

**BETWEEN**

**LEWTYN MICHAEL SCOTT**  
Appellant

**AND**

**ROSEMARY ANN SCOTT**  
First Respondent

**AND**

**LEE MCNEILLY**  
Second Respondent

**AND**

**ALISON SCOTT**  
Third Respondent

**AND**

**CARA ANN CLARE**  
Fourth Respondent

Hearing: 16 October 2009

Court: Tipping J  
McGrath J  
Wilson J

Appearances: K G Davenport for the Appellant  
R E Harrison QC for the Respondents

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**CIVIL APPEAL**

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10 **TIPPING J:**

Ms Davenport, you appear for Mr Scott, don't you?

**MS DAVENPORT:**

I do, thank you, Sirs. Mr Scott is supposed to be coming, Your Honours, but  
15 at the moment, he hasn't arrived.

**TIPPING J:**

Well, we're not going to wait for him.

**MS DAVENPORT:**

No, I'm not asking you to, I'm just advising the Court.

5 **TIPPING J:**

And Mr Harrison, you appear for the respondents?

**MR HARRISON:**

That's correct, Your Honour.

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**TIPPING J:**

Yes, thank you. Yes, we'll hear you now, Ms Davenport.

**MS DAVENPORT:**

15 Thank you, Sirs.

**TIPPING J:**

And we think that it would be convenient to address, first, the primary issue, which is the question of leave to appeal from the Court of Appeals declining  
20 an extension of time, and subject to the fate of that, will dictate where we go from there. So if you just confine yourself at the moment, please, to that issue.

**MS DAVENPORT:**

25 Thank you, Your Honours. I had down as order of play that, Sir, then the stay, and then the question of the fifth respondent.

**TIPPING J:**

Well, we'll deal with the question of the application for leave to appeal from  
30 the Court of Appeal's 19 June order refusing an extension of time. We'll deal with that first, and on its own.

**MS DAVENPORT:**

Thank you, Your Honours. In a recent speech to the Legal Research Foundation, Dame Hazel Genn described a well-ordered civil system as “the basis for a peaceful and ordered society”. And in the submission of the appellant, there is no doubt that the right to appeal is an integral part of this right. And as the Court of Appeal commented in the judgment, a case of this size and complexity with eight hearing days would normally be heard by the Court of Appeal. But, of course, the right to appeal, as the appellant acknowledges, is subject to an obligation to prosecute that appeal in a timely way. But Rule 43 is a procedural rule, and one where the Court of Appeal noted that an application for an extension is not often declined. But in this case it was, and the appellant argues that he ought to be given leave to appeal from this decision for a number of reasons under s 13. He submits to the Court that there has been a substantial miscarriage of justice, and he also submits that there is a matter of general and commercial significance, in respect to the arguments which relate to the ability of a trustee to acquire trust property when authorised to do so by their Will trust, which created that trust.

**TIPPING J:**

That is a point that relates to the underlying appeal, I take it, not specifically to the appeal from the Court of Appeal’s exercise of its discretion under Rule 43?

**MS DAVENPORT:**

That’s right, Your Honours.

**WILSON J:**

I take it from that answer, Ms Davenport, that you accept that the Court of Appeal exercised a discretion in this case?

**MS DAVENPORT:**

Yes, they did. And I am hoping to persuade Your Honours that they exercised that discretion in a way which lead to a substantial miscarriage of justice for the appellant.

**TIPPING J:**

So the ground you rely on for the immediate purpose is substantial miscarriage of justice, is it?

**MS DAVENPORT:**

5 Yes, it is.

**TIPPING J:**

That they exercised discretion in the way that it was has represented in a substantial miscarriage of justice?

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**MS DAVENPORT:**

Yes.

**TIPPING J:**

15 Not that there was any matter of general or commercial significance in the way the discretion was exercised, as it were?

**MS DAVENPORT:**

20 No, I think there is a matter of general and commercial significance in the dismissal by the Court of Appeal of the merits of the case, which they did, in the course of their judgment. But in terms of the overall analysis of the Court of Appeal's decision, what the appellant relies upon is a substantial miscarriage of justice.

25 **TIPPING J:**

Yes, thank you.

**MS DAVENPORT:**

30 And there are a number of reasons that the appellant advances this ground. First of all, counsel withdrew on the day before the hearing. Secondly, the delay, which was the subject of some significant comment by the Court of Appeal, the focus on the delay was from the commencement of the proceedings, rather than focusing on what had happened in the six months

since the appeal was lodged. And finally, the dismissal by the Court of Appeal of the merits of this appeal.

**TIPPING J:**

5 On that last point, just for clarity, I understood the Court of Appeal not to say that the appeal was without merit, but that its merits were not great, or were slim, or were small, or words to that effect.

**MS DAVENPORT:**

10 Yes, they did. They said, Your Honour, that it really turned upon an analysis of the remedies which were available to the appellant. And they deal with that at paragraphs 13 to 35 of the judgment. And they say that it was slim, it would delay resolution of the proceedings, and that there were insufficient merits because, essentially, the High Court relied upon the judicial remedial  
15 discretion in making a judgment as between these parties. So dealing now with the absence of counsel. The right to counsel is enshrined in the Bill of Rights, which, of course, has limited application to private cases. But in my submission, the reason it's in the Bill of Rights is a simple matter of natural justice, that in cases of importance, it is a matter of natural justice to the  
20 appellant to have his or her appeal argued by someone who has the ability to argue that. Now, in this particular case, and I will take the Court through Mr Harrison's timeline, Mr Scott's counsel began to seek leave to withdraw on the 12th of June. That was four days before the Court of Appeal were due to hear this case.

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**TIPPING J:**

I thought there was a reference somewhere to seven days. Is that wrong?

**MS DAVENPORT:**

30 My understanding is that it was 12 days. There may well have been a letter written by Norris Ward on the 9th of June, but they began to talk to the Court of Appeal.

**TIPPING J:**

I thought your client was notified by Norris Ward seven days before, that they were going to withdraw, or seek leave to withdraw.

**MS DAVENPORT:**

5 Yes, they did write a letter dated the 9th of June. But the evidence from Mr Scott, and I'll take the Court to that, is that he was ill during that time. He got the letter only on the 12th. He then immediately began to make contact with Norris Ward.

10 **WILSON J:**

Why hasn't your client been prepared to waive privilege in respect of the actions of this former solicitors, Ms Davenport?

**MS DAVENPORT:**

15 Well, he says, Sir, that this is because he discussed with them a number of things relating to the appeal, and that if he waives privilege, those matters will come before the Court.

**WILSON J:**

20 Well, I've got difficulty with that. Surely he could just waive privilege for the purpose of enabling these solicitors to address the question that you're now addressing.

**MS DAVENPORT:**

25 Well, Sir, certainly that has been suggested by my learned friend as an approach that Mr Scott might find appealing. But he hasn't found it appealing. His instructions are clear, that he does not waive privilege. I'm not certain of whether the Court has access to the High Court file as well, but you will see, if the Court does have access to the High Court file, that shortly after the Court  
30 of Appeal heard this, there was another telephone conference with Justice Stevens in late June and Mr Scott and Mr Hood from Norris Ward there had an opportunity to articulate before the High Court the reasons that each of them sought leave to withdraw and, for Mr Scott's part, wanted to maintain Norris Ward as his counsel. And at the end of that Justice Stevens

commented that, having heard all the evidence, it did not matter as to the merits and that it was clear that the relationship between Mr Scott and his solicitors had broken and that they should be given leave to withdraw.

5 So Mr Scott's position is that the evidence is clear that his solicitors did seek leave to withdraw. Whether they sought leave to withdraw because of, as Norris Ward have said, some allegation by Mr Scott that they were in breach of Rule 5.1 of the Code of Professional Conduct or not, it is submitted by me as irrelevant really to the question of –

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**TIPPING J:**

I think I must, I'm afraid, take you up on the same point as Justice Wilson. It is quite clear that in law you can have partial waiver of privilege. You can waive privilege for one purpose but not for others. I remain quite  
15 unpersuaded at the moment that there was any valid reason for your client's declining to waive privilege partially, save for the fact that that would show him in considerably bad light, and that is the inference at the moment, speaking purely for myself, I would be inclined to draw.

20 **WILSON J:**

As would I.

**TIPPING J:**

And I think you should have the opportunity of addressing that directly.

25

**MS DAVENPORT:**

It's difficult to address that directly without canvassing with Your Honours each and every withdrawal since the time of the appeal.

