nothing in the definition of PCBU that requires it to be a single person or a single unincorporated body. You could just charge them all.

MR FINN:

Could I just have a moment, your Honour? Just to –

WILLIAMS J:

I could be completely wrong.

MR FINN:

I could be completely wrong. I'll just take a moment. I'm sorry to go round in circles, Sir, I'm probably, your Honour, I'm probably not adequately understanding you. So could I just zero in on what's being proposed here by way of a charging approach?

WILLIAMS J:

So you'd charge them all individually.

MR FINN:

Individual trustees, yes.

WILLIAMS J:

Yes, because you don't have to bring a single charge against a PCBU. You could bring multiple charges against a PCBU comprising multiple individuals.

MR FINN:

On the basis that they're all the same PCBU.

WILLIAMS J:

Yes. Well, that's what section 33 seems to anticipate.

MR FINN:

I'm not necessarily sure…

WINKELMANN CJ:

Can I ask question?

WILLIAMS J:

Can I get an answer to this one first?

WINKELMANN CJ:

Well, if he, yes. Maybe clarify it.

WILLIAMS J:

So section 33 (1) says: "More than 1 person [can carry the] same duty." If the duty is a PCBU's duty, you can have multiple individuals with the same PCBU duty, and you could charge them all individually and get to the same point.

MR FINN:

But they're not individuals. They're a PCBU. I mean that –

WILLIAMS J:

Well, a PCBU does not have to be an individual.

MR FINN:

No, it doesn't. Look, I may be getting confused. You're, of course, right but if you're dealing with a body of persons, the idea is that you charge the body of persons.

WILLIAMS J:

Yes, but that's to start with a conclusion. My question is, do you need a body of persons to get precisely where you need to get to, which is to identify a group that is the PCBU and have them all charged?

WINKELMANN CJ:

Are you putting Mr Butler's proposition to Mr Finn?

WILLIAMS J:

I don't know whether I'm putting Mr Butler's proposition.

MR FINN:

I think your Honour is. I think your Honour quite fairly is. Look, yes, it is hypothetically possible –

WILLIAMS J:

But they don't have to be individual PCBUs. You can just have one PCBU.

MR FINN:

I'm not sure I agree with that necessarily. I could be getting confused.

WILLIAMS J:

Well, there's nothing in section 17 that says a PCBU has to be an individual person or an individual corporate or an individual unincorporated body. It just has to be a PCBU. Section 33(1) says more than one person can carry the same duty. If the duty is the duty of the PCBU, then you could charge them all as a single PCBU without having to do violence to the rules of equity. It's just an idea that I wanted to test with you.

MR FINN:

Oh well, look, thank you, and I'm not up to the task of having been tested with it sufficiently, to be honest.

WILLIAMS J:

It's a very disarming response.

MR FINN:

But perhaps I will be in 15 minutes, as I muse on it.

WINKELMANN CJ:

Can I ask you my question? You'd concede that you could have charged each of the trustees as a PCBU, but in your conception of the Act, is that correct? And I think this might be related to the vibe of Justice Williams' question, which is that is each trustee, does it actually fit within the definition of section 17, of the purposive interpretation of section 17, if you're really looking at someone who's able to conduct a business? Because an individual trustee's not able to conduct a business. They have to act unanimously with the others to conduct that business.

MR FINN:

That is, and I'm sorry if I haven't made it clear, that is part of my point. Yes, in reality and substance, that is what ought to be occurring as part of the business.

WINKELMANN CJ:

I think that might be part of what you were talking about, perhaps? No? Maybe.

WILLIAMS J:

Oh, the basic point is that a PCBU does not have to be an individual anything. It can be multiple individuals. I would have thought the Interpretation Act says that's possible. Of course, the singular is the plural and here they explicitly say that multiple people can carry the same duty.

MR FINN:

Can I put a pin in that, Sir?

WILLIAMS J:

Please do.

MR FINN:

I'm sorry, I'm no further down the track in progressing a decent answer.

WILLIAMS J:

Sure. I thought you meant you were going to explode it with a pin. No?

WINKELMANN CJ:

No, that would be pulling a pin, not putting a pin. So that's just exploring that, the purposive interpretation of section 17, which really says conducting a business or undertaking, it suggests a level of control.

MR FINN:

Yes.

KÓS J:

But perhaps not exclusive control. We've got three birds flying here, Mr Finn. One is charge against the trust. Justice Williams' is the second bird, and that's a charge against individual trustees collectively amounting to a PCBU, and the third bird is Mr Butler's bird, I think, which was that each of the trustees can be a PCBU. Those are the three theories that are aloft in this large courtroom.

MR FINN:

Well, look, obviously my money's on bird number 1. I haven't – I don't think I've even been able to see bird number 2, regrettably, and I've already formally conceded that it remains a possibility that one can adopt bird number 3, but I say that –

WINKELMANN CJ:

But that's, well, a question I asked you, you're conceding it, but are you conceding it? Because it seems to be inconsistent with your argument to say that you could charge each trustee as a PCBU when you they don't have control. They only have control when they act with unanimity.

MR FINN:

I'm sorry and –

CAMPBELL J:

Mr Finn, when you made that statement earlier, I thought that you were simply saying it's a possible interpretation, but the better interpretation is yours. Isn't that how you put it 20 or so minutes ago?

MR FINN:

Yes, it is, but I – and I apologise, there is a further nuance. One thing that I thought we'd said in the submissions and in front of the Court of Appeal was this. It must depend on the facts, so we would say that there will be cases, and my friends have picked them out from past WorkSafe prosecutions in the District Court where an individual trustee is the proper PCBU to charge, even though they are part of a trust, and that will depend upon the facts as to whether or not the business is being operated as a collective. There is a portion of the majority's reasoning that I might just try and find, if it's all right, Sir.

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WINKELMANN CJ:

So this is not, that's who you're stepping away from trust theory and now plunging into the passive and active trustee world.

MR FINN:

A little. I'm acknowledging that when choosing how to charge, the prosecutor has to consider the facts and not just run headlong into one possible approach and if the facts show that it really is just one trustee that has the control and management, surely it would be right just to charge that one trustee and so that's all I am trying to concede.

WILLIAMS J:

That's a matter of prosecutorial discretion, which is famously difficult to review, so you have that problem of a kind, it's worth at least thinking about, but I see your point.

