

IN THE SUPREME COURT OF NEW ZEALAND

SC 40/2007

BETWEEN GEORGINA KAIN, GEORGE HARRY
 COUPER KAIN, GEORGE CHARLES
 KAIN, GEORGE THOMAS CARLTON
 KAIN AND GEORGE MICHAEL KAIN
 First Appellants

AND GEORGE THOMAS CARLTON KAIN
 Second Appellant

AND JONATHON RHODES HUTTON
 First Respondent

AND WILLIAM ALEXANDER XAVIER
 COUPER
 Second Respondent

AND ANNETTE ELIZABETH COUPER
 Third Respondent

AND WAYNE KEITH STARTUP
 Fourth Respondent

AND GEORGE THOMAS KAIN
 Fifth Respondent

AND MARY HUTTON
 Sixth Respondent

Coram: Tipping J, McGrath J, Anderson J.

Counsel: J S Kós QC and J V Ormsby for First Appellants
 M R Camp QC for Second Respondent
 R A Osbourne for Third Respondent

Date of Hearing: 19 November 2007

APPLICATION FOR LEAVE TO APPEAL

10.03am

Kós May it please the Court, I appear with Mr Ormsby for the first appellants.

Tipping J Yes thank you Mr Kós, Mr Ormsby.

Camp Yes if Your Honours please I appear for Mr Couper.

Tipping J Thank you Mr Camp.

Osbourne If Your Honours please I appear for Mrs Couper but you will have seen that I'm essentially sitting in with Mr Camp's submissions.

Tipping J Yes thank you Mr Osbourne. Mr Kós.

Kós Yes if Your Honour please conscious as I am that with very limited timeframes in place and sometimes

Tipping J It is capable of being extended Mr Kós.

Kós I wouldn't presume so. What I'm presuming instead is that you might like to see what I would say orally in a slightly written form so I have prepared an outline of my submissions which I hope I will be able to traverse and I managed to reduce it to four pages, although the Court will immediately apprehend that that doesn't comply with the Court's normal requirements as to size and spacing but it is four. And what I've attached Your Honours is a small bundle which again I wasn't entirely clear what the Court might have in terms of the material from below and principally what's attached in the bundle is some of the pleadings that was below, and also Mr Graham's expert report. He was the Court appointed expert – he's at page 39, and the cross-examination that ensued from that. That's really all I think I want to take you to in the bundle today.

Tipping J Right, thank you.

Kós My submissions are in three parts. The first concerns the question of whether there is knowing receipt or a Trustee de son tort relationship here, and my submission is that if one looks at the evidence, and in particular if one looks at the evidence in relation to the Lybster transaction one sees that there was indeed a knowing receipt of trust assets by Mr Couper in relation to the acquisition of that farm for which he maintained from the outset an ultimately personal entitlement. And if one looks at my outline at 1(c), that's the first branch of the purchase, the 70% of it, which was funded by a BNZ loan, but that was secured against the Waitaha Trusts property not against the Lybster Farm itself. Lybster paid interest but the loan was denominated in US dollars and the Waitaha subsidiary that had undertaken the lending, or the borrowing I should say, incurred a foreign exchange loss of some \$340,000 before the loan was restructured. Now that loss wasn't borne by Lybster; wasn't borne by

Mr Couper ultimately as the owner of Lybster, but was borne by the Waitaha Trust which is the borrower, and that's never been reimbursed. The second element I note (e), 25% contribution, was funded in advance from the Waitaha Trust sourced from other Trusts, and again I note two points here. First that principal has never been repaid, so Mr Couper has the Greenlees farm paid for to the extent of 25% by the Waitaha Trust and for which he's made no recompense

McGrath J But the effect of the judgments thus far is that principal and interest will be accounted for is it not?

Kós Well that's a very interesting question. There are no orders against Mr Couper personally and there are orders in relation to the undertaking of a winding up of the inter-trust accounts, but Lybster and Bideford are not Trust property, and that's a very significant difficulty in my submission that the intended response in this case face because there can be no re-accounting as between non-parties.

McGrath J The way I've read the judgments of Justice Panckhurst and the Court of Appeal, their intention certainly was that there would be an accounting for principal and interest certainly not on the normal basis of an accounting for the profits or the advantages gained

Kós Yes

McGrath J But is not the case, is that not what the Court of Appeal was endeavouring to do?

Kós I'm not sure what the Court of Appeal was intending to do Sir but it certainly was what Justice Panckhurst was endeavouring to do. There are two difficulties. The first is that Lybster and Bideford as I say are not parties

McGrath J Yes I understand your point but I'm just wondering whether that isn't in the nature of sort of a further consequential matter that shouldn't be dealt with in the lower Courts if there was some incidental orders needed to give effect to what their intention was.

Kós Well that's certainly a possibility but not currently contemplated. The second difficulty then is these adjustments, there's accounting for principal interest in my submission doesn't approach what is an appropriate remedy

McGrath J I certainly understand what you're endeavouring to bring to our Courts Mr Kós. I can understand that it's no doubt a matter of very substantial financial significance.

Kós Well if one looks – can I make two points about that? The first is if one looks at the amount involved. The Foreign Exchange losses of \$343,000 were incurred at the end of 1998 and so when one takes into

account simple interest, there's a very substantial amount due there. There's no provision or discussion in the Courts' judgments below as to how that might be recompensed, and then there's also the question of the, which I noted, (g), 1(g), the Lybster Farm, at least the Greenlees Farm owned by Lybster, was leased to the Waitaha Trust at rentals of about \$100,000 per annum in excess of their fair market value. The Court of Appeal made an interesting observation in para.159 of its judgment. It said that that might have been appropriate because as Lybster was undertaking, or at least as Waitaha, the lessee, was undertaking the farming it should incur the costs of borrowing, but one would have thought on a matter of ordinary practice a fair market rent would be sufficient to cover the costs of borrowing, and this seems to involve a super profit element. We see the super profit noted in (h). Because the outcome was that because there was such an excessive rent over outgoings, Lybster was able to pay Mr Couper a dividend in 2000 of \$375,000. Just the first point

Tipping J Just before you move on Mr Kós if you don't mind, this allegation of Trustee de son tort, when did this first emerge from the thicket that this litigation represents?

Kós Well Your Honour's quite right to say it's a thicket, and indeed I think it can be fairly for the parties whom I represent that the pleadings are a mess, and I acknowledge that, and that in fairness to them was not entirely their fault because the factual circumstances of this issue, in particular the question of how these assets had been funded, emerged only with Mr Graham's report, second report, received on the seventh day of trial after Mr Couper had given his evidence. So the expression of the issue as a Trustee de son tort was advanced in the Court of Appeal.

Tipping J Advanced by your clients was it?

Kós Yes, yes that was how it was characterised. What had been alleged prior to that in the High Court was that there had been a breach of trust by the trustees of the Trust that had funded these assets, and my submission is that's right because what you have here is the act of funding effectively, the personal interest of a stranger to the Trust, Mr Couper, was the set law of the trust. He had appointment powers under the Trust but he wasn't a beneficiary. The trustees through his direction and I've indicated how that is in para.3 of the outline, the Trustees through his direction had funded the acquisition of these assets and at the end when this became clear in the course of the trial on the seventh day when Mr Graham's judgment was delivered, that was then followed by a recasting of the remedy sought by the plaintiffs as a claim for a constructive Trust superimposed. Justice Panckhurst declined that because he said that hadn't ever adequately been pleaded, and in a sense that's fair because what the parties I represent are not seeking is to challenge the beneficial ownership of the farms, what they are saying, and this picking up the second point I

was about to make to Justice McGrath before, what they're saying is there should be a proper accounting for the gains that have been made by Mr Couper through his ownership of these properties, through the funding and other resources applied by the Trusts over and above what is an inadequate and partial only form of accounting, because the fact that Justice Panckhurst has ordered that there the unwind occur and that there be an adjustment between Trust is in itself a form of accounting.

Tipping J So your clients want more than just repayment of principal and ordinary interest?