30 **TIPPING J:**

No, no, no, I'm afraid not. I'm looking just at this one waiver, this one refusal to waive it, from the point of view of Norris Ward. I'm not interested at the moment in all the background, I'm just say looking at that incident alone, or that circumstances alone, I – and I'm putting it to you to give you the

opportunity to respond – am minded to draw an adverse inference, because of his refusing to waive privilege for that particular purpose. He comes along, he blames his lawyers, and then he declines to let them give an explanation for him, so he puts it, being “left in the lurch” at the last minute. Now, surely, he  
5 had an obligation, not a legal one but a tactical obligation if you like, if he’d wanted to avoid an adverse inference, of waiving privilege to that extent.

**MS DAVENPORT:**

10 It’s difficult for me to give Your Honours an answer which makes sense of that, because Your Honours of course make an excellent point, why is he not prepared to waive privilege for Norris Ward for that sole purpose? It would give them an opportunity to explain perhaps letters that they sent to Mr Scott saying why they were withdrawing –

15 **TIPPING J:**

Well, he hasn’t even gone on oath and said why, other than, I think, in the most tenuous way, why he’s taking this stance. To say that there are other things that he doesn’t want disclosed completely misses the point.

20 **MS DAVENPORT:**

I accept that from Your Honours. I hope to be able to persuade you that notwithstanding that, it can still be seen from the extrinsic evidence, namely the fact the Mr Scott was unwell, and even if one –

25 **TIPPING J:**

Well, I’m not wanting to press you, I just felt you should be fairly put on notice that this is the tentative thinking of at least two members of the Court.

**WILSON J:**

30 If I could just generalise the point a little. It seems to me, Ms Davenport – and I put this to you to enable you to respond – that essentially what your client was seeking here was an indulgence from the Court of Appeal and now this Court in terms of a, in effect, waiver of the six months time limit. I would have thought it was incumbent on any party seeking such an indulgence to be frank



with the Court as to what happened, and that frankness on the facts of this case would seem to me to require a waiver to be given in the limited way articulated by Justice Tipping.

5 **MS DAVENPORT:**

Well, Sir, I hear what you say and all I can do is repeat that Mr Scott's instructions are clear, that he won't give that waiver. But –

**TIPPING J:**

10 All right, well, you're bound by your instructions and that is fair and perfectly understood, and if you can't take that point any further we would invite you to move on.

**MS DAVENPORT:**

15 Well, I ca –

**TIPPING J:**

We wanted you to be made fully aware, up front, that the Court finds this point a troublesome one.

20

**MS DAVENPORT:**

Well, it is a troublesome one, and there's no shying away from that. But what I hope to be able to persuade Your Honours is that notwithstanding that refusal to waive privilege, there is still sufficient evidence for the Court to see  
25 what happened at that time.

**TIPPING J:**

Fine, well, let's –

30 **MS DAVENPORT:**

And also –

**TIPPING J:**

– let's look at it in due course.

**MS DAVENPORT:**

5 Of course, and also to say that it's not the fact that Norris Ward were given  
leave to withdraw because, you know, that's a perfectly appropriate thing for  
the Court of Appeal to have done. It is the effect of that and the effect that it  
happened the day before, which has led to a miscarriage of justice for  
Mr Scott.

10

**TIPPING J:**

Yes, all right, thank you.

**MS DAVENPORT:**

15 So, the fact that –

**TIPPING J:**

The point is fully understood, Ms Davenport, your client's position, that he was  
left in the lurch, so to speak, as a matter of fact.

20

**MS DAVENPORT:**

But if the effect of that being – I think that the Court is focusing on the reasons  
why he was left in the lurch, and that's perfectly understandable for where he  
is seeking an indulgence from the Court, but my submission is that  
25 notwithstanding the reasons that he was left in the lurch, the fact of being left  
in the lurch led to a miscarriage of justice.

**TIPPING J:**

All right, we have the point, thank you.

30

**MS DAVENPORT:**

So, I think probably it may be helpful to look just briefly then at the affidavit  
that Mr Scott filed in the Court of Appeal, which has been annexed to his

affidavit in this Court under his stay application, and I understand from the Registrar that the Court has all of those affidavits.

5 **TIPPING J:**

We have the Court of Appeal, Ms Davenport, and we have identified that that Court had before it two affidavits, as one might expect, one from your client in support of the application for extension of time and one from Rosemary Scott, Rosemary Ann Scott, in opposition –

10

**MS DAVENPORT:**

Yes.

**TIPPING J:**

15 – subject to anything counsel says now, we understand that that was the compass of the evidence before the Court of Appeal.

**MS DAVENPORT:**

20 It was, Sir, and I'm not addressing that point, I'm looking at what happened in that week, before the Court of Appeal made its decision, to let the Court know what it was that Mr Scott says happened, and that information is contained in an affidavit that is before this Court, sworn on the 24<sup>th</sup> day of September 2009.

**TIPPING J:**

25 Right. Yes, thank you, we have it.

**MS DAVENPORT:**

Now in that affidavit, which is exhibit C to Mr Scott's affidavit of 24 September, so it's at the back, C is the last exhibit –

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**TIPPING J:**

What is the nature of the exhibit, Ms Davenport?

**MS DAVENPORT:**

You're looking, Sir, for the affidavit of Mr Scott, sworn the 10<sup>th</sup> of September 2009, which is exhibit C to his affidavit of 24<sup>th</sup> September.

5 **TIPPING J:**

My exhibit C to the affidavit of Lewtyn Michael Scott, sworn on the 24<sup>th</sup> of September 2009, is a application for directions pursuant to Minute 8 of Justice Stevens re sale of Trust farm.

10 **MS DAVENPORT:**

Well, my C is definitely that affidavit. I wonder whether it's...

**WILSON J:**

15 I have it as a stand-alone document, the 10 September, and I've come free of something else.

**MS DAVENPORT:**

I apologise for that, it cert –

20 **TIPPING J:**

Well, I'm sorry, this all seems – I'm afraid the papers here are in a terrible state, but I see this was an exhibit to another affidavit –

**MS DAVENPORT:**

25 Yes, what you –

**TIPPING J:**

Well, summarise it for us, Ms Davenport –

30 **MS DAVENPORT:**

Yes, Sir, what there is bef –

**TIPPING J:**

Just tell us essentially –

**McGRATH J:**

I haven't yet got to that affidavit either, I'm afraid, and I thought mine were all numbered, but it doesn't seem to be there.

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**TIPPING J:**

Well, Justice Wilson has it and we'll listen, he's got the affidavit in front of him, no doubt it's in amongst these voluminous papers. But if you just help us by summarising what it is he said that you contend is relevant now.

10

**MS DAVENPORT:**

It's the very last two pages of that affidavit, Your Honour, so the very last two pages –

15 **TIPPING J:**

The last two pages, all right, yes.

**MS DAVENPORT:**

20 You'll find a medical certificate and a timesheet for his employers. The medical certificate shows that he was unfit for work and not working for the 10<sup>th</sup> and 11<sup>th</sup> of June, the 16<sup>th</sup> to the 18<sup>th</sup> of June inclusive and then you have his time record from his employer who's an American company showing that he was actually off work on those days.

25 **TIPPING J:**

So this evidence demonstrates that he was unfit for work on the stated dates and there's some time records, what do they show?

**MS DAVENPORT:**

30 They just show that he wasn't actually at work.

**TIPPING J:**

Oh wasn't actually at work.

**MS DAVENPORT:**

But he wasn't working.

5 **TIPPING J:**

Okay. All right. It doesn't say what the nature of the problem was that caused him to be unfit for work?

**MS DAVENPORT:**

10 No it doesn't. I think he says in his evidence that he had the flu. In my submission he has, in this affidavit, been open with the Court about the reasons that he did not have representation on that day. He acknowledges receiving the letter. He says he immediately took steps to call the partner concerned at Norris Ward and details in his affidavit several attempts that he  
15 made to leave messages asking them to call him back including Monday the 15<sup>th</sup> when he says he continued to try and call Norris Ward. He says he called the Law Society, he called the practice manager and he did not, he said, get a copy of Justice Hammond's minute which was sent to him by Norris Ward and you will see that that minute was not sent by Norris Ward until about 10 past 5  
20 on the 15<sup>th</sup> of June and it was sent to Mr Scott's work email address.

**TIPPING J:**

I just think, in fairness to you Ms Davenport, I've got to ask you to pause, we've got to try and find the right affidavit. I've got one sworn on the  
25 24<sup>th</sup> of September 2009, filed in this court and it's got seven paragraphs, sworn at Tauranga this 24<sup>th</sup> day of September 2009. It's got three affidavits – three exhibits referred to in the first paragraph. A, copy of a Court of Appeal decision. B and C, copy of affidavits. Where's this affidavit that annexes a medical certificate?

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**MS DAVENPORT:**

It's exhibit C Sir.