WINKELMANN CJ:

And yet it does not conform. It does not conform with your theoretical approach to section 17, because you're saying section 17 is about control and there is you control through unanimous resolution of trustees,

MR FINN:

Not in every case. I'm saying that –

WINKELMANN CJ:

So, what if there was a trust deed allowed one trustee to act?

MR FINN:

Hypothetically. Look, I don't want to and I'm sorry I'm probably falling into a trap that I oughtn't, but I don't want to cut off the possibility of being at a charge like that in certain cases.

WINKELMANN CJ:

But you must see that you have to run through your theoretical, you can't just, you know, well, you're now running with the fox and hunting with the hounds, you can't argue a theoretical construct in section 17 and say, look, this is a PCBU because when they act, they act collectively and therefore it's only when they're acting collectively that they're a PCBU, but then say, but sometimes there'll be a rogue trustee who goes off and ignores the unanimity requirements and actually the rest of them sit by and let that rogue trustee operate the place and then they're just PCBU. Is that what you're saying or not?

MR FINN:

Look, I feel as though and perhaps I'm wrong, I can say that. If as a matter of fact they're not operating as a collective, if as a matter of fact there is evidence to suggest that, then surely that should remain open as an option. The default position is the one that I advance, but I don't want to exclude the possibility and, look, I have to be fair and say that we accepted that in the Court of Appeal and I think the High Court, so it would be wrong of me to –

WINKELMANN CJ:

It tends to conform with Mr Butler's argument.

MR FINN:

My submission is that it only partially conforms with it, because the starting point, the default position, should be collective liability.

CAMPBELL J:

The question of law that was raised in the High Court on appeal and then in the Court of Appeal and here now, one of the problems with it is that it is abstract.

MR FINN:

Indeed.

CAMPBELL J:

And your responses confirm some apprehension that I had about that, because and I read, as I understand it, WorkSafe was a little reluctant to bring the section 147 application in the first place or to bring it in the District Court and I can see why, because it's I'm not sure that one can answer this question fully in the abstract, other than the way that the Court of Appeal did which is a trust or trustees acting collectively can be a person, not are, or is.

MR FINN:

That's – I've nothing to add to that except that I'm candidly the application under section 147 predates my involvement and so whether it was made with reluctance I cannot say, but my former counsel was not known for his reluctance, so –

WINKELMANN CJ:

But your argument is actually based on the *Cometa* analysis which is that when you have the structures which compel you to behave in a certain way, then you are held to behaving in that way, in terms of defining what a PCBU is, so it's defining what a PCBU is and that's your argument, but now you're coming up with another argument which is notwithstanding the internal structures I might just look at it and say, and a prosecutor and say, well, it may have been, that may be your internal structures but in this, but the reality is, it was operated in a different way which doesn't seem to sit very well with your statutory interpretation argument.

MR FINN:

Look, I very respectfully differ and if I'm wrong, I'm wrong.

WINKELMANN CJ:
Okay.

WILLIAMS J:
I think you may have a point, particularly where you have the rogue trustee and the other trustees not watching with a duty to watch, you might actually charge the collective and the individual trustee because they have, the rogue, because they have different levels of culpability. One as a collective, and the other additional culpability because of their acts.

WINKELMANN CJ:
I think you're saying you might not charge the other trustees at all.

MR FINN:
Potentially not. That's what's happened previously. Look I'm mindful that I got properly interrogated about other reasons why I might say that my learned friend's interpretation doesn't work, or isn't ideal, and it's probably worth me mentioning officer liability at this point.

Section 44 creates the officer duty. It's a duty on those in senior governance type roles primarily to exercise due diligence to ensure that the PCBU meets its separate duties under the Act. There's multiple statements to that effect in the case law and the officials' reports. I'm not going to go through them.

First of all, just for what it's worth, I know at one point it was suggested, I'm not sure by whom I'm sorry, that this might be a lesser form of liability. Well no, we don't see it as that. We would very respectfully submit it's just a different form of liability under the Act, not lesser or greater.

Now my understanding of the approach my friends are suggesting is that if you have separate trustees as only of a separate PCBU, that all but does away with officer liability which is a pretty major cornerstone of the new Act, and one which I say was created to help encourage, or ensure that PCBUs do comply with their duties by putting the onus on the officers to make sure that they do.

So that, to me, would jar somewhat with the framing of the Act. Now my learned friend points out, well yes it might be possible under section 32 of the Act for one person to hold multiple duties as both an officer and a PCBU, and I believe the example of the single person company was given. Fair enough, up to a point. A single person company with a single officer as its director, yes, the company and the person are obviously very closely connected, but one is a company, one is the director of that company, whereas here what would potentially be being toyed with is the idea that a trustee could be both a PCBU and an officer of themselves as a PCBU. That seems hopelessly artificial, awkward, and I'm not even sure it's legally possible.

So my submission is that that approach jars with a key cornerstone of the Act, and therefore is not preferable for that reason. That was one of the features of my learned friend's interpretation that the majority of the Court of Appeal took issue with in its judgment.

KÓS J:

But how would that apply to a body unincorporate? I mean you might have a committee member there. You would charge the friendly society, or whatever it is in its name, then charge the committee member under their name. That's how you would separate them?

MR FINN:

Yes potentially if you're dealing with that form of organisation, yes. My friend has said, well look, the section 18 officer provision doesn't specifically include trustees, and of course he's right, it doesn't, but section 18, like section 17, is a deliberately broad and open-ended definition that I would very respectfully submit is intended to cover as many potential situations as possible, and you can see that in the way that it's worded, particularly (b) which it's meant to be expansive, it's meant to capture a lot of different situations which may occur without being too prescriptive. So I say the absence of reference to the trustee is no more than a neutral factor in the context of this Act and its definitions.

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KÓS J:

If we had a partnership, say a two-person partnership, who would you charge?

MR FINN:

Under the Act?

KÓS J:

So, let's say – no, who's the PCBU in that situation?

MR FINN:

The partnership is.

KÓS J:

The partnership? So, Mr Luke and Mr Cunningham, and then also William, and then you charge them additionally as officers?

MR FINN:

Yes, let's be contemporaneous. So, me and the other 10 partners, our partnership gets into trouble, doesn't take care of its workers, we charge the partnership, but if it turns out that me, as a particular member of the partnership, didn't do enough to ensure that the partnership did its job properly in relation to its workers, then I should be charged as an officer.