Kós Yes.

Tipping J That's the effect of it is it?

Kós It is and we say Sir and that's the point we come to at the end when we come to the question of whether there is an issue of general importance here and it's something I need to address clearly is that if the Court of Appeal is right, then if a stranger to the Trust who has in effect directory powers because that was the nature of the position Mr Couper found himself. The Trustee who organised these affairs was Mr Springford. Mr Springford was Mr Couper's personal accountant. Mr Springford acted we submit on the evidence of the direction of Mr Couper. Mr Couper bought the farm; Mr Couper organised the funding for the farms; Mr Couper organised that the security be provided by the Trusts. All of this Mr Springford was compliant with. Now what we say Sir is that

McGrath J Was he the one who told him which legal entity was to buy them or to be formed to buy them?

Kós So I would submit Sir, but I can't take you to – the reference is in the

McGrath J No but this sort of structure does carry a lot of connotations of avoiding estate duties and matters of that kind doesn't it?

Kós Yes, although peculiarly that's right, although in 1989, so some years after the Lybster farm was purchased, something called the Couper Farming Partnership was established and that ran all the Trusts together and that's really what the inter-entity accounting or adjustments will deal with, but that particular body was established in order to avoid GST issues because there were inter-entity transactions where GST would otherwise have been payable. Now at the end of the day it seems a very unfortunate muddle has emerged in part to avoid what's a really fairly minor taxation incident from GST.

McGrath J I think we certainly understand the principles that you're saying we should consider that would deal with the accounting on a different basis that it was dealt with, particularly by Justice Panckhurst, and as I

understand it upheld by the Court of Appeal. The real issue that I'm a little confused on is how this case was pleaded. Now I hear what you say about Mr Graham, but there were differences between the pleadings in relation to these matters and I'm glad that you've got the pleadings in the document. The submissions haven't really thrown up for us the detail I think we really need. It can on occasions of course just be unfair to allow at this level a matter to be fully argued when it was dealt with differently in the lower Courts because it would be unfair given the way the case was run in light of those pleadings

Kós Yes.

McGrath J And that's a concern I have in relation to whether we should grant leave on this ground.

Kós Can I address that point directly? If we look at the bundle Sir and the numbers at the top of the page are from the case on appeal and that the bottom right-hand side which I will use the bundle numbers, if we turn to page 15 of the bundle, bottom right-hand corner.

McGrath J Just hold on a minute, I just want to check another note. Sorry if I just get my own note in front of my I might be able to follow you.

Tipping J Is this your drawing our attention to the second cause of action are you Mr Kós?

Kós No, no not at all Sir, in fact I'm drawing your attention to the prayer.

Tipping J Prayer, sorry, right.

Kós That precedes that and to (e) and (f) in particular.

McGrath J So right down at page 15 and which paragraph are we looking at?

Kós The prayer Sir – (e) and (f). The prayer in the first cause of action.

Tipping J And the first cause of action was removal/appointment of the trustees?

Kós Yes that's right, and what was sought as part of that was as you see at (e) an inquiry into damages suffered by the Trust and the plaintiffs consequent on the above. Now I'm the first to acknowledge the conventional and proper distinction between damages and an account, and it's clear that what has not been sought there is an account. But this is an equitable jurisdiction and what has been sought is an inquiry to damages suffered by the Trusts

Anderson J That they're diametrically opposed.

Kós Yes they are.

Anderson J Damages is to cover loss suffered and account is to render profits wrongfully gathered.

Kós Yes I accept that. I acknowledge the distinction, but in the position that's been taken historically and conventionally by the Courts has also been that particularly where facts emerge during the course of trial, the plaintiff can elect between the remedy it seeks for damages or an account of profits at the conclusion, and what was sought here as we know was a restitutionary remedy in closing because what the plaintiff sought in closing was the imposition of a constructive Trust. Now Justice Panckhurst said no you can't have that because you certainly haven't pleaded that

Anderson J Well that's a different idea again.

Kós I accept that but I'm not going to defend the course it was taken below, but I maintain again it's an equitable jurisdiction. A restitutionary remedy had been sought; there was no unfairness to the plaintiffs, sorry, to the defendants, in dealing with this remedially in a different way. All the evidence required had been traversed

Tipping J Sorry Mr Kós, sorry to interrupt you.

Kós Not at all.

Tipping J When you say a restitutionary remedy had been sought, is that a reference to the constructive Trust?

Kós Yes.

Tipping J But that's a proprietary remedy.

Kós Correct, and that was inappropriate because what was not sought here ultimately was to disturb the beneficial ownership of the farms. It was accepted that they were the property of Mr Couper. The question then really was how should that argument for constructive trust be construed, and the submission I'm making is the proper course given the range of appropriate remedies to the Judge setting an equity extended to saying no you can't have a constructive trust, but it is appropriate in this case to order relief short of that and that relief would include an account. In a sense in this case that's what the Court's done.

Anderson J But what would be accounted for?

Kós The following things. If we list the items that Mr Couper or his proxy the Lybster Farming Company have gained, they are these. First the Foreign Exchange losses that were incurred on his behalf by the Waitaha Trust. Secondly the excess payments of rental under the unwritten leases – they're called leases but they're not written down,

they're informed. Thirdly, the 25% equitable contribution which is noted at para.1(e) of the outline, which has never been reimbursed. Fourthly there is interest, also noted at (e), that it was never paid in respect of that advance. I think those are the principal items. Have I missed anything?

Tipping J And is it broadly speaking encompassed in page 25, sorry 11 of the bundle, 67(b)3, improving his own financial position at the expense of the Trust?

Kós Yes it is and there was never any question in this case that that improvement was an issue. If we look for instance on a few pages to page 30 of the bundle, this was the list of complaints, and if the Court wouldn't mind just flicking on a little bit further to page 37 which is a minute of Justice Panckhurst in December 2003, at 1(b) His Honour noted that the outline of issues described as the initial documents were reviewed as a normal pleading. So the complaint formed part of the effectively the plaintiff's pleadings and if we go back to page 30 at para.19, the complaint notes that Mr Couper's asserted that beneficial ownership and so that was clear before the trial. What was how the acquisition had been funded. That became clear from Mr Graham's report in the middle of the trial and it goes on to say if that had been correct then Mr and Mrs Couper have made profits at the expense of the Trust as articulated in paras.9 and 10 in the statement of particulars, and you don't have that document in front of you but it's quite clear Your Honour that the question of in terms of the pleading you just took me to a moment ago, improvement of his position, page 11(b)(3), proven his own financial position the expense of the Trust was clearly in front of the parties at trial. So the issue really here is not whether that was an issue but what remedy should be applied to it and what my complaint is that what has been provided here is a partial form of accounting, not the appropriate form of accounting that would be, and this is where I raise the issue of general importance, where there is a series of Trusts; where you have a stranger to the Trust who is in a position of significant influence over that Trust, over the trustees. As a result of that you get the extraordinary series of gain. I mean one cannot describe the payment of rental under the informal leases at four times the fair market value as being anything other than extraordinary, so with that position of influence able to achieve those extraordinary gains at the expense of the Trusts, simply having a form of inter-entity accounting for commercial rates of interest and perhaps but not clearly further accounting, although Mr Couper is not party of such an order, and Lybster and Bideford themselves are not party to the proceeding at all, in my submission simply was an inadequate response.

Tipping J So you say that in equity the reach can go as far as Mr Couper personally in spite of all these shall I say to try and be neutral, awkwardness' of pleading and conceptual thinking?

Kós Yes, yes I do, and I accept they're awkward, but I say that there was no unfairness to the defendants from this position because the fact that these complaints were before the Court was without doubt the case and the only question was what remedy should be granted.

Tipping J Yes.

Kós But the plaintiffs' overreached when they sought a constructed Trust but it doesn't mean that the choice was then simply between the constructed Trust that they elected for but had no real justification for and on the other hand the form of tepid accounting or account that the Court concluded should be given. Having embarked on a form of account, the Court should have granted a proper account.