**TIPPING J:**

Well –

**MS DAVENPORT:**

Exhibit C is –

5

**TIPPING J:**

Are there two affidavits that are sworn on the 24<sup>th</sup> of September 2009?

**MS DAVENPORT:**

10 No Sir it's the affidavit – the medical certificate is annexed to exhibit C which was an affidavit –

**TIPPING J:**

Oh it's annexed to exhibit C, I see.

15

**MS DAVENPORT:**

It's an affidavit that he swore in the Court of Appeal. It's exhibit C is his affidavit of 10 September 2009 which was a document filed in the Court of Appeal.

20

**TIPPING J:**

All right. I just wanted to make sure that the court was keeping up with you Ms Davenport. Yes we've got a copy now thank you.

25 **MS DAVENPORT:**

So I apologise –

**TIPPING J:**

30 Selectivity hasn't been of the essence of this documentary exercise but never mind. All right. Well we've got the medical certificate and we've got the timesheet, thank you, that's fine.

**MS DAVENPORT:**

Thank you Sir. So the –

**TIPPING J:**

Now you say that he's been frank and missed a step?

5 **MS DAVENPORT:**

He is, Sir ,and the paragraphs in which he sets it out are paragraphs 7 to 10 of that affidavit.

**WILSON J:**

10 Now I don't want to go over old ground unduly Ms Davenport, but as I read paragraph 7 to 10, Mr Scott is deposing as to contact, to use a neutral word, that he had with Norris Ward during that time. That to me makes it all the more astonishing that he's not prepared to waive privilege, well on the one hand he is prepared to assert as to what did take place between him an the  
15 firm.

**MS DAVENPORT:**

Yes I appreciate the complete paradoxical nature of that matter Sir but I have my instructions in that respect.

20

**TIPPING J:**

So he wants the good bits in but not the bad bits, putting it cynically Ms Davenport, it's an inference that's open. All right. Well you've got your instructions and the Court is troubled by that point but you're endeavouring to  
25 persuade us that nevertheless there's been this miscarriage of justice through the absence of counsel and because – although he got seven days, well you say he didn't get seven days, he got four days' notice –

**MS DAVENPORT:**

30 Of their intention to withdraw –

**TIPPING J:**

And he was ill in the meantime, yes, well we have the picture.



**MS DAVENPORT:**

And he says also Sir, I think it's quite important, that he did contact Norris Ward and urge them to stay on and they, as is perfectly within their rights, were not prepared to do that. And the Court of Appeal gave Mr Hood  
5 leave to withdraw on the day before the hearing.

**WILSON J:**

Ms Davenport, will you at some stage be coming to what the practical effect of this was? I think the Court of Appeal appears to have been of the view that, it  
10 wasn't put to it that there had been any disadvantage consequential in the sense that there was no new point that would have been made orally that could now be pointed to. It was really just something of a, as a matter of general principle if you like, it's more advantageous to have counsel present but you haven't been able to point to a specific inadequacy in terms of an  
15 argument that wasn't advanced. I don't know – at some stage that I think is an important consideration.

**MS DAVENPORT:**

Perhaps I should deal with that now Sir. What I actually said to the Court of  
20 Appeal, and I have this in my submissions, was I was not certain of what was not advanced on Mr Scott's behalf because I was not there.

**TIPPING J:**

But he did have some written submissions filed.  
25

**MS DAVENPORT:**

He did have submissions –

**TIPPING J:**

30 And he made an affidavit?

**MS DAVENPORT:**

He did but those written submissions, with the greatest of respect Your Honours, were described as submissions that would be amplified at the

hearing. They did not deal with what I, as counsel, would have thought the most important thing that Mr Scott could have offered which was to agree to some stringent timetable orders so that the Court could see that he was willing to achieve the necessary rigour needed to get this case to be heard. And it did not, in my submission, deal fully with the merits, the underlying merits of the appeal against the number 1 decision of Justice Stevens. But they did have submissions before then which talked about the matters addressed in the affidavit of Mr Scott which were matters relating to Sharp Tudhope and Mr Lawson who were the solicitors acting for Mr Scott in the period January to April 2009. But in my submission had counsel been there that glaring omission, the possibility of unless orders, one would have hoped they're clearly articulated and the Court of Appeal said in its stay judgment that they themselves did, or considered this matter, and rejected it. But in my submission had counsel been there, there's no doubt that that, an indication and a willingness by Mr Scott to show that he would have been prepared to submit to unless orders would have made a significant difference, I submit.

**McGRATH J:**

It would have involved something of a change of tactics though. That's the sort of approach that you might expect to be up front in the written submissions that were being advanced at a time when he did have counsel. Presumably he –

**MS DAVENPORT:**

Well one – yes, I would have expected them to have been in there Sir but there weren't. Now either that, that was because they didn't occur to Mr Hood or I'm not certain but they certainly weren't there. Mr Scott says clearly now that he is prepared to accede to any unless orders.

**TIPPING J:**

Well it's a bit late for it now. That was sort of a bit of a fall-back if he was sort of backed into a corner. I'm inclined to agree that there's force in my brother McGrath's point that, you know, it's all very well to have two bob each way and say oh well, you know, if counsel had been there he might have been

able to do a better job on a fall-back position. The general impression I got was that this was a sort of, fairly intransigent approach. That there was really nothing wrong with what he was doing and he should have an extension almost as a right.

5

**MS DAVENPORT:**

I don't think, with respect, that the submissions that Mr Hood filed do read like that Sir. They do provide an explanation for what had happened and do seek an extension. I think it would be unfair to characterise him as being, you know, that this is my right and I'm going to stick to it.

10

**TIPPING J:**

Well, perhaps I overstated that, Ms Davenport, but he certainly didn't sort of fall on his sword, and say, well, look, yes, of course I'll submit to terms, and that sort of thing. The idea of having that as a kind of backstop –

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**MS DAVENPORT:**

Well, he didn't submit, that, Sir. And in answer to Justice McGrath's question about what should have been in that submissions that the Court of Appeal could have considered, that is clearly a matter which –

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**TIPPING J:**

Well, we've got the interests of the respondents to consider here.

25 **MS DAVENPORT:**

Yes, of course.

**TIPPING J:**

It's all very well to keep saying that things haven't been done the way they should have been done. That seems to have bedazzled your client's view of this matter from the start.

30

**MCGRATH J:**

From my point of view, Ms Davenport, it's really a matter of getting in proportion the consequences of it all. I mean, it does seem to me significant that his counsel, Mr Hood, I think, had written submissions before the Court. And so it's not a case in which his point of view was not heard. And it's really  
5 a matter of just trying to get a sense of what the practical, of the extent of prejudice to him, if you like, through not being heard orally. At the moment, I think you're emphasising that the tactics might have been to take a slightly different approach to the matter from the outset, and as my brother puts it, that could have been taken as a fallback position. And I think there's nothing  
10 really substantially new, anything apart from that consideration that the Court of Appeal didn't have in mind, as it were. And that, I suppose, is not to deny that your point has some force, but it's just to get it all in proportion.

**MS DAVENPORT:**

15 Well, Sir, as well, I also think that Mr Hood's submissions, which he proposed to amplify, didn't really spend much time on the actual merits of the case, which are important when considering discretionary matters. He didn't deal with the law, and he did say, in his submissions, that he would amplify them. So, I mean, I wasn't at the hearings, I have said to the Court of Appeal. And  
20 so it does make it difficult to comment on exactly what the Court of Appeal took into account. But there is no doubt that, having had these submissions before them, having given leave to those solicitors to withdraw, Mr Scott not having been there, and my learned friend advocating forcefully and competently, as he always does, for this discretion not to be granted, in my  
25 submission, the Court of Appeal were left with a clear impression that this was a case which was not deserving of an extension of time, which they acknowledge themselves would normally have been given. And the reason for that could only have been because they felt that Mr Scott had not sufficiently persuaded them that there were explanations for the delay, and  
30 that the merits of the case were with him, or at least arguable.

**TIPPING J:**

On this question of explanations for delay, and this is perhaps a subset of the present point, I have difficulty in understanding why they couldn't, if they were

having difficulties with the previous solicitors of getting documents and so on, why they just didn't go to the Court office, and get the necessary documents to prepare the case on appeal from that source. Six months is the time given. It's quite, well, it's not generous, but it's by no means small. And at the  
5 moment, I have a sense that there really was no adequate explanation for the delay, or the failing to get the thing organised. Bearing in mind that the respondents had been expressing understandable concern about delay for years.

10 **MS DAVENPORT:**

Yes, Sir. Perhaps it might be a good idea to take you to my learned friend's timeline. We can look at that point in some more detail.

**TIPPING J:**

15 Well, are you able to give me any help on the present view I hold, that there is no real explanation for the delay, other than a rather facile observation that it was all the solicitor's fault, and he'd done his best?