WINKELMANN CJ:

So – yes, again, but you'd charge both partners as the PCBU?

MR FINN:

You'd charge the partnership as the PCBU.

WINKELMANN CJ:

Yes, but your earlier proposition was that if you thought that one partner was particularly reprehensible, you might just charge them as the PCBU, which I have some difficulty understanding as coherent with your other arguments.

WILLIAMS J:

Or as an officer.

WINKELMANN CJ:

I mean, I can see it as an officer. I see that, but I don't see –

MR FINN:

Look, I – I'm sorry, Ma'am, I wouldn't take that approach for a partnership, so perhaps I shouldn't be suggesting that it's an available approach for a trust, but it seems to me, that's all I'd say on that, Ma'am.

I am mindful of the time. I've tried to stick to my script. I'm also mindful that I don't dodge anyone's questions.

WINKELMANN CJ:

Well, you haven't to date. Perhaps just move on.

MR FINN:

I'm done with my part of the address.

ELLEN FRANCE J:

Could I just ask one question? In terms of disadvantages of the approach that the appellant advances, do you see any practical evidential issues with that?

MR FINN:

Potentially, yes. I may have only touched upon those before, but yes, I do. I mean, I think we've referred in our submissions to how awkward this might make the application of the privilege against self-incrimination, but there's also the fact that if, in fact, the business is operating as a collective, trying to differentiate who exactly is responsible for what, where in fact they're all collectively responsible, is evidentially more fraught, so yes, I do, is the short answer.

WINKELMANN CJ:

And who, you're not handling the indemnity issue, then?

MR FINN:

I was going to leave that to my learned friend Ms Bagchi.

WINKELMANN CJ:

Okay, Ms Bagchi.

MR FINN:

Unless your Honours had any further questions.

WINKELMANN CJ:

Thank you, Mr Finn.

MR FINN:

Thank you.

MS BAGCHI:

Thank you, your Honours. I am going to address the issue of indemnity and how that affects access to trust assets in the context of section 29 of the Health and Safety at Work Act, which prohibits insurance and indemnity. That is going to be the first point that I'm going to address, but if there are any additional points that come up from the questions, then I can also address them.

In terms of section 29, and your Honour asked earlier, what was the mischief? The majority in the Court of Appeal considered that section 29 would create a mischief in the sense that it would prevent a trustee who was prosecuted as a PCBU or as – well, who was prosecuted individually from having access to the trust assets in terms of paying the fine. We could take a step back from that proposition and look first at what the target of the fine should be and everyone at the Court of Appeal seemed to be agreed that the fine should be paid out of the Trust assets, in the sense that it is the Trust that is the business, that the

Trust or the business is operating as a trust and so it makes sense for the assets for that business to be the thing that is targeted.

Now whether section 29 prevents that from happening, I think we would need to look at the language of section 29 which is in the respondent's authorities bundle at tab 2. So subsection (1) of section 29 talks about "insurance policy or a contract of insurance" and subsection (2)(a) then cross-refers to policies or contracts of insurance. When we head into subsection (2)(b) onwards, the language changes to: "A person must not— … (b) indemnify, or offer to indemnify, another person for the other person's liability to pay a fine or an infringement fee under this Act." And the same language is then, or similar language is repeated for subsection (2)(c) which talks about, which prohibits, "be indemnified, or agree to be indemnified". And then subsection (d) which talks about: "pay to another person, or receive from another person, an indemnity for a fine".

The majority at the Court of Appeal found that the indemnity referred to in subsection (2), section 29(2)(b) to (d) would prevent a trustee from being indemnified from trust assets, and the reason is that that is just the plain language of the statute. So if that happens, then it is not possible for a fine that is imposed against a trustee who is prosecuted as a PCBU to be sheeted back to the Trust assets. It is just the trustee who is left paying the fine from their own resources and that is not what would achieve the legislative intent of targeting the business' assets.

KÓS J:

I suspect you and Mr Butler are violently agreeing here, aren't you, on this point?

MS BAGCHI:

So –

KÓS J:

I mean, just looking at his last, he ends by saying, section 29 of the Act does not preclude indemnity, subject to limitation.

MS BAGCHI:

Sir, I think where we are taking a different position in that my learned friend is saying that section 29 does not prevent a trustee from being, from accessing trust assets to pay the fine, whereas we are saying that it does. I think Justice Whata in the Court of Appeal made the argument, made the finding that because a trust is not a person, it is not covered by the wording of indemnifying another person, because that prohibition only applies to one person indemnifying another.

KÓS J:

It's, okay, yes.

MS BAGCHI:

Our position is that a trust, if it is not a person, then the assets are, in fact, held by the trustees. So in a multiple trustee trust, it is still other trustees who are indemnifying the trustee who was prosecuted using the trust assets. So it is not possible to get around the language of one person indemnifying another. So on that basis, using my learned friend's approach to this section, so on the basis on that a trustee is prosecuted individually, they would be prevented under section 29 from accessing trust assets.

WILLIAMS J:

Only if there was more than one of them.

MS BAGCHI:

Yes, your Honour.

WILLIAMS J:

That's a bit weird, isn't it?

MS BAGCHI:

In an individual single trustee situation, we are saying that there is no body of persons, so it is still consistent to treat them, to prosecute that individual trustee.

WILLIAMS J:

It's not the problem of prosecution, it's the indemnity point.

MS BAGCHI:

In that context, the trustee is the sole legal holder of the trust assets, so they would essentially be using assets that they legally own to pay the fine and I don't think –

WILLIAMS J:

Yes.

MS BAGCHI:

– that would come within the indemnity. It is when you've got a body of persons being the trustee, so you've got –

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WILLIAMS J:

Yes, I understand that but it doesn't appear to fit the intent of the legislation at all.

MS BAGCHI:

Is your Honour's concern that there would be a lack of deterrence in that particular instance?

WILLIAMS J:

Well you have a right to recourse the Trust assets in the happenstance of being a trustee appointed by a set law, but if there's more than one you can't. It just doesn't appear particularly rational from a policy point of view. You really need to be all in or all out.

MS BAGCHI:

Sir, with section 29 that is only preventing indemnity. That's not preventing recourse to one's own assets.

WILLIAMS J:

Yes, I understand that point. It's perfectly clear. But in terms of the practical effect in the context of this Act it doesn't appear particularly rational.