Tipping J So it's the extent of the account that lies at the heart of this third intended ground of appeal?

Kós Yes.

Tipping J So you would formulate the ground as whether the Court of Appeal erred in not ordering a more extensive form of account or something like that?

Kós Yes, yes, I've said it erred in not ordering an account because in my submission what's been ordered is less than

Tipping J An account.

Kós An account.

Tipping J Yes.

Kós It's an adjustment and that's all that's been described. It's an adjustment between only some parties, not the key parties here.

Tipping J Well an account of profits isn't in terms directed at restoration of principal or interest is it?

Kós No. It goes behind that.

Tipping J I don't want there to be yet another mismatch.

Kós Yes and that's not necessarily an issue of course for this Court. That would be an issue ultimately for the Court that was determining the form of the inquiry, because what was sought was an inquiry. Clearly there needs to be an inquiry because all the facts are not fully known.

Tipping J Are you going to ask that the matter be remitted to the High Court?

Kós Yes, yes.

Tipping J To have an inquiry or

Kós Yes, with the principles having being established at this level.

Anderson J That's been the problem with the case right from the start. It started out as an attempt to remove Trustees and then sort of evolved without any structure.

Kós Yes.

Anderson J And if it had been analysed before litigation, the litigation would have high-lighted where the issues were.

Kós Well yes and no. That's right conceptually and that would have been desirable but again remembering the difficulty in terms of the factual underpinning of this case

Anderson J There would have had to be some way to find the facts.

Kós Well clearly Sir the parties launched themselves into litigation without having for instance the benefit of Mr Graham's report, and Mr Graham's report with all that it has and you've got it in the bundle, it's very easily absorbed. It makes it quite clear how the funding, particularly the Lybster entity, was achieved. If that had been in front of the parties it would have been pleaded very differently.

Anderson J Well it was a task for accountants before lawyers really wasn't it?

Kós Yes.

McGrath J Mr Kós we don't have before us the amended statement of claim 21 May 2002 do we?

Kós Sorry the first sorry?

McGrath J Yes, well the amended statement of claim May 2002.

Kós No, but I think I can put my

McGrath J The point I wanted to make and if you've got it you may want to refresh your memory about it, but I appreciate you haven't been in this case for all the stages, but the amended statement of claim of 21 May 2002 in complaint no.8 in particular and perhaps complaint no.9, did seem to get a lot closer to pleading a cause of action in the terms that you're now inviting us to take up. Now the point of course I'm wanting to explore with you is that there does seem to be something of a backing off of the particularity in the 2002 document, in the March 2004 document.

Kós I'm sorry Sir could you just

McGrath J But I don't actually have it in front of me

Kós No no, I see it now

McGrath J If you're looking at complaint no.8.

Kós That's right, which is at page 112 of volume 1 of the case on appeal.

McGrath J It's 112 (1) that's actually handy thank you.

Kós Yes, and Your Honour's point is fair. Although there the focus was on the dividend that was paid which is noted in my outline at para.1(h).

McGrath J Sorry, refer you para.1(h)?

Kós That's right.

McGrath J But I'm really more concerned not with what it is but the nature of the pleading at that stage. Is that what you're acknowledging as fair?

Kós I'm acknowledging that's fair. The point I just made to Your Honour is that complaint 8 is very much focused on the dividend element, which is only one of the, and in fact I don't think that there's anything necessarily improper about the dividend.

McGrath J Well I don't want to get too distracted on the dividend. What I want to focus on is the fact that the matter was pleaded in a certain way at least as to one items earlier and there does seem to be something of a back off. It now comes as almost a subsidiary matter in a pleading that's focused on removal of the Trustees.

Kós Well, yes Your Honour's point is fair and I can't argue against the form of pleadings, except that I do note that para.151 of the amended statement of claim the pleading was made that the properties therefore constituted Trust assets, so it was directed then at seeking a form of relief which appears to be at least in the nature of the constructive Trust or payments to be

McGrath J Absolutely. It's the comparison though I'm inviting you to comment on not the worth of the first pleading.

Kós No, and I accept that Your Honour's point is a fair one because it is clear, it was better articulated

McGrath J Well whether my point is fair enough isn't actually a particular concern to me, what's of more concern to me is whether it would be unfair to allow you to bring up the concepts in the Supreme Court that

were apparently put forward and then backed off from in the High Court.

Kós Well the concepts of course were brought on the Court of Appeal as well, but subject to that point in my submission it is not unfair however in as much as what was clearly put in issue was, and we see that through the subsequent complaint document and the statement of claim, that profiting at the expense of the Trust, what was sought at the end of the plaintiff's was the appointment of a constructive Trust. I've accepted, as I did in the Court of Appeal, that that was an inappropriate course of action because at the end of the day what was not sought at trial was a removal of the beneficial ownership. What was sought instead was that there be a proper form of recompense to the Trust. It was put in terms squarely in the final form of the statement of claim, the second of the statement of claim, in the paragraph we've seen at page – it's prayer (e) was an inquiry into damages suffered by the Trusts.

McGrath J Just what page are we at now?

Kós 15 of the bundle.

McGrath J 15?

Kós 15.

McGrath J You're back to 15, thank you, yes.

Kós An inquiry into damages suffered by the Trusts.

McGrath J Yes.

Kós I've accepted that it's not of course in its terms of accounting, but an accounting remedy nonetheless was granted. The submission I've made is that the form of account granted simply was insufficient given the nature of the breaches of trust, the inter-meddling and the fact that Mr Couper in effect became a de facto Trustee as Lord Millet put it, therefore as Trustee de son tort.

McGrath J Well the key concern for me is unfairness and you're saying there's no unfairness, and I think that's fine for you to say that. I'm expecting Mr Camp to raise the question of unfairness if he thinks there is any and if there is no unfairness well that

Kós I'm sure he will. All I can say Sir is that it is clear that the issue of benefit, personal benefit, was clearly raised; the remedy sought expressly was in the form of an inquiry into damages; the remedy granted was a form of account, and Mr Camp's submission in the Court of Appeal in relation to the adjustments order was that that was a perfectly proper remedy. His own words 'proper remedy'. So the

adjustment was seen to be proper, and all I'm submitting is the adjustment to the extent it was a countless proper, what was improper was the extent of the account.

McGrath J What would be the reason for backing off? I mean you could understand perhaps in the early stages and with some confusion not quite hitting the right remedy, but what would possibly be the reason for hitting the right remedy and then backing off in the

Kós I can't image

McGrath J You weren't there and that's your answer.

Kós Well that's not a good answer though, but I can't speak as to what that would have been. Clearly it would have been preferable if they hadn't but I say that no prejudice has risen from the fact that they have.

Tipping J So in the simplest possible terms the cause of action without trying to be jurisprudential is benefiting personally at the expense of the Trust and the remedy is an account of which only a sort of half-baked account has been so far ordered.

Kós I couldn't agree on that Sir.

Tipping J It all sounds very simple and clear Mr Kós with your good assistance but the whole thing is just, and it was you I think said, it's an appalling mess and can justice been done with no real findings of fact as to precise causes of action; no findings of fact exactly focused on the sort of remedial and cause of action type articulation that we've now uncovered. That's what's worrying me. My heart is with your clients but my head is against them.

Kós Well can I make two points? The first is knowing the terror of the transcript that emerges sometimes in these matters. I don't know if there are transcripts in leave applications, I hope there isn't.

Tipping J No we normally take one.

Kós Well the comment I was nearly going to make was I did say Sir that things were a mess. I don't think I said that were an appalling mess, but you're entitled to form your own view of that.

McGrath J It was in a different context Mr Kós.

Tipping J Well I will say without ascribing it to you the pleadings are an appalling mess.

Kós Yes, and playing the game Your Honour I would disagree with you on that particular point but can I answer more substantially the second point which is whether there is unfairness in terms of findings of fact?