**MS DAVENPORT:**

20 Well, the explanation is that he had three solicitors during that time, and they don't seem to have managed, for the reasons that he deposed in his affidavit, to have got the case prepared. And my own view of looking at the evidence is that Mr Lawson –

25 **TIPPING J:**

Well, I don't want your view.

**MS DAVENPORT:**

No, no, Sir, my submission –

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**TIPPING J:**

We want any submissions that you can responsibly make.

**MS DAVENPORT:**

I apologise for that, Sir. My submission is that Mr Lawson, who made the rather laconic application for extension of time in April, in making an application to the High Court for orders for division of property, which, to put it at its most charitable, was a rather unusual application, allowed matters to  
5 proceed in that way, without really focusing on the appeal for the time that he was acting for Mr Scott.

**TIPPING J:**

Well, the faults of one's legal advisors are often not attributed in a situation  
10 like this, but I have to say that in view of the case in the round, I would have expected a far better performance. And there comes a time when the respondent shouldn't have to endure this sort of behaviour.

**MS DAVENPORT:**

15 No, Sir, and that's why we have rules like Rule 43, so there is an accountability for all the parties to keep themselves towards a timeline.

**TIPPING J:**

But there's no explanation as to why they couldn't simply have gone to the  
20 Court office and got the relevant documents and prepared the case, if they were having difficulty getting documents. The whole focus seems to be on the difficulties that one firm were having getting documents from another. Well, there's an easy solution to that.

25 **WILSON J:**

And it's by no means unusual.

**TIPPING J:**

And as my brother, who's been in more recent practice than me, says it's by  
30 no means unusual.

**MS DAVENPORT:**

No, it's not, Sir, and Mr Quinn says that he actually sent the documents, the Court documents, to Mr Lawson.

**TIPPING J:**

5 I think they were spending more time doing rather peculiar manoeuvring than getting on, preparing the case on appeal.

**MS DAVENPORT:**

Well, I do too.

10

**TIPPING J:**

Well, that's very candid of you, Ms Davenport. I wasn't expecting you to say that, as a personal view.

15 **MS DAVENPORT:**

No. But I'm trying to illustrate.

**TIPPING J:**

20 I really want to have your client, who's, you know, is looking for an indulgence, has to be given every opportunity to answer points that are obviously troublesome to us. That's the only reason we are appearing, to give you a bit of a, you know, probing you quite carefully as to what your client's position or answers can be.

25 **MS DAVENPORT:**

Of course, Sir, and I'm not indicating, and I hope that I'm not –

**TIPPING J:**

30 No, of course you're not. I'm just explaining that that's why the Court – this is a very unusual application for leave to apply, you know, in the sense that it is from a discretion of the Court of Appeal on a procedural matter.

**MS DAVENPORT:**

It is very unusual.

5 **TIPPING J:**

And we have to be satisfied to grant your client leave to appeal that it really is properly in the interests of justice to do so, because of the interests of the respondent, getting this litigation completed.

10 **MS DAVENPORT:**

Of course. There have been a number of cases in which the failings of counsel have been allowed to lead to an extension of time. The Court of Appeal, in the *My Noodle Ltd v Queenstown Lakes* [2009] NZCA 224 CA120/09 Glazebrook J, O'Regan J, Arnold J said that a three month delay  
15 caused by the lawyer's inadvertence was an acceptable reason for the –

**TIPPING J:**

Well, it might be in some circumstances, but I think, putting it bluntly, that the circumstances that we're faced with here really invite you to move on to your  
20 next point, which is the focus on the delay from the beginning was inappropriate.

**WILSON J:**

And, I think, as you've foreshadowed, for myself it would helpful if you could  
25 use Mr Harrison's chronology as a basis for this part of your argument.

**MS DAVENPORT:**

I want to make a general comment on Mr Harrison's chronology. I accept that  
it's helpful. I don't agree with some of the comments –  
30

**WILSON J:**

I'm not surprised that you say that.

**TIPPING J:**



Well, we'll try and concentrate for the moment on the hard data, rather than the editorial.

5

**MS DAVENPORT:**

It's a beautiful piece of work. So in my submission, the focus for the Court of Appeal ought to have been on the delay between October 2008, when the notice of appeal was filed, and April 2009, when the six months expired. And the reason that I make that submission is because the cases say that delay is relevant in terms of that six month period, and that's understandable. And not delay from the beginning of the trial, because one assumes that the High Court has adequately dealt with that in its judgment and in the interim matters which preceded the judgment. And in my submission, that was the situation in this particular case. My learned friend's chronology, the first three pages, deal with matters that were before the High Court, and were dealt with by the High Court. In my submission, it's not an appropriate consideration for this Court –

10

15

**TIPPING J:**

Are you saying that it's irrelevant or that the Court of Appeal put too much weight on it?

20

**MS DAVENPORT:**

I'm saying the Court of Appeal put too much weight on it. It's relevant only in terms of an overall assessment. But in terms of looking at delay, I say that the appropriate focus for the Court was the six months between the filing of the appeal and when the notice to – when the case on appeal ought to have been filed. And in my submission the Court of Appeal were not focused on that. Whatever one can say about the delay, it –

25

30

**TIPPING J:**

Well, I think they were, because they said it was unusual to refuse extensions in these circumstances, so I think they were mindful of the fact that they were going outside normal territory, so to speak.

**MS DAVENPORT:**

5 But they did say that the delays in this case had been egregious. Now, with the greatest of respect to licence allowed by words, an egregious delay is not six months. An egregious delay could only be the delay which they attribute –

**TIPPING J:**

10 They were clearly referring to the whole period in that remark, yes.

**MS DAVENPORT:**

Yes.

15 **TIPPING J:**

But what I'm putting to you is I think they were conscious that they were taking a line that was not confined to just that period.

**MS DAVENPORT:**

20 Yes, I –

**TIPPING J:**

The real issue is whether, I think, whether they "overdid" it, putting it colloquially, because it's –

25

**MS DAVENPORT:**

Well, of cou –

**TIPPING J:**

30 – clearly relevant, must be. The question is whether they've just allowed themselves to be carried away, if you like, by this history which, on any view it has to be regarded as a – well, speaking for myself – one of the most extensive chapters of accidents, to put it as its most favourable, that I've ever seen, from the point of view of change of solicitor.

**MS DAVENPORT:**

Yes, he certainly has had a –

5 **WILSON J:**

And having regard to the nature of the issues, the ongoing significance for the parties.

**TIPPING J:**

10 And the fact that, you know, the status quo strongly favoured one party.

**McGRATH J:**

Mmm, yes, that is important.

15 **MS DAVENPORT:**

Yes. Paragraph 30 of the Court of Appeal judgment is what I was look for. He said that, “There’s powerful force in those submissions” - that's obviously my learned friend’s submissions - “The history of delays, evasions, which have attended this proceeding is quite unacceptable. The most recent  
20 unhorsing of counsel on the eve of the hearing is, in this Court, simply a furtherance of the same sort of delaying tactics”. So, in my submission, that –

**TIPPING J:**

What paragraph was that, I’m sorry?

25

**MS DAVENPORT:**

That's paragraph 30 of the Court of Appeal judgment.

**TIPPING J:**

30 The use of the word “unhorsing” suggests the taking of an inference.

**MS DAVENPORT:**

Yes, it does.

**TIPPING J:**

Do you say that inference was not available to the Court of Appeal?

**MS DAVENPORT:**

5 I do. It's a pej – goodness me, I don't want to use that word, "pejorative" – but it's certainly a word that indicates that they had formed a view on the merits of that.

**TIPPING J:**

10 Well, the fact – we don't want to cover old ground –

**MS DAVENPORT:**

No.

**15 TIPPING J:**

But I'll note you were saying that that inference that's inherent was unjustified.

**MS DAVENPORT:**

20 Thank you, Sir. So if – and my submission has some force, in that this matter came before various High Court Judges and they dealt with the applications for adjournment either by accepting them or denying them, and for the Court of Appeal then to say that history of events created an unacceptable delay is, in my submission, inappropriate because it suggests that the High Court did not deal with those proceedings appropriately, and one can't  
25 simply make that submission, one must assume –

**WILSON J:**

No, no. Well, for myself, that doesn't follow at all. As I read the background, the High Court Judges involved were confronted with periods of delay and had  
30 to address those periods of delay as best they could, having regard to the interests of all parties.

**TIPPING J:**

And some of the expressed themselves –

**MS DAVENPORT:**

That's right, Sir, and they did –

5 **TIPPING J:**

– very, very strongly, Justice Heath in particular -

**MS DAVENPORT:**

Yes.

10

**TIPPING J:**

– as to the facts of the delay and the circumstances in which it had arisen.