MS BAGCHI:

The way I would think of this, your Honour, is where we have, where the intent is to achieve deterrence against a specific individual, and that is because, for example, a trustee is being prosecuted as an officer, in that situation then section 29 would prevent that trustee from having access to – the rationale of the section would operate to prevent that trustee from being able to access trust assets to pay the fine. If the intent is to target the business, and it is not really the personal culpability of any trustee, then it makes sense for the trust assets to be the ones that's targeted. So I think based on what your Honour has just asked I can see that you're suggesting if a trustee is prosecuted as an officer then they would still have recourse to the trust assets to pay the fine which –

WILLIAMS J:

Well if they're prosecuted as a principal, or as an officer. It doesn't really matter because the law says the asset is theirs, so they can't possibly be being indemnified, but if you have multiple trustees, then the other trustees, who also have a share in the asset, are indemnifying the one who is charged and having to pay, you see. So it doesn't, in terms of the purpose of the legislation, it doesn't seem to make a lot of sense.

MS BAGCHI:

With a single trustee situation there appears to be no way to say that it is one person indemnifying the other.

WILLIAMS J:

I get it, yes.

MS BAGCHI:

And that seems to be the reason why section 29 would not prevent that person from, that trustee from having recourse to the trust assets even if there appears to be some anomaly in terms of the rationale of how section 29 is intended to operate. But that should not, in itself, justify reading section 29 in a way that allows a trustee who was being prosecuted because of their personal culpability to have recourse to the trust assets, and my learned friends interpretation is that there is no barrier from section 29 to these situations either.

WINKELMANN CJ:

So is your response to Mr Butler's point that it's their assets anyway so they can't be, they're not indemnifying – there's no other person indemnifying them because it's their asset. Is that that's not true because there are actually other trustees who own that, hold those assets?

MS BAGCHI:

Yes Ma'am, in the multiple trustee situation, and that is why we say that in that situation section 29 would prevent the trustees from being indemnified.

WINKELMANN CJ:

Well can I ask you this. Is it the main – access to indemnity is not the main reason this point is being argued by WorkSafe, is it, because my understanding was that the main reason it was being argued was to keep the responsibility of the PCBU word actually resides which is with those who have collective responsibility for the site?

MS BAGCHI:

Yes your Honour. As my learned friend Mr Finn said, the fundamental reason from WorkSafe's perspective is that the PCBU should be the body of persons which is conducting the business or undertaking, and when there is a group of trustees who are under a duty to act unanimously, and who are obliged, essentially, not to take active or passive roles, then there is that body of persons.

I would like to refer to the question your Honour asked earlier in terms of what situation might justify going over a single trustee in a multiple trustee situation. Perhaps an example might be, if the trust did make some provisions for the trustees to do certain things, but that does not extend to them jointly conducting the business or undertaking.

WINKELMANN CJ:

Individual powers.

MS BAGCHI:

Yes your Honour. So that might be a situation where it is possible or appropriate to go after one trustee as the PCBU, despite there being other trustees.

Do any of your Honours have any questions on either section 29 or on the issue of – the rationale for WorkSafe's case in this context?

All right. There is some other points which I think we had treated as miscellaneous, but mainly to do with enforcement, and my learned friend has pointed out that there are several issues with prosecuting a trust, but our submission is that none of these issues are insuperable in terms of service. Service can be against a trustee as a representative of the trust in terms of decision-making as to plea that would follow the normal decision-making processes for the trust, and that would be in relation to the plea to be entered by the Trust as the defendant. In terms of enforcement –

WILLIAMS J:

What would happen if they can't agree?

MS BAGCHI:

There would be, that situation can arise in any context where trustees are making a decision. They have a duty to act unanimously but in the lead-up to that they may disagree between themselves, but there will be some way for them to reach consensus so that they can act unanimously. So this can be treated in the same way.

WILLIAMS J:

What if they can't because there's a violent disagreement amongst them as to whether they should throw themselves on the mercy of the Court, or fight?

MS BAGCHI:

There is an Australian case, your Honour, which contemplates that a trustee who essentially disagrees to do what's right may be replaced by someone else, so that could be an option in that case.

KÓS J:

Well I would have thought if they're incapable of entering a plea the usual thing would happen, that is a plea of not guilty would be inferred. If they can't agree on what the plea is.

WILLIAMS J:

That would prejudice the ones who did want to plead guilty, wouldn't it, because if they're ultimately found guilty they would lose the guilty plea discount.

MS BAGCHI:

In this situation, your Honour, we are saying that it is the Trust which is the entity that is being prosecuted. So there is no disbenefit to the individual trustees for pleading not guilty, because it is the Trust ultimately. They wouldn't have got –

WILLIAMS J:

Well there's a disbenefit to the Trust at least then.

MS BAGCHI:

Yes your Honour, and that is a situation where – I suppose what I'm trying to say is in any situation where a decision needs to be made, there maybe disagreements and one course of action maybe better for the Trust than the others, but whatever course of action is ultimately adopted, that becomes the Trust's action, and in this case, following discussions about what the plea should be, if they cannot agree, then it's a not guilty plea. If they agree then – if they essentially say that they're not going to pose a guilty plea, then that is going to be the course of the action for the Trust. It doesn't seem to be a fundamentally – a situation that poses any sort of issue that can't be dealt with through the normal processes for the Trust.

WILLIAMS J:
It's not particularly satisfactory, though, given the exposure.

WINKELMANN CJ:
Would it be the same situation for other, for incorporated and unincorporated bodies, with decision-making? I suppose they might have, if they say they require unanimity, I suppose they normally have majority but it could notionally be a hard-fought thing.

MS BAGCHI:
For example with the board of directors in a company, they are the ones deciding whether a company pleads guilty or not. There maybe some who have a different view and if a not guilty plea is entered by this reasoning it would appear that they would also have the disbenefit in that the company doesn't go through the process that a guilty plea would've resulted in, so –
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WILLIAMS J:
Yes, but in those circumstances, the rules identify what a valid decision is. The problem in this case is that a valid decision cannot be made, is a little unsatisfactory in that the criminal law would impose a decision in those circumstances, given the jeopardy.

MS BAGCHI:
This maybe analogous to a situation where a defendant refuses to enter a plea, in which case there are procedures that would, essentially the Court would

proceed on the basis of a not guilty plea, so the same should apply in the context of a trust, where the trustees cannot reach a decision.