What's important here is that there were two issues. Did Mr Couper beneficially own these properties? That initially was unclear, but he asserted that he did and that was accepted. It was accepted he did beneficially own them and so that ceased to be a matter in issue. The second question was how had he gained them? To what extent had there been assistance from the Trusts? The evidence on that only became clear when Mr Graham's second reports were received, and that's very very clear then as to what occurred. That evidence as we see in the bundle at page. Oh sadly we don't see it because we're missing one page in the bundle, but Mr Graham's evidence was led by Mr Wilson for the plaintiffs. Mr Graham was the Court appointed expert and if we look at the bundle then at page 64 we see then the extent of cross-examination of Mr Graham in relation to his report.

McGrath J Can you possibly put a date on this?

Kós The date of the?

McGrath J The date that presumably Mr Graham's report comes out.

Kós Mr Graham's report is found at page 413 of volume 6 of the case on appeal. It appears to have been received on Tuesday the 23 March 2004 at 2 minutes past 2.

Tipping J That seems fairly precise.

McGrath J Received by those to whom it was sent?

Kós Yes, Mr Graham gave evidence in two parts. He produced an initial report which is found in the sixth volume of the case on appeal at page 72. Mr Graham then said 'well there's a whole lot of additional things I would need to do to come up with any useful conclusions about these two farms'. So Mr Graham was sent away, I'm not sure whether it was by the Judge or the parties, to go and do that work and then he produced the second report which was introduced into evidence on the date and time that I've just indicated, and on page 412 he is called by Mr Wilson for the plaintiffs and at page 438, or page 64 of the bundle we then see the cross-examination. The point I'm making in answer to Your Honour presiding's comment on observation about fairness was that Mr Graham's report was comprehensive; it was the subject of very limited cross-examination by the respondents. Essentially his findings were not challenged.

Tipping J Were they adopted by the Judge essentially?

Kós They were adopted by everyone.

Tipping J By everyone.

Kós In essence.

Tipping J So we have at least a bit of a roadmap of fact through this report?

Kós Yes, yes. The Court of Appeal criticised the plaintiffs for not recalling Mr Couper and cross-examining him in light of Mr Graham's report. I don't know what they would have had to cross-examine him about, because what was clear was that Mr Couper had the beneficial ownership of the properties first; secondly how it had been funded was made clear by Mr Graham's report, it was for the defendants to cross-examine him and they did to an extent but not on the substance of these issues, and so his findings became common ground. There was nothing further to examine.

McGrath J And there was no attempt to alter the pleadings in any formal or informal way thereafter?

Kós Only informally in the sense that in closing the plaintiff sought the imposition of a constructive Trust.

McGrath J In closing submissions in the High Court?

Kós Yes.

McGrath J So, sorry to interrupt you.

Kós May I just say, that they were perfectly entitled to do conceptually because that is one of these cases as I pointed out in para.5(c) of the outline, where it's appropriate to elect that form of remedy at the conclusion of the case when the facts have become apparent through the course of the case, and I've referred there to the *United Australia* decision of the House of Lords followed by the Court of Appeal here in *Thornton Hall*. So there was nothing unfair given that the facts had been traversed fully about their seeking to elect a constructive Trust. It's just that a constructive Trust was the wrong remedy. I'm sorry Your Honour, I cut you off.

McGrath J No, not at all Mr Kós not at all. How did he acquire them – this is the properties that he's now acknowledged to be the beneficial owner of. How did he acquire them you asked rhetorically was the sort of key next question? And you say how he acquired them is perfectly apparent from the Graham report?

Kós Yes, and if there is an issue about what Mr Graham had said about them it was for Mr Couper to cross-examine Mr Graham.

McGrath J And is cutting it to its simplest, the method of acquisition was either through or by Trust assets.

Kós Yes, absolutely. And the argument I'm sure that my friend Mr Camp will make as well, these were just commercial advances of money. And to an extent they were advances between Trusts, but first of all the Couper Farming partnership wasn't formed till 1989 and these events occurred in 1984/85. Secondly in my submission huge care has to be taken before the Courts' sanction this kind of inter-meddling as being something that can be simply met by a kind of commercial response so the commercial rates of interest are paid. Because what that simply means is that at the end of the day if someone makes themselves a Trustee de son tort and they are caught out well then all that were required is a kind of adjustment that will put them back into the same position they would have been if they'd ordered their affairs properly in the first place and borrowed the money from a bank instead of from the Trusts of which they resume responsibility.

Tipping J So it's whether a fiduciary type response is appropriate as opposed to a purely commercial one

Kós Absolutely.

Tipping J That's the key point.

Kós That's the general issue in this case.

Tipping J That's the general issue isn't it, yes?

Kós Yes, and I also say Sir, and just touching on the second point that this is one of those cases where there has been in my submission a miscarriage of justice because of the tepid or partial nature of the account ordered.

Tipping J You could call Justice Panckhurst's and the Court of Appeal's approach commercial. Your clients seek an equitable or fiduciary response to these events.

Kós Yes, that's exactly it.

Tipping J Yes.

Kós And because of the factual underpinning. I mean the case was a subject of enormous examination. It was a thoroughly argued case, if a badly pleaded one. There is in my submission, given the nature of Mr Graham's report, absolutely no unfairness in saying well there we are the facts are clear the question is simply how responsible.

Tipping J So are you inviting us to take the view that Mr Graham's report is almost like an agreed statement of facts?

Kós Effectively so, because it is only disagreed to the extent it's been cross-examined.

Tipping J Right, so it's an agreed statement of facts saved to the extent it's been put in issue?

Kós Yes, and nothing I've said to Your Honours today in my submission conflicts on the nature of the cross-examination, or is inconsistent I should say with the cross-examination limited as it was that we see in those three pages.

Tipping J Yes, well now where does that take you to Mr Kós in your outline? I'm appreciative that we've sort of distracted you from it as I understand.

Kós No, I think Sir with respect I may not be able to improve where I've got to now. I've touched only briefly on the points I've taken relation to leave but I've submitted Sir what the general issue here is and secondly what the miscarriage is and I'm simply content Sir to leave Your Honours with the written outline. I don't think there is anything I want to add to what I've put in there or what I've said this morning.

Tipping J Well if you're happy with that Mr Kós we'll obviously have a chance to study it quite carefully.

Kós Yes well thank you Sir. I appreciate you've given me three times my allotment which is not quite four times the rental paid, but it's not bad thank you.

Tipping J Very well, thank you Mr Kós. Nothing further from Mr Ormsby I take it.

Kós No Sir thank you.

Tipping J No, thank you. Mr Camp.

Camp Thank you Sir. Your Honours just to start where my learned friend's finished, Mr Graham could be seen to be in agreed statement of facts and not cross-examined on these issues only because these issues weren't alive. There's absolutely no reason for me to indulge in some cross-examination to Mr Graham on an issue of whether there should be some form of accounting for Lybster and Bideford, when no issue of accounting for Lybster and Bideford is live on the pleadings. That's why we didn't get into it.

Tipping J Well that's an issue of consequence, but what I was seeking is not so much the consequences of what is in Mr Graham's report, but the factual accuracy of the facts and other materials of a financial kind. I mean I hear what you say but it's not a complete answer.

Camp No, no, no. I'm going to turn to the pleading point in a moment because I do think that's absolutely central

Tipping J But before we go off this question of Mr Graham, do your clients accept that so far as matters of primary fact are included in the Graham report and not challenged, they could safely be acted on?

Camp In the sense that what Mr Graham is doing is analysing historic accounting then it was agreed position reached by the Trustees' expert, a Mr Hadlee, who was a forensic accountant in Christchurch, and Mr Graham, so that Mr Graham and Mr Hadlee had met before trial; Mr Hadlee had previously done his own report and that features in the Panckhurst judgment. Mr Graham is then asked by the plaintiffs to be appointed as a Court-appointed expert and he was. He then meets with Mr Hadlee; they go through the material together; they did so with Mr Springford who had been the accountant; they reached common ground as to the historic accounting material and that features in the Graham report. Now that is agreed in that sense

Tipping J Yes.