**MS DAVENPORT:**

15 But nonetheless, they may be orders sought, now, and the matter then proceeded for hearing.

**WILSON J:**

20 Those orders sought couldn't obviate all the consequences of the delay, they just had to mitigate those consequences as best possible, surely?

**MS DAVENPORT:**

25 Well, that is right, but when we come to look at the Court of Appeal in June 2009, making a decision about whether or not an extension of time ought to be granted, in my submission it's inappropriate for them to focus on those delays which were, for better or for worse, delays which the High Court dealt with and enabled this matter to go to trial. Now, the –

**McGRATH J:**

30 Well, what weight do you say they can give to those delays? You say they should not have focused on them, but I'd just like you to be a bit more precise as to what you accept is the relevance of those earlier delays.

**MS DAVENPORT:**

Well, in my submission, the Court always has an over-riding ability to look at the entire merits of the case. So, insofar as my learned friend could convince them that the delays before the trial ought to be taken into account, I accept that the Court could take it into account in the round. But when looking at the  
5 Rule 43 matter, which – the case has focused the Court's attention on two matters, the reason for the delays and the merits – in my submission they needed to look at the reasons for the delay in those six months and then the merits and then make a decision.

10 **McGRATH J:**

Yes, so is it perhaps you're accepting that the delays before the decision of the High Court that's appealed are relevant, that they are not of great relevance, and they should be given only limited weight, would that be one way of putting your submission?

15

**MS DAVENPORT:**

Yes, it would, thank you, Sir.

**TIPPING J:**

20 Do you agree that the ultimate question is whether it was just as between the parties to grant the extension sought?

**MS DAVENPORT:**

Yes.

25

**TIPPING J:**

Yes.

**WILSON J:**

30 Well, perhaps to refine that a little, the question here is whether it was properly open to the Court of Appeal to conclude that it was just between the parties to grant the extension?

**MS DAVENPORT:**

Well, I think that then puts the emphasis on creating a hurdle that perhaps the appellant doesn't have to overcome. I think that the question of whether it was just as between the parties that the Rule 43 application be granted would, in my submission, encapsulate the Court's obligations under Rule 43.

5

**McGRATH J:**

I think what you're saying is that the question really in the end is whether the discretion was exercised correctly, that it could be exercised wrongly without – which is an evaluative exercise, rather than an assessment of a legal test.

10

**MS DAVENPORT:**

Yes, it has to have been that. It's a discretion after all, so it involves –

**McGRATH J:**

15 Yes –

**MS DAVENPORT:**

– a number of factors.

20 **McGRATH J:**

– I can understand that, unsurprisingly.

**TIPPING J:**

25 Well, I suppose it comes down to either was there a wrong principle or were they plainly wrong?

**McGRATH J:**

Yes.

30 **MS DAVENPORT:**

And I'm saying both, putting it most baldly.

**TIPPING J:**

And the wrong principle was what?

**MS DAVENPORT:**

The focus on the delays, that were the entire length of the proceeding, and a  
5 failure to focus on the real merits. And also in the context of this case it's  
important to realise that this is an unusual case, because they're arguing  
about an interim decision of Justice Stevens, and it's become unbelievable  
messy, this case, for a variety of reasons, but not the least because there is  
10 now a second judgment of His Honour, which tries to – not tries to, does –  
address all of the matter which were left in abeyance at the end of the first  
interim decision. I don't know that that –

**TIPPING J:**

I just want to make clear, because we will have to approach this in a fairly  
15 strict principle basis, wrong principle and plainly wrong, and the wrong  
principle sub-divides into too much focus on prior delays –

**MS DAVENPORT:**

Yes.  
20

**TIPPING J:**

– too much, it can't be a wrong principle to look at them at all, I take it you  
accept?

**MS DAVENPORT:**

Yes, too much focus on the delays from the inception of the proceedings to  
the High Court –

**TIPPING J:**

30 Yes, yes, by that prior delays, I mean, the ones before the six months one.

**MS DAVENPORT:**

Yes.



**TIPPING J:**

And the second thing you said was failure to focus sufficiently, I think, would  
5 be on the real merits.

**MS DAVENPORT:**

On the real merits.

10 **TIPPING J:**

And just to make sure we don't overlook anything –

**MS DAVENPORT:**

And a subset of that, Sir, the failure to focus on the real merits, would also be  
15 taking into account the unusual nature of this decision, insofar as it was  
expressed to be an interim decision.

**TIPPING J:**

And I suppose, aside from the discretionary grounds, you have the preliminary  
20 ground, if you like, of proceeding in the absence of counsel.

**MS DAVENPORT:**

Yes.

25 **TIPPING J:**

I'm just trying to get some sort of headings, so that we can address your very  
helpful argument, under those sort of headings.

**MS DAVENPORT:**

30 Well I had a lack of counsel, delay, wrong focus, lack of examination of the  
merits and an overall point that in the circumstances of this case where, and  
my learned friend has just said that Justice Stevens does not say it was an  
interim decision, but in fact he does use those words in his judgment.

**TIPPING J:**

Right now that's very helpful Ms Davenport. Now I'm not for one moment  
5 closing you down but I'm just trying to get this into a sort of tidy shape. So  
there's the absence of counsel, there's the wrong principle which had two  
limbs to it, too much focus on prior delay and failure to focus sufficiently on  
real merits and then there's the plainly wrong anyway suggestion.

10 **MS DAVENPORT:**

Mmm.

**TIPPING J:**

Does that fairly, for analytical purposes, capture the ground that you're  
15 wishing us to consider on your client's behalf?

**MS DAVENPORT:**

Yes it does Sir and I wonder whether we should perhaps explore perhaps a  
failure to focus on the merits a little more.

20

**TIPPING J:**

Of course. No, no, you develop any of this further if you wish. I think we've  
done absence of counsel fairly thoroughly.

25 **MS DAVENPORT:**

I think we've thrashed that point.

**TIPPING J:**

And too much focus on prior delays, I think we know exactly what you mean.  
30 Now the real merits, or what you're calling the real merits?

**MS DAVENPORT:**

The real merits. The Court of Appeal was somewhat dismissive of the real  
merits of the underlying appeal. This case, as you know, involves, in respect

of the sale of Tombstone, can I assume that I don't need to recap anything about –

**TIPPING J:**

5 No, no, you can assume we're pretty familiar with the background Ms Davenport.

**MS DAVENPORT:**

10 That when, one of the principal focuses for the interim decision was the decision of Justice Stevens that the sale by the trustees of the estate, so my client, his mother and sister, to Mr Scott breached his obligation as a trustee and as a result of that finding the High Court set aside the sale and purchase to Mr Scott and re-vested the land, the half share in the land back in the trust. So clearly that was a critical point in this decision. The breach of trust in  
15 respect of the trust farm was acknowledged. So it really only related, in many respects, to the analysis Tombstone and the transactions that took place in respect of Tombstone. And in my respectful submission the analysis of whether or not Justice Stevens had got it right or not, a little once overlightly, probably because there was no one putting Mr Scott's point of view to the  
20 Court. And in my submission that is because it is clearly arguable that where a will and/or a trust authorises a trustee to acquire property, authorises to acquire it by way of mortgage, then the law does permit that and there are a number of cases, *Sergeant v National Westminster Bank & Ors* that say the law permits that because it's a trustee itself which has put the trustee in that  
25 position where conflict – where duty and obligation conflict. And in my submission the Court did not really look at whether that point, which would be argued fully at appeal, was an arguable point. Really it came down to an analysis of the equitable adjustment between the parties which was something that Justice Stevens was, of course, capable of doing and there  
30 was little point in analysing an appeal which might just lead to an adjustment of that on appeal.

**TIPPING J:**

Can I just ask you? Where does the Court of Appeal's discussion at para 34 of their judgment about the, which is related to acquiescence or waiver, but suggests that the Judge found that there'd been some active, or misleading by Mr Scott, proposed transactions. Where does that fit into this scenario? Is it  
5 an additional ground, if you like, upon which the Judge was of the view that the transaction should be set aside? Because there had been –

**MS DAVENPORT:**

Well in my submission –

10

**TIPPING J:**

– no proper consent to it if you like?

**MS DAVENPORT:**

15 Yes, that's how I would analyse the evidence. That the advice that was given to all the parties was by one, the family solicitor and it was given to Mr Scott, his mother and sister and the Court found that the younger member, certainly there's other youngest, but there's two other sisters, were not fully informed or independently advised.

20

**WILSON J:**

They weren't trustees, I think, is that the case?

**MS DAVENPORT:**

25 They weren't trustees.

**TIPPING J:**

30 But it would be quite difficult to, on appeal, upset a finding of actual misrepresentation or whatever it was, if it was in an email as opposed to an oral matter. I'm just wanting you to help me with whether this is a problem from your client's point of view in attacking the setting aside of the transaction which is at the heart of his complaint.