WILLIAMS J:

It might be better for the prosecutor to charge individually in those circumstances.

MS BAGCHI:

With individual, and so the argument that my learned friend is making is that that is the only option that is available to the prosecutor which is to charge the trustees individually or a separate –

WILLIAMS J:

Yes, I understand that but it's a matter of prosecutorial discretion. It maybe that the better approach is to charge them individually if they can't agree, but that's a matter for the prosecutor, of course.

MS BAGCHI:

If it is a situation where the prosecutor is choosing to charge the trustees of a trust, if there is a basis for saying that there is collective liability then the proper entity to be charged would be the trust, so it would not necessarily be a situation where prosecutorial discretion can sidestep that.

WINKELMANN CJ:

Thank you. Is there anything else?

MS BAGCHI:

No. Those are my submissions, your Honour.

WINKELMANN CJ:

Does Mr Finn want you to address anything else? You're looking –

MR FINN:

If it's all right, could I have a bite at that particular cherry?

WINKELMANN CJ:

You want to respond to Justice Williams' question?

MR FINN:

If I'm permitted, I won't –

WINKELMANN CJ:

Yes, go ahead.

MR FINN:

Look, very briefly I pick up entirely on what my learned friend was saying and the point that his Honour Justice Kós was making. A deemed not guilty plea is an essential part of the Criminal Procedure Act. It's essentially the default position where somebody refuses to engage or cannot engage. It casts the onus and standard of proof squarely on the prosecution to establish its case so in those circumstances, the prejudice to the extent it exists, I submit is minimised. Meanwhile, the trust sits in a state of stasis, and I accept that, of course, but that the trustees have obligations and, in those circumstances, acting properly as a collective, they ought to be trying to reach a unanimous decision. It is part of their obligations to do so, I would say. So, look, that's my very discrete answer to that point, appreciating that it may not be perfect.

WILLIAMS J:

Easy for us to say, but we're not sitting at the table, staring down the barrel of a large fine and there may be strong views one way or the other as to how the matter should be dealt with.

MR FINN:

You're absolutely right, your Honour. Of course, there may be strong views, but it's part of the trustees' jobs to resolve differing strong views, so that is my submission.

WINKELMANN CJ:
Well, I just want – actually whilst you're on your feet, there was a question we asked Mr Butler which was that there might be, and you may have no idea, but it strikes me that Mr Butler's clients might not be fully representative of the views of the vast number of trustees who might not wish to be personally liable as individual PCBUs without arguably, or perhaps not, rights of indemnity.

MR FINN:
Yes.

WINKELMANN CJ:
All right.

MR FINN:
I can say no more than that.

WINKELMANN CJ:
Right.

MR FINN:
I'm not in a position to speak for the community, but that must be a possibility is all I would say.

WINKELMANN CJ:
Right. Thank you, Mr Finn.

MR FINN:
Thank you very much for that opportunity.

WINKELMANN CJ:
Mr Butler are you going to handle reply.

MR BUTLER KC:
I will. I will try and be succinct, if I may. Starting with the last question, I'm just going to go in reverse order. So starting with the last response you've heard

from my friend about not being representative of all trustees. I think it's very important to recall how it is that this question's come before the Court on their application. This matter has proceeded in a way in which you would expect it to do which is contested. Propositions have been put in front of you, and being blunt, if any of the courts along the way had felt that the submissions that we are advancing are favourable to one form of trustee as opposed to another, then I would've thought that the Court would've taken the view that having an intervention or somebody else to represent the views of those would've been adopted or indeed, the Crown would've suggested it. They haven't. What you have got in front of you is what I would say is a representative trust structure, because you've got human beings and you've got a corporate trustee, indeed a professional corporate trustee.

WINKELMANN CJ:

Well, you're extremely knowledgeable about the trust, also. I was really testing you about it.

MR BUTLER KC:

Yes, no, indeed.

WINKELMANN CJ:

And I just thought I'd better get Mr Finn to give him a chance to reply, because he hadn't really dealt with that.

MR BUTLER KC:

Yes, no, so I think it's important to understand, your Honour put to me the proposition, right at the outset of my submissions, you know, what's informing the approach here, you know, the mischief et cetera? And my immediate response is principle, and it is. You will have, the Court will have seen through the exchange you've had not only with me but also, I think, when you really started to test, once you really got into the detail of, you know, put my friend's feet to the fire in terms of, well, are you trying to have your cake and eat it? So, you're trying to have a trust to be treated as a PCBU but then they want to be able to prosecute individual trustees as a PCBU, with no suggestion they would do the same when it comes to a company, and then when the proposition was put to them about a partnership, my friend retreated rapidly, an Italian retreat, a rapid retreat from the –

WINKELMANN CJ:
That's harsh, that's very harsh.

MR BUTLER KC:
But it was, it was a rapid retreat, I think in recognition of the fact that at least on their approach to the case –

WINKELMANN CJ:
I was saying harsh on the Italians.

MR BUTLER KC:
Well, indeed, I'll be forgiven by my many Italian friends, so the proposition I'm simply putting, that's why the parties have come at each stage before each of the courts we have come before, because there is fundamentally a question of trying to get clarity on what is quite an important issue in terms of the correct defendant to a charge under this legislation, but as you can see, charge under other legislation and potentially more generically, so I think it is quite important to orientate ourselves back in that way.

KÓS J:
All right, so as to the – which is the proper defendant, which of those three birds can fly and which can't?

MR BUTLER KC:
So in my submission, the only ones that can fly are either it's a trust and so you recognise a trust, I say, for the first time as being, in effect, some form of body of persons unincorporate, and give it a deemed identity, contrary, I say, to the way things were being done before, because that's the clean way of doing it, because you identified the trust by name, or you do it the way we say, which is orthodox, obviously, when you identify the individual trustees, people who are

the trustees, with the relevant duties at the relevant time, those individuals, and you charge them, so in other words the alternative approach that's been adopted.

KÓS J:
So that's bird 1 or bird 3?

MR BUTLER KC:
So that's bird 1 or bird 3.

KÓS J:
You don't like Justice Williams' alternative?

MR BUTLER KC:
No. We don't even know what bird 2, to use the thing, looks like. We don't have a charging document to see what it looks like and I think it was interesting when it was being teased out with my friend as to quite what it would look like, it was not easy to articulate. I take your Honour's point that – I think your Honour's point was that when you're looking at that definition of what a PCBU is, which just says it's a person conducting a business or undertaking, but of course, the key word in there when we're looking to try and identify a defendant is the notion of a person.