Camp But

Tipping J Yes, but the consequences are quite a different matter.

Camp Well the reason I'm being tentative in the way I express it is that what was done by Mr Springford in the 1980s and the 1990s was primarily known to Mr Springford. Now Mr Springford gave evidence at trial but wasn't asked anything about these and didn't give any evidence on what he did do. Now you will see for instance in the Court of Appeal's judgment Justice Glazebrook talking about the difficulty with cherry picking as between one Trust and other Trusts and how the position as between the Trusts changes every year because there seem to be a common approach towards what was done for funding. Now the person that could give you a satisfactory explanation as to why he did what he did and what it was that he did do is Mr Springford, and he didn't give that evidence. He didn't give that evidence; I didn't cross-examine him on it because it wasn't live as an issue.

Anderson J But it couldn't alter the factual history.

Camp It couldn't alter the accounting history as such Sir, but I would not accept for a moment that Mr Springford believed when he was a Trustee of six of the major Trusts and a responsible chartered accountant, I don't think he believed for a moment that he was acting improperly, favouring Mr Couper as against the Trust.

Anderson J It doesn't require that though does it? You can breach trust in good faith as it were I suppose.

- Camp Well Sir there are indications, for instance there's an indication in the Court of Appeal judgment. It refers back to a memorandum of Mr Springford's where he says 'we're going to get Mr Couper to carry an undue amount of the interest in relation to these matters generally because it will reduce income tax'. Now that's simply an indication. In that period of time Mr Couper through Mr Springford was transferring what is in today's money at least \$50 million worth of farms into Trusts out of the name of Mr Couper and doing so sequentially through the 70s and the 80s. During that period of time he would have been entitled to very large amounts of income at the time that he still owned the farms and after he's transferred the farms into each Trust, he would be a net creditor in respect of each Trust for giving money each year. Now I know none of the detail of that and I think it very likely that if anybody had cared to do the arithmetic, that at the time that either Lybster or Bideford was bought, Mr Cooper would personally have been good for it so to speak, but that isn't how Mr Springford seems to have run it.
- Tipping J Is this a suggestion that if we're going to have this sort of accounting counter-accounting might have been put in
- Camp Absolutely Sir and that's exactly what the Court of Appeal put its finger on, that
- Tipping J Well I don't know if they put it quite like that.
- Camp Well they did say that you can't really cherry pick in this area
- Tipping J Is that what they meant by cherry picking - sort of vacuum type, isolation type?
- Camp Well if it is the case these two entities were funded in this way, there's absolutely no reason to think that all the other ones haven't been similarly funded in that way, and why can one suddenly focus on two of the pieces of the jigsaw without straightening out the other 18 or 19 that are in there? That's what it comes down to and the person that could have answered that was Mr Springford. I don't want to harp on about it. Perhaps if I can cut to the pleadings because I do think the pleadings are important.
- McGrath J Before you go there could you just perhaps in a couple of sentences summarise why because what I hear you saying is that Springford was out there looking to fiscally save the entities as much as possible on a global basis, possible estate duty, possible GST, possible income tax, and he would have explained all of this. Now let's say that Mr Springford had turned up and had basically shown that he'd save millions to the entities through his financial planning, where's the unfairness in him not having the chance to say that, because I think it's actually fairly obvious that these Trusts are set up, I mean the whole concept of the way farms are owned in New Zealand at its heart

lies financial planning. So what's the unfairness? Mr Kós was saying no unfairness here.

Camp Well substantially so Sir because Mr Springford was called to give evidence and I never went down this road with him because it wasn't live.

McGrath J But let's just assume you'd got a complete financial picture and that a lot of money had been saved, now how would this have been relevant to whether or not there should be a Trust form of accounting as relief?

Camp Well I'm being asked to crystal ball gaze 20 years back and I can't really do that for you Sir. All I can say is that it's an absolute certainty that all the entities in the group have had the same broad brush treatment from Springford. We don't know that and we didn't get into that, and the reason that it's inappropriate to contemplate this inquiry as to damages at this stage is it wasn't being sought and had it been sought the evidence would have been radically different.

Tipping J It's not an inquiry into damages that they're seeking as I understand it Mr Camp, it's an account of profits. Even now there seems to be some uncertainty, at least in the minds of some.

Camp Well maybe it does get clear if I do go back to the pleading issues.

McGrath J Does it really come down to this, and there may be force in this Mr Camp, that Mr Springford was a competent accountant; he knew what he was doing; that there huge benefits to the group and the members of the group in relation to taxes and potential taxes and what he was doing. He was a person of integrity who would have been able had it been challenged to put up his own basis as to the proper principles on which he was giving in trust law, he was giving this advice.

Camp I expect that to be absolutely so Sir. He was the Trustee of six of the Trusts. Mr Smith, the Solicitor, was also a Trustee of several of the Trusts. Mr Couper did the farming part of the job that there's 90,000 stock units and 26,000 acres, and you don't run that sort of empire by sitting down

McGrath J You've since got back on to Mr Springford though.

Camp But he did the accounting is what I'm saying; he's running that cutter; he's the one that can explain it. It's ludicrous to suggest that Mr Couper could give a coherent explanation of what his accountant was doing on this inter-entity business that he was running.

McGrath J Well I take that and I take your crystal ball point too. I understand what you're saying there.

Camp Yes, thanks Sir. It is helpful Sir if I go back to pleadings because there was an original statement of claim. There was then the amended statement of claim Justice McGrath referred to as the May document, and something like the December before trial

Tipping J If your client claims that he's prejudiced on a pleading point why don't we have all the relevant pleadings in front of us Mr Camp?

Camp You've got

Tipping J All I have in front of me is what Mr Kós chose to put in front of me.

Camp Well I actually made the inquiry as to whether you had the second amended statement of claim and that's all I need to turn on Sir. At the moment I'm trying to fill in the gap

Tipping J Well where is it? Is it the one that Mr Kós

Camp Yes, yes it is.

Tipping J Oh right, that's alright.

Camp But what I'm doing at the moment Sir is Mr Kós has taken you to some other documents, I was there, so I can explain what did happen and that's what I was embarking on. What I was going to say

Tipping J We only need for your purposes this one that Mr Kós has got.

Camp Yes you do Sir and I'm going to use his booklet, and just his booklet, when I get to it, but I went back to this amendment statement of claim Justice McGrath referred to and what I said happened after that is in the December I think it was, with trial in the March, Mr Wilson put in that statement of issues that features in Kós's booklet, but then realised that you actually can't run a case on a list of statement of issues that aren't tied into some form of relief and some form of pleading, and as Justice Panckhurst's memorandum, which is at page 37 of that bundle says, that this is to be viewed as a normal pleading binding subject to the normal power of amendment. Now it was, that's at page 37 of Mr Kós's booklet

McGrath J And that's the 10 December and a few days before Mr Wilson's points had been served.

Camp Yes, and so the points are put in and then Mr Wilson realises that you can't actually get any relief by putting up a series of questions. You've got to have a pleading that says I want something. So what happened is on the morning of trial, and this you can see from page 1 of Mr Kós's bundle, on the morning of trial the second amended statement of claim is put in and replaces the issues. Now it is getting late in the day when a case is being

Tipping J Oh so this is a replacement of that issue.

Camp This is a replacement pleading Sir and it's the 3 March 2004 the morning trial starts. Now it has absolutely nothing in it about Lybster or Bideford. The words never appear anywhere in the pleading. As the Court has observed in the section that Mr Kós drew attention to which starts at page 11 and is para.67, 'the first cause of action is the removal appointment of Trustees', and I just remind the Court that in terms of removal of Trustees whilst Mr Couper is the Trustee of perhaps five old Trusts that were family creations, along with his brother-in-law, Mr George Kain Senior, those are the only ones that Mr Couper features in. All of the major Trusts, the Trustees are Mrs Couper and the other two, Mr Startup and Mr Hutton. So when it's asking for

McGrath J Sorry, he is a Trustee of the Kain Trust I think

Camp He is a Trustee of the Kain Trust which is created by

McGrath J But he's not a Trustee of the remaining Trusts?