**MS DAVENPORT:**

Well in my submission it's certainly a hurdle that he has to overcome. I mean the email that the Court relied upon was an email in which Mr Scott said, I'm going to proceed with purchasing the estate's share as a sort of a swap for purchasing mum's share, and this is for GST reasons, and then later on I'll  
5 purchase mum's share, or words to that effect. And in my submission on appeal that email will have to be analysed to see whether or not it did create a misrepresentation or whether or not that is a, if it did create a misrepresentation, that it was sufficient to lead to the transaction being set aside which is the next step.

10

**TIPPING J:**

But if it was a representation, let's assume for the moment that it was false, and I know your client would not accept that, upon which the necessary consents were obtained, this is really a factual issue that's been found by the  
15 trial court, the High Court, against your client presumably?

**MS DAVENPORT:**

Yes Sir and that was something that – but in my submission that's not the end of the matter because of course the trustees are authorised by the trustee to  
20 deal with the property, make decisions on behalf of the beneficiaries and this –

**TIPPING J:**

Yes.

25

**MS DAVENPORT:**

The point was whether or not the beneficiaries had actually consented.

**TIPPING J:**

30 But if the trustees have been misled in –

**MS DAVENPORT:**

The trustees were not misled.

**TIPPING J:**

The trustees were not misled?

**McGRATH J:**

5 One of the other two was, wasn't it, wasn't that the –

**TIPPING J:**

So someone whose consent to this was necessary?

10 **McGRATH J:**

Yes.

**TIPPING J:**

15 Yes well if a consent was necessary and it was obtained by misrepresentation then that would be highly material to the setting aside, wouldn't it? Because it's no good saying, well they have the power anyway. If they had the power but only subject to consent. I may have this wrong Ms Davenport but I'm just saying to you that this must be a very integral point?

20 **MS DAVENPORT:**

Well it is Sir but I think it's clearly arguable whether one of the trustees was actually misled because she was also being advised – she also had the benefit of legal advice.

25 **TIPPING J:**

But could the trustees enter into this transaction only with the consent of certain parties and –

**MS DAVENPORT:**

30 No.

**TIPPING J:**

– and that consent was given but upon a misrepresentation, is that the correct analysis of what the Judge found?

**MS DAVENPORT:**

5 He found that the transaction was entered into with the consent of all parties, not that it was a necessary part of the transaction being legal or able to be –

**TIPPING J:**

I see, it wasn't a necessary legal precondition?

10

**MS DAVENPORT:**

No but it wasn't – but it did in fact happen so the trustees could have made the decision without the beneficiaries –

15 **TIPPING J:**

But who knows that they'd have made the same decision if they had not thought that there was proper consents. I don't know.

**McGRATH J:**

20 As I understand it -

**MS DAVENPORT:**

I don't know either Sir but I do think that on appeal that point is arguable and requires further examination.

25

**McGRATH J:**

30 It's clear, is it not Ms Davenport, that we have the principle, the argument of principle which you first raised, to what extent can a transaction of this kind take place when the will authorises certain things in relation to transfer of mortgages. We then get into, it would also be the case that the merits would be looked at and this question, I think, of the merits of waiver in this respect, whether the consent was a good enough consent, if I can put it colloquially, to support a waiver and matters of that kind so those would be the issues that would have to be covered. So it's both principle but there's also an overlay of

the merits of the way the consent was obtained in the particular circumstances that would be in issue?

**MS DAVENPORT:**

5 Of course. And an analysis of whether or not Mr Scott paid a valuation was obtained for Tombstone, and he agreed to purchase the half share at half the valuation. But the conclusion being that because of the fact that his mother's life interest wasn't adequately addressed. Had she actually relinquished the life interest or not, that the ultimate beneficiaries were disadvantaged by the way that this transaction was put together. And I think, also, that an analysis of whether or not the life interest had been extinguished, which was canvassed by both counsel in the High Court, would also be a matter which the Court of Appeal will, perhaps, want to re-examine. Because I personally find it very difficult to understand how a transaction of this nature, with a life interest and the trustees, can't be regarded as an extinguishment of life interest, but clearly since the interest was paid to the life tenant, it may also not have been, which does create some other legal hurdles. So in my submission those are the legal merits of the appeal, which ought to, perhaps, have been more fully explored before the Court. Because, of course, if that transaction can be upheld, then Mr Scott has a right to retain a half share in Tombstone, and that –

**TIPPING J:**

That changes the complexion of the case if that step is insecure. Well, that's been most helpful, Ms Davenport. Is there any other aspect of the merits that you want to draw to our attention?

**MS DAVENPORT:**

The only other aspect of the merits which does really warrant some comment, Your Honours, is the question of the ability of an appeal Court to upset the equitable adjustment between the parties that His Honour Justice Stevens carried out. Now, I'm making that comment because when one reads the first High Court judgment, it's a very measured approach by His Honour, and he deals fairly with the plans of all of the parties. He reaches a conclusion. He



then makes an order for the sale of the Trust fund. But it's clearly couched in such a way that he contemplated that Mr Scott might have the ability to come back and ask the Court to sell him Tombstone. It's quite a different tenor, which is the tone of the second judgment. There were a variety of reasons for that, lapse of time, the legal processes that took place between the  
5 September judgment and the August number 2 judgment. But nonetheless, in my submission, on an appeal, if at all possible, it would be appropriate to argue both matters together, so that the overall discretion as between the parties could properly be analysed again, rather than the, sadly, somewhat  
10 piecemeal way that the resolution of this case has played out.

**TIPPING J:**

Is there an argument that you can advise us of? So far, it doesn't seem possible, but can it be responsibly suggested that Justice Stevens made a  
15 clear error of law in his first judgment, or is it simply, the argument is, that he shouldn't have exercised the equitable powers of rescission, or whatever one might properly call them, in the particular circumstances of this case? So far I haven't seen any suggestion that it can be responsibly argued that the charge misdirected himself in law, as opposed to wrongly exercised powers that he  
20 undoubtedly had, if you like.

**MS DAVENPORT:**

Are you talking about in terms of remedies, Sir, or are you talking about his decision?  
25

**TIPPING J:**

No, I'm talking about the order for setting aside the transaction, that part of it, the order whereby he set aside the purchase.

30 **MS DAVENPORT:**

Well, I think, Sir, that it's quite arguable that if his analysis of the law, which appears at paragraph 73 and following, on the right and obligations of the Trustees to purchase Trust property is held to be wrong, as I submit that it is at least arguable, then that inevitably leads to a conclusion that his equitable

adjustment was wrong. So in my submission, it is arguable that His Honour got the law wrong.

**TIPPING J:**

5 But there was a breach of trust, and he chose to exercise the powers to set aside the transaction. Now, are you saying that he had no power to set it aside for no reason, as opposed to wrongly exercising a power that was there?

10 **MS DAVENPORT:**

I'm probably taking a step back, Sir, to say that the error of law was in finding that there was a breach of trust.

**TIPPING J:**

15 Oh, I see.

**MS DAVENPORT:**

Although once he made the finding of a breach of trust, he had a variety of equitable remedies available to him, that's inarguable. Now, in appeal, the  
20 appellant would seek to argue that he exercised that discretion wrongly, and in particular, thinking about the Trust farm, he wasn't in breach of any trust in relation to the actions of his mother and sister.

**TIPPING J:**

25 There doesn't seem to have been suggested, unless I've missed something, which is distinctly possible, up until just now, that there was an argument that the judge was in error in finding a breach of trust in this respect.

**MS DAVENPORT:**

30 Well, I think that the notice of appeal, which was drafted by Shane Tudhope, does –

**TIPPING J:**

Oh, does it. Well, in that case, as I say, I was hesitant, because I wasn't confident of reading –

5 **MS DAVENPORT:**

I will find that, and just point to the paragraph.

**TIPPING J:**

It's just that I'm trying to get a feel for the weight of the merits of the appeal.

10

**MS DAVENPORT:**

The notice of appeal, paragraph 1. "Having held that the family had agreed to the appellant acquiring the estate's interest in Tombstone, and that independent valuation accounting advice was taken, the learned judge erred in going on to hold that the appellant's purchase constituted a breach of trust and/or fiduciary duty". And then paragraph 2, just to complete the picture, the notice of appeal says that, "Even if the purchase was a breach of trust and/or fiduciary duty, in all the circumstances, including the passage of more than eight years since the date of the transaction, the acts and statements of acquiesce in and affirmation of the arrangement by the respondents, and the appellant's work on the property during that time, a remedy of rescission was not appropriate and/or justified". And that was because the argument was run at trial, and not accepted, that if a breach of trust was found, then the appropriate remedy was to repay the profits.