The person still has to be a person within that notion, and of course it's critical, from the point of view of a charging document, each charging document must identify a defendant, and where there are – where the same charge has been brought against multiple individuals, each one of them gets a charging document. I can't remember the exact section, but it's in the Criminal Procedure Act, so it's quite important to separate out when you're doing a charging document, each of the defendants. That's why it seems to me if you're going with the thesis of my friends, it's – probably what you're doing is you're charging a name, X trust.

WINKELMANN CJ:

So in the High Court Rules 2016 it provides that trustees can be sued on behalf of the estate of the trust.

MR BUTLER KC:

Yes, it's a curious language because I think it says, it talks about in the name of the – on behalf of the property or something like that. I don't have it in front of me.

WINKELMANN CJ:

No, here we are, I've got it in front of me: "Trustees, executors, and administrators may sue and be sued on behalf of, or as representing, the property or estate" –

MR BUTLER KC:

The property.

WINKELMANN CJ:

Yes, "property or estate of which they are trustees".

MR BUTLER KC:

Yes, so again, it's a curious formulation, but what it's doing is it's recognising, I think, in the context of the High Court –

WINKELMANN CJ:

Civil.

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MR BUTLER KC:

– litigation, civil litigation, and it's talking about, well, do you go against the trust fund, no, the way in which you intitule your document is to, if this is the property you're making a claim against, you identify the people who are the trustees of it, so it's for identification and naming purposes.

KÓS J:

There is actually a fourth bird, and the fourth bird is that you don't sue the PCBU at all – sorry, don't charge the PCBU at all. You charge the trustees as officers.

WINKELMANN CJ:

Of what?

KÓS J:

Of – well –

MR BUTLER KC:

Yes, certainly, that's certainly a possibility.

KÓS J:

That must be an available possibility. The business or undertaking is simply not charged here for one reason or another.

MR BUTLER KC:

And so, and I suppose so the way I'd think about that is must you, in every case, charge a PCBU where you've seen particular offending or what you believe to be offending against the Act? Of course, you need not, so there could be situations in which you decide, actually, what we want is we want to focus on the officer, so it may be, I don't know, I mean, I'm not disagreeing with the general proposition, but in order to go against an officer –

WINKELMANN CJ:

But doesn't it require a PCBU?

MR BUTLER KC:

There must be a PCBU.

WINKELMANN CJ:

Exactly.

MR BUTLER KC:

Yes.

KÓS J:

That's right.

WILLIAMS J:

So, I'm not a big fan of the bird analogy, but let's stick to it for clarity's sake.

WINKELMANN CJ:

No, neither am I.

MR BUTLER KC:

Certainly. I see a flock.

WINKELMANN CJ:

Yes, can you please abandon it?

WILLIAMS J:

That's one word that might be used.

MR BUTLER KC:

And the question is whether bird flu is going to apply to any of these.

WILLIAMS J:

Yes, quite.

WINKELMANN CJ:

Can we just name the thing, as opposed to birds? Because I'm finding it confusing, myself.

WILLIAMS J:

So, there'd be, the idea that came to me was that you don't have to have each trustee. You don't have to be satisfied that each trustee is themselves individually a PCBU, they could be collectively a PCBU and charged individually consistently with section 33(1). Why not?

MR BUTLER KC:

Yes, and so because, we would say, in that particular case what you're doing is you've identified a person who's a PCBU, identified a person PCBU and if you look at the duty under section, the way section 33 is expressed, can I just quickly grab my statute? I didn't bring the statute deliberately so I wouldn't go on very long. I'm failing miserably, so if you look at section 33, so how I read – more than one person can have the same duty imposed by or under this Act at the same time, and then if you look at section 33(3), if more than one person has a duty has a duty for the same matter, each person "retains responsibility for that person's duty in relation to the matter" so the way I –

WILLIAMS J:

Why is that – doesn't that work well?

MR BUTLER KC:

No, I think what it does is it emphasises the importance of zeroing in on the conduct of the relevant duty holder and how it is that they have gone about discharging their duty, and that –

WILLIAMS J:

Isn't it a shared duty? The duty referred to in section 33(1) is a duty that can be held by more than one person. If it can be a single duty held by more than one person –

MR BUTLER KC:

That's right, but therein, there's a little – if I may put it this way, there's a little textual elision involved in the use of the verb "share" there, because it's not that they're shared collectively, it is that each person, each duty holder, holds the same duty at the same time, so it is true to say that more than one person has the duty but that doesn't mean they share it, as in it's divisible between them.

WILLIAMS J:

Well, but the duty is only to the extent that they're able to influence and control the matter, so that takes into account the fact the that they're at a table, they're not a single, autonomous individual.

MR BUTLER KC:

Certainly, I accept that, but what you start with, the duty, so the duty is the duty as expressed in subsection (1) of 30, and all – so if you go back up there, a duty imposed on a person requires the person to eliminate, so that is the duty, and then what comes in subsection (2) is the extent of compliance with the duty. You don't fail to comply with your duty in circumstances where you did not have the ability to influence and control the matter to which the risk relates, or probably more accurately, you only fail to comply with the duty to the extent that you failed to exercise your ability to influence and control the matter to which the risks relate, so what I'm trying to say is, it's still your duty.

WILLIAMS J:

Yes, no doubt about that. It'd have to be your duty, or you couldn't have committed an offence.

MR BUTLER KC:

Yes, yes.

WILLIAMS J:

But there's nothing wrong with the duty being shared jointly without having to worry about unincorporated bodies, otherwise the approach you're taking really requires a judge to be satisfied, or a jury to be satisfied, that each trustee is unto themselves a PCBU –

MR BUTLER KC:

Yes.

WILLIAMS J:

That is impossible to prove with respect to a trustee singularly because they have to act collectively.

MR BUTLER KC:

No. They do act collectively and in certain, this again about the point about –

WILLIAMS J:

They can't act any other way. No single trustee can make the necessary decision to stop the gate doing what it was doing. It has to be a decision of all three.

MR BUTLER KC:

And the way in which you see that duty of each of the individual trustees being exercised is looking at the decision that they make in respect of, for example, the gate, if the gate arises, unlikely that that specific issue might arise, but that there might be a health and safety plan. So –

WILLIAMS J:

Well, there'll be expenditure to make sure that the gate is safe.