Camp The Trusts that he settled, which is the big chunk, he's not a Trustee of any of those. He's an early settler.

Tipping J Are those the WAX Couper Trusts are they?

Camp Well that's one. That's a little one. It's Glendale, Hukanui, Mangaheia.

McGrath J Waitaha, Hukanui, Middle Block, Mangaheia.

Camp Yes for example, yes.

McGrath J Right thank you.

Camp So that what's being sought at para.67 is the removal of five Trustees of which Messrs Couper and Kain are very much bit players so to speak and it's an action focused on the removal of Mr Weston's three Trustees, so it sets out grounds of complaint and then it finishes with with (e) an inquiry into damages suffered by the Trusts and the plaintiffs consequent on the above and an order reserving the right to reply. Nowhere in there has there been any mention of Lybster and Bideford, nor have they been in any way singled out, and it really is drawing a long bow to suggest that that pleading in any sense focused on that. What was in fact sought by this plaintiff in closing and was then the subject of complaint by me was the constructive's Trust argument, and the reason for the complaint was it didn't appear until closing.

Tipping J What was the constructive Trusts supposed to be over? Was it a remedial constructive Trust that was sought? An institutional constructive Trust, what?

Camp Well Justice Panckhurst's judgment is puzzled by exactly that and says I don't really know and it's not clear what was being sought.

Tipping J But what assets were they seeking to impress this Trust upon?

Camp Lybster and Bideford.

Tipping J What, the shares in the companies?

Camp Yes they said these two companies belong to Trusts, and the Judge said well belong to which Trusts, and the answer is well I don't really know which Trust they belong to but they should be the subject of a constructive Trust. That was the argument and my recollection is

Tipping J By the company, you mean the shareholding?

Camp It wasn't at all clear Sir. It actually arose I reply. Mr Weston then had leave to answer it and he answered it because it was as against his Trustees that the issue was being raised, but

Tipping J But if it's against the companies presumably it would be against the shares owned by whoever it was rather than the companies assets as such, or are you unable to assist on that?

Camp I'm unable to assist because I don't think it was formulated with very much clarity and you can see that in the judgment of Justice Panckhurst. He actually says there's a pleading point against this. It hasn't been pleaded but nonetheless I'll go on and puzzle my way through it. I have said that this isn't Trust, this is just a commercial transaction. It's debtor creditor relationship in Mr Springford's books as between the entities and if there should be some interest paid well it could be paid. That's the position I took on it. But there was no pleading, now that simply never changed. Now when it went to the Court of Appeal it was accepted that a constructive Trust argument couldn't succeed, but it was then said oh but we could have a claim for some form of monetary recompense instead. Well equally that wasn't pleaded, so that the evidence

Tipping J The only thing that was pleaded was an inquiry into damages.

Camp Yes Sir, and that isn't in any sense focused at Lybster and Bideford and for that I rely on the fact that when it came to the closing the plaintiff didn't suggest this was related to Lybster and Bideford. The plaintiff said Lybster and Bideford is a constructive Trust. And the Judge said I beg your pardon.

- McGrath J Yes, in the High Court, but I presume that in the Court of Appeal they were on sued, Lybster, Bideford.
- Camp In the Court of Appeal they said we accept that the constructive Trust doesn't work so what we now seek is some form of
- McGrath J Monetary recompense of that sort of kind, yes.
- Camp Monetary recompense. And they said well where do you go for a pleading for that. Now Mr Kós's answer today is he goes to this, but it really wasn't live at the High Court in those terms on that pleading and I did actually bring an authority I observed the other day. It's really very nice to have being doing this job for quite a while because it means you just go back to cases you've done before to look for authority, and I've
- Tipping J Well that wasn't evident in your fairly sparse written submissions Mr Camp.
- Camp No it wasn't. Justice Tipping knows *Chase v Saville*, because when the Court of Appeal was upholding Justice Tipping in *Chase v Saville*
- Tipping J So far so good.
- Camp Yes.
- Tipping J Speedy recovery.
- Camp And in very laudatory terms. They said if a point was not taken before the Tribunal which hears the evidence and evidence could have been adduced which by any possibility would prevent the point from succeeding it cannot be taken afterwards. Now the Court of Appeal went on to say if there was any prospect to Mr Young's new points succeeding there could well be an injustice to *Chase Holdings* in allowing it to be put forward at this late stage, and decided on evidence which was directed at other targets in a case shaped to meet a different pleading. Now that's exactly what we're at. This wasn't a live target. The evidence wasn't shaped or directed towards it, and it can't be fixed. Graphically the way in which it can't be fixed is demonstrated by Mr Kós saying well what we have to have is an inquiry. We wouldn't just have to have an inquiry, you really should go back and take the evidence of Mr Springford on the point because he's the man that did it. These are transactions of the 1980s. No forensic accountant just looking back over the records is as useful to somebody that is setting up to produce a monetary recompense award is as useful as the man that says this is what I did and this is why I did it and this is how I did it.
- Anderson J You're asking us to look at the whole picture rather than just part of it.

Camp Yes I am Sir.

Anderson J And as I understand your argument, and this is just paraphrasing it, the applicants' say Mr Couper obtained a personal profit through these transactions and your response is you can't say that because if you look at the whole picture, you may see that he has channeled it back into other Trusts which interact with those anyway.

Camp Yes, yes, that's absolutely right Sir because in the course of Mr Couper's farming life, which is from the 1950s onwards, he has put together about 20,000 or so more acres of land and livestock and the major thrust of his life's work has been the transfer of all of those assets out of his name and into the Trusts. Now the professionals of Hawkes Bay have got a debt of gratitude to the Government's leaving the issue of estate duty hanging over their heads because that's what causes there to be a multiplicity of Trusts and this desperate attempt to shift everything out of your own name, but that's what he's done, so if you look at the broad picture he has unequivocally shifted a huge amount of stuff out of his name and into the Trusts rather than the other way around. This is just trying to focus on a particular part - it was probably a work in progress - it's quite probable that in due course he would have put these into Trusts. They hadn't gone into Trusts, but if you want to draw a line and say where is it as of today, well as of today Lybster and Bideford are in his name. That's where it is.

Tipping J An aspect of the pleading that you say was the one that took over from everything else on the first day of trial, page 11 of Mr Kós's book, this improving his own financial position at the expense of the Trusts. First that was a pleading relating to removal of Trustees

Camp Yes.

Tipping J Was the first point.

Camp Yes.

Tipping J I take it there was no particularity as to what that was all about and expressly no linkage with whatever these two companies are?

Camp No, there wasn't Sir. I can be more expansive but Mr Couper had actually terminated Mr Springford's services; got himself a new accountant, and got himself a new solicitor. He said that he'd got a new solicitor because Mr Smith who had been his solicitor for a long time had Alzheimers and he did need to replace him and he wanted to get a new accountant, and he then wanted a new structure and he asked for advice from the new solicitor and the new accountant and they said form this company called The Couper Farming Company. Get rid of the partnership, it's too cumbersome. You should have an income of \$200,000 a year as manager for it and he

Tipping J I'm not immediately following how this is an answer to my query Mr Camp.

Camp Yes quite but I will get there Sir. But the new accountant, the new solicitor, and Mr Couper started up the new enterprise, started paying Mr Couper the money and the Kain plaintiffs erupted and issued the proceedings.

Tipping J Yes.

Camp And one of the primary objects that they focused on was the shift of everything out of the partnership into the company saying that the company was going to benefit at the expense of all of the Trusts; that Mr Couper was going to benefit at the expense of all the Trusts and it was all wrong and the profit sharing was going to be different, so there was a very big baggage of complaint about the shift and direction by Mr Couper and his advisors in setting up the Couper Farming Company, and if I were asked how Mr Couper was improving his own financial position at the expense of the Trusts, then there was a bootload of allegations of that sort pertaining to the formation of a new company. So that's where at trial that issue was thought to be focused. It certainly wasn't thought to be focused on Lybster and Bideford. There was never a word of it. I probably should have started with the end of it rather than the beginning of it Sir but that

Tipping J Well it's always much more exciting when one kept in suspense Mr Camp.