25

**TIPPING J:**

Thank you, I'm glad that I inquired that. That puts it into slightly clearer focus.

**MS DAVENPORT:**

30 But unfortunately, the trouble with this, sir, it's a bit like saying that a camel is a horse drafted by a committee. These notices of appeal have been drafted by several solicitors, and sometimes it's hard to –

**TIPPING J:**

Well, you've clarified it, at least from this perspective. Thank you, Ms Davenport. Is that all you wish to say orally?

5 **MS DAVENPORT:**

I was going to talk to the timeline, Sir. But I don't know whether Your Honours want me to do that.

**TIPPING J:**

10 Well, we're pretty familiar with the timeline, unless there's something particular about it, Ms Davenport. And with great respect, I would have thought, from your client's point of view, unless there's something particularly significant that one hasn't noticed, the timeline is not something that I think one would wish to emphasise.

15

**MS DAVENPORT:**

No, sir. But I know that my learned friend would want to, and it's important that I try to head him off at the pass, really.

20 **TIPPING J:**

Well, we're not sure yet on what issues we'll need to hear Mr Harrison. And you'll have a right of reply. So I wouldn't necessarily trouble yourself with heading him off at the pass.

25 **MS DAVENPORT:**

I did want to make one point, sir. And that is that it's important to note that the application under Rule 43 was made before the expiry.

**TIPPING J:**

30 Yes, that point has been firmly noted.

**MS DAVENPORT:**

And in my submission, that's relevant because it's not showing a continuing delay, it's showing a recognition of the need to address that point, and an

application being made in April, which was, in my submission, a timely application. Now, Sir, that is all I want to say on the leave to appeal matter. Do Your Honours want to hear me now on the stay?

5 **TIPPING J:**

No. What I'm proposing to do now is that the Court will retire briefly to consider your submissions, and to decide what course the matter should now follow, and if into the extent we need to call on Mr Harrison to indicate what points we want to hear from him on. So we will retire for five or ten minutes, a short period, and then return, and I'll indicate where we're moving from here.

**MS DAVENPORT:**

Sir, there is one other matter. I have firm instructions from Mr Scott, on which I've given him advice, that he wants to put before the Court these two videotapes that I have in my hand. I have apologised to my learned friend for the late notice for that. I haven't myself seen these videotapes, because I don't have the technology to do so, but Mr Scott says that they are a phone call with his lawyer, Mr Lawson –

20 **TIPPING J:**

No, I don't think we can take any further evidence in this way at this time, Ms Davenport. You've made your application. I'll confer with my brethren – no, definitely not. Quite unprincipled. You've followed your instructions. Thank you. Right, we'll just briefly adjourn, as I indicated, and I'll return and announce where we're going.

**COURT ADJOURNS: 11.11 AM**

**COURT RESUMES: 11.16 AM**

**TIPPING J:**

30 We have considered everything that's been said orally and in writing on behalf of Mr Scott in support of the application of leave to appeal from the Court of Appeal's decision not to extend time. Unanimously, we are unpersuaded that

a case have been made out of that application. It is dismissed, with reasons to follow in writing in due course. We didn't find it necessary to hear from you, Mr Harrison, on that matter. We will now hear you, Ms Davenport, on the application for leave to appeal against the Court of Appeal's stay determination on the second appeal. As I understand it, that is the only issue that remains outstanding in the light of our first determination.

**MS DAVENPORT:**

And that, Sir, is the question of whether or not there should be a stay in respect of the sale of Tombstone, and the removal of Mr Scott from Tombstone. And the application which has been put forward is on the basis that Mr Scott intends to prosecute his second appeal against the decision of Justice Stevens in respect of the orders relating to the sale of Tombstone, and for removal from the property, and that if orders are not made allowing him to remain in the Station and on the farm, and thus staying the proceedings and staying the sale, then the effect of this appeal will be nugatory. Now, he sets out in some detail in his various affidavits filed in the Court of Appeal and in this Court what his position is in respect of the farm, that he lives there with his four year old son, with whom he has partial custody, that he has a lot of farm equipment and animals on the farm, and that he has an overwhelming and burning desire to remain on the farm, and be allowed to purchase the farm.

**TIPPING J:**

What's to stop him from purchasing the farm, if he is able, either at an auction, or by tender?

**MS DAVENPORT:**

Well, the argument in respect of the tender, Sir, is that that would require him to proceed blindly, and to not have the benefit of an open sale, where he could bid and understand that he was competing openly, and that essentially

—

**TIPPING J:**

Does he really want an opportunity to negotiate a private treaty before it, in effect, goes on the open market? Is that what this is about?

5 **MS DAVENPORT:**

Well, he has made an open offer to purchase, Sir, but it wasn't accepted by Mr Tate in respect of the Trust farm, and I imagine a similar offer would be rejected in respect of Tombstone. There is still, next to one of his affidavits, an open letter that Sharp Tudhope sent to the respondents, in which he  
10 offered to purchase both at a figure.

**TIPPING J:**

I have some difficulty in the light of the background and the first determination we've reached in understanding how he's sufficiently prejudiced to justify a  
15 stay by having to either bid at auction or put in a tender?

**MS DAVENPORT:**

Well perhaps I could just finish with a tender submission Sir because the nature of a tender is it's a secret process and he submits that because of his  
20 connection to the land, the concept of Turangawaewae, his family having been on the farm for five generations, and the undenied intention of all of the parties at the beginning of this exercise, that he be entitled to remain on Tombstone and farm it, that he should be given an opportunity to, at the very least, not be disadvantaged by the tender process and that if it has to go to a  
25 public sale, rather than be sold to him by way of private treaty, that it should be an open sale by way of an auction as opposed to the tender process. And this is the argument that I ran in the Court of Appeal, that if he had to make a tender and he lost it for as little as a dollar that, in this family's circumstances, would not be an equitable outcome for him especially Justice Stevens'  
30 indication in the first judgment that he should, well an indication that there should be some ability perhaps for him to be able to purchase Tombstone. So in my submission the tender process acts as a barrier to him. In respect of the public auction process obviously that is not, there is no barrier in that way but his submission has always been that he should have, does have a right to

argue that as a co-owner of Tombstone he had a right to ask the Court to make an order for sale in his favour. Justice Stevens did a careful analysis of whether the Property Law Act 1952 or 2007 applied to that analysis when considering the first judgment in August of this, sorry the second judgment, in 5 August of this year and found that the Property Law Act 2007 did not apply and the 1952 Act applied which limited Mr Scott's rights to ask the Court to make an order allowing him to purchase. So in my submission the totality of that position is that there isn't any urgency for the sale of Tombstone. That if 10 the sale of Tombstone and his removal from the land is stayed pending the resolution of the second appeal there will be no great hardship to anyone. If, on the other hand, he is ordered to remove himself from the land and he's subsequently able to purchase, then there will be significant hardship to him and his son.

15 **TIPPING J:**

What does he hope to achieve in the second appeal to his – what's the best that he could achieve in the second appeal, that would justify holding things up in the meantime?

20 **MS DAVENPORT:**

Would be an order under the Property Law Act, probably 2007, that he had a right to purchase, make a pre-emptive right to purchase.

**TIPPING J:**

25 But on what terms?

**MS DAVENPORT:**

On terms that are fair to all the parties.

30 **TIPPING J:**

Evaluation or something like that?

**MS DAVENPORT:**

Evaluation or – you know that the –



**TIPPING J:**

In this case, and this background, isn't that a recipe for further delay, arguments?

5

**MS DAVENPORT:**

Well he has offered in the first – before the Court of Appeal to purchase at the average of the – at the valuation found by Justice Stevens in the first decision where he said, having heard all the evaluation evidence, I find that the value of Tombstone is X dollars and the value of trust funds is – between, I'm sorry, my learned friend is right, between a range of values and he's offered to purchase at the mid point of those two values.

10

**TIPPING J:**

15 All right.

**WILSON J:**

Was that an unconditional offer to purchase?

20 **MS DAVENPORT:**

Yes it was. But there was no provision for a payment of deposit, which my learned friend has always quibbled about, but it was an open offer to purchase.

25 **TIPPING J:**

The trustee, surely, is entitled to, if not obliged, to test the market and –

**MS DAVENPORT:**

Well Mr –

30

**TIPPING J:**

And the method by which the market is tested is getting quite subtle. I understand your point about tender and the one dollar short point but as a

matter of principle where did the Court of Appeal go wrong in this stay assessment? Arguably so to justify leave to appeal.

5

**MS DAVENPORT:**

They refused to – well they said essentially it came down to an analysis of a desire by Mr Scott to control the sale process and I think, with respect to Mr Scott, that that's not necessarily a fair analysis of his desire. He certainly  
10 desired –

**TIPPING J:**

You mean that's a conclusion on which they were plainly wrong?

15 

**MS DAVENPORT:**

That is my submission Sir. He certainly desires to own the properties but he acknowledges that he will have to purchase the properties at fair market value and he has annexed, and continues to assert, that he has the finance to enable him to do that. So in my submission –

20

**TIPPING J:**

So it's really a question of how fair market value is determined, is that a fair –

**MS DAVENPORT:**

25 

Yes –

**TIPPING J:**

– conclusion?

30 

**MS DAVENPORT:**

– Sir and he has put an offer in the form of his draft order to the High Court in which he said that he was perfectly prepared to pay I think it was 2.87 million, my learned friend will correct me if I've got that wrong, for the property and that he would pay that within 30 days. My friend pointed out that he hadn't

made a provision for a deposit but in my submission, if the payment is made within 30 days or he moves from the farm, that would have the same effect because he, of course, will be receiving some benefit from the sale –

5

**TIPPING J:**

Again we're starting to lose you a bit Ms Davenport I'm sorry.

**MS DAVENPORT:**

10 He will be receiving some benefit from the sale of the trust farms which will free up cash for him.

**TIPPING J:**

15 But the argument is, to justify leave to appeal, that the Court of Appeal was plainly wrong in the way it exercised its discretion in this case. Is that –

**MS DAVENPORT:**

20 Yes that's right Sir, it's a miscarriage of justice because not to grant the stay will clearly render his right of appeal nugatory because the only point on which he can appeal is the decision from the, of the Court, not to allow him the right to make a pre-emptive offer to purchase Tombstone. That is the only matter which is left standing really.

**TIPPING J:**

25 Yes.

**MS DAVENPORT:**

So not to grant him the right to appeal will completely remove that right.

30 **TIPPING J:**

So no stay means that the appeal is useless?

**MS DAVENPORT:**

Is useless.

**TIPPING J:**

Is that really the crunch point?

5

**MS DAVENPORT:**

Well in my submission it is Sir, yes.

**TIPPING J:**

10 What did the Court of Appeal say about that? That point must have been made directly to them because I can see the force of it. What did they say about –

**MS DAVENPORT:**

15 Well I think the Court of Appeal were looking at the matter in the round Sir which was at that stage that he had a live application for leave to appeal to this Court so they were looking at the matter in terms of the entire appeal process and I don't think that they actually addressed that point at all Sir except to say that it was, I'm so sorry Sir, I'm trying to find their judgment.

20

**TIPPING J:**

No, no well we may need to look it up because I propose, subject to anything further you might wish to advance Ms Davenport, I'm proposing to follow the same procedure as we followed just a moment ago and retire and consider if  
25 and the extent to which we need to Mr Harrison on this particular application.

**MS DAVENPORT:**

They talk about this Sir at paragraph 16 and 17.

30 **TIPPING J:**

Would you mind just reading that out please?

**MS DAVENPORT:**

No Sir. "Mr Scott accepts that in order to preserve what he regards as his interest, he is going to have to buy out the other interests in these properties at some point. The central issue for some considerable time has been and still is the basis on which he is to do so. Obviously the sensible resolution of this whole unfortunate litigation would have been an agreed private treaty between the parties to achieve that outcome. That did not occur. Stevens J has had the burdensome task of trying to produce a fair outcome to which, with respect, he has applied himself scrupulously. He gave Mr Scott the very opportunity to achieve a better outcome for himself and it was not taken up."

10

Paragraph 17, "The cause of all the present difficulties is that Mr Scott has sought to control the sale process. He did so, for instance, by his attempt to have the Court endorse what was called a buy out at application in relation to the trust farm, see paragraph 83 of the 5 August High Court Judgment, but as Mr Harrison rightly pointed out before us on this application as a matter of law that has already been determined against Mr Scott. He abandoned his first appeal on that point and in the 5 August 2009 judgment the concession was expressly made that that issue was raised *res adjudicata*, see paragraph 86. Mr Scott in another roundabout way has endeavoured to raise that issue again before us on this very application. As noted above we cannot accede to that application".

15  
20

Then they go on to say, "That after six years of litigation the High Court has ordered sale of the two farm properties. In respect of the first, Mr Scott is a one-fourth beneficial owner, along with his three sisters. In respect of the second, Tombstone is residual beneficiary as to one-eighth interest." Mr Scott's difficulty is that he's not able to dictate whether, as against his mother or his three sisters, whether and on what basis these two farm properties should be sold. And then I go on to talk about the market price analysis. Would the Court like me to read that as well?

25  
30**TIPPING J:**

No, not unless you feel it was helpful to your cause.

**MS DAVENPORT:**

No.

**TIPPING J:**

5 Thank you for doing that.

**MS DAVENPORT:**

So, in my submission, it wasn't really squarely addressed by the Court in that way, they were looking really at the whole Trust farm and Tombstone –

10

**TIPPING J:**

One could observe that perhaps they were giving a fairly strong signal in that as to the perception of the underlying merits of the second appeal.

15 **MS DAVENPORT:**

Yes.

**TIPPING J:**

I just put that out for possible comment.

20

**MS DAVENPORT:**

Well, that's entirely arguable, but Mr Scott does have a right of appeal on that particular point and –

25 **TIPPING J:**

Of course he does, but he has no absolute right, even on a nugatory basis, to have the judgment stayed, no absolute right.

**MS DAVENPORT:**

30 No, he doesn't, I respect that, Sir, of course he doesn't. But, in my respectful submission, not to stay that judgment would, essentially, mean that his appeal rights in that respect were rendered nugatory because they really relate to the disposition of Tombstone.

**TIPPING J:**

Yes, I fully understand the force of that point. Yes, well thank you very much, Ms Davenport, we'll adjourn briefly again and return and indicate where we're going.

5

**MS DAVENPORT:**

Thank you, Sir.

**COURT ADJOURNS: 11.31 AM**10 **COURT RESUMES: 11.37 AM****TIPPING J:**

Yes, thank you very much, please be seated. The Court doesn't need to call on you, Mr Harrison. The application for leave to appeal from the Court of Appeal stay judgment is dismissed. Reasons will be given in writing in due course. The only remaining matter, I think, in this Court, is the question of costs. I take it you would apply for costs, Mr Harrison, and would leave the matter in our hands as to quantum?

20 **MR HARRISON:**

Well, I certainly apply for costs, Your Honour, and it's nice to be able to actually say something this morning, if I may say so, finally, and indeed my submissions indicated a desire to seek above the standard order because of the nature of that.

25

**TIPPING J:**

We've noted that.

**MR HARRISON:**

30 But I emphasise that, and I don't need to say any more, it speaks for itself and I'm content to leave those applications in Your Honours' hands.

**TIPPING J:**

Very well.

**MR HARRISON:**

5 There's one other matter, if I –

**TIPPING J:**

Well, I'll just hear whether Ms Davenport wants to say anything on costs, before we come to the other matter. Do you want to say anything on costs,  
10 Ms Davenport?

**MS DAVENPORT:**

Well, I would urge Your Honours to make costs just fall in the usual way as opposed to the uplift sought by my learned friend.  
15

**TIPPING J:**

Thank you. Now, what other matter, Mr Harrison?

**MR HARRISON:**

20 Yes, just to be absolutely on the safe side, Your Honour, Justice McGrath, made an ex parte order in relation to the acceptance by Mr Tate of the tenders for the Trust farm. I've been advised, we've been advised by Mr Tate that he's managed to hold on to the four highest tenders until the 30<sup>th</sup> of this month, but I would respectfully seek that ex parte order be rescinded forthwith  
25 so that I can advise Mr Tate that he is at liberty to go ahead with the process. The other matter incidentally, housekeeping, was an order for joinder of Mr Tate, and that obviously falls by the wayside I would submit.

**TIPPING J:**

30 Sorry, what – you started to –

**McGRATH J:**

Falls away, yes.



**MR HARRISON:**

There was an application –

**TIPPING J:**

5 All other issues fall away.

**MR HARRISON:**

Yes.

10 **McGRATH J:**

Mr Tate, we need, no need to deal with –

**TIPPING J:**

You can't oppose the rescission of that interim order I take it, Ms Davenport?

15

**MS DAVENPORT:**

No.

**TIPPING J:**

20 Very well, that interim order made by Justice McGrath is rescinded. The Court wishes to say, Ms Davenport, that although your client has failed in his two applications, you have advanced his case with total competence and professionalism. No one could have done more than you have done for your client.

25

**MS DAVENPORT:**

I appreciate that, thank you, Sirs.

**COURT ADJOURNS: 11.40 AM**