MR BUTLER KC:

Exactly.

WILLIAMS J:

And they'll have to agree the expenditure.

MR BUTLER KC:

Yes.

WILLIAMS J:

But that's something they'd have to agree together.

MR BUTLER KC:

Yes.

WILLIAMS J:

Unless the deed says otherwise or if it's in the Māori Land Court, the order says otherwise, they cannot make those decisions individually, which means section 33 is triggered every time.

KÓS J:

I think we're looking at the wrong provision. I think it's section 17. They are "persons conducting a business or undertaking".

MR BUTLER KC:

Yes, that's right.

KÓS J:

Meaning "a person conducting a business or undertaking – (i) whether the person conducts a business or undertaking, alone or with others …"

MR BUTLER KC:

Yes, that's right, and so to me that –

KÓS J:

So Justice Williams' theory must be available on section 17.

WILLIAMS J:

I don't understand why you have a problem with this, frankly.

WINKELMANN CJ:

This is right back to the beginning, Mr Butler.

WILLIAMS J:

Because it doesn't do a violence to notions of trust.

MR BUTLER KC:

But so how does it then cash out in terms of the way in which liability is imposed as against the individual.

WINKELMANN CJ:

You see, that's why I brought up the High Court Rules, but because the High Court Rules allow you to sue trustees on behalf of the estate and this is like prosecuting the trustees on behalf of the estate.

MR BUTLER KC:

But the way in which the liabilities are actually imposed on those individuals you've actually named, that's for identification purposes in order to initiate a process in the court. That is different from actually how the liabilities are then imposed on those people that you've identified as defendants. That's the difference in nature in kind. So that rule just simply tells you how you identify them on your front page. It doesn't tell you anything about how the law then decides to make liable and enable the execution of a judgment against a person who is in the office of trustee.

WINKELMANN CJ:

Well, does it not, I mean –

MR BUTLER KC:

No, it doesn't.

WINKELMANN CJ:

Well, we might be going down a side road there.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

But it does say, on behalf of the estate.

MR BUTLER KC:

Yes, I feel very comfortable.

WINKELMANN CJ:

Right.

MR BUTLER KC:

On very solid ground that it does not.

WINKELMANN CJ:

Well, I'm sure you do. We can give us our –

MR BUTLER KC:

The liabilities of a trustee or an executor are fixed in accordance with the common law. It doesn't matter what the High Court, with great respect to the –

WINKELMANN CJ:

No. This is suing to access the trust's assets. That's why you – how do you do that and that's what the High Court Rules are telling you.

MR BUTLER KC:

No not. No, it doesn't, because you can choose, for example, depending on the nature of the cause of action you've got and who is parties to it, you may choose to decide, you may decide only to name one of the trustees as a defendant in terms of – when you're looking to execute, because you may be happy to go after one of them and their particular indemnity, indemnity right. Anyway, that will now get us down some rabbit holes that we don't need to go down.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

My point simply is, is the High Court Rules does not tell you anything about how the liability of those people you identify through the curious wording of High Court Rule, four point whatever it is, how their liability is then assessed and how you execute a judgment against anyone or all of those people who you've identified that's – so I wanted to come to the one or two quick points of reply.

WINKELMANN CJ:

Well we’re just making use of your knowledge, Mr Butler.

MR BUTLER KC:

Yes. No, thank you and again, I'm emphasising, it’s all of us here are doing, our job is to try and assist the Court with this matter that, I am pleased to see my friend nod, that cries out for some clarity. That’s what we’re, that’s the goal here that everybody is trying to pursue.

My friend Ms Bagchi made reference to, there was a question, I think, that came from her Honour the Chief Justice about access to the indemnity and WorkSafe, whether it does or doesn’t want that to happen and then she gave an example of what might justify going after a trustee individually as a PCBU.

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So I don’t know whether you remember there was an exchange about the circumstances that might justify going after it, because she said, oh, because maybe there’s an individual power reserved in the trust deed exercisable only by the particular person.

Of course, I don’t know what that magic power is in the trust deed. I can’t eliminate that somebody might devise such a thing, but of course, in that case you would be going after the person not because they’re a trustee as such, but because they’ve been given the specific power or particular power to control or influence whatever the conduct of the business, and in that named capacity, so that’s the answer to that, they wouldn’t even be going after them as qua trustee, you’d be going after them because through some other means, they are able to exercise the relevant control or influence.

WINKELMANN CJ:

Well, what say the trust deed said, so it’s a modern trust, you know, it’s some sort of a business trust and it says, and the trustees, there are all of these trustees, these trustees are responsible for the investment of the funds, and these trustees are responsible for the management of the business?

MR BUTLER KC:

Ah, yes. Great example. That is a good example, in which case, in that situation, then you would be looking at the trust deed, in that case, and you're saying, well, the fact that we hold the assets and have very delimited roles means that in fact we, those trustees who don't, who have a very specific role that touches not at all on health and safety, we don't carry the responsibility or the liability in terms of the way in which the definition works, and then how the duties, most importantly, how the duties are operationalised. Again, we don't see there being any difficulty with that, it just allows you to work with the weave and the weft, or the weft and the weave, I can't remember –

WINKELMANN CJ:

Whatever.

MR BUTLER KC:

Whichever, whichever.

CAMPBELL J:

So, you mean that in that example, the trustees with the power to manage the business would be, on your theory, if there were three of them, they'd each be PCBUs but the two other trustees who just had investment powers would not be, and the contest would be between –

MR BUTLER KC:

Because they might not be conducting the business. The proposition that was put to me is that the functions were identified in such a way that they were not conducting the relevant business or they're not conducting the farm, they're just, I don't know. They make decisions about which shares you invest in, so that might be again, I'm not going to eliminate any – I can't eliminate any particular possibility. We just take them as they come.

So, I think I've addressed, by the by, the question of, I think your Honour the Chief Justice had picked me up for perhaps running with the hares and hunting with the hounds, and I think the same was –

WINKELMANN CJ:
It's hares, not foxes, yes.

MR BUTLER KC:
Yes, with my friend in terms of either, I think we all ought to agree here that if the idea is you've got to assimilate, and I do use that word, assimilate trusts to bodies of persons unincorporate, then the way in which the statute applies to the trusts must mirror that of the other forms, such as the companies, the partnerships, et cetera. We can't have a scenario where you can just say, oh yeah, we can go after an individual trustee, you can't go after an individual director.