Camp Yes it's like an old-fashioned judgment Sir, yes.

Tipping J Yes. Alright well let's move on. So in essence you're saying it would be unfair to allow this because there was no reasonable signal of this specific complaint and request for remedy at trial and you were therefore not in any way put on guard?

Camp That's right, and I would have

Tipping J Is that it in a nutshell?

Camp That's it in a nutshell and I would have unequivocally taken a different position on evidence vis a vis for instance Mr Springford, who was as it happens the only fact witness that was called by the plaintiffs. They did call Mr Graham but I'm saying he's an expert.

Tipping J Yes.

Camp Mr Springford gave evidence but he never even ventured an opinion on these things. It just wasn't live and that's all. Now

- Tipping J And apart from this curious constructive Trust proposition that didn't get legs, was there any suggestion – there's certainly none in the pleading – but was there any suggestion of a fiduciary type of remedy being sought as opposed to damages?
- Camp No Sir. Just thinking back, the remedy for Lybster and Bideford sought was just the constructive Trust thing. There was nothing else
- Tipping J Why Lybster and Bideford, because that in the whole morass had somehow or other come to the surface as a result of the Graham report, is that
- Camp No I don't so for a moment Sir. I think it was always visible and known. I mean Mr Kós says well we found that they belonged to Mr Couper. Well they always belonged to Mr Couper. Mr Springford actually said in evidence, he said oh yes I did the Lybster and Bidefords
- Tipping J But the point is how were they acquired, how were they funded? That's what the real complaint is isn't it? They were funded through or with Trust assets and it's now wholly inappropriate simply to give a common law as opposed to an equitable response. Now how do you deal with that?
- Camp Well the funding of Trust assets is simply that Mr Springford keeps the books for all of these entities and works out the profit share every year; puts on the books the amount of profit that that particular one is entitled to, but then may lend it from entity one to entity two if entity two is the one that's going to do some purchasing next for instance, and that happens every year. Every year whilst there were distributions from the Trusts at times, every year whatever is still left over is utilised for the further growing of the farming enterprise, and it's advanced
- Tipping J Why did they secure the borrowings from the BNZ over that Trust asset rather than over the asset for which the borrowings were, I mean that has the appearance of shall we say light footwork.
- Camp Oh Your Honour I think it is much more likely that all that's happened is that whenever the Bank has advanced funds for the enterprise, the Bank has said we'll take security over a couple of the bigger Stations, whatever they are.
- Tipping J And this is part of the problem that I see that we don't have any evidence as to explain why it was done that way and what the contemporary thinking was.
- Camp Yes

Tipping J And I only said the appearance of

Camp Yes.

Tipping J Deliberately because there must be more that one would have thought can be said about this.

Camp My expectation Sir is that I mean one of the Trusts is Glendale. It's got 6,000 acres of coastal land in Hawkes Bay. It's quite big. It would be very likely that whichever Bank was being utilised by the partnership for funding of the partnership would say well we'll take a mortgage over A and we'll take a mortgage over B. That doesn't saddle that Trust with any responsibility in relation to that particular debt. It just means that at that time that was the particular asset that was

Tipping J Well it appears to have saddled the Trust with the loss that arose on the way Mr Kós put it to us Mr Camp

Camp Yes, yes

Tipping J So that's a little bit

Camp If that's how Mr Springford has done it then Mr Springford really should have given an answer as to why he did that, and it would have been very sensible if it was going to be advanced in this Court to have called some evidence from Mr Springford to say what he did do, and he didn't.

Anderson J The probabilities are that it was all done for the good of the empire.

Camp Yes very likely Sir.

McGrath J I think you're also saying it was probably done because it was there, it was not encumbered, but don't speculate here. You haven't got the evidence, avoid speculation

Camp That's all it can be Sir, but I mean it is a very big empire and there are some parts of it that are already taken up. For instance there is a Waipuna farm which belonged half to the Kain family. You couldn't use that for funding purposes but the rest of it would have just been under the umbrella. That's all it was, and without that having been live downstairs and Mr Springford telling us what it was he was doing it just gets to be speculative.

Tipping J Yes well the point is fully understood Mr Camp.

Camp Thank you Sir, that's all.

Tipping J That's all, thank you Mr Camp. Mr Osbourne do you wish to be heard.

Osbourne Sir may I. I have followed, in fact I've adopted my friend's

Tipping J Would you mind coming to the podium, thank you.

Osbourne Sir there are only two points because I have adopted my learned friend's position throughout the Courts below. There are only two points I make and they really may or may not assist. The first Sir is I would ask that the Court be conscious in relation to the second of the companies that it is Mrs Couper who there owns the 50% shareholding in her own right and so that's my reason for being here.

Tipping J Yes.

McGrath J Yes, which company was that?

Osbourne That's Bideford.

McGrath J Bideford, yes.

Osbourne Lybster is fully owned by Mr Couper, and I just say Sir that there is a danger in the way the appellants put their case below and in the way it's put here without Mrs Couper or Mr Couper really being questioned on the issue which came before the Courts really for the first time in the Court of Appeal, which is knowing receipt that certainly from my perspective apart from the issues for examination it could have been looked at with Mr Springford, there is a real issue once the emphasis of the case changed to Trustee de son tort in the Court of Appeal as to whether Justice Panckhurst would have been helped in the context of a pleading which would have had to plead knowing receipt by having those issues explored with Mr and Mrs Couper. It's a very simple point really but I think that is a second aspect to the disadvantage of relitigating this through a point taken for the first time on appeal. Sir the second issue, and it's a very short point again. My friend Mr Kós quite rightly makes the point that it's often at the end of a case that a plaintiff makes its election as to profit or account, and that's certainly been my experience and my understanding without having brought the authorities here that that's precisely right, but the election once taken is an election once and for all and this plaintiff made its election on the first day of trial. It didn't keep its alternative pleadings as in the way one traditionally pleads if one wants to keep the option for account.

McGrath J That's in the March 2004 amended statement of claim.

Osbourne At page 15 Your Honour.

- Tipping J So just to make sure I understand it and I think I do, are you saying that the morning of trial pleading which talks only about inquiring into damages should be distinguished against the one immediately before it which was wider? Is that the point?
- Osbourne Sir it is the point, but it also is intended to meet Mr Kós's point which I understand cases develop through seven days of a trial which is precisely why the tradition is to plead profit or damages as alternative and to make one's election in closing, I absolutely accept that, but as I understand it, not just the traditional approach of advocacy but the requirement of pleading is you keep that open by pleading in the alternative.
- Tipping J And that's what it was in the previous one?
- Osbourne No Sir, I don't know whether it was but what I'm saying is
- McGrath J It certainly wasn't at the trial.
- Tipping J It certainly wasn't here.
- Osbourne What I'm saying is that once you file your claim you have made your election. You don't specifically say to the Court in a pleading, I am abandoning the alternative. You make your election by pleading what you want. If you want to keep both open, you plead the alternative and then elect at the end Sir. So those are the very short points.
- Tipping J Yes I understand entirely, thank you. Mr Kós.
- Kós If Your Honour pleases four points. The first concerns the question of whether Lybster and Bideford were live as a matter of pleading and I submit that the short answer to this is found in three points, three sub-points. The first is if one looks at the bundle at page 15 we have seen that there was an inquiry sought as to damages. Now we've seen this, this is para.(e) of the prayer. I take the point that my friend says well that doesn't seem to be directed at Lybster. Lybster is not named, so one has to go pass this and say and say well what then was an issue at the trial. Was Lybster a bit of an issue at the trial? Plainly Lybster and Bideford were. If one looks at the start of Mr Graham's report, the second report which is at page 39 of the bundle, the Court has requested an analysis be undertaken as to the nature of the funding of the acquisition of the three properties. It's page 39. Greenlees and Bideford and Ponui which has dropped out of issue here. There's no question that the case in the trial proceed on the basis of Lybster but if it were live issues. The Court asked Mr Graham to go away and investigate those issues specifically. My third subpoint is
- McGrath J But certainly the companies were being examined as to what financial transactions had taken place. Can you take it any further than that,

can you say that it was a live issue as to the basis of their claim being an equitable one?

Kós

I think one can Sir because that's my third subpoint, which is if one looks at the judgment of Justice Panckhurst in the High Court at para.84 where he deals with the constructive Trust point, there's no suggestion thereby His Honour that the claim in relation to Lybster and Bideford wasn't before the Court is an extensive analysis in the judgment of the position in relation to Lybster and Bideford. If my friend Mr Camp is right it would have been a short one-paragraph answer, not the multiple paragraph analysis that's provided in the judgment. What Justice Panckhurst found was that the remedy sought in relation to Lybster and Bideford wasn't appropriate. Now the second point I make as my friend pointed out you can't just cherry pick these two assets, and this is the argument about the empire, presumably not an evil empire but a great and glorious empire. But within the great and glorious empire of the Couper Trusts there seems to be a small principality not named Alsace, but named Greenlees Farm where its location presently unknown to counsel. And another one called Pinecroft Farm. The point being that these farms were plucked, have been plucked out of the empire because Mr Couper asserts a beneficial entitlement to own them, and there was no attempt in the evidence to set off these other considerations such as the possibility there might have been other gains through Mr Springford's excellent accounting and it's just simply speculation by my friend without an evidential basis. But if there is a point to be made which is to say that there are set-offs against these gains, that Mr Couper has given as well as taken, then that's the very reason why an inquiry is appropriate, because that's the context in which those set-offs can be ascertained. The third point I want to make – so in fact there are only three points I really want to make. The third point is in relation to the last point that my friend Mr Osbourne made in relation to election and that very helpful passage from the judgment of the Court of Appeal – in fact it's the speech of Lord Simon in *United Australia v Barclays Bank* which I have cited in my written outline, and what His Lordship said there was 'there is nothing conclusive about the form which the writ is issued or about the claimants made in the statement of claim. A plaintiff may at any time before judgment be permitted to amend' and he goes on and says 'at some stage of the proceedings the plaintiff must elect which remedy he will have. There's no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment'. Now in my submission there is no suggestion here – there doesn't seem to be any suggestion below and there's certainly none by Justice Panckhurst, that the election of constructive Trust was an election they were not entitled to make by reason of the fact they'd already made an election at an earlier stage. It simply was that it wasn't pleaded and was inconsistent with the acceptance of the beneficial

Tipping J But if you haven't pleaded them in the alternative Mr Kós, no question of election arises.

Kós It comes in the sense Sir that no question of election in a direct sense does, but the question of amendment certainly does.

Tipping J But there was no request to amend. The only request for amendment was to a constructive Trust.

Kós Yes that's right, in the alternative to an inquiry into damages.

Tipping J Into damages.

Kós Yes.

Tipping J I fully respect what Lord Simon said in that case. Yes of course you don't have to elect until you seek judgment, but if you have not pleaded you would have to ask to amend as you say, and they didn't.

Kós Well I'm not certain that they didn't Sir. I wasn't there. My friend says that this arose in reply. That's not the way I read Mr Wilson's submissions which I have here because on the 30 March 2004 Mr Wilson's closing submissions expressly, and perhaps it's useful just to

Tipping J Well you had better just check because otherwise it's a pretty strong point against you.

Anderson J The point is that it's proceeded to judgment and you have not elected an account.

Kós I can't point to an election for account.

Camp Can I just clarify Sir that it's not that it's in reply it's that Mr Wilson closes for the plaintiff after we've closed.

Tipping J Yes quite. Yes well Mr Kós has no doubt very properly said he can't point to a specific election.

Kós I can't point to a specific election, but what I do point to is Lord Simon's judgment though which says that that may occur at any point until you apply for judgment, so clearly one can do that in the very context that Mr Wilson did.

Tipping J But if here for example what Mr Wilson did hypothetically for the moment should be deemed to have been an application to amend so as to give himself the right of election, would not then the other parties, the counter-parties have been able to say well we can't oppose the amendment because of the evidentiary matter, which is effectively what they're doing here now, say well our whole evidence would

have been differently focused if we knew you were trying to achieve this outcome.

Kós Well the answer to that I think simply lies on whether one can say that the existing pleading, and let's look at two aspects. First the history of the pleading which in my submission put Lybster and Bideford in issue, then the final pleading which the Courts pointed to and which is in the bundle which doesn't directly refer to them. I accept that but would nonetheless seek some inquiry into damages suffered by the Trusts. Throughout the trial there is then extensive analysis by Mr Graham, by parties, by counsel, and by the Court in its judgment of the position in relation to Lybster and Bideford. So in my submission it's difficult to say that there would be any additional factual matters that would arise in relation to Lybster and Bideford which hadn't been expressed, because as I submitted before, Mr Couper's assertion as to ownership was made and accepted and the funding position was articulated by Mr Graham for the first time and accepted by all parties. So I'm not quite certain what this prejudice is. I mean the consequence of my friend's argument seems to be that if this issue isn't live, then it remains live and can be the subject of new proceedings, which would seem a vastly unfortunate position for any of the parties in this particular case to

Tipping J Well I'm not sure. It may be much more satisfactory and I'm making no comments and I'm just thinking aloud, to have a thing if it's going to be looked at on the premise if it still can be and I'm not expressing a view, done properly. I'm not wishing to sound any note of encouragement or anything, I'm just saying that just on a purely neutral basis. But anyway what you just said is a fair point Mr Kós.

Kós The question of perhaps not so much impropriety, and it's not impropriety that I am suggesting, but inadequacy, in my submission there is a pleadings point rather than an evidential point when one looks at the matter in the whole.

Tipping J So if there is a problem it's more in the field of pleadings than evidence is there?

Kós Well my friend Mr Camp hasn't pointed to what, apart only from the question of whether other things should be brought into account, to diminish the extent of gain by

Tipping J Well now both of them have said and they haven't been particularly specific, but they've both said that if they knew they were at risk of this they would have got further evidence from Springford; they might have wanted to call Couper; they might have wanted to call Mrs Couper, or led further evidence from those sources I mean.

- Kós But there is an air of unreality about that because Lybster and Bideford plainly were an issue at trial. Hence Mr Graham's report and the extensive analysis in Justice Panckhurst's judgment.
- Anderson J They were at issue in terms of damages.
- Kós Yes, and that's right and the question then is if the question of damages then is, that's the question of what is taken from the Trusts as opposed to what is gained by Mr Couper, but that can be addressed in an inquiry within these proceedings rather than by forcing the parties to commence new proceedings which in my submission would be entirely unnecessary.
- Anderson J It might get statute barred anyway.
- Kós Well it might or might not given the emergence of the facts in the course of Mr Graham's report.
- Tipping J Is this, and it's just a tentative thought Mr Kós, is this a possible way of looking at it that your clients, leaving aside the strict enforceability of what Justice Panckhurst suggested about principal and commercial interest and so on, your clients have really been given damages but not equitable relief.
- Kós Yes.
- Tipping J In a very very sort of broad sense.
- Kós In a very loose sense but within vast pot-holes in the tundra represented by the forex losses for instance on the one hand and the excess payment of rent on the other for which no express reference has been made, and then of course with a significant ice-flow between the tundra and the presence of Lybster and Bideford non parties.
- Anderson J I thought this land was at Hawkes Bay. You make it sound as though it's in Siberia.
- Kós I think it was my reference to Alsace before that drew me off in that direction. That's all from me Sir.
- Tipping J The only link with Siberia is the word 'wilderness' Mr Kós.
- Kós Quite so Sir.
- Tipping J Very well, we're most grateful to all counsel for their submissions. We'll obviously take time to consider this and we'll combine this in the decision which we're going to give anyway on the other clients.

11.30am Court adjourned