WINKELMANN CJ:
Unless it's as officers.

MR BUTLER KC:
Exactly. No dispute about that, and as I said, but again, on our theory of the case, I've said it, my friend talked about, well, you know, the Act, as I must now call it, the Act, you know, was a change –

WINKELMANN CJ:
Well, you weren't calling it that other thing and actually I accused Mr Finn of running with the –

MR BUTLER KC:
I started that one, I'm afraid, because that's what I was told it's referred to by those in the know.

WINKELMANN CJ:
Did you? Shocking.

MR BUTLER KC:
So, let's just call it the Act. So, the important thing is to recall what it is about the Act that made it different and new, and the concern was that in the old days

corporate form would enable the officers, those with the directing minds to hide behind, the corporate form in order to be shielded from liability. If you start from that proposition, then you see that the innovation that my friend refers to as the officer, of course it's an innovation because it brings within the reach of the health and safety regulation people who were previously out with it. But on my thesis, at least in the case of trustees, trustees were always within it. So that if you're thinking in other words around, well, we need – he says, oh, well, if you don't, if you adopt the approach advanced by the appellants, then somehow you're acting inconsistently with the officer concept. No, you're not.

The primary duty of care that attaches to a PCBU is one which attaches to a trustee. That is that higher duty that you must meet. There's no need for a subsidiary support of an officer duty because you're already – you are subject to the higher duty. The officer duty is there for those forms of structure, companies, partnerships, et cetera which the law had allowed those within them to use as a shield against criminal liability. That's really, in my view, quite an important point. It depends on where your starting point is and how you look at the nature of the reforms. These are small points here, so I'm just trying to focus on the high points, your Honours.

So there was reference made by my friend, section 34, the coordination duty. Of course, the coordination duty in section 34 is an additional duty. It's not a substitutive duty. It doesn't in other words displace a duty that a PCBU would have in its own right under section 36. It's an additional duty which arise where more than one PCBU has the same duty in respect of the same matter. So it's additive not substitutionary. So there's nothing in other words in that duty which should be seen to be a matter of concern.

Reference to *Cometa*, my friend made reference to *Cometa*. Of course, *Cometa* is a body of persons case, it's not a trust case. I have accepted, as I must, that the statute intends to capture as a person, bodies of persons, whether corporate or unincorporate. That's not an issue. It's plain on the words of the statute. The question for this Court is, are trustees a body of persons unincorporated? That's the question. The fact that *Cometa* applied the concept that it's within the statute on the facts of its case whether it be right or wrong, I'm not going to opine as to whether it's right or wrong, it's a decision but it was a decision that was taken very much on the basis that the way in or that phenomenon in front of it, or it was a body of persons unincorporated. Can you say the same in terms of a trust? The answer we say is, for the reasons already given –

WINKELMANN CJ:

Why does your argument necessitate that you must assess the liability of a PCBU, the trustees individually as PCBUs when they're working together? Because that's the question that Justice France really asked Mr Finn about the difficulty of really assessing them as individual PCBUs when the evidence will actually relate to their collective activity. Why does your theory require them to be individual PCBUs?

MR BUTLER KC:

Well again, I have to be careful, we all have to be careful when we use the word "individual", because of course, individual, the word "individual" has got a significance within the statute.

WINKELMANN CJ:

Okay, separate.

MR BUTLER KC:

Meaning human being whether they – so it's separately.

WINKELMANN CJ:

Each trustee is a PCBU.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

That's something I really struggle with when you've got a requirement of unanimity, because the thing I really struggle with in your argument is that there is a requirement of unanimity so they're really acting collectively and should be as – and their performance should be assessed collectively and the notion of them slicing and dicing and saying, oh, well I did this and the other person did that, seems to be inconsistent with the fundamental structure.

MR BUTLER KC:

And all I, my response is that the nature of trustee liability is it is individual. You – yes, I can't –

WINKELMANN CJ:

Yes. Okay, so –

MR BUTLER KC:

I've made my submission. I don't know that I can take it any further.

WINKELMANN CJ:

Okay, that's fine.

MR BUTLER KC:

One last point which is where my friend began with going through the, what he referred to as the fundamentals and he began unsurprisingly on his case with the fundamentals of the statute and he talked about the broad language of the statute and said, well that gets you to the conclusion that he prefers. He says that the definition in section 17 of a "PCBU" is deliberately broad. We don't dispute that it's broad in the sense that it says that it's a person conducting a business or undertaking, but that's not the answer.

WINKELMANN CJ:

But you say that if it was going to include it, intended it to extend to trusts, it would've said so.

MR BUTLER KC:

Exactly and actually the key concept to be focused on here is the notion of "person" and how that notion of "person" maps onto trusteeship, bearing in mind what he wasn't able to say. He wasn't able to say, was how will you be able to – how will we be able to confine the reach of the concept of "person" to trustees in this case but not in other cases. Because remember, he relies on the fact that it's just a broad definition and that the broad definition is it just uses the very word "person" that needs to be defined by reference to a generic definition of "person".

CAMPBELL J:

Do you mean, in this case or in this Act?

MR BUTLER KC:

I mean in this case potentially, this Act for sure, and on the statute book, absolutely.

WINKELMANN CJ:

That's your across the statute book argument.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

And common law?

MR BUTLER KC:

Yes, exactly and you know, we do talk, when we talk about, and we do, I say, when we do this work that we do in a court like this or those who are advising, you look at the whole tapestry of the law so that the pulling one thread can have impacts elsewhere, we know that. That's not necessarily a reason, I accept, it's not necessarily a reason not to tug at the thread, I accept that, obviously. I'm sure I've encouraged your Honours to tug at the odd thread when I've appeared in front of you before, but equally, sometimes the tapestry needs to not have the threads pulled because the look of that part of the tapestry it just needs to be consistent, pleasing to the eye, because it is consistent across the cloth. This is one of those cases, your Honours. Thank you.

WINKELMANN CJ:

Thank you very much, Mr Butler. Well, thank you counsel for your excellent submissions. We’re only sorry we didn’t get to hear from those who were originally scheduled, and we take full responsibility for that, the schedule to make submissions, and we will reserve our decision.

COURT ADJOURNS: 3.53 